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COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, BEFORE THE HONOURABLE MR. JUSICE DAVIES AND A JURY, FROM THE VERDICT PRONOUNCED ON THE 1ST DAY OF NOVEMBER, 1983, AT PRINCE RUPERT, BRITISH COLUMBIA

REGINA

RESPONDENT

v.

PHILLIP JAMES TALLIO

APPELLANT

Publication and sealing orders have been made in this case over material referred to in this factum

---

RESPONDENT'S REVISED FACTUM

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PART I STATEMENT OF FACTS

Overview of respondent's position

1. In 1983, the appellant was 17 years old. He pleaded guilty to the second degree murder of Delavina Mack, mid-way through a trial for first degree murder, with the assistance of his trial counsel, Phillip Rankin, Q.C. The appellant asks this Honourable Court to quash the guilty plea. The respondent's position is that the appellant cannot meet his burden and demonstrate that his guilty plea was invalid, or otherwise that his conviction was a miscarriage of justice.

2. Delavina was 22 months old at the time she was killed. There is no issue that she was sexually assaulted and suffocated sometime between **5:05 a.m. and 5:45 a.m.** on April 23, 1983, in the home of her grandparents Gertrude Mack and Sam Mack (now deceased) (the "Mack home"). She had been restless that early morning, was awake and fed a bottle before falling asleep beside her grandparents in the living room of their small home in Bella Coola.

3. The appellant had spent the late evening and early morning at his aunt and uncle's home, Nina Tallio and Cyril Tallio (the "Tallio home"). He was living with them. There had been a party there that evening. Delavina's mother, Marion, also known as Lotta Bolton and her father, Blair Mack, were both at the party, as were other members of the Bella Coola community. There is no issue that the appellant left the Tallio home sometime that early morning and walked over to the Mack home. He left the Mack home and went back to the Tallio home and told people there that Delavina had been "raped".

4. The police were called at **6:11 a.m.** and RCMP office Bruce Hulan (now retired) went to the Mack home. Delavina was wrapped in a blanket and being taken to the hospital by her grandmother, her body was still warm. When Cst. Hulan was called to the hospital, he learned she had died. At approximately 9 a.m. another investigating officer, Cst. Allan O'Halloran (now deceased), with Cst. Hulan, went to the Tallio home and detained the appellant. The appellant was interviewed twice by Cst. O'Halloran and once by Cpl. Garry Mydlak. He confessed to Cpl. Mydlak, saying he had smothered

Delavina when he put a pillow over her head, as she started to cry as he was "doing it to her". He was charged with first degree murder.

5. The appellant was taken to Vancouver and ultimately remanded for a 30-day psychiatric assessment at the *Forensic Psychiatric Institute* ("FPI"). A report was provided to the Court from two *FPI* psychiatrists, Dr. Emlene Murphy, and Dr. Robert Pos (now deceased). Both psychiatrists concluded he was fit to stand trial. Dr. Pos's report included that the appellant told him: "I don't know why they made it first degree. . . I didn't think she died... when I put the pillow on her head... I didn't plan on the pillow doing this to her. . . I don't know why I did it."

6. His case was prosecuted by Deirdre Pothecary (now a retired provincial court judge). Phillip Rankin, Q.C. and Ellen Bond were his defence counsel. He had a preliminary inquiry on July 7, 8 and August 8, 9, 1983, and was committed to stand trial by the Honourable Judge Barnett. His trial commenced on October 21, 1983, in Prince Rupert with a jury, presided over by the Honourable Mr. Justice William H. Davies (now deceased). The trial started in the absence of the jury with a challenge to the jury array, followed by a *voir dire* into the admissibility of his police statements. His trial counsel succeeded in having the second interview and third inculpatory statement excluded. The trial then commenced with the Crown calling several witnesses.

7. What followed is at the heart of the issue of this appeal – his trial counsel negotiated with the Crown so that the appellant could enter a plea to second degree murder, before the jury heard the incriminating testimony from Dr. Pos. Rather than face a conviction for first degree murder in which he would not be eligible for parole for 25 years, a plea "bargain" was struck, so that the appellant would be eligible for parole in ten years.

8. There are no trial transcripts; the exhibits and the investigative file have been lost, although parts have been found in files from other agencies. The Crown's trial file still exists. The preliminary inquiry transcripts exist, filed as an Appeal Book, although the evidentiary value is obviously attenuated due to the limited purpose of a preliminary inquiry. Many key witnesses are deceased.

9. The appellant appears to want to base his appeal almost exclusively on fresh evidence, much of which is inadmissible, not reliable and not sufficiently cogent to be admitted pursuant to s. 683 of the *Criminal Code*. The respondent's position is that this Court should approach its assessment of the validity of the appellant's claims as much as possible from the objective, reliable evidence provided by documents produced before, during or after the offence, as supplemented by admissible reliable fresh evidence in the form of affidavits, as needed.

10. In addition to concerns about the **reliability** of the appellant's proffered fresh evidence, the respondent has significant concerns about the **credibility** of the appellant's assertions. In a nutshell, the appellant swears that he: (1) never instructed his counsel that he would enter a guilty plea; (2) never confessed to Cpl. Mydlak; and (3) never even met Dr. Pos, let alone said anything inculpatory to him. These assertions are neither reliable nor credible as demonstrated primarily from objective facts.

11. The respondent has re-ordered the appellant's grounds of appeal to reflect what it considers the primary issues on appeal, as set out in the appellant's revised factum, filed February 10, 2020 ("ARF"). The ultimate issue on appeal is whether maintaining the appellant's conviction, arising from his guilty plea, would be a miscarriage of justice.

12. **Issue I (Appellant's Issue IV): The appellant's guilty plea was valid, not uninformed and counsel not ineffective** - The appellate analysis should start with consideration of whether the appellant's guilty plea was voluntary, unequivocal and informed; as it is safe to say that there will usually not be a miscarriage of justice if that is the case. This is what the appellant refers to as the "traditional *Adgey/Wong* analysis" ([1975] 2 S.C.R. 426; 2018 SCC 25). The appellant in his revised factum alleges only one ground of appeal in relation to this traditional analysis – this being that his plea was uninformed – and argues that had he been "advised of the inadmissibility of the Pos evidence he would not have entered plea negotiations" (ARF, Issue IV, page 53; Heading, page 111).

13. There is no evidentiary basis for this Court to intervene in this regard. The appellant's evidence in his first, second and fourth affidavits dated November 29, 2016, June 26, 2017 and July 5, 2019, is that he did not engage in *any* plea negotiations. The appellant's *evidence* is that "he did not instruct his counsel to enter a guilty plea, he did not understand what the term 'guilty plea' meant, and he never would have pled guilty to sexually assaulting and killing Delavina" (ARF, paras. 218, 228, 361, 396). The appellant's Amended Notice of Appeal (March 10, 2017) and first factum stated that he seeks to withdraw his guilty plea as he "did not knowingly instruct his counsel to plead guilty", yet the voluntariness of his plea appears to no longer be an issue on appeal.

14. The appellant is now apparently accepting that he "entered into plea negotiations". He is now arguing that he was uninformed in this process because trial counsel was clearly wrong to have concluded that Dr. Pos's evidence could be admitted, and that the appellant was at risk of being found guilty of first degree murder by the jury. It appears, therefore, that the appellant is agreeing that his trial counsel had instructions, did provide him with advice and he knowingly pleaded guilty. He is now accepting that his plea was valid, but arguing it should be struck as it was premised on his counsel's incompetent understanding of the admissibility of statements made to a psychiatrist.

15. It is the respondent's position that this Court cannot strike a guilty plea on the basis that the appellant's decision to plead guilty was based on purportedly incompetent legal advice, assuming there is a legal basis to even do so, when *factually the appellant proffers no evidence that he relied on or even heard that legal advice*. In fact, the appellant's evidence directly refutes the factual underpinning of his uninformed guilty plea argument because he attests that trial counsel never discussed with him either Dr. Pos's evidence or the potential outcome of the case. *4th Aff.Tallio, AFE, Vol. 3, Tab 42D, para. 43.*

16. The appellant may be attempting to explain this glaring inconsistency when he argues that his uninformed guilty plea argument "engages an analysis of the appellant's cognitive state", and that his cognitive state "provides a backdrop from which this court can assess the context of the relationship he 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" (Overview, page 1, ARF, paras. 361, 362). It is not clear to the respondent how he reconciles engaging in plea discussion with the cognitive weaknesses his counsel relies upon. This is one way he can reconcile the credible evidence from trial counsel; or it is that his sworn evidence is not credible.

17. The respondent's position is that the appellant's evidence that he did not instruct his counsel to enter a guilty plea, and did not understand what the term 'guilty plea' meant is not credible. The submission that he suffered from a significant cognitive disability at the time and did not "understand much of what was going on" is also not credible (ARF, para. 226). The objective evidence relatively close in time to the guilty plea demonstrates the appellant made a choice to and understood that he was pleading guilty. Also, he had been assessed by multiple experts leading up to and at the time of the offence, including an assessment of his cognitive abilities, and he was found fit to stand trial.

18. It is important to identify what flows from the appellant's lack of credibility in light of his position on appeal. It fully substantiates trial counsel's evidence that the appellant understood, acknowledged and accepted guilt for this offence. Further, his lack of credibility undermines all of his assertions, including his position that he has been wrongly convicted. It means that his plea was valid and therefore that the appellant waived his right to make the Crown prove its case, or the opportunity to challenge the strength of the Crown's case by applying to exclude the statements he made to Dr. Pos, or having the case go to the jury, who could have assessed the strength of the case with or without the evidence of Dr. Pos.

19. For this reason, the Court does not need to assess the appellant's submission that trial counsel was "ineffective because he did not properly evaluate the anticipated evidence of Dr. Pos" because the appellant's evidence is that he never instructed his counsel to enter the guilty plea, or otherwise acted on his counsel's legal advice.

20. **Issue II (Appellant's Issue III) – The anticipated evidence of Dr. Pos was not inadmissible hearsay or because he was a person in authority** - The respondent recognizes that the Court may be willing to overlook the evidentiary hurdle of the appellant's own evidence being that he never entered into plea negotiations. Should this Court choose to consider whether trial counsel erred in assessing the admissibility of the evidence from Dr. Pos (and with the assumption that there was no other evidence to support the appellant's guilt). The appellant is also asking the Court to consider the admissibility of Dr. Pos's evidence on a "stand alone" basis in aid of his request that this Court conclude his conviction is a miscarriage of justice. The "stand alone" legal argument regarding the admissibility of Dr. Pos's evidence, and the remainder of the appellant's grounds of appeal allege a miscarriage of justice requiring appellate intervention *despite* a valid guilty plea, what the appellant describes as a "*Kumar/Tailleferl/Hanemaayer* [2011 ONCA 120 / 2003 SCC 70 / 2008 ONCA 580] miscarriage analysis". These other grounds of appeal do not relate to the effectiveness of trial counsel.

21. On this alternative basis the respondent will address the appellant's submission that: (1) the appellant's statement to Dr. Pos was inadmissible for its truth *as a matter of law*, as "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" (ARF, Issue II, p. 53, paras. 354, 358-360); and, (2) Dr. Pos was a person in authority. He also argues that for policy reasons and based on practice of some prosecutors the evidence of Dr. Pos was inadmissible.

22. The appellant appears to be presenting these legal arguments as evidentiary absolutes, such that no competent counsel trial counsel would have recommended the appellant plead guilty in order to avoid the jury possibly hearing from Dr. Pos. Or framed another way, only an incompetent counsel would not have challenged the admissibility of the Pos evidence. And so absolute that this Court should provide a remedy notwithstanding a valid guilty plea. The respondent's position is that the appellant's arguments do not support such a definitive assessment of the admissibility of evidence from a psychiatrist in 1983.

23. First, trial counsel and Crown counsel were aware the appellant could challenge the appellant's statement to Dr. Pos as being (1) to a person in authority; and (2) involuntary. The outcome of this ruling was uncertain, and trial counsel cannot be faulted for seeing a risk in running a *voir dire* and having the statements admitted and the case go to the jury. Second, the appellant is not correct in arguing that the statements to Dr. Pos were hearsay and could not be led as declarations against interest.

24. **Issue III (Appellant's Issue II) – There was authority for the psychiatric remand** - The appellant challenges the jurisdiction for his remand pursuant to s. 465(1)(c) of the *Code*, R.S.C. 1970, Chap. C-34. He argues that "legal proceedings involving the appellant at the time were a nullity, and evidence derived from the order was inadmissible" (Issue II, ARF, p. 53, 77, para. 323). Importantly, in the respondent's view, he does not allege that trial counsel or for that matter Crown counsel or the judge who ordered the remand was incompetent in not identifying this purported jurisdictional problem. Nor is it being alleged as a basis for the guilty plea to have been invalid. The respondent's position is that surely a "fresh **argument**" such as this does not justify the Court exercising its residual discretion to intervene on the basis that a miscarriage of justice has occurred.

25. Furthermore, the appellant has provided no authority for the proposition stated in paragraph 323 of his revised factum, this being that as a result of lack of jurisdiction any evidence derived from the appellant's placement at FPI "was a nullity and inadmissible on its face". In other words, even if there was no jurisdiction to remand the appellant, there is no remedy on appeal. But in any event, there was the jurisdiction to remand the appellant, as the provincial court judge, Crown and defence counsel recognized at the time.

26. **Issue IV (Appellant's Issue I) - DNA evidence does not exonerate the appellant.** The testing of the histology tissue samples taken during Delavina Mack's autopsy for male DNA has not provided any probative evidence. None of the partial male profiles have probative value and this Court can put no weight on it. To the extent that the Court accepts the opinions of the appellant's experts, it does not assist as

neither the appellant, nor his Uncle Cyril, are excluded from being contributors to the male DNA identified from the uterine or vaginal tissues.

27. **Issue V (Appellant's Issue V) - The initial investigation was not "inadequate" and there is no basis to conclude that "others perpetrated the crime".** As already noted, the record of the case against the appellant is incomplete, many witnesses are now deceased. The case against the appellant was a strong one, as trial counsel assessed at the time.

Respondent's position regarding the appellant's factual record and the admission of fresh evidence on this appeal.

28. The appellant argues in paragraphs 235-236 of his revised factum that this Court has the authority to allow appeals against all convictions "on any ground there was a miscarriage of justice". In support of his application for this relief the appellant applies to introduce three volumes of affidavits and a separate volume of documents through the Affidavit of Sigrid Pembroke; further affidavits or those that have been revised or filed after the January 2020 pre-hearing Motions are in the appellant's revised fresh evidence affidavits filed February 11, 2020 ("ARA"). The appellant describes in paragraph 249 of his revised factum his fresh evidence, hereinafter referred to as "AFE", as follows:

1. that amplifies what transpired in 1983 relating to the incident;
2. concerning what occurred during the investigation in 1983;
3. that expands on what transpired during the legal proceedings in 1983 and 1984;
4. relating to DNA; and
5. relating to Tallio's cognitive capacity and relative ability to understand matters.

29. The respondent has filed seven volumes of affidavit evidence, the Crown's fresh evidence hereinafter referred to as "CFE". Some of the respondent's affidavit evidence is tendered to provide information to the Court regarding the proceedings, some of it is to respond or rebut the appellant's allegations or evidence. The appellant's appeal is based almost entirely on fresh evidence, especially his Statement of Facts which relies significantly on evidence from "new" witnesses and "new" evidence from the appellant attesting to what he says he was doing the morning Delavina was killed.

30. Section 683(1) of the *Criminal Code* is the provision that empowers an appellate court to admit evidence on appeal. For fresh evidence to be admitted, the appellant will at a minimum have to demonstrate that the evidence is: (1) relevant in that it bears upon a decisive or potentially decisive issue; and (2) is credible in the sense that it is reasonably capable of belief; and (3) is such that, if believed, could have affected the result; and (4) the evidence must be otherwise admissible. *Palmer v. The Queen,* [1980] 1 S.C.R. 759; *R. v. O'Brien*, [1978] 1 S.C.R. 591

31. The appellant "requests this Court's forbearance in terms of assessing the evidence contained in the various affidavits" and argues that the rules of evidence should be "attenuated". He argues that there is an important cultural component and context in assessing the issues and evidence in the case; that there "significant communication and trust issues with the non-Indigenous community". He submits that the concept of strict admissibility of evidence should be "approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims". *ARF, paras. 251-252*

32. The respondent does not agree that the legal principles regarding fresh evidence on appeal should be relaxed, or ignored as the appellant suggests. The focus and central issue in this appeal is whether the appellant's guilty plea to second degree murder in 1983 was valid. The respondent recognizes that the appellant has raised other issues in support of a claim that a miscarriage of justice has occurred. But raising these other issues should not have the effect of displacing fundamental and basic rules of evidence, many of which were developed to ensure that decisions by a court are based on reliable evidence that can be properly assessed and tested.

33. Section 683 of the *Criminal Code* empowers an appellate court to admit evidence on appeal where "it considers it in the interests of justice". Generally, the "interests of justice" fundamentally guides the admission of all evidence offered on appeal. To succeed on appeal, the appellant must ultimately convince the appellate court that the fresh evidence sufficiently undermines the reliability of the verdict so as to warrant the conclusion that maintaining the verdict would amount to a miscarriage of justice. It is a *prerequisite* to the admissibility of fresh evidence on appeal that the proffered evidence

is admissible under the criminal rules of evidence - in addition to being sufficiently cogent - credible, reliable, probative - such that it could reasonably be expected to affect the verdict.

34. *R. v. Truscott*, 2007 ONCA 575 and *R. v. Phillion*, 2009 ONCA 202 are two cases that were brought to the Ontario Court of Appeal in order to revisit the validity of historical criminal convictions in light of fresh evidence. In contrast to this appeal, the Minister of Justice referred them to the appellate court having concluded that a miscarriage of justice likely occurred. In the end, even though they before the court as a result of a reference from the Minister of Justice, the Court did not disregard the principles regarding fresh evidence on appeal. The Court in *Truscott* explained in detail the legal principles that apply in fresh evidence appeals, in relation to (1) the scope of the inquiry by the appellate court, *and* (2) the applicable evidentiary rules.

35. The appellant carries the burden of persuasion that there has been a miscarriage of justice. In addition to this ultimate burden, the appellant also bears the onus of establishing any factual assertions that are material to the arguments he advances. He bears responsibility of demonstrating the admissibility of any fresh evidence. As explained and expanded upon in *Truscott* (with the respondent's emphasis):

> [70]...An appeal is not a wide-ranging investigatory process like a public inquiry or [counsel's] review on behalf of the Minister [pursuant to s. 696.1 of the *Criminal Code*]. Nor is an appeal a retrial of the allegations against the appellant, much less the kind of open-ended factual inquiry into past events that might be conducted by an historian or journalist. Rather, an appeal is an adversarial judicial process carried out in accordance with the statutory provisions of Part XXI of the *Criminal Code*. Those provisions define the appeal court's procedural, substantive and remedial powers.
>
> ******
>
> [72] The unique features of this Reference do not, however, alter the basic appellate nature of the inquiry directed by s. 693.3(3)(a)(ii) of the *Criminal Code*. For example, under Part XXI, the rules of evidence applicable to criminal trials apply in determining the admissibility of material proffered as fresh evidence on appeal. The evidentiary difficulties encountered by the appellant because of the many years that have passed since the homicide do not permit this court to

deviate from that evidentiary requirement so as to assist the appellant in making his claim that he has suffered a miscarriage of justice.

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[74] The appellate nature of these proceedings dictates that the appellant carry the burden of demonstrating based on evidence admitted on this Reference that there has been a miscarriage of justice. On conviction appeals, the court presumes the validity of the conviction until the appellant demonstrates otherwise. In these proceedings, the court begins from the dual premises, that on the evidence adduced at trial, the appellant was properly convicted, and on the material produced on the first Reference, that conviction was properly affirmed.

[75] In addition to carrying the ultimate burden of persuasion, an appellant also bears the onus of establishing any factual assertions that are material to arguments advanced in support of a motion to adduce fresh evidence. For example, on this Reference the appellant argues that certain documents were not disclosed to the defence at trial or on the first Reference. To the extent that the admissibility of any of the tendered documents depends on whether they were disclosed in prior proceedings, the appellant must establish on a balance of probabilities that there was non-disclosure.

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[95] Evidence is potentially admissible on an appeal, and consequently on this Reference, only if it would be admissible under the rules governing the admissibility of evidence in criminal proceedings. This is so for at least three reasons. First, binding precedent says so. Second, the rules of evidence governing the admission of evidence in criminal proceedings are shaped primarily to facilitate the search for the truth. That search is no less important and no different when considering the admissibility of evidence offered on appeal. Third, it would be irrational to use different rules governing the admissibility of evidence on appeal than at trial. It would not make sense to admit material on appeal that was not admissible under the usual rules of evidence and to order a new trial based on that material, only to have that material excluded at the new trial by the operation of the usual rules of evidence.

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[110] ... Section 686(1)(a) of the *Criminal Code* sets out the grounds upon which an appellate court can allow an appeal from conviction. The language of the section does not fit easily with appeals that are allowed on the basis of fresh evidence. Section 686(1)(a)(iii) is the only provision that is potentially relevant. It allows an appellate court to grant an appeal "on any ground there was a miscarriage of justice". This power can reach virtually any kind of error that

> renders the trial unfair in a procedural or substantive way. The section has been applied on appeals where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.

36. The appellant should be presenting this Court with reliable evidence that is *prima facie* admissible, cogent, convincing on its face, and which can be properly tested if necessary. Both *Truscott* and *Phillion* recognized that the historical nature of the claim raised substantial problems of proof for the appellant. But this does not mean that the rules of evidence can be discarded. This is why the test for admissibility of fresh evidence is not an easy test to meet in historical cases: *Phillion at [196].*

37. As a procedural matter, this Court may consider the fresh evidence on a preliminary basis without admitting it, in order to assess its impact. As described in *R. v. Aulakh*, 2012 BCCA 340 at [68]:

1. Determine if the fresh evidence is admissible under the rules of evidence (e.g., no hearsay, speculation, opinion or mere argument).
2. If the fresh evidence complies with the rules of evidence and if it is apparent from the trial record that the fresh evidence could not reasonably have affected the result (assuming the allegations of ineffective representation could be established) there is no miscarriage of justice and the application to adduce fresh evidence and the appeal should be dismissed.
3. If that determination is not apparent and the fresh evidence in support of the allegation of ineffective representation is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the allegation of ineffective representation, an issue that was not adjudicated at trial. At this stage the fresh evidence will not be admissible to determine the substantive issue of whether a miscarriage of justice has occurred.
4. In considering whether the performance component of the test for ineffective representation has been established, apply the standard of "reasonable professional judgment", remembering that the appellant must establish the facts underlying the claim of *ineffective assistance* on a balance of probabilities.
5. If the performance component of the *ineffective assistance* of counsel claim is established, consider whether the appellant has established the prejudice

component of the test, namely a "reasonable probability" that the outcome of the trial would have been different if the appellant had received the effective assistance of counsel (i.e., if there has there been a miscarriage of justice). If the answer is yes, the *fresh evidence* application should be granted, the appeal allowed, and a new trial ordered. If the answer is no, the *fresh evidence* and the appeal should both be dismissed.

The best evidence of the investigation and trial proceedings

38. The appellant's statement of facts refers to and blends material from the time of the offence, mostly reliable, with evidence arising from affidavits he has filed as fresh evidence, many of which are in the respondent's view *prima facie* inadmissible or irrelevant, without addressing in some instances the relevance or purpose for which the evidence has been tendered. The appellant has made only brief submissions in some circumstances to justify the admissibility of some of the fresh evidence, or put short notations on some of the revised affidavits (such as "investigative hearsay" as a basis for admission). The respondent does not intend to painstakingly review each affidavit filed by the appellant, but addresses in its Argument fresh evidence that is inadmissible or irrelevant and should not be admitted.

39. The respondent's statement of facts will address the fresh evidence that it considers reliable and admissible, and will address the appellant's fresh evidence only as necessary in its Arguments. The following is the respondent's best efforts to describe the proceedings against the appellant, and some of the reliable fresh evidence that is probative to the issues on appeal.

40. In 2010-2012, the *Innocence Project* and the RCMP each made efforts to locate the investigative file and exhibits, and any other documentation from the time of the offence, through searching RCMP files, Crown counsel trial file, provincial court and Supreme Court files, and Correctional Services Canada files and elsewhere. *CFE, 3rd Aff. Katalinic, Vol. 4, Tab 14, paras. 7 – 18, 24, 26, 28, 32, 37, 38, 43, 46 – 48, 50, 52, 53, 71 – 72; Affidavit of Tamara Levy, CFE, Vol. 2, Tab 8.* These efforts have continued off and on since then.

41. There is no dispute that this Court does not have a complete record, as the RCMP investigative file has never been found, no exhibits located, and there are no trial transcripts. Many key individuals no longer have their files (such as trial counsel), or have no memory of the appellant (Dr. Murphy), or have died (Crown witness Dr. Pos, defence expert Dr. Marcus, the trial judge, investigating RCMP officers O'Halloran and Defer, and civilians (including two individuals the appellant alleges could have perpetrated the offence, Cyril Tallio and Wilfred, *see 3rd Aff.Katalinic at para. 53, CFE, Vol. 4, Tab 14*). One example of lost police investigative materials is the approximately 20 continuation reports Cst. O'Halloran had written by the time he testified at the preliminary inquiry in early July, 1983 – they have not been recovered. *Prelim. T., O'Halloran, p. 267, l. 43 – p. 268, A.B., p. 279-280*

42. Delavina Mack died on April 23, 1983. RCMP officer Bruce Hulan was one of the key investigators into her death. *CFE, Vol. 2, Tab 7, Prelim T., p. 1 – 32, A.B., p. 9 – 41.* The respondent tenders this affidavit as fresh evidence, admissible to rebut the appellant's assertions that the police investigation was inadequate and in response to other allegations surrounding the circumstances in Bella Coola at the time of the offence. He and the other officers who testified at the preliminary inquiry described the early part of the investigation:

- The police were called at 6:11 a.m. and were told that a child had been raped. Cst. Hulan responded and arrived at the Mack home at 6:15 a.m.
- Grandmother, Gertrude ("Gert") Mack, and uncle, Wilfred ("Bill") Tallio, Jr., were getting into a truck, with Delavina wrapped in a blanket. Cst. Hulan did not have the opportunity to look at Delavina, and did not realize she was dead.
- Cst. Hulan was directed to the bedroom where Delavina had been found, he photographed the room and then seized the pillow, the "bedclothes" and two socks. The pillow and one of the socks had some blood staining on them.
- Cst. Hulan was called to the hospital, and arrived there at 6:25 a.m., at which time he learned that Delavina was dead. Cst. Hulan called his colleague, Cst. Alan O'Halloran, who attended the hospital shortly thereafter. Cst. Hulan maintained continuity of Delavina's body and she was placed in the morgue.

- Delavina's father, Blair Mack, was arrested by Cst. O'Halloran and brought to the detachment. Cst. O'Halloran took a statement from him.
- The police learned that the appellant had supposedly found Delavina's body and wished to interview him as a witness. Cst. O'Halloran and Cst. Hulan attended the Tallio home at about 9:05 a.m. and located the appellant. Cst. O'Halloran detained the appellant and they transported him to the detachment.
- As already described, Cst. O'Halloran interviewed the appellant in the morning, the first statement, which was admitted at trial. Cst. O'Halloran also seized the appellant's clothing, and a medical doctor, Dr. McIlwain, attended to obtain pubic hair samples.
- Cst. Hulan transported Delavina's body to Vancouver for the autopsy. Dr. Glenn Taylor conducted the autopsy at B.C. Children's Hospital. Once the autopsy was complete, Cst. Hulan provided the exhibits seized at the autopsy to the RCMP crime detection lab for forensic analysis, and then returned with Delavina's body to Bella Coola.
- In the meantime, three officers arrived from the Prince Rupert RCMP Sub/Division to provide investigational support: Cpl. Wayne Watson, Cpl. Garry Mydlak, and Cpl. Gerry Galenzoski (a forensic identification officer). Cpl. Watson and Cpl. Galenzoski photographed and searched the Mack home, and seized some more items. Cpl. Mydlak interviewed several witnesses.
- The appellant was interviewed two more times in the evening, first by Cst. O'Halloran and then by Cpl. Mydlak, but these interviews were not admitted at trial.
- The police requested charge approval from Crown counsel, and obtained the approval to lay a charge of first degree murder. The charge was laid on April 24, 1983, and the appellant was remanded by a justice of the peace to appear in Vancouver Provincial Court. Cst. Hulan transported the appellant to Vancouver for his first appearance on April 25, 1983.
- On April 29, 1983 Cst. Hulan transported exhibits seized by him, Cst. O'Halloran and Cpl. Watson to the Vancouver crime detection lab for forensic analysis.

The appellant is in custody and interviewed by the police

43. The appellant was taken into custody at approximately 9 a.m. on April 23rd and gave three statements to the police.

Approx. 9:15 a.m. April 23 to Cst. O'Halloran, AFE, Pembroke Aff., Tab 25:

44. The appellant's first statement is an important statement for the purposes of this appeal. It was recorded on a Dictaphone by Cst. O'Halloran. It is the one police statement that was ruled voluntary and admissible at trial. The judge's ruling is not challenged on appeal. Trial counsel notes in paragraph 31 of his affidavit that what the appellant said in this first statement was potentially inconsistent with other evidence that had been led at trial. *AFE, Vol. 2, Tab 31*. As the preliminary inquiry judge noted in his voluntariness ruling:

> He was questioned by Constable O'Halloran and that was taped, and he didn't admit anything. He was seen by a doctor and again, although some information was forthcoming, that information wasn't anything in the nature of an admission by Tallio. The doctor made observations which are not entirely consistent with things that Tallio had told Constable O'Halloran. *A.B., p. 430, T., p. 415(19-26)*

45. The appellant's statements to Cst. O'Halloran are further problematic for him on appeal, as it is inconsistent with the appellant's present assertions regarding what he did that night, such as that he "saw a large blood stain on the bed between her legs"; he "tried to wake the grandparents up", and that he was asked by Lotta "earlier in the night" to go check on Delavina, and had "been in the kitchen" for a period of time before going to check on her. *ARF, paras. 47, 72-74.* Rather, in his April 23, 1983, voluntary statement he says:

> All I know is that her Mother, Lotta, asked me if I could go up and check on her so I – when I left the house I walked around the block and I went up to their house and when I got there the door was wide open and I went in and checked in the living room and Blair's parents were sleeping in there, I looked to see if Delavina was there – she wasn't, so I went down to the Bedroom and when I went down to the bedroom Delavina was laying on the bed and she had her bottom part of her pajamas just below her – whatever you want to call it. ... And I went in and I checked to see if she was breathing and I tried to wake her up and she wouldn't

> wake up so I listened for her heart and there wasn't any so I ran out and then I ran down to my Uncle's and I told Nina. *page 1*

46. He was asked what time it was when Marion [Lotta] asked him to go up to Sam Mack's house to check on Delavina and said "It was about 6:00-6:30" (*pages 1, 4, 9*). He said he didn't go directly to Sam Mack's house from Cyril's place, as he went "up to the corner by Silas King's" and then "headed up towards the Co-Op" then he went up to the top street and then I walked down" as he "wanted to go for a walk" (*page 2*).... He "walked around the block" (*pages 4, 6).* He was asked if he knew what happened to Delavina and said:

> When I got to the house the only thing I figured was she had to have been raped cause when I found her her pajamas were down to there and her legs were just apart a bit and she had that bloody sock just beside her... (*page 2)*

47. He was asked, "Was there anything about the room that was unusual?" and replied "Just the way she had her pajamas and the sock that she had beside her" (*page 6).* He was asked, "did you wake Sam and Gert up and tell them what happened?" And answered, "No". When asked why not, he said "I figured that – Blair and Lotta should know first" (*page 6).* He was asked:

> Q. Do you think that somebody meant for Delavina to die?
> A. I don't think so.
> Q. What do you think happened?
> A. Well the way I figure is whoever it was went in and did that to her and after they found out she was dead they just took off cause the door was left wide open and the way she was dressed with her pyjamas. (*page 7)*

48. He said that he went to bed around 4:30 that morning, and was awakened by Lotta to go out at about twenty to a quarter to six (*page 4, 9).* He said he was awake most of the night "except for an about an hour and a half asleep and that's when I woke up and Lotta asked me to go up and check on Delavina.... Just going onto 6:00" (*page 4).* He was asked if he met anybody when he was walking to the Mack home and said that all he saw were a couple of guys, 4 or 5 of them, in the alley. He didn't recognize or speak with anybody he saw on the way to the Mack home, "didn't pay attention" (*page 7).*

7:03 p.m. April 23 to Cst. O'Halloran after his arrest for murder (this statement was ruled inadmissible at the trial), AFE, Pembroke Aff., Tab 26:

49. The respondent is not relying at the appeal on the next two statements the appellant made, as they were ruled inadmissible for the truth of their contents at the trial. Nonetheless, they are in the material the appellant has filed and have some relevance to some of the issues the appellant has raised, such as whether the police investigation was inadequate.

50. In this second statement he repeats that Lotta asked him at around 6 a.m. to go to the Mack home and check on Delavina and if she was there to take her down to Cyril Tallio's home. He repeats that he got to the house and found Delavina in the bedroom.

8:16 p.m. April 23 to Cpl. Mydlak (this statement was ruled inadmissible at the trial), AFE, Pembroke Aff., Tab 27 and 29:

51. The third interview was with Cpl. Mydlak at approximately 8 p.m. It was not recorded. Cpl. Mydlak believed he was taping the first part of the interview on an Uher recorder, not the Dictaphone used by Cst. O'Halloran, as the reels were moving, but it was still paused. The judge at the preliminary inquiry (*A.B., p. 431, T., p. 416(16-23)*) and the judge at the trial (*A.B., p. 474*) characterized the lack of recording as human error, unintentional and a malfunction. The second part of the interview with Cpl. Mydlak was not recorded because the appellant asked that the tape recorder be turned off.

52. The best evidence at this time of the first part of the interview is Cpl. Mydlak's testimony at the preliminary inquiry. Cpl. Mydlak also wrote a letter to Crown counsel describing the first part of the interview. He was working off his prepared interrogation notes. *Aff. Pembroke, Tabs 29, 22 written in May*

53. The second part of the appellant's interview is at Tab 27 of the Pembroke Affidavit. Cpl. Mydlak wrote out questions and wrote out the appellant's answers, which are at the back of Tab 27. The appellant signed the first page. He initialled the remaining pages. The statement was later typed out.

54. The appellant was asked to tell Cpl. Mydlak in his own words what happened in Delavina's bedroom. He said "I went down and undressed her and I just.... And did what I did to her. She cried, so to stop this he "put a pillow over her head". He did not mean to hurt her.

Travel to Vancouver

55. As already mentioned, after obtaining the approval of Crown counsel, the police charged the appellant with first degree murder. He was then remanded by a Justice of the Peace on April 24th, for transportation to Vancouver. On April 25th they flew to Vancouver. The provincial court records of these proceedings are attached to the Pembroke Affidavit, filed by the appellant in a separate volume. The Information and Warrant are at Tab 9. The following is a chronology of the proceedings that followed.

April 24, 1983: appeared before a Justice of the Peace in Bella Coola who remands him to April 25th in Vancouver (Tab 1)

April 25, 1983: appeared in court at 222 Main Street and remanded to April 26th (Tab 2, 6). The Vancouver Police Department booking sheet, 5:25 pm, April 25, noted that he was "Suicidal!" and that there were slash marks inside his arm (Tab 5). Dr. Emlene Murphy saw the appellant on April 25th at the City Jail, at approximately 6:50 p.m. She hand wrote a short letter to Mr. Herb Weitzel at Crown Counsel (Tab 8).

> CONCLUSIONS:
> 1. He is not certifiable under the Mental Health Act;
> 2. He may be mentally ill. This could be ruled out if he 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.

Dr. Murphy also prepared a four page type-written more detailed report regarding her meeting with the appellant on April 25th. It is not clear to the respondent when this document was written or typed, as there is more information in it than referenced in the letter to Crown counsel, including the appellant's admission date to the FPI (April 26, 1983).

April 26,1983 appeared in court at 222 Main Street and is remanded to May 24, 1983. The Minute Sheet (Tab 3) provides that he was remanded to FPI for an in custody psychiatric order. He was represented by counsel. It appears that he did not consent. The endorsements to the Information (Tabs 9) state: "Pursuant to section 465(1)(c) CCC the accused is remanded in custody for observation in the Forensic Psychiatric Institute at Port Coquitlam, B.C. for a period not to exceed thirty days, until May 24, 1983. The ROP on (Tab 9) notes that there was a Hearing on April 26, with Emlene Murphy MD.

The Remand By Order (Tab 10) says that he was remanded into the custody of the Executive Director for observation, there being in the judge's opinion reason to believe, supported by the evidence of a duly qualified medical practitioner, Doctor Emlene Murphy, the accused may be mentally ill. Crown counsel Judith Bowers signed the Forensic Psychiatric Services Referral Form for a 30 day remand with the box for fitness to stand trial marked as the reasons for the request for a psychiatric opinion (Tab 14). The respondent has filed the file from FPI, attached to the affidavit of Cpl. Katalinic. *CFE, Vol. 7, Exhibit HH, p. 1169 - 1262.*

May 17, 1983 – Dr. Murphy wrote the judge with her report, where she concluded the appellant was fit to stand trial (Tab 11). A letter to her from Dr. Robert Pos is attached to her letter (Tab 11). It appears that Dr. Pos signed both letters (he was at that time the Chief Psychiatrist at FPI). Dr. Murphy asked Dr. Robert Pos, Psychiatrist-in-Chief at FPI, for a second opinion. Lastly, it is also not disputed that Dr. Pos wrote a letter dated May 17, 1983, to Dr. Murphy (the "Pos Report"), which was provided to the court with Dr. Murphy's report. Dr. Pos describes his conversation with the appellant, just after Dr. Pos ensured that the appellant understood that he was charged with first degree murder, part of which is:

> Q. What are you thinking about right now?
> A. (silence)... I tried to think about the charge... how it happened...
> Q. Yes?
> A. ... I don't think I understand why (they made it) first degree... I didn't think she died... when I put the pillow on her head... I made sure it was not on her face... it came out of the blue, I didn't plan on the pillow doing this to her.

May 20, 1983 – The appellant appeared in court at 222 Main Street where he was remanded to reside at the Lower Mainland Regional Correctional Centre to return to court on May 27, 1983 (Tab 4, 13). His preliminary hearing date was set: July 7, 1983, in Bella Coola.

The preliminary inquiry

56. The transcripts of the preliminary inquiry were located in the Crown file, and were filed by the appellant in the Appeal Book. The witnesses who testified there provide relevant evidence of what happened the evening of April 22, and the early morning of April 23, 1983, albeit in the context of a preliminary inquiry which has a limited purpose and in which examinations are not as fulsome as trial testimony.

57. The preliminary inquiry was held in Bella Coola on July 7, 8 and August 8, 9, 1983, presided over by Judge Charles Barnett. The appellant has filed an affidavit from now retired Judge Barnett. *AFE, Vol. 1, Tab 4* The respondent's position is that the contents of his affidavit are irrelevant and should not be admitted as fresh evidence.

58. The record of proceedings from the preliminary inquiry is attached to the Information, Tab 9 of the Pembroke Affidavit filed by the appellant. The following individuals testified at the preliminary, and it is noted below if any of them have also provided affidavits for the appeal:

James Hulan RCMP (*CFE, Vol. 2, Tab 7*)
James Galenzoski RCMP
Wayne Watson RCMP
Glenn Taylor, pathologist (*CFE, Vol. 2, Tab 12*)
Getrude Mack, Delavina's grandmother
Blair Mack, Delavina's father
Marion Bolton, Delavina's mother
Bill Tallio (*AFE, Vol. 2, Tab 36*), Gertrude Mack's brother
Cyril Tallio (now deceased), the appellant's uncle
Nina Tallio, the appellant's aunt
Celestine Vickers, sister of Nina Tallio (*AFE, Vol. 3, Tab 45*)
Ray McIlwain, physician (*AFE, Vol. 2, Tab 23*)
Ted Walkus, RCMP
John Elsoff, RCMP

Allan O'Halloran, RCMP (now deceased)
Ronald Schiefke, RCMP
Gary Mydlak, RCMP
Paul Wilson, social worker (*ARFE, Tab 20*)

59. At the conclusion of the preliminary inquiry the appellant was committed to stand trial. *Appeal Book, page 429-436; T., p. 414-421*

The trial and guilty plea – Prince Rupert File No. 74/83

60. The record of proceedings at trial is attached to the third affidavit of Janet Dickie, CFE, Vol. 1, Tab 3, as follows:

October 17, 1983 – 10 a.m. - challenge to the jury array; ruling – ruling at 11:20, dismissed. The judge's ruling is in the Appeal Book, page 467. Trial counsel explains in his affidavit, para. 28, that this challenge was on the ground that the jury did not have a sufficient number of Indigenous people. *AFE, Aff.Rankin, Vol. 2, Tab 31.*

11:46 a.m. – appellant placed in charge of jury - not guilty plea entered. Court adjourned to October 18.

October 18, 1983 - 10 a.m. – 4:35 p.m. – statement *voir dire* – Officers Hulan and O'Halloran testified. Tape cassettes and transcripts entered as exhibits.

October 19, 1983 - 10 a.m. – 4:43 p.m. – Cst. O'Halloran examination continued.

October 20, 1983 - 10 a.m. – 4:30 p.m. – Cst. O'Halloran finished, Cpl. Watson, Leslie Pinder (defence witness), Wallis Stiles, Ian Trepanier, Cpl. Mydlak testified.

October 21, 1983 - 10 a.m. - 4:39 p.m. – Cpl. Mydlak testified, Crown closed case on *voir dire*. Defence witness - Paul Wilson.

October 24, 10 a.m. – 4:34 p.m. – Paul Wilson, Darlene Tallio, Dr. Peggy Koopman (qualified as an expert in forensic psychology).

October 25, 1983 - 9:35 a.m. – 5:13 p.m. – Dr. Koopman finished, submissions by Crown and defence.

October 26, 1983 – submissions continue until lunch break.

61. The trial judge gave his ruling on the admissibility of the police statements on October 28, 1983. It is electronically available, *R. v. Tallio,* [1983] B.C.J. No. 258 (S.C.) and is in the Appeal Book at page 469, and attached as an exhibit to the first affidavit of Deidre Pothecary. *AFE, Vol. 2, Tab 30A.* In this Ruling, the judge described Dr. Koopman's testimony and her conclusions regarding the appellant answering the police officers' questions:

> [10].... Further, that because the [right to silence] statements were meaningless to him, and as the questioning proceeded after the asking of the questions, he would have concluded that he was required to answer. The doctor advised that the effect of the isolation imposed by the police would be devastating to Mr. Tallio. She explained that this would be due to the fact that he had few inner resources, and had an enormous dependence on others.She was also asked if she had an opinion as to what effect, if any, the tandem approach of interrogation would have had upon him, that is to say, the interrogation by constable O'Halloran followed quickly by corporal Mydlak. Her opinion was that, as he was submissive, he would be brought to believe he must respond, that the repeated questioning would cause him fatigue to a point where he would feel a need to bring it to an end, and that he would speak to stop the speaker. *A.B., p. 478, respondent's emphasis*

62. Ultimately, the judge ruled that only the first, morning, statement to Cst. O'Halloran was admissible. The trial continued:

October 26, 2:10 p.m. – 4:22 p.m. - Crown opening remarks, Officer Galenzoski testifies

October 27, 10 a.m. – 4:09 p.m. – 10:01 – 10:19 – in the absence of the jury there is discussion between counsel and a "ruling made"; 10:23 - jury present, admissions of fact, Gertrude Mack, Samson Mack, Blair Mack testify.

October 28, 9:30 – 4:25 – 9:30 – absence of jury, statement voir ruling; 10:18 – jury present, Marion Bolton, Bill Tallio, Cyril Tallio, Nina Tallio.

October 31 – 11:34 a.m. – 4:12 p.m. – 11:34 – 3:12 - in the absence of the jury a warrant is issued for Celestine Vickers; *voir dire* with Dr. Raymond McIlwain, ruling; 3:23 p.m. – jury present, Dr. McIlwain testified.

63. The appellant entered his guilty plea November 1, 1983. There is no transcript of this proceeding, but the parties were given a copy of Justice Davies' bench book from that day. *CFE, 3rd Aff Dickie, Vol. 1, Tab 3, page 51*

Nov 1, 1983

Rankin – advises of client's wish to enter a plea of not guilty
Sec 670-671 [745.2, 745.4]
review the procedure
jury called in Rankin
- advises on plea change
- asked if he has explained the consequences to his client
- Indictment is read to accused
- Plea: to included offence of 2nd degree murder
  Confirmed by Mr. Tallio

- Facts: approved by defence counsel read to the jury by Crown counsel
- Rankin formally admits those facts on behalf of the accused

Question to the Jury –

Verdict: Not guilty on charged but guilty of 2nd degree murder
Jury Recommendation: none

For sentence Vancouver – Thursday, 9:30 a.m. November 8, 1983 [and at that appearance adjourned to January 26, 1984]

64. There is a partial transcript of the January 26, 1984, sentencing proceedings. Dr. Anthony Marcus was called as a defence expert in the field of forensic psychiatry. He testified that he saw the appellant on three occasions in 1983: September 28, October 3, and October 12. *CFE, 3rd Aff. Dickie, Vol. 1, Tab 3, page 33*

R. v. Tallio – Proceedings at Trial (Sentence), T., p. 3(12) – 4(9), typographical and grammatical errors in original not corrected:

But I think underneath this lad has extreme difficulty in handling his own emotions, in terms of being able to sort them out in terms of planning, understanding and anticipating events. Although, on the surface level, your honour, he can understand the difference between right and wrong, below that Phillip has great difficulty in dealing with actions when he is confronted with his own emotional impulses. It was for this reason your Honour, that I did ask Dr. Peggy Coopman, a colleague of mine to see Phillip, she having an understanding of his cultural

heritage and his capacity to organize language and thinking. And, I would like, your honour, like to quote from just one or two lines from her report, that I have in my possession. 'His ability to assess the relative importance of events and the seriousness of consequences is very impaired. He is unable to think through to the conclusion of most events he can not predict or guess the probability of outcomes. He lets the chips fall where they may and lacks the responsibility for his acts, in the sense, your honour, that he rarely sees himself as the prime act in their existence.'

I feel absolutely in accordance with that view in relation to this young man. The ultimate tradgedy for which he stands before this court, is one again in which it is in a sense the climax of a series of enormous social unhappiness in the young man and yet he had gone to Bella Coola at the time in terms of a place to be, that was to be enduring, he had a young lady, a girl friend, she has had his own child, he is – he has emotions of a good sort in relation to that. I had to come to the conclusion, you honour that he represents the diagnostic category in the DSM-3, which is the American psychiatric standard, its called the diagnostic and instructional manual of the American Psychiatric Association. That he fits the category of a sociopathic personality, a young man with impulsive difficulties uninhibited under alcohol, who has been in a lot of trouble. Who has explosive outbursts on occasion. But your honour, that is – that diagnosis is only a way of communicating, it no way explains Phillip's tremendously deep seated psychological turmoil and his almost unsocialized quality. *T., p. 3(12)-4(9),*

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65. Upon questioning by Crown counsel, Dr. Marcus answered (T., p. 7(11)):

A .....he was going to school and he had a girl friend. And what I am saying your honour, is that I do not believe you wish the events traced that particular night, but in a sense, again, Phillip felt lost. There was nowhere to sleep, there was nowhere to sleep in the house. The house was totally occupied by the maximum, they had come to stay, he was sitting on a chair and falling asleep. He had had a few drinks. He wandered into the night. I am saying your honour, that such events, such small events can precipitate a young man like this to sometimes terrible tragedies. They are not necessarily connected. Phillip Tallio is not and has no history of being a previous sexual offender, for instance. Do you follow me? It's an unpredictable, totally inconsistent moment.

Q You are aware, however, that there is a history of at the least, fairly spontaneous violence, with respect to a shooting incident of an old woman in Williams Lake?

A Tragically, that is one and there are more, of his unpredictable outbursts yes.

Q Is it your opinion then, that small and otherwise insignificant events what can trigger some very impulsive, very violent behavior on the part of Phillip Tallio, such that nobody around could see that this is what's happening?

A Absolutely. I find that he develops attitudes and ideas to situations and to people, that his emotions influenced his appropriate judgment. He does for instance, not know sometimes, who's on his side and who isn't. Because he can't really sort it out. *T., p. 7(11-42), typographical and grammatical errors in original not corrected*

****

A ....Phillip is just under the average range in intelligence. I think he can have the capacity to change, with assistance, with very experienced assistance... *T., p. 9 (16-19), typographical and grammatical errors in original not corrected*

66. The parties to this appeal were also provided the bench notes of counsel's sentencing submissions. *CFE, 3rd Aff Dickie, Vol. 1, Tab 3, p. 53.*

Rankin

- Evidence of remorse from witnesses
- Death of the baby was unintentional
- Drunken party at his Uncle Cyril's
- Dozens of foster placements
- Re Gourgon [[1981] B.C.J. No. 485 (C.A.); 21 C.R. (3d) 384 (C.A.); upholding [1979] B.C.J. No. 1316 (S.C.); 9 C.R. (3d) 313]
  (d) - 17 years old – life-style – psychiatric evidence
  [in the margin] Transcript – Dr. Marcus

- tragedy
- Has been in turmoil since the trial started
- Very fearful
- Eligible for parole when he is 28 – should have the possibility of coming out. Not to be totally [indecipherable]

Pothecary

Crown is not opposing a 10 year period.
death occurred in a [indecipherable/tradgic?] circumstances
element of unpredictability.

67. The reasons for sentence were transcribed. *CFE, 3rd Aff Dickie, Vol. 1, Tab 3, p. 45.* The circumstances of the offence were briefly described (T., p. 2(19-32)):

> ...On the evening of April 22nd, 23rd, 1983, you were involved in a drinking party at your Uncle Cyril's home at a Bella Coola Indian reserve, that is on the night of the tragedy. That was not by choice but because you lived at that house. There was evidence that you were drinking also, but that evidence was that you were not drinking to excess. In any event, later that night or early in the morning after those attending the party left, or had gone to sleep, you apparently went for a walk. You entered the Mack residence where you sexually assaulted the child, Delavina Lynn Mack, and in the course of which she died of suffocation. *T., p. 2(19-32)*

68. The judge referred to the expert opinion of Dr. Marcus and Dr. Koopman (who had testified at the voluntariness *voir dire*) in his sentencing reasons (T., p. 3(12-26)):

> There is no question this was a senseless tragedy. I have had the opinion of Dr. Marcus and Dr. Koopman. They have explained that Phillip Tallio's unfortunate childhood has made him an individual whose emotions influence his judgment. The evidence of his relatives at the trial all confirm that his childhood was a total tragedy. Without reviewing his life story, his emotional problems started at an early age with his mother's suicide and he has gone from crisis to crisis since then. His life at one point was described to me as a turmoil, and I agree. In my view, Phillip Tallio, in his present condition, is a danger to society. However, both Dr. Marcus and Dr. Koopman say that he can be helped. *T., p. 3(12-26)*

69. The judge directed that the reasons for sentence and testimony of Dr. Marcus be sent to prison authorities and recommended that he be sent to the Regional Psychiatric Centre at Abbotsford for an assessment. He set parole ineligibility at 10 years of his life sentence. At the request of the Crown and the victim's family, he also recommended that personal items or clothing of the deceased be returned to the grandmother, Gertrude Mack. *T., p. 3(28-42), p. 4(24-42)*

PART II ISSUES ON APPEAL

57. The respondent is addressing the appellant's issues on appeal as follows:

The appellant's guilty plea was not invalid or uninformed (*Adgey/Wong*):

Issue I (Appellant's Issue IV) The appellant's guilty plea was valid and there is no basis to quash it. The appellant cannot allege that his plea was uninformed on the basis that his lawyer gave was incompetent legal advice as his evidence is that he did not rely on that advice, or instruct his lawyer to enter a guilty plea.

Issue II (Appellant's Issue III) Alternatively, trial counsel was not ineffective in assessing the admissibility of Dr. Pos's evidence, or the strength of the Crown's case. The appellant cannot demonstrate that Dr. Pos's evidence was inadmissible as proof of the truth of the contents, or that Dr. Pos was a person in authority to whom he made an involuntary admission.

The appellant cannot demonstrate that the guilty plea was a miscarriage of justice (*Kumar/Taillefer/Hanemaayer*):

Issue III (Appellant's Issues II) The appellant cannot establish a remedy should this Court conclude that the provincial court judge did not have the jurisdiction to order the appellant remanded to FPI. In any event, the remand was valid.

Issue IV (Appellant's Issue I) The DNA evidence does not exonerate the appellant.

Issue V (Appellant's Issue V) The investigation was not inadequate, and there is not a sufficient connection between the any third party to justify this Court considering anyone else the "real" perpetrator.

PART III ARGUMENT

The evidentiary framework for analysis of issues on appeal in light of the passage of time

70. As set out earlier, this Court should accept only accept credible, reliable and admissible fresh evidence in order to resolve the issues the appellant raises. As was the case in *Truscott*, many of the people whose conduct is at issue in this case are now deceased. This is particularly true of individuals the appellant significantly maligns - Dr. Robert Pos, the psychiatrist that the appellant claims he never met; Cyril Tallio and Wilfred Tallio, individuals who committed or are alleged to have committed sexual offences in Bella Coola during the 1980s and are now being accused of murder.

71. In many instances, this Court is being asked to speculate about what people knew or did not know, and what they did or did not do over thirty years ago. The record is clearly incomplete. The Ontario Court of Appeal in *Truscott* noted, in light of the inadequate record in that case, that any attempt to assess the merits of the appellant's unfairness claim should not produce its own unfairness; it could reflect adversely on individuals who were no longer alive, or could not remember events so long ago. The respondent requests that this Court take a similarly cautious approach:

> [124] Any court must go where the evidence takes it and decide the issues that must be decided even if those decisions do harm to the reputation of otherwise respected individuals. Where, however, the evidentiary record is far from clear and the issues do not need to be resolved to do justice in the case, decency dictates that the court avoid stretching the evidence to make factual findings that could irreparably harm the reputation of individuals who will never have the opportunity to respond to the allegations made against them.

72. It is also the respondent's submission that this Court should consider the extent to which the appellant bears responsibility for delay in prosecuting the appeal, with the concomitant loss of evidence, and death of relevant witnesses. The appellant's case is not the same as the *Truscott* or *Phillion* - cases where individuals diligently pursued their assertions of innocence. The appellant could have brought this application to strike his guilty plea in a timely way but did not. This has caused significant prejudice to the

respondent in its ability to reprove the case and compromises meaningful accurate appellate review.

73. The appellant claims in his first affidavit that he lacked the capacity to appeal, and that he did not know what an appeal even was until 1992. *AFE, 1st Aff.Tallio, Tab 42A, para. 132* This is not a credible assertion, as recent evidence from the appellant, and historical (and reliable) *Correction Services Canada* ("*CSC*") records demonstrate otherwise.

74. For example, the RCMP interviewed the appellant on July 19, **2011**, when looking into the appellant's miscarriage claims. *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit J (transcript) and Exhibit K (audio)* His statement is tendered as fresh evidence by the respondent, and the appellant has admitted the voluntariness of the statement. This is what the appellant said nine years ago:

> The reason why I didn't appeal was because he [his trial lawyer] told me if you appeal you more than likely get stuck with life twenty-five.
>
> Q. And when did that conversation happen?
> A. Right after we left the court room. Sitting in the holding cell waiting to go back to, at that time it was the new remand centre in Vancouver.
> *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit J, p. 234 (transcript p. 34 of 37), lines 1418-1425*

75. The appellant has therefore expressed a current acknowledgement that he understood *from the time he was sentenced* that he ran the risk of being convicted of first degree murder, and being ineligible for parole for 25 years if his case went to a jury, and that he chose not to appeal due to that same risk.

76. In his second affidavit, sworn June 26, 2017, the appellant attempts to explain away this statement to the RCMP on the basis that he was "combining what Mr. Rankin and IPO Fox said", and because he "recently started taking a medication called Celexa" that made him "foggy". This is no explanation at all. *AFE, Vol. 3, Tab 42, para. 7*

77. The historical records from the appellant's *CSC* file likewise support the respondent's submission that the appellant *chose* not to appeal at a time when, were

his guilty plea to be struck, the case for first degree murder could have been re-instituted. These records were generated in the ordinary course of *CSC*'s business, and are admissible as business records: *R. v. Ziegler*, 2012 BCCA 353 at [73]. They are attached to the Third Affidavit of Cpl. Katalinic. *CFE, 3rd Aff.Katalinic, Vol. 5.*

78. The appellant was sentenced on January 26, 1984. On **January 27, 1984**, while at the Pretrial Services Centre the appellant signed a form letter and a Waiver of Appeal. About a year later, **February 11, 1985**, a *CSC* Progress Report notes that "Tallio does not admit to the offence and alludes to a possible appeal or re-trial" (repeated in a May 9, 1986 Progress Report). In a **June 3, 1986** Individual Program Plan "Tallio states that he will be appealing his conviction at some future date, however, it is likely to be a few years before he has the resources to conduct an appeal". *CFE, 3rd Aff.Katalinic, Vol. 5, Exhibit S, p. 467 – 469; Exhibit T, p. 471 – 477, specifically 475.*

79. Even after 1992, when the appellant says he learned what an appeal is, he did nothing. By this time the appellant had changed his name to Jesse Vernon Christian. From a **February 7, 1994** Progress Summary Report:

> . . . CHRISTIAN [Tallio] states that he was wrongfully convicted and that he knows who the guilty party is. Although [Phillip] has this information, he has not made efforts to appeal to the Courts in order to ensure the right party is convicted. The CMT finds this confusing and questions whether [Phillip] is indeed innocent or whether he uses this to justify any denial he may be feeling in regards to his offence. *AFE, 1st Aff.Tallio, Vol. 3, Tab 42A, Exhibit O, p. 6*
>
> * * * * * * *
>
> CHRISTIAN [Tallio] states that he has considered appealing his conviction, however, has not initiated any proceedings. *AFE, 1st Aff.Tallio, Vol. 3, Tab 42A, Exhibit O, p. 2. (See also October 13, 1994 Progress Summary Report, CFE, 3rd Aff.Katalinic, Vol. 5, Tab T, p. 479 – 480)*

80. In a letter from "Christian's" Case Manager to F. Wilson, in Psychology at the Saskatchewan Penitentiary, dated **November 28, 1994**, the author states:

> In regards to his criminogenic factor of Sexual Behavior (sic), CHRISTIAN [Tallio] denies committing the offence and states that he knows who the guilty party is. Recently, the subject has stated that he is in the process of securing a lawyer's services in regards to his conviction as the "guilty party" is, apparently, speaking

> out. *AFE, 1st Aff.Tallio, Vol. 3, Tab 42A, para. 140, Exhibit P, respondent's emphasis*

81. In a **September 26, 1995** Progress Summary Report, reviewed by the appellant, as there are corrections to it, he again "denies any involvement in his current offence, and that "his [cousin's] grandfather is guilty of committing the offence and the father is guilty of helping to 'setup' CHRISTIAN [Tallio]." The subject has indicated that he is considering appealing his conviction". *CFE, 3rd Aff.Katalinic, Vol. 5, Tab T, pp. 483 – 487.* In a report from an **October 25, 1997** Case Conference at the cultural center attended by amongst others a native elder, it is noted:

> We discussed the fact that we cannot support him for [escorted temporary absence's] until such time as he [addresses] the reason he is incarcerated. He still claims to be innocent and therefore does not want to admit to being guilty or go to RPC for the Sex Offender treatment program. We told him that DNA testing is reopening a lot of cases now and that if he wanted to appeal his case again that that would be a good possibility if there is still crime scene evidence left. He did not appear to accept this idea. He said his family is doing an investigation of their own... *CFE, 3rd Aff.Katalinic, Vol. 5, Tab U, p. 489, respondent's emphasis.*

82. In a Referral and Consultation Report dated **June 22, 2001**, regarding attendance at a program, it again states that the appellant did not want to talk about the offence as "(Mr. Christian is apparently appealing his conviction)". *CFE, 3rd Aff.Katalinic, Vol. 5, Tab U, p. 491.* In a Memo to file by Raymond Silbernagel dated **January 17, 2003**, it is reported that "Jesse" "went on about a lawyer who may be taking his case".

83. In summary, the objective evidence contradicts what the appellant swore in his first affidavit, in order to obtain an extension of time to appeal. These documents demonstrate that he persistently referred to the fact that he *could* appeal, was contemplating an appeal and taking steps to do it. In response to this evidentiary record, the appellant filed another affidavit on June 26, 2017, cryptically stating: "I never made a conscious decision not to appeal. I am using the word 'appeal' as I understand it today": *AFE, Vol. 3, Tab 42B, paras. 6 & 8*

Other evidence of appellant's conduct and cognitive capacity while incarcerated

84. The respondent relies on other fresh evidence to demonstrate that the appellant is not a credible historian. The appellant's revised factum no longer argues that his guilty plea was involuntary on the basis that the appellant's cognitive state at the time of the trial and plea was such that he did not appreciate the nature of what was transpiring; (also the ground of appeal in his Amended Notice of Appeal). Yet he relies on "cognitive evidence" and argues that he did not understand what was happening. The respondent's position is that he cannot disavow his sworn evidence provided to this Court, as recently as July 2019, that he did not instruct his counsel to plead guilty and still argue that he entered plea negotiations.

85. Other documents in his Corrections Records demonstrate that the appellant had no trouble advocating for assistance when he *actually* wanted something, and that he had the cognitive capacity to understand what had happened in the court proceedings. In other contexts, he was able to self-advocate on legal and medical matters. These "Request for Interview" forms have a checklist of possible subject matters for the request, such as "parole, day parole, educational matters" and "appeals" (respondent's emphasis). The appellant's requests are handwritten in clear cursive writing, or typewritten, as by 1986 he had taken a typing course and learned key boarding; they are articulate and polite.

86. For example, **within a year** of starting his sentence he makes numerous "Requests for Interview" with his classification officer so that he can arrange to set up a trust fund for his daughter, and get his birth certificate and documents notarized. "I would like to see my CO to have her help me fill out a form for my trust fund". This continues on **November 18, 1985** when he writes "my birth certificate has arrived, and I would like to have you sign some papers necessary for my trust fund". There is follow up in **November 26, 1985**, when he asks "have you made the appointment with the Notary member?" This is approved in **April 1986** when he has $4925.92 in his bank account, and access to funds from a fishing licence inherited with his brothers. *CFE, 3rd Aff.Katalinic, Vol. 5, Tab V, pp. 493 – 509*

87. In **June of 1989**, he "Requests an Interview" with his classification officer as he would like to speak "about obtaining a lawyer in regards to a possible paternity case". He was seen on June 21, 1989, where he asked for "the assistance of a legal aid lawyer" and "was given appropriate Legal Aid forms". He must have sent something to the mother of the child, as she writes him regarding his efforts to "to take [her] to court about seeing [his daughter]" and she refers to a "court case your talking about". He "Requests an Interview" on **July 26, 1993** saying he "needs to see [his classification officer] about some legal matters that [he] is concerned about. As soon as possible would be appreciated". *CFE, 3rd Aff.Katalinic, Vol. 5, Tab V, pp. 511 - 517*

88. There are many other examples of his ability to make other types of requests, and advocate for himself as set out in Exhibit W of the Katalinic Affidavit. These demonstrate his cognitive capacity, verbal skills, intelligence, and vocabulary. Within them he reflects on his past experiences, including with psychologists and what occurred in court proceedings. These records also demonstrate his interest in staying connected with his family, which in the respondent's submission is a powerful motivator to deny the commission of the offence:

June 26, 1984 - within months of being incarcerated and at Kent Institution – "I would like to see the Psychologist, Peggy Koopman. She comes in once in awhile. My reason being she can help me with a problem concerning my family. Much appreciated."

August 3, 1984 – My reason for making this request, is I wish to try and finish my schooling. At the time of my arrest I was doing gr. 10 and my last grade completed is gr. 9. Last school attended was Sir Alexander MacKenzie High school in Bella Coola, British Columbia. Thank you.

October 2, 1984 – I would like to receive a notice of what the dates are [parole and day parole checked], that I get these two types of parole.

September 19, 1984 – I would like very much to be able to speak to a psychologist instead of the psychiatrist. I have alot on my mind, and need someone to talk to along that level. I have spoken to psychologists in the past, and I have been able to talk more openly with them. Now if this can be made possible, it would be greatly appreciated.

89. In **1990**, the appellant filed an "Inmate Complaint Form" regarding the fact that he has not received special knee braces. He stated: "I am not known as a trouble maker

for any dept. within the institution, and I don't want to start by taking them to court over a set of knee braces". In **1991**, he filed another complaint regarding "insufficient medical treatment"; in **2000** he wrote a letter in support of a request for "the purchase of high-top runners"; he has written regarding concerns about his sleep apnea, in **2003** a detailed list of medical complaints, such as possible diabetes, Hep C, a possible "UTA" and "lumps", and in **2004** a request for medication for his knee pain. *CFE, 3rd Aff.Katalinic, Vol. 5, Tab X, pp. 589 – 601*

90. In the late 80s the appellant started a pen pal relationship with a woman in Norway. He "Requests an Interview" numerous times in **1989** regarding "a language course he would like to take"; to request a dictionary in the "dialect she is used to"; to explain the need to get permission to order an engagement ring and wedding bands; he wrote a detailed letter to the Warden in support of his request for language material; to the Deputy Warden seeking permission to purchase an engagement ring; and had his Case Management Officer write to the Public Prosecution Service for permission to marry. By May 1993 he advises that the marriage had been called off, and he "Requests an Interview" about a tape he received from the parole board. *CFE, 3rd Aff.Katalinic, Vol. 5, Tab Y, pp. 603 – 629.*

91. The impression the appellant attempts to convey in his first affidavit is that he can be forgiven for doing essentially nothing to advance his appeal until 2006. Even then, it was as a result of his friend, Robyn Batryn, reaching out to *AIDWYC/Innocence Canada* and then the UBC *Innocence Project.* Yet as set out above, he was able to self-advocate and negotiate in other legal matters.

92. This Court does not have to conclude why the appellant never pursued his appeal, but it is a matter that can be considered in assessing the lack of an evidentiary record on important matters. Had the appellant pursued an appeal in a timely way the validity of his guilty plea could have been assessed with a transcript; without having to resort to retroactive speculation of what the appellant understood; with trial counsel's records and with key witnesses still alive. If he had been successful, the Crown would have been able to prosecute him for first degree murder. Instead, this Court is having to review matters as best as can be reconstructed.

93. The respondent's position is that the appellant chose not to pursue an appeal despite maintaining an innocent stance while in custody. Acting on this innocent stance in a timely manner would have put him back to the very jeopardy he faced when he made the decision to plead guilty. It is certainly conceivable that the appellant changed his name and hoped to be released on parole and start a new life within ten years of committing the offence, while at the same time never having to admit to his family, or anyone for that matter, that he committed such an offence.

ISSUE I: The appellant's guilty plea was not invalid or uninformed / counsel was not ineffective

94. The respondent's position is that the primary focus of this appeal should be on the question of whether the appellant's guilty plea to second degree murder was valid. The appellant alleges that his guilty plea was invalid as it was uniformed. Later in the factum, the respondent will address the appellant's arguments that this is one of the exceptional cases in which a division of this Court would find that the circumstances that led to the plea, valid at the time, are now so discredited that a miscarriage of justice occurred: *R. v. Alec*, 2016 BCCA 282 at [69]-[84]; *R. v. C.M.*, 2010 ONCA 690 at [10]; *R. v. Shepherd*, 2016 ONCA 188, *R. v. Kumar*, 2011 ONCA 120; *R. v. Hanemaayer*, 2008 ONCA 580 at [20].

95. The appellant's position is that the guilty plea was uninformed due to ineffective assistance of counsel, as trial counsel did not properly evaluate the anticipated evidence of Dr. Pos, and had the appellant been advised of the inadmissibility of the Pos evidence he would not have entered plea negotiations (Appellant's Issue IV).

96. The appellant's position is not clear to the respondent. He argues he did not "knowingly" instruct his lawyer, which suggests that Mr. Rankin *was* instructed to enter the plea, but that this was "unknown" to the appellant. Yet, he has filed three affidavits in which he adamantly and repeatedly asserts that he did not instruct Mr. Rankin to enter a guilty plea; did not know what a guilty plea even was; and, did not know that as a result of the court proceedings he was admitting to having killed Delavina. But he is not alleging Mr. Rankin was incompetent in entering the guilty plea. Indeed, it appears

that the appellant is *accepting* Mr. Rankin's evidence, but arguing that the Court can still strike his plea.

97. He attempts to reconcile this fundamentally irreconcilable position by providing the Court "new" evidence about his cognitive abilities. The respondent understands his argument to be that even if the Court concludes that he did instruct his counsel to plead guilty, he actually never intended to, or knew what that meant. Essentially arguing that through no real "fault" of anyone, he pled guilty even though he never wanted to, or committed the offence.

98. The respondent's position is that the appellant is not credible. **First**, Mr. Rankin's recollection that he took instructions and that the appellant understood the plea agreement should be accepted. **Second**, the appellant acknowledged the "plea bargain" in 1988 to his Institutional Parole Officer, and there are other Corrections Records that demonstrate his cognitive abilities at the time were such that he could have instructed his counsel to enter a guilty plea and understood that he was doing it. **Third**, the appellant was found fit to stand trial at the time of the offence; and shortly before the guilty plea he was assessed again by defence experts. Although at the lower end of the normal range of intelligence, he was functionally able to participate in his trial and instruct counsel. **Fourth**, Ministry, probation and forensic records from before the guilty plea demonstrate that the appellant was neither cognitively challenged nor inexperienced with the justice system.

99. The **appellant's fresh evidence**, primarily a report from the *Asante Centre* prepared in 2017, does not demonstrate otherwise. It is not a forensic report and is not evidence of what the appellant's cognitive abilities were in 1983. The fresh evidence from witnesses who knew him at the time, stating that he was "overwhelmed", "did not understand the gravity of the situation", "trusted in lawyers" or "failed to appreciate future consequences" is not relevant to the core issue on appeal – was his guilty plea a valid one.

100. Likewise, the fact that he told some people at the time that he did not commit the offence is irrelevant, and inadmissible through these witnesses. What matters are the instructions he gave his lawyer when the opportunity arose to be found guilty of the lesser offence. The fact that he has maintained a denial stance is likewise of no real assistance to what he told his lawyer to do at the time. The appellant has not challenged the conclusion that he was fit to stand trial, but is instead attempting to invite this Court to ignore it, by claiming that he had some strange cognitive deficit that no one understood until very recently.

Summary of the fresh evidence provided by the appellant, AFE, Vol. 3, Tab 42

101. For convenience, the respondent is reproducing the factual assertions made by the appellant, divided up by affidavit, with respondent's emphasis:

> First affidavit, November 29, 2016, AFE, Vol. 3, Tab 42
>
> 110. I know now that I did not understand a lot of what happened during my trial....
>
> 112. Mr. Rankin never explained to me what a guilty plea meant. He just spoke legal jargon. He did not explain that a guilty plea meant that I was saying that I had raped and killed Delavina. I now understand that it was a plea bargain, but at the time I did not understand it.
>
> 120. I did not kill Delavina Mack and I did not agree to plead guilty to her murder. I have told everyone this since I got to jail.
>
> 121. After being imprisoned for so long, I now understand much more about the justice system. Today I understand that the original charge was for first degree murder when the plea was entered, it was for second degree murder, with eligibility for parole after 10 years. At the time of my plea and then my sentencing, I did not understand this.
>
> Second affidavit, June 26, 2017, AFE, Vol. 3, Tab 42B
>
> 5. Phil Rankin never asked me if I *wanted* to plead guilty. In 1983, I did not understand what a guilty plea meant. I did not understand that it meant I was admitting to the offence. *Emphasis in original*

Fourth Affidavit, July 5, 2019, AFE, Vol. 3, Tab 42D

The appellant makes many assertions in response to Mr. Rankin's affidavit in paragraphs 21 to 48 of this affidavit, including:

- Mr. Rankin did not tell me that pleading guilty meant that I was admitting to raping and murdering Delavina... I did not know what pleading guilty meant.... para. 22
- I did not give Mr. Rankin instructions to plead guilty....para. 42
- he did not tell me that if I pleaded guilty, that would mean I was saying I caused Delavina's death...
- Mr. Rankin did not tell me that if I did not make a deal with the Crown, that Dr. Pos could testify about the statements he said I made to him in FPI... para. 43
- I did not know that I was entering a plea to second degree murder... para. 51
- If Mr. Rankin had asked whether I wanted to say that I raped and killed Delavina in order to enter into a deal that would end my trial so that I would serve fewer years in prison, I would never have agreed to this...para. 53

54. ... In 1983, I did not know that Mr. Rankin told the court that I admitted to raping and killing my cousin through entering the guilty plea. I did not instruct him to say that I did this. If I had been informed about what a guilty plea was during my trial, I would never have agreed (and I did not agree) to Mr. Rankin entering a guilty plea. I would never have pleaded guilty – and again, I did not know that this is what happened in the first place. ...I would have never, and will never, say that I raped and killed my cousin Delavina Mack.

Affidavit from trial counsel, Phil Rankin, Q.C., AFE, Vol. 2, Tab 31

102. Mr. Rankin has provided the Court with an affidavit in which he describes his obligations and his methodology before entering a guilty plea on behalf of a client. *AFE, Vol. 2, Tab 31, para. 34, see also paras. 11-14, 43.* He states:

> In 1983, as now, I understood that counsel must not assist a client in entering a plea unless:
>
> (1) the client actually admits the essential elements of the offence;
>
> (2) the lawyer is confident that the client understands the nature of the guilty plea (it is a formal admission of guilt);
>
> (3) the lawyer is confident that the client understands the consequences (the guilty plea is final, and the client cannot later say he is not guilty).

103. He swears that he took verbal instructions from the appellant to explore a plea agreement with the Crown (para. 34). With respect to the appellant acknowledging his guilt, Mr. Rankin swears that:

- At no time during the period when I represented Mr. Tallio, did he ever say that the police officers suggested the contents of his statements to him. He never denied making the statements and never denied the truth of them to me. *Para 38*

- The appellant confirmed that he had given the statement to Cpl. Mydlak and that its contents were true. *Para. 23*

104. The appellant never denied the offence to his trial counsel. Trial counsel's evidence that the appellant admitted the essential elements of the offence and understood the nature of a guilty plea and its consequences should be accepted.

105. The appellant in his fourth affidavit, paragraph 30, appears to accept that he told trial counsel that his statement to Cpl. Mydlak was true - but "explains this away" on the basis that this was because he never confessed to Cpl. Mydlak and maintained his innocence throughout the police interrogations. It is the appellant's position that Cpl. Mydlak fabricated his confession. This is not a credible explanation for why trial counsel, mistakenly in the appellant's view, believed the appellant was admitting guilt. The appellant clearly signed the Mydlak statement with his distinctive signature, and initialed each page. *AFE, Aff.Pembroke, Tab 27, handwritten statement April 23, 1983; 3rd Aff.Katalinic, Vol. 5, Tab S, signature on waiver of appeal, page 467, 469, Ex. V, pages 493, 495* The file notes of defence psychologist Dr. Peggy Koopman confirm that the appellant never denied speaking to Cpl. Mydlak, or for that matter Dr. Pos. *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit M, in particular pp. 284, 288.*

106. Although there is no transcript of Dr. Koopman's testimony in the *voir dire*, it is apparent from the description of Dr. Koopman's testimony in the *voir dire* ruling that she accepted the appellant made the statement to Cpl. Mydlak. Further, the trial judge accepted the appellant made the statements he did to Cpl. Mydlak – he excluded the incriminatory statement on the basis that the appellant felt "compelled to answer", thus a

reasonable doubt that the statements were voluntarily made. *A.B., p. 483, voir dire ruling, page 14.*

Legal principles

107. A plea of guilty carries an admission that the accused committed the crime. It is an admission of all of the essential ingredients of the offence. By entering such a plea, the accused waives his or her right to require the Crown to prove its case beyond a reasonable doubt: *R. v. T.(R.)* (1992), 10 O.R. (3d) 514, [1992] O.J. No. 1914 (C.A.) at [13].

108. A guilty plea can be withdrawn by appealing the conviction, but the appellant bears the onus of showing that the plea ought to be struck: *T.(R.)* at [12]; *R. v. Le*, 2013 BCCA 455, at [18].

109. Where an accused is represented by counsel at the time of the guilty plea, the Court will, absent evidence to the contrary, presume that the plea was valid. More particularly, this Court will presume that counsel took the necessary steps to ensure that the accused understood the nature and consequences of the plea, including that the effect of the plea is to admit the facts alleged in the charge: *R. v. Alec*, 2016 BCCA 282 at [71] citing *R. v. Eizenga*, 2011 ONCA 113 at [4]. The respondent notes that trial counsel in this case has described these steps in detail in the affidavit he filed.

110. There is no finite list of grounds that can justify striking a guilty plea: *T.(R.)* at [10]; *Alec* at [76]. The key question is whether allowing the plea to stand will create a miscarriage of justice. It is nonetheless safe to say that there will usually not be a miscarriage of justice where the plea was voluntary, unequivocal and informed: *T.(R.)* at [14]; *R. v. Hexamer*, 2018 BCCA 142 at [61]; *R. v. Singh*, 2014 BCCA 373 at [33]. In this case the appellant alleges that his plea was uninformed because it was based on incompetent legal advice.

111. A plea is **voluntary** if the accused has made a conscious volitional decision to plead guilty for reasons he or she regards as appropriate. This test for voluntariness is the same as that applied in determining whether an accused is fit to stand trial. Whether

the choice to plead guilty is rational or in the accused's best interests plays no part in this assessment. Moreover, a plea entered in open court is considered voluntary unless the contrary is shown: *Alec* at [72]; *R. v. Yukich*, 2017 BCCA 77 at [28]-[30]; *Hexamer* at [70]. A plea is **unequivocal** where nothing on the record suggests it was qualified, modified or uncertain: *Singh* at [43]-[44]; *Alec* at [73]. And a plea is **informed** if the accused is aware of the nature of the nature of the allegations and the effect and consequences of the plea: *R. v. Wong*, 2018 SCC 25 at [3] (majority); [43], [63], [67] (dissent).

112. As noted by Fitch J.A. in *Alec* at [82]: An appellate court will examine the trial record and receive additional material tendered by the parties which, in the interests of justice, should be considered in assessing the validity of the plea. The strictures of the test governing the admission of fresh evidence on appeal as set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, particularly the due diligence criterion, is relaxed when the proposed evidence is directed at the fairness or integrity of the proceedings. The remaining criteria (relevance, credibility and whether the evidence could be expected to have affected the result) apply with appropriate modification: *Singh* at [17]. But as addressed earlier, the rules of evidence are not dispensed with on applications to adduce fresh evidence directed at the fairness or integrity of the proceedings. The proposed evidence must be relevant and admissible: *R. v. O'Brien*, [1978] 1 S.C.R. 591.

113. The appellant draws a distinction between the traditional analysis for assessing whether an individual's guilty plea is valid, as set out above, and essentially a "miscarriage of justice" analysis that stands independent or alone as a basis to strike a valid guilty plea. It is important to clarify what the appellant understands to be captured by this residual discretion in an appellate court to intervene and strike a guilty plea. In this appeal the appellant relies almost entirely on the Court's residual "miscarriage of justice" discretion as a means by which he can obtain an acquittal or stay of proceedings.

114. But the facts do not support this Court exercising its jurisdiction this way. This is not a case in which there is new information that demonstrates both that the appellant is not guilty, and explains why he nonetheless pled guilty. That is why this is not a case

such as *R. v. Hanemaayer*, 2008 ONCA 580, where an appellate court intervened despite the plea meeting the voluntary, unequivocal and informed requirements:

> [11] In an affidavit filed with this court, the appellant explained why he changed his plea. In short, he lost his nerve. He found the homeowner to be a very convincing witness and he could tell that his lawyer was not making any headway in convincing the judge otherwise. Further, since his wife had left him and wanted nothing more to do with him, he had no one to support his story that he was home at the time of the offence. He says that his lawyer told him he would almost certainly be convicted and would be sentenced to six years imprisonment or more. However, if he changed his plea, his lawyer said he could get less than two years and would not go to the penitentiary. The appellant agreed to accept the deal even though he was innocent and had told his lawyer throughout that he was innocent.
>
> *****
>
> [20] As a necessary corollary of the power to receive fresh evidence in these circumstances, the court has the power to set aside the guilty plea in the interests of justice, even though many years have passed. This is obviously one of those cases. The fresh evidence proves beyond doubt that the appellant did not commit the offences to which he pleaded guilty. One miscarriage of justice would be compounded by another if this court had no power to intervene. As I have said, the Crown agrees that this is a proper case for setting aside the guilty pleas and entering acquittals.

115. Similarly in *R. v. Kumar*, 2011 ONCA 120 at [34]-[37] the circumstances were very different. The Court was presented with cogent, persuasive and *independent* investigative material from the *Goudge Inquiry* demonstrating the conviction was based on faulty science and unreasonable. The appellant's explanation for why he pleaded guilty was credible. Or in *R. v. Tallifer*, 2003 SCC 70, where the requirements for a valid guilty plea was met, but the accused's constitutional rights were infringed at [85]-[90]. The lack of disclosure bore directly on the appellant's decision to plead guilty, and was found to have impacted his decision to plead guilty and take the risk of a second trial: [108]. The respondent's position is that there are important differences in the miscarriage of justice cases that permitted an individual to withdraw a guilty plea and the facts of this trial / sentencing proceeding and in light of the appellant's evidence.

Application of facts and law

116. The appellant cannot meet his onus of demonstrating on a balance of probabilities that the plea was invalid. This onus is not easily discharged and is not in this case. The respondent makes the following submissions in support of its position that there is no basis to set aside the appellant's guilty plea, and why he cannot prove that he did not understand that he had:

I. He is not credible. His trial counsel is.
II. He acknowledged the "plea bargain" in Corrections records and other Corrections Records that demonstrate his cognitive abilities at the time were such that he could have instructed his counsel to enter a guilty plea and understood that he was doing it.
III. He was found fit to stand trial at the time of the offence; and shortly before the guilty plea he was assessed again by defence experts.
IV. Ministry and Youth records before the guilty plea demonstrate that the appellant was neither cognitively challenged nor inexperienced with the justice system.
V. The appellant's fresh evidence is inadmissible or does not support his claims.

I. He is not credible. His trial counsel is:

117. It is important to identify what the appellant is actually asserting. The appellant is alleging that he never pled guilty – this is the miscarriage of justice that he seeks to remedy. The appellant is not alleging that he was persuaded to plead guilty despite being factually innocent, or the "pressure" of a resolution proved to be "too much". In other words, he is not asking this Court to strike his plea because of the phenomena of "false guilty plea" – individuals who choose, or decide, or agree to plead guilty, rationally or irrationally, due to the uncertainty of the trial outcome and the incentive of a significantly reduced sentence. (For a discussion of this phenomena see *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada, 2018*) His sworn testimony is that he never chose, never decided and never agreed to plead guilty, although he now appears to accept that he "entered plea negotiations".

118. The appellant refers to fresh evidence in this statement of facts regarding the appellant's understanding of his arrest, at his preliminary inquiry and at his trial. The appellant relies on this evidence in his Argument only as it informs his submission that his guilty plea was uninformed (ARF, paras. 361-370). As already indicated, it is not clear to the respondent how the appellant is relying on erroneous legal advice to strike a guilty plea while at the same time relying on evidence that he did not understand the proceedings. But importantly, the appellant's fresh evidence and his own evidence in this regard is not credible.

II. He acknowledged the "plea bargain" in Corrections records, and other records demonstrate his cognitive abilities at the time were such that he could have instructed his counsel to enter a guilty plea and understood that he was doing it:

119. The respondent relies on documentary evidence located in the appellant's *CSC* file to support its position that the appellant understood and instructed his counsel to plead guilty. In 1988, only five years after the offence, the appellant wrote a letter to his Institutional Parole Officer, Vivian Toles describing his trial proceedings, and his agreement to plead guilty to second degree murder:

> . . . When it went to trial I had it beat, and then the Prosecutor brought in a psychiatrist. I tried to tell my lawyer that I had not seen him at all during my stay at the Forensic unit, looking back on it now, I regret not changing lawyers. I guess I can really blame my loss of the case to youth.
>
> . . . I just went along when they told me to stay with the lawyer I had. Anyway. . . When they brought in the psychiatrist, he came in with a statement he said I gave him. . .
>
> ... Therefore, my lawyer made a plea bargain.
>
> The deal was this. I agree to 2nd degree murder, and they would not use doctor pos' testimony. Although my family wanted me to keep fighting it, I felt that parole eligibility sounded better at ten years, rather than at twenty-five. But if I had known more like I do now, I would have tried to fight it. *Received by Ms. Toles October 20, 1988; CFE, 3rd Aff.Katalinic, Vol. 5, Tab R, pp. 455 – 457.*

120. The respondent's position is that this document is persuasive, objective and reliable evidence, close in time to the guilty plea, which demonstrates that the appellant:

- understood the trial proceedings;
- understood that his lawyer had made a "plea bargain";
- understood what that "bargain" was – he would agree to plead guilty to second degree murder; and
- made a choice to plead guilty, even though his family didn't want him to.

121. The appellant filed an affidavit on June 26, 2017, purportedly to explain this letter to his Institutional Parole Officer, after the respondent filed this letter at his application to extend time to appeal. It is non-responsive to the parts of the letter demonstrating his understanding of, and choice to plead guilty:

> 6. In the letter to IPO Toles, I wrote that "I felt that parole eligibility sounded better at 10 years, rather than at 25 years." I wrote this to respond to both what Mr. Rankin told me after the sentencing hearing, that I'd still be a young man when I got out, and to what IPO Jan Fox told me when I asked her for help, that I could wind up with life-25 instead of life-10 if I appealed and lost. I didn't know what an "appeal" involved at that time, but I knew that life without parole eligibility for 25 years was worse than life-10. *2nd affidavit of Tallio*

122. On August 2, 1989, six years after sentencing, a psychiatric report was prepared in which the author reported:

> [Tallio] was not prepared to discuss the evidence presented to the Court and claimed he only pleaded guilty to the secondary murder (*sic*) in order that the confession which he alleged was false, was not placed before the Court. *Report of Dr. I.D. Plant, Locum Psychiatrist; CFE, 3rdAff.Katalinic, Vol. 5, Tab BB, p. 736.*

123. Again, this is objective evidence relatively close in time to the guilty plea that demonstrates the appellant made a choice to and understood that he was pleading guilty. In both documents the appellant is providing an explanation for *why* he agreed to plead that is consistent with trial counsel's explanation – he understood that by pleading guilty the jury would not hear evidence from Dr. Pos that would put him in jeopardy of being ineligible for parole for 25 years.

III. He was found fit to stand trial at the time of the offence; and shortly before the guilty plea he was assessed again by defence experts:

124. The appellant claims that he did not understand the proceedings, yet he had been found fit to stand trial approximately five months before his guilty plea, by Dr. Murphy and Dr. Pos, assisted by psychologist Dr. Koch. Dr. Koch specifically tested the appellant's level of intelligence and concluded that it was in the "average to dull normal ranges" (dull normal meaning the lower end of average). *CFE, 3rd Aff.Katalinic, Vol. 7 Exhibit HH, FPI Records, Dr. Koch's Psychological Evaluation May 3, 1983, p.1199 – 1202; Aff.Dubgarty, Vol. 1, Tab 4, p. 27, para. 101.*

125. The test for fitness was, and still is a functional one: whether an accused understands the nature of the proceedings and the possible consequences of the proceedings and can communicate with counsel. He was assessed and met this test. The appellant is certainly not challenging on appeal Dr. Murphy's conclusion that he was fit to stand trial, as he has adduced no evidence from a properly qualified expert to say that he was not fit to stand trial, and is even relying on it to argue that Dr. Pos's assessment was unnecessary.

126. As set out above, the required standard of competence for a guilty plea to be valid is the "limited cognitive capacity" standard, which requires that the court be satisfied the accused understands the process, can communicate with counsel, and can make an active or conscious choice; this standard is equated this standard necessary for the making of a plea with that required for an accused to stand trial: *Yukich* at [29] citing *R. v. M.A.W.*, 2008 ONCA 555 at [25]-[28]. Mr. Yukich's application to quash his guilty plea was dismissed as, in the absence of psychiatric evidence directed specifically at the appellant's condition at the time of the plea, this Court was not persuaded that his condition when the plea was entered was significantly different than that described in the doctor's report that concluded he did not have a mental disorder at the time of the offence: *Yukich* at [35].

127. Furthermore, his own two experts assessed him only a few weeks before his guilty plea and neither raised any issue about the appellant being unfit, or unable to understand or instruct his counsel. Dr. Marcus testified at the sentencing hearing as a

defence psychiatrist who had assessed the appellant. Dr. Marcus is now deceased. The RCMP spoke to Dr. Marcus in 2011, but he had no recollection of the case and his file no longer existed. The RCMP were later provided a four-page report Dr. Marcus wrote to defence counsel on October 13, 1983. It is attached to Dr. Koopman's affidavit (*AFE, Vol. 2, Tab 20*) and within her full file notes attached to the affidavit of Cpl. Katalinic. *CFE, Vol. 4, Exhibit M, pp. 301 – 304*

128. This letter should be accepted as fresh evidence for this appeal to negate the appellant's assertions about his understanding of the trial, and as evidence of the truth of the appellant's statements to Dr. Marcus, or for cross-examination of the appellant. In his report, Dr. Marcus states:

> In an interview with Corporal Mydlak, Phillip did not know why he went to the Mack house and stated that he did not feel drunk. Phillip appears to have signed the statement with an x as acknowledgement. In his first interview with myself he said he had a blackout, "Just after I undressed her up at Delavina's and for just about the whole time I was doing it to her." He spoke of blacking out twice during the time it is alleged he attacked Delavina. *Letter to Ellen Bond, October 13, 1983, p. 2, respondent's emphasis*
>
> *****
>
> When I tried to have him tell me what happened with respect to Delavina he said, "I don't remember anything about it. I don't remember giving a statement. They charged me with the murder of a baby. They say sex was had with that baby. The baby was at the cousin's. I don't remember going to the house. They said I went to the house and found the baby in the bedroom. They're trying to accuse me of doing it. I didn't do it. It came out in court that I went back to the house and said to my aunt the baby was dead. I'm bringing out the fact it wasn't me. I know for a fact it wasn't me. I was at home when they picked me up. I don't remember giving a statement. I can't remember giving a statement. I can't go on what's been said and tell you what I know."
>
> I slowly and quietly went over this sequence with Phillip but he seemed to become more closed in, sullen and some anger was beginning to surface.... *Letter to Ellen Bond, October 13, 1983, p. 3, respondent's emphasis*
>
> *******

> Phillip appeared oriented to place, time and person. He was well aware of the subject matter under discussion. He knew the difference between right and wrong. He showed no evidence whatsoever of any psychotic symptomatology in this thinking, feeling or behavioural spheres.
>
> It is noteworthy he did convey to Dr. Pos and to the RCMP some aspects of culpability, however, over the time he has spent in custody and with myself, he has blocked out those memories, and adamantly stuck to the type of statements reported here. *Letter to Ellen Bond, October 13, 1983, p. 3*
>
> ******
>
> ...It is noteworthy that he was in the situation of having nowhere to sleep in the household when others occupied the comfortable places and he had heard that Mr. Tallio liked Delvina and had said he would like a child like her, if only his wife could bear more children. For Phillip such apparently trivial remarks could be the very triggers of personal humiliation to set him into a course of action that would be sad, outrageous and shocking.
>
> It is my clinical opinion Phillip has now suppressed his recall, using the mechanism of denial for, to admit it would be too catastrophic for him. I do feel he has blank times, particularly when he drinks. I am sure if the tragedy was carried out by Phillip he totally panicked when Delvina cried and tried to quiet her with the pillow. I do not think the tragedy was a result of planned or deliberate intention on Phillip's part. *Letter to Ellen Bond, October 13, 1983, p. 4*

129. In the end, Dr. Marcus was of the opinion that the appellant did not fulfill the requirements of the "*McNaughton Ruling*" and therefore could not be considered insane within the legal definition at the time. His final diagnosis was that Tallio had an explosive sociopathic personality and "is a danger to himself and others".

130. The appellant's statements to Dr. Marcus are inconsistent with his most recent statements that he clearly recalls what he did and did not do in the Mack home. During his first interview with Dr. Marcus he acknowledged "undressing" Delavina; the respondent understands the appellant's position to be that this is a typographical error, and that Dr. Marcus is referring to what he told Cpl. Mydlak, (Question/Answers 34, 35). Later, Dr. Marcus reports the appellant saying he does "not remember". His statements contain a blanket denial but, in substance are actually a claim that he did not remember

what happened. The appellant's statements to Dr. Marcus also show that he understood that he was charged with the murder of Delavina Mack and what the core factual allegations were (sexual assault and killing her in the course of same).

131. Dr. Koopman, a registered psychologist was also retained by defence counsel and saw the appellant on October 5, 11 and 13, for a total of about six hours, and she wrote a report to counsel on October 17, 1983. She met him for another two hours in Prince Rupert during the trial on October 18, 19 and 20 (when she testified on the *voir dire*). Like Dr. Marcus's report, this report is written roughly two weeks before the plea was entered. Dr. Koopman's records offer further insight into the appellant's state of mind at the time he pled guilty. *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit M.*

> The first session ended by my asking Phillip to trust me enough to delve into the events on the evening Delavina died. He said that he would try to remember all he could... *page 3*
>
> ****
>
> . . . he maintained throughout that he had no recollection for any part of the activities that preceded and caused her death. He had no recollection of approaching the child lifting and carrying her to another room, undressing her or himself, participating in the sexual act or placing a pillow over her face. He recalled only being aware that he must tell his Aunt Nina that he thinks that Delvina is dead, which he does by awakening her. He said that he felt almost in a fog or stupor at the time, but was adamant that it was not due to alcohol.
>
> *CFE, 3rd Aff.Katalinic, Vol. 4, Ex. M, October 17, 1983 Report, p. 275*

132. Also in the October 17, 1983 Report from Dr. Koopman is the following:

> He stated that ever since he found his mother dead by suicide at 7 years of age, he has experienced periods where he loses conscious awareness for events. These events that do take place outside of his awareness tend to be aggressive and occur most often when he is angry or when someone acts in an angry or aggressive manner toward him. The duration of unawareness can be from a few minutes up to an hour or more. He often feels tired afterwards and sleeps, but is unaware that something has happened until someone else "fills him in"...

> He reports that these periods of unawareness are sometimes preceded by almost [indecipherable] in that he becomes very anxious and feels that he might do something that could hurt someone. He begins to shake, especially his facial muscles and his hands. He maintains that control is very difficult, but that sometimes he can get to a place by himself and wait for the feeling to pass. The aura seems to be most closely associated with those events of a short duration, or where he is literally able to fight the urge to be destructive. *p. 274*
>
> ****
>
> The third and last session with Phillip was spent trying to give us more opportunity to add to, amend, or deny the content of the previous two sessions. We spent about one and one-half hours reviewing all that we had discussed. He made no changes except to expand by adding details to incidents etc. He seemed to have little understanding of the enormity of what lay before him. It somehow seemed too abstract, too far away. He was more preoccupied with the here and now (eg. the fellows in the pre-trial centre that were giving him a hard time). When I asked him what he thought should happen to him, he shrugged and said he thought that he likely needed someone's help so he wouldn't get so angry. He did not have any idea as to how this might occur. He seems to view what is happening as a series of life events that will unfold as they will through no influence of his own. He will simply wait to see what happens. He feels that he has little control over his life; this being a larger example of what always happens to him. *pp. 275 – 276*

133. This version of events – a lack of recall - did not change during Dr. Koopman's six interviews with the appellant. At one point she suggested hypnosis as an option to assist the appellant recall the offence. Dr. Koopman does not record in any of her notes or her report from 1983 that the appellant denied the offence. Rather the appellant had "no recollection", he acknowledged periods of blackout, and recognized that he needed treatment to help manage his anger. Dr. Koopman's materials also demonstrate that the appellant understood what he was charged with and the core factual allegations in support of the charge. Her notes from her meetings with him during the trial indicate that he understood the evidence and could discuss it with her.

134. Like Dr. Marcus, Dr. Koopman concluded the appellant did not satisfy the requirements of the *McNaughton* ruling and was not therefore insane. Dr. Koopman's final opinion in October of 1983 was that the appellant constituted a danger to himself

and others. In saying such, Dr. Koopman clearly accepted that the appellant committed the offence.

135. The appellant in his 4th affidavit, sworn July 5, 2019, states as follows regarding his discussions with Dr. Koopman:

> 31.... [Dr. Peggy Koopman] was talking to me about why I was there with her. Again, I just started getting confused with all of the legal words. But Dr. Koopman asked me to explain what happened from the time that I left Cyril's house the morning of April 23, 1983 to the time that I got back to Cyril's from the Mack's house. After I did this, Dr. Koopman talked to Mr. Rankin and then after she left that's when I told Mr. Rankin I did not kill Delavina. I don't remember his reaction after I said this. *Respondent's emphasis*

136. The appellant's assertions about his discussions with Dr. Koopman are not credible. He swears in his fourth affidavit, filed two and a half years after his first affidavit, and 36 years after Dr. Koopman wrote her notes and Report, that he has a current memory of telling Dr. Koopman "what happened" in the Mack home. Dr. Koopman's notes and reports taken *at the time* do not support this assertion.

137. The appellant has filed a recent affidavit from Dr. Koopman, sworn April 30, 2014 in support of his submission that he had no understanding of the trial proceedings. *AFE, Vol. 2, Tab 20* The appellant is presenting Dr. Koopman as a "fact" witness, regarding her observations and conversations with him in 1983, but also as an expert witness regarding her "cognitive assessment and the cognitive functioning" of the appellant. The respondent's position is that while Dr. Koopman's evidence about her cognitive assessment of the appellant *at the time of the offence* is admissible if relevant, Dr. Koopman as a psychologist is not qualified to comment on *psychiatric* ethics or fitness examinations, and her proposed evidence on these issues is inadmissible.

138. The appellant relies on Dr. Koopman's recent 2014 affidavit in support of his position that he did not understand the court proceedings and could not have pled guilty:

33. In my clinical experience with Phillip, he did not understand the court proceedings, the differences between the first and second degree murder, his plea or the consequences of that plea.

34. It is also my opinion that the RCMP and Mr. Rankin likely did not know the limitations of Phillip's understanding, including his understanding of a plea to first or second degree murder. Because he appeared alert and responsive, had an agreeable demeanour, appropriate social skills and good vocabulary, and voiced "Yes," if he understood when they asked him, they believed he fully appreciated what was said to him, responded directly from that understanding and understood the implications and consequences of his alleged actions in the index offence.

35. Police and Phillip's counsel believed that he was functioning from fully competent cognitive and linguistic abilities so that what he said could be relied upon as reflecting what he understood and meant to say because he had thought it through this was his informed response. I do not believe that Phillip understood what he thought he understood or what others thought he understood.

36. In my clinical opinion, Philip, the RCMP and Mr. Rankin did not appreciate that his emotional, cognitive and linguistic limitations had rendered it impossible for him to fully appreciate his situation or anticipate what the outcomes would be.

37. During the time after Philip was arrested and then being tried for the index offence, he was unable to adequately understand his situation or to instruct counsel but he did not know that nor did his counsel or the RCMP.

139. Even if it is admissible, Dr. Koopman's 2014 opinion does not make sense in that it seems to be saying that an individual can be fit to stand trial, but nonetheless understand nothing. Her opinion, and in particular the underlined propositions challenge well-established legal principles regarding when an individual is fit to stand trial. She seems to be claiming that it would have been "impossible" for trial counsel to communicate with the appellant about important steps in his trial.

140. Yet psychiatrists found him fit to stand trial, which meant he had the ability to instruct counsel on those same important steps. More importantly, she was not present when trial counsel spoke to the appellant about his plea or took written instructions from him.

141. Dr. Koopman's 1983 notes describe her conversations with the appellant during the *voir dire*. *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit M, p. 283.* She notes "He says it is untrue that he asked to see no one while was detained in RCMP cells..." etc. She notes that he is "completely confused", and that he says he "understands very little". Yet the appellant understood enough to discuss the evidence with her, and understood enough that Dr. Koopman never suggested to his trial counsel that he was not fit to give instructions. Dr. Koopman's professional and ethical obligations were to advise trial counsel if she sincerely believed that the appellant did not understand his counsel, or what was occurring at the trial. If this was actually the case she would have said something in 1983, not 30 years later. The 2014 affidavit of Dr. Koopman is substantively inconsistent with her conduct at the time of the trial, and what she recorded in 1983.

142. The respondent has filed as fresh evidence an affidavit from registered psychologist Anthony Dugbartey. *CFE, Aff.Dugbartey, Vol. 1, Tab 4.* He notes that Dr. Koopman simply accepted the appellant's assertions that he had difficulty understanding without considering and excluding other explanations that could explain her observations: paras. 117-131. He identifies other non-cognitive factors which could explain some of what the appellant reported to her. Dr. Dugbartey also describes the role that psychologists can play in assisting psychiatrists in the assessment of fitness, but how, in British Columbia, psychologists are not designated to provide court order fitness assessments.

143. Trial counsel retained Dr. Koopman and Dr. Marcus. Trial counsel had full awareness of the appellant's cognitive and processing limitations, because *he led evidence regarding them.* Dr. Koopman would have shared with trial counsel her insights into the appellant's language skills, as set out in her notes. For these reasons, the respondent's position is that the evidence from Dr. Koopman does not support the appellant's assertions that he was cognitively unable to instruct his counsel to enter a guilty plea, or understand that he had. *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit M, p. 287.*

IV. Ministry and Youth records before the guilty plea demonstrate that the appellant was neither cognitively challenged nor inexperienced with the justice system:

144. The respondent has provided the Court with historical Ministry of Children and Families ("MCFD") records regarding the appellant. These records were generated in the ordinary course of business by the authoring agencies, being the Ministry of Human Resources (and its precursor), youth probation offices and the Forensic Psychiatric Services Commission (youth), and are now stored under MCFD's umbrella as MCFD records, and therefore admissible as business records. These records are attached to the Third Katalinic Affidavit, as Exhibits EE – GG (the entirety of CFE, Vol. 6). The respondent has also filed an affidavit from Bernard Macleod, the appellant's social worker from 1977 to 1981, CFE, Vol. 2, Tab 9. These records are provided to this Court as they are the best evidence of the appellant's cognitive and communication skills leading up to this offence. These records also address his familiarity with court proceedings; he was not inexperienced with the police and the criminal justice system. This material supports the respondent's position that the appellant would have understood his trial counsel and the court proceedings. This material is also relevant to the appellant's character, which he has put in issue in this appeal.

145. The MCFD documents came from three different agencies: (i) family service and child welfare, (ii) probation, and (iii) youth forensics. The respondent highlights the following relevant material from within these records:

i. In 1975 (at age 9), the appellant was assessed by a psychologist, Dr. Kennedy, and the appellant scored very high in the Mill Hill testing of his cognitive functioning. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit GG, p. 1145; see also Aff.Dugbartey, Vol. 1, para. 98*
ii. At age 10 (June 1976) the appellant was signed into care by his father, when his family advised that they could not handle his behaviour (despite support being offered by the Ministry), and also after he was dismissed from the elementary school because of his behaviour. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 769 – 781*

iii. By age 12, the appellant's behaviour stabilized during a long term placement in a group home with foster parents who had training in behavioural issues, and his family in Bella Coola agreed to take him back. The Ministry returned him at the end of the school year, June 1978. But the appellant quickly went out of control again. The appellant was also charged with break and enter for an incident that occurred in October. The appellant either pleaded guilty or was found guilty, and received a year of "friendly supervision" with a curfew in December 1978. The appellant was removed from Bella Coola at his family's request. *CFE, Aff.Macleod, Vol. 2, Tab 9, para. 34; CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 783 – 820, 847 – 851; Exhibit FF, pp. 1041, 1055 – 1057*

iv. Then he was placed in two successive families starting in January 1979. The first of those placements (Jan 1979 to late 1979) was with the Stewarts – it broke down because of his disturbing behaviour (stealing money and guns and shooting them in the woods, running away, possibly killing/burning chickens). During his placement with the Stewarts, the appellant was charged with break and enter to business, and theft over, he was represented by counsel, and he either was found guilty or pleaded guilty and received probation for one year. *CFE, Aff.Macleod Vol. 2, Tab 9, paras. 35 - 52; CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 821 – 830, 853 – 875; Exhibit FF, pp. 1061 – 1062*

v. The second placement, with the Woods (early 1980 to late October 1980), broke down because he shot the foster parent's mother. During the time that the appellant lived with the Woods, he was charged with and pleaded guilty to three counts of break and enter (his school and two residences), for which he received a sentence of probation for six months in October 1980. For the shooting, which occurred in late October 1980, the appellant was charged with discharging a firearm with intent and theft of auto, he pleaded guilty and received a sentence of containment for 9 months, and probation expiring March 31, 1982. *CFE, Aff.Macleod Vol. 2, Tab 9, paras. 55 - 69; CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 832 – 846, 881 – 929; Exhibit FF, pp. 1065 – 1066, 1069 – 1078*

vi. Once he was released from custody the appellant went to his aunt's home, Geraldine Morton, in Nanaimo. While the appellant was living with the Mortons,

and just after he finished his period of probation, the appellant committed another break and enter offence in Nanaimo in April 1982. The appellant fled the Mortons unexpectedly. The appellant was brought back to Nanaimo, he was held in custody on that charge and was represented by counsel. He pleaded not guilty, a trial occurred, he was found guilty by a judge, and he received a sentence of containment to December 6, 1982; *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 941 – 973; Exhibit FF, pp. 1047 – 1051, 1103 - 1129; Aff.Geraldine Morton, Vol. 7, filed as Exhibit KK to Third Katalinic Affidavit*

vii. There were several assessments by psychologists or psychiatrist before the murder of Delavina Mack. Because of the behaviour reported by the Stewarts and the Woods, the appellant received counselling with a psychologist, Dr. Surkes, set up by social worker Macleod in the summer of 1980 (before the shooting occurred). He was to be sent to The Maples, the provincial diagnostic and treatment centre for children with behaviour and emotion issues, but then he committed the shooting and could not attend the Maples because he was sentenced to containment. *CFE, Aff.Macleod Vol. 2, Tab 9, para. 70; CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, p. 881, 883, 923; Exhibit GG, Dr. Surkes' Report October 28, 1980, pp. 1147 – 1148*

viii. The appellant was also assessed by psychiatrist Dr. Bridge for the court as a result of the shooting charge, he received counselling and an assessment by psychiatrist Dr. Tilser while he was serving his sentence for the shooting. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit GG, Dr. Bridge's Report December 1, 1980, pp. 1155 – 1156; Dr. Tilser's Report April 27, 1981, pp. 1157 – 1160; see also Exhibit EE, p. 935, MSP billing record listing that Dr. Tilser had six billed appointments*

ix. After the appellant was released from containment, while living with the Mortons, he again received the support of a counsellor. *Aff.Geraldine Morton, attached as Exhibit KK to 3rd Aff.Katalinic, Vol. 7, paras. 7 – 8*

x. When the appellant was held in custody regarding the April 1982 break and enter charge, psychiatrist Dr. Luke also assessed him. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit GG, Dr. Luke's Report July 7, 1982, pp. 1161 – 1167*

146. The appellant demonstrated throughout these timeframes that he was not necessarily a follower and he did not always do what he was told to do. As a specific example, about a year prior to the murder of Delavina Mack, the police in Nanaimo interviewed the appellant regarding the April 1982 break and enter; the transcript demonstrates he had no difficulty disagreeing with the police and advocating for his version of events. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit FF, pp. 1105 – 1118* Also, the appellant's cousin, Raymond Morton described the appellant as helping him in school, being able to stand up to racist bullies when the appellant lived with them (September 1981 to April 1982). *CFE, Aff.Raymond Morton, Exhibit JJ to 3rd Aff.Katalinic, Vol. 7, paras. 7 - 8*

147. While the appellant is described as being sometimes non-communicative, no one, including his social worker, Bernard Macleod, his foster parents, Raymond Morton, Geraldine Morton, or any of the psychologists or psychiatrists that assessed or worked with him, expressed any concern that the appellant was cognitively challenged. The record shows that the appellant received a lot of attention and care, and such cognitive challenges, had they existed, would have been noticed.

The post-1983 cognitive assessments concluded that the appellant is bright

148. The appellant was assessed at the Regional Psychiatric Centre of CSC by psychologist Dr. Fransblow, who concluded that the appellant was functioning in the average range of intelligence. Dr. Fransblow described some of the appellant's cognitive strengths and some areas of weaker ability, but no issues were identified in the appellant's ability to understand written or oral information. *CFE, 3rd Aff.Katalinic, Exhibit BB, Vol. 5, Dr. Fransblow's Report March 21, 1984, pp. 729 – 730*

149. Thereafter, the appellant was assessed several more times, two of which included cognitive assessments. In 1988, the appellant's score in the cognitive testing placed him in the "bright range of intellectual functioning". In 1993, the cognitive testing placed him as "functioning in the above-average range of intelligence." *CFE, 3rd Aff.Katalinic, Exhibit BB, Vol. 5, Dr. Mason's Report May 17, 1988, pp. 731 – 732; Dr. Hunter's Report January 26, 1993, pp. 739 - 741*

150. Other assessors, such as psychiatrist Dr. Manohar in 1988, psychiatrist Dr. Plant in 1989, psychologist Dr. Arnold in 1996, and psychologist Dr. Couture in 1997 all interviewed the appellant about a variety of matters, often including the offence. None apparently had difficulty communicating with the appellant and he in understanding them (other than the appellant was sometimes described as being reluctant or cautious with the interviewers). *CFE, 3rd Aff.Katalinic, Exhibit BB, Vol. 5, Dr. Manohar's Report June 6, 1988, pp. 733 – 734; Dr. Plant's Report August 2, 1989, pp. 735 – 738; Dr. Arnold's Report January 5, 1996, pp. 743 - 746; Dr. Couture's Report October 30, 1997, pp. 747 - 750*

V The appellant's fresh evidence is inadmissible or does not support his claims

151. The appellant in paragraphs 367-370 of his revised factum references the Asante Centre report dated February 18, 2016 ("Asante Report") written by a three-person team based on testing conducted in late 2015. Who wrote which portion of the report is not identified within the report itself, but based on the descriptions of each author's role in the appendix, Dr. Julianne Conry (Ph.D. R., Psych.) was apparently the author of the part of the report the appellant relies upon, relating to his cognitive assessment. Yet, the appellant has presented the report through Dr. Jiminez, who conducted the medical evaluation, a component of the report that is irrelevant to the appellant. *ARA, Tab 17*

152. The appellant relies on the Asante Report as evidentiary support for his submission in paragraph 370 of his revised factum that "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". It appears that the appellant is relying on the Asante Report as if it was a forensic assessment of his cognitive abilities in 1983. The respondent's position is that it cannot be considered as such. The Asante Report was not a forensic assessment prepared for court purposes, and it does not provide an opinion about the appellant's cognitive abilities in 1983.

153. The respondent has filed an affidavit from psychologist Dr. Dugbartey in reply, to support its submission that this Court can give little or no weight to the Asante Report, CFE, Vol. 1, Tab 4. In his affidavit, Dr. Dugbartey provides the following reasons for his opinion that the Asante Report cannot assist in establishing the appellant's cognitive abilities at the time he pled guilty, paragraph 70:

i. The Asante report only offers a clinical assessment about Mr. Tallio's current functioning and was not a forensic opinion of his functioning and ability to understand the legal proceedings in 1983;
ii. The report does not explicitly address the potential impact of Mr. Tallio's Indigenous background on the psychometric testing results;
iii. The report does not address the impact Mr. Tallio's complaints of hearing loss and tinnitus could have on the psychometric testing results;
iv. The report does not account for how Mr. Tallio's physical pain symptoms could have impacted the psychometric testing results;
v. The report does not account for the impact Mr. Tallio's depression could have on his current intelligence test results;
vi. The report does not address the apparent disparity between how articulate Mr. Tallio appears to be in his writings, and their test results;
vii. The total score in one of the key cognitive tests is potentially misleading because of the wide variability among its constituent subtests;
viii. The report does not offer any explanation for the difference between the test results compared to Mr. Tallio's childhood and young adult test scores; and
ix. The report does not address how much weight was put on the cultural sources.

154. The Asante Report is simply a clinical assessment of whether the appellant had Fetal Alcohol Spectrum Disorder ("FASD") and what his functioning and needs were as of late 2015. The Asante Report concluded that the appellant did not have FASD, because significant prenatal exposure to alcohol could not be confirmed and because the appellant's functional brain assessment did not meet the criteria for FASD. The

Report focuses on the appellant's functioning in late 2015 in order to evaluate his needs *going forward*.

155. The Asante Report does not comment on the appellant's cognition when he was 17 years of age. The appellant has offered no expert evidence that says that the Asante Report's results in 2015, when the appellant was 49 (almost 50), are indicative of his cognitive functioning when he was 17. The appellant is apparently inviting this Court to assume that the 2015 results directly translate to 1983. Even as an assessment of the appellant's functioning in 2015, the Asante Report's conclusions about the appellant's cognitive profile cannot be given much weight in light of the frailties identified by Dr. Dugbartey.

156. In addition to his own assertions and the Asante Report, the appellant relies in paragraphs 363 to 366 of his revised factum on the fresh evidence of affidavits from individuals who apparently observed his "communicative and cognitive abilities" in 1983 and "throughout his youth" to bolster the credibility of his assertions that "he truly did not understand what was occurring during the trial". The respondent's position is that this evidence does not ultimately assist him. This evidence, discussed below, addresses the fact that the appellant was "immature". This describes the appellant's character and sophistication as an individual, it does not undermine the other evidence that he understood the proceedings and chose to plead guilty.

157. Colleen Burns (ARA, Tab 3): The appellant in paragraphs 13, 200 of his revised factum relies on Ms. Burns observations from the time of the offence and portrays Ms. Burns (who was apparently Colleen Noel in the early 1980s) as having had extensive dealings with the appellant by administering his Ministry file for three years. The appellant is incorrect. Ms. Burns was the appellant's social worker in Bella Coola for less than two years (from about December 1980 to about October 1982) and the appellant was not under her direct supervision. The appellant lived in other communities under other direct supervision that entire time frame:

- in December 1980, the appellant was remanded in custody for the shooting charge and then he started serving his sentence at the Youth Detention Centre ("YDC"). Bernard Macleod was the social worker responsible for him.
- When the appellant was released from YDC in September 1981, he was released to live with the Mortons in Nanaimo under the Nanaimo Ministry office's direct supervision.
- The appellant left unexpectedly in April 1982 to live in Bella Bella, but then was back in YDC in June, 1982, when he was remanded in custody for the Nanaimo break and enter charge.
- The appellant was found guilty after a trial in youth court, and he was in YDC serving his sentence until December 6, 1982, when he released to live in Bella Bella. By this time, other social workers in Bella Coola seemed to have conduct of the appellant's file. *See, for example, CFE, Aff.Macleod, Vol. 2, Tab 9, paras. 66 - 73; 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 842 – 846 (portion of Williams Lake Ministry running record), pp. 909 – 915 (Mr. Macleod's updates and correspondence), p. 941 – 959 (records regarding the appellant's move to Nanaimo and the Nanaimo Ministry running record).*

158. Ms. Burns' entries in the Bella Coola running record are accordingly sparse, with an entry on December 15, 1980, and then no entries until May 5, 1982. Ms. Burns apparently only met with the appellant on <u>one occasion</u>, when she accompanied him from Bella Bella to Nanaimo for a court appearance in June, 1982. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 971 – 973.*

159. Also, Ms. Burns described the appellant quite differently in one of the records she wrote in 1982, compared to how she now portrays him in her affidavit. Ms. Burns referred the appellant to The Maples in 1982, and a copy of the application she prepared is included in the Ministry records attached to Cpl. Katalinic's Third Affidavit. Under the heading "Reason for Referral", and after she described the appellant's behavioural problems, Ms. Burns stated: "Phillip's positive characteristics include <u>a verbal ability to communicate</u> once a repoire [sic] is established." Under the heading "Physical Description", Ms. Burns wrote: "Phillip is <u>verbally communicative</u> with adults

and seems to relate (perhaps immaturely) to fellow peers." Notably absent is any mention of cognitive deficits. *CFE, 3rd Aff.Katalinic, Vol. 6, Exhibit EE, pp. 983 – 1003, in particular p. 991.*

160. Marie Spetch (AFE, Vol. 2, Tab 34): The appellant relies on Ms. Spetch's affidavit in paragraphs 14, 15, 198, and 364 to support his "lack of understanding". According to the YDC records located in the MCFD probation and social work files, Ms. Spetch was the appellant's correctional officer while he was in YDC for his first containment sentence (December 1980 – September 1981), and for at least part of his second sentence (July 1982 – December 1982). Ms. Spetch wrote a number of case management reports. Again, what is noticeably absent is any mention in Ms. Spetch's reports, or in any of the YDC records, of the appellant showing significant cognitive deficits or having problems understanding verbal communication. He needed some help with his school work, but that is all that Ms. Spetch mentioned at that time.

161. Also, Ms. Spetch swore a solemn declaration on June 28, 2011, which the respondent says is materially different than her affidavit. Ms. Spetch's solemn declaration is attached to the Third Affidavit of Cpl. Katalinic. *CFE, Vol. 4, Tab 14, para. 23; Exhibit L, pp. 241 – 244.* In her solemn declaration, Ms. Spetch describes what the appellant told her about the proposed plea bargain, and that Mr. Rankin told the appellant "this is what I suggest you do". The appellant told her that he did not want to do the plea bargain (*para. 13*). Ms. Spetch also describes the appellant as "slow mentally", that she needs to explain things to him, and that she has to be careful about how she words things (*paras. 18 – 19*). Implicit in this declaration is that the appellant understood what his lawyer had told him, was engaged in conversations with his lawyer about his case, and that he was able to understand things if they were explained to him.

162. In the affidavit the appellant filed, Ms. Spetch mentions nothing about their discussion about the plea bargain, and simply repeated what the appellant apparently told her: that he had been pressured to plead guilty (*para. 14*). The appellant is not claiming on appeal that he was pressured into pleading guilty, so the hearsay assertion is irrelevant. Ms. Spetch also stated that she thought the appellant had not understood the legal proceedings (*para. 20*), but this is not grounded in any facts and only amounts

speculation. Ms. Spetch's affidavit filed by the appellant is hearsay, unreliable, speculative, arguably inconsistent with documents she wrote in the 1980s, in contradiction with her earlier sworn solemn declaration, and should not be admitted.

163. Paul Wilson (ARA, Tab 20): The appellant relies on a revised affidavit from his social worker, Paul Wilson. Mr. Wilson testified during both the statement *voir dire* at preliminary inquiry and the statement *voir dire* at the trial. Mr. Wilson was qualified as an expert at the preliminary inquiry. It does not appear that Mr. Wilson was qualified as an expert during the trial *voir dire*. The record of proceedings noted when Dr. Koopman were qualified in a *voir dire*, and no such notes were made regarding Mr. Wilson. *CFE, 3rd Aff.Dickie, Vol. 1, Tab 3, Exhibit A, p. 16 – 17*

164. Mr. Wilson's affidavit evidence about whether the appellant "could grasp concepts" and his opinion "as a social worker that Phillip was mentally challenged" (paras. 13, 24) are inadmissible opinions he is not able to give (he has neither the requisite training, experience, or professional qualification and the appellant has not attempted to qualify him). Further, Mr. Wilson does not appear to have considered whether what he observed in the appellant may be attributable to suspiciousness, behavioural issues, or other social factors. Instead, it appears that Mr. Wilson has simply assumed the appellant had cognitive issues. See for example, the discussion in Dr. Dugbartey's affidavit. *CFE, Vol. 1, Tab 4, paras. 122 – 124.*

165. The affidavit from Mr. Wilson is not necessary as fresh evidence, as his sworn evidence from the preliminary inquiry is available, which addresses essentially the same issue, this being his observations of the appellant's ability to understand and advocate for himself. Further, Mr. Wilson's revised affidavit is different in material respects. The respondent notes that paragraph 10 of his original affidavit is edited in paragraph 12 of his revised affidavit to remove Mr. Wilson's evidence that the appellant would ask for something if it was something specific that was weighing on his mind, such as the appellant phoning him a number of times because he wanted to leave Bella Bella, and that he would tell him more about things he was interested in. Paragraph 27 of his first affidavit attests that trial counsel made it clear that the appellant had a "right to a strong defence" and that Mr. Wilson was not surprised that the appellant was convicted.

These inexplicable omissions in his recent affidavit, going to the appellant's communication and cognitive skills, and the competence of his counsel undermine the credibility of Mr. Wilson's affidavit.

166. The appellant relies in paragraph 231 of his revised factum on Mr. Wilson's evidence in paragraph 28 regarding what Mr. Rankin told him the appellant said. This is hearsay, and not relevant in any event, as Mr. Wilson was not present during conversations with the appellant, and certainly not when the decision was made to plead guilty. The appellant cannot rely on this hearsay statement to support his submission that he "never wished to admit to the elements of the offence".

167. Dr. McIlwain only had limited interactions with the appellant in the police cell to physically examine him for blood and to assist in the collection of some of his pubic hairs. While Dr. McIlwain questioned how much the appellant understood at the time, he seems to have been more concerned that the appellant was naïve and did not have the assistance of counsel. Otherwise, it appears that Dr. McIlwain believed that the appellant understood what was going to occur during the examination, and that the appellant provided (at least) medical consent for Dr. McIlwain to proceed. It also appears the appellant was able to understand verbal requests made during the examination. *AFE, Vol. 2, Tab 23.*

168. Ms. Pinder only spoke to the appellant on the phone on one occasion. While Ms. Pinder may have been concerned that the appellant did not understand what she was telling him, she did not know what it was caused by. She listed a few potential causes, including mental deficiency. Again, Ms. Pinder appears to not have considered that the appellant's lack of affect in his tone, etc., may have been due to suspiciousness, behavioural issues or social factors. *AFE, Vol. 2, Tab 29.*

169. Judge Barnett nor court reporter Mr. Cairns (*AFE, Vol. 1, Tabs 4 and 5*) had any direct interactions with the appellant and they observed immature behaviour. Immature behaviour is not necessarily indicative of cognitive deficits, as there are other explanations, such as personality/behavioural issues and avoidance. As already noted, Dr. Dugbartey discusses in his affidavit why people may appear to be cognitively limited

when they are not, when he discusses Dr. Koopman's assessment of the appellant. *CFE, Vol. 1, Tab 4, paras. 118 – 124.*

The appellant's "denial stance"

170. The appellant seems to rely on the fact that he has maintained his innocence to the Correctional authorities since his incarceration to support his application to withdraw his guilty plea. The respondent's submission is that this Court should not consider his "denial stance" as probative to the issue of whether his guilty plea is valid, or consider it of much assistance to the issues on appeal. It is a self-serving statement.

171. There are other explanations for the appellant's denial stance, such a desire to maintain a relationship with his family, or for his personal safety while incarcerated. The appellant likely spent his first 10 years of prison, by which time he had changed his name to Jesse Christian, not appreciating that denying the offence would compromise the "bargain" that he had agreed to. As set out earlier, he did not follow through during this time on statements that he was going to appeal his conviction.

172. Furthermore, although the appellant appears to have repeatedly denied committing the offence in his Correctional records, the respondent is not aware of a single statement by the appellant in those records stating that he did not agree to plead guilty.

ISSUE II: Trial counsel was not ineffective in assessing the Dr. Pos evidence

173. The appellant's allegation against trial counsel can be summarized this way: trial counsel was "unreasonably incompetent" in failing to consider that *R. v. Abbey*, [1982] 2 S.C.R. 24 precluded the admission of Dr. Pos's evidence, and because Dr. Pos was a person in authority. *ARF, Issue II, III, p. 53paras. 382 – 396, in particular paras. 390, 394.* The appellant then submits that it is clear "that the appellant 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". *ARF, para. 401.*

174. The respondent's primary submission is that this Court should not entertain this ground of appeal in light of the appellant's sworn testimony that he was not aware that he was pleading guilty. The appellant cannot allege that his plea was uninformed on the basis that his lawyer gave him incompetent legal advice, when his evidence is that he did not rely on that advice, or instruct his lawyer to enter a guilty plea. If his evidence is not accepted, then the appellant instructed trial counsel to enter the guilty plea. With this conduct, and by entering such a plea, *he acknowledged his guilt*. By entering his guilty plea he waived his right to require the Crown to prove its case beyond a reasonable doubt, and waived his right to test the admissibility of evidence from Dr. Pos.

175. The respondent will therefore address the challenges the appellant raises to the advice he received regarding the admissibility of Dr. Pos's testimony in the alternative, as follows:

> Point 1: Trial and Crown counsel recognized that Dr. Pos may have been a person in authority and the appellant's statement may have to be proven voluntary; and
>
> Point 2: Trial and Crown counsel did not err by failing to recognize that the appellant's statements to Dr. Pos could never be admitted for their truth. *Abbey* was not relevant to the admissibility of the appellant's admissions against interest to Dr. Pos. The anticipated evidence from Dr. Pos was not inadmissible "as a matter of law and policy".

176. The respondent notes that although the appellant summarizes some of the evidence of Drs. O'Shaughnessy, Glancy, Bradford and Semrau in his statement of facts (para. 197) he is not arguing that the ethical standards are relevant to the admissibility of the evidence of Dr. Pos, or to any other ground of appeal (although he is now arguing other trial counsel's "policies" or practice are relevant). This argument was not precluded following the January pre-appeal hearings, as objections to the ultimate relevance of this evidence were postponed to the hearing of the appeal. Presumably, upon reflection, the appellant realized that forensic psychiatric ethical standards were not clear or well established in 1983, as he seems to acknowledge this in paragraph

185 of his revised factum. Indeed Dr. Koopman and Dr. Marcus both reviewed Dr. Pos letter and raised no concerns regarding it. Raising ethical standards afforded him no remedy on appeal in any event.

177. In order to succeed in his assertion that trial counsel was incompetent in his advice regarding whether to enter a plea, the appellant has to demonstrate that no judge would ever have found his admissions to Dr. Pos to be admissible. In other words, there was no risk in having the Crown continue to try and prove its case. He cannot meet this burden. There are no absolutes in evidentiary rulings before trial judges. It is impossible to say that the statement would certainly have been excluded.

178. The respondent has set out the procedural history of the remand to *FPI* in its statement of facts. By way of introduction to the issues regarding the evidence of Dr. Pos it is necessary to make a few general statements. It is important to recognize that at the time of this offence forensic psychiatry was a "young discipline". The *Criminal Code* did not refer to "fitness to stand trial", but assessments could consider that issue in practice.

179. There were powers of remand for mental health assessments, both in the *Code* and in provincial mental health legislation. It was a challenge in the criminal justice system, and still is, to balance dealing with mentally disordered accused persons while at the same time protecting their rights, and fairly prosecuting offences. In this case, s. 465(1)(c) of the *Code* R.S.C. 1970, Chap. C-34 permitted a judge to remand an individual in order to assess whether that person is "mentally ill". In this case, that order was made in regards to a 17 year from an unstable background, who had made two suicide attempts, and with the knowledge that he had been assessed by at least four psychiatrists in the past and whose reports were not available as of the remand. This individual had admitted in a warned interview to sexually assaulting and killing an infant. These facts cried out for a remand to assess his mental health.

180. The appellant seems to be relying on public policy to support what he argues is the absolute bar or inadmissibility of incriminating statements made to psychiatrists in the course of medical assessments. The follow up questions from Dr. Pos are

seemingly unusual, but the answers were not what incriminated him and arguably, along with his observations, could have provided Dr. Pos with evidence of dangerousness or whether the appellant was suffering from a disease of the mind, the "*McNaugton Rule*". Whether all psychiatrists at that time would have reported the incriminatory statement that the appellant made when asked "What are you thinking about right now?" is not the issue on this appeal. That concern is irrelevant to whether the statement was necessarily involuntary, or otherwise inadmissible.

181. The respondent provides the following resources from the time of the offence in support of its position that Dr. Pos's evidence would almost certainly have been admitted had a *voir dire* been held, or alternatively no policy or evidentiary guarantee that the evidence would not have been admitted:

- Ratushny, Ed. "*Self-Incrimination: Nailing the Coffin Shut*" (1978), 20 Crim. L.Q. 312 (QL);
- Rogers, R. and Mitchell, C., *Mental Health Experts and the Criminal Courts* (Toronto: Thomson Carswell, 1991);
- Manson, A. "*Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality*" (1982), 27 McGill L.J. 196;
- Manson, A. "*Ordering Psychiatric Examinations*" (1986), 53 C.R. (3d) 387 (QL);
- Schiffer, M., *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978), Chapter 2;
- Lindsay, P. "*Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada*" (1977), 19 Crim. L.Q. 303 (QL);
- Roesch, R., Webster, C., and Eaves, D. *The Fitness Interview Test: A Method for Examining Fitness to Stand Trial* (Toronto/Vancouver: Centres of Criminology and Criminological Research, 1984);
- Barrett, J., and Shandler, R. *Mental Disorder in Canadian Criminal Law (looseleaf)* (Toronto: Thomson Carswell, 2019), Chapter 2.6;
- The appellant refers in his revised factum to *The Ethics of Pre-Arraignmen Psychiatric Examinations: One Canadian Viewpoint*, (1980), 12 C.R. (3d) 34.

Point 1: Trial and Crown counsel recognized that Dr. Pos may have been a person in authority and the appellant's statement may have to be proven voluntary

182. The trial Crown intended to elicit from Dr. Pos a *prima facie* admissible statement against interest made by the appellant, which could only realistically be challenged on the basis of voluntariness. This distinction is discussed in article written a few years before the time of the trial: *Self-Incrimination: Nailing the Coffin Shut*, Ed Ratushny; see also *Mental Health Experts and the Criminal Courts, A Handbook for Lawyers and Clinicians*, pp. 40, 42, 106-107, as further support that the prosecution could use statements made to a psychiatrist. Crown and trial counsel understood the law at the time and governed their conduct of the trial accordingly. There was nothing preventing Crown counsel leading a "psychiatric confession" at the time from Dr. Pos, albeit some concerns expressed in academic and medical professions because of the impact on the professional relationship, as described in textbooks and articles from the time.

183. Trial counsel and Crown counsel anticipated that the admissibility of Dr. Pos' testimony would be decided after a *voir dire*. If not admitted, the appellant could have been acquitted – it was for the jury to decide whether he was guilty based on the circumstances of his attendance at the Mack home, amongst other facts. If admitted, there was a very good likelihood he would be convicted of first degree murder. In light of this uncertainly, a plea "bargain" or resolution was reached, in which the appellant could plead to second degree murder.

184. The appellant argues that Dr. Pos would have certainly been found to be a person in authority. But as the Supreme Court of Canada concluded in *R. v. Hodgson*, [1998] 2 S.C.R. 449 at [34], [36] and *R. v. Grandinetti*, [2005] 1 S.C.R. 27 at [38] and *R. v. S.G.T.*, [2010] 1 S.C.R. 688, 2010 SCC 20 at [20]-[24], the analysis of whether an individual is a person in authority is decided on a case by case basis. In *R. v. Burgess*, [1974] B.C.J. No. 788 (Co.Ct.), for example, the psychiatrist was found not to be a person in authority: *at [24]*. The case relied upon by the appellant, *R. v. Fowler*, [1982] N.J. No. 14 (C.A.), is another example of a fact-specific analysis, and cannot be taken as binding authority that all forensic psychiatrists conducting remand assessments must be persons in authority.

185. The test focuses on the accused's perception of the person purported to be in authority, whether that person was acting on behalf of the police or prosecuting authorities. In this case the appellant could not have subjectively perceived Dr. Pos to be a person in authority, as he claims to have never met him (discussed further below).

186. The appellant then relies on Dr. Semrau's evidence to support his person in authority argument. *ARF, para. 358.* This is despite the fact that Dr. Semrau did not work at FPI in 1983, was not present for the interview, and cannot know how the appellant perceived Dr. Pos. Dr. Semrau is not providing expert opinion evidence, he is simply speculating. And, the appellant makes this submission despite agreeing at the January pre-hearing evidentiary motions that Drs. O'Shaughnessy, Glancy, Bradford and Semrau could not speak to this issue and that he would not rely upon their affidavits for that purpose. *T. January 22, 2020, p. 57(25) – 61(24), in particular p. 60(19 – 23), p. 61(21 – 23).* The respondent objects also to paragraph 188 of the appellant's statement of facts in his revised factum as the evidence of defence counsel Jim Millar regarding what his client said to him is not admissible.

187. What the appellant does not substantively address in his revised factum is voluntariness. He does not list voluntariness as one of the issues on appeal despite specifying the other allegations he is making about the admissibility of Dr. Pos' evidence. *ARF, p. 53, Issue III.* In footnote 530, the appellant merely asserts: "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' coercion of Phillip". *ARF, para. 360, ftnt 530, p. 99 - 100.*

188. The appellant offers no evidentiary support that his admissions to Dr. Pos were the product of violence, a threat, a promise or an inducement. Given his stance that the interview never occurred, the appellant cannot say that he subjectively believed those circumstances existed. Also, there is no objective evidence of violence, threats, promises or inducements that would have rendered the statement involuntary. In fact, Dr. Pos was simply having a discussion when the appellant responded – it was not a direct question which prompted the most incriminating reply. The appellant "blurted" it out so to speak.

189. He appears to be arguing that the Crown would not be able to establish the circumstances of the statement. *ARF, para. 359.* Dr. Pos was going to testify to what was described in his report less than six months after his conversation with the appellant, certainly a memorable one in light of the disturbing facts, and had discussed the case with Crown counsel. His report would refresh his memory, if he needed it. His notes could have been stored elsewhere. It cannot be demonstrated that there are no "handwritten notes", as the appellant alleges in paragraph 191 of his revised factum. It is also not supported by the notes in the Crown's interview, which demonstrate he had an independent recollection. *AFE, Vol. 2, Tab 30b, Ex. E*; *Affs.Pothecary, AFE, Vol. 2, Tab 30A, paras. 10-15, Tab 30B, para. 37.*

190. Trial counsel also describes the anticipated evidence of Dr. Pos in his affidavit. *AFE, Tab 31, paras. 24-27.* To summarize the recollections of the lawyers that were at the trial, as set out in the affidavits, both Crown and defence counsel interpreted Dr. Pos's evidence as inculpatory and an important piece of evidence in the Crown's case. Dr. Marcus viewed it that way, too. *Aff.Koopman, AFE, Vol. 2, Tab 20, Dr. Marcus report to defence counsel dated October 13, 1983, page 4.*

191. The appellant is also not apparently relying on his own evidence that he never spoke with Dr. Pos since this evidence is also not relied upon for any of his grounds of appeal. *AFE, Vol. 3, Tab 42A, para. 105, 42D, para. 35.* The appellant has withdrawn the affidavits of Dr. Fadden and Nick Avis, Q.C., and is no longer relying on the affidavits of Drs. O'Shaughnessy, Bradford and Semrau to claim that there were questions about whether the interview occurred.

192. The appellant is not credible in his assertion and it could not assist him in invalidating his guilty plea. According to Dr. Koopman's notes, the appellant never told her that he never met Dr. Pos. *CFE, 3rd Aff.Katalinic, Vol. 4, Ex. M* There is a note in the records from *FPI* that Dr. Pos met with the appellant on May 16, 1983 – "report to be dictated" and his initials are on several pages of *FPI*'s chart notes. *CFE, 3rd Aff.Katalinic, Vol. 7, Ex. HH, p. 1245* As he stated in his letter, the notes in Crown counsel's trial file regarding the pre-trial interview with Dr. Pos indicate that he met with the appellant after

his counsel had been to see him. *AFE, Vol. 2, Tab 30, Ex. E* This is confirmed by the visitor sign in sheet from FPI, where Mr. Rankin had signed in. *CFE, 3rd Aff.Katalinic, Vol. 7, Ex. HH, p. 1223*

193. According to notes in the Crown's trial file, Dr. Pos told Crown counsel that the "spontaneous question" was "part of the exam" and the "other ques." were "to exclude poss. of insanity". Dr. Pos also told trial Crown that it was "clinically important to ask him if memory of incident and any feelings [__] in." *AFE, 2nd Aff.Pothecary, Tab 30B, Ex. E* Dr. Pos was entitled to conduct his examination of the appellant in accordance with his professional judgment. The phrasing of his subsequent questions could not render what the appellant had already said inadmissible in any event.

194. The appellant relies on records that indicate the appellant chose not to speak to other individuals at *FPI* about the offence to support his submission that he did not speak to Dr. Pos. It is speculation to assume that the appellant was not warned or aware that he likewise did not have to talk to Dr. Pos. Although Dr. Pos's letter does not state specifically that he told the appellant that the interview was not confidential, this does not prove that he not say this to the appellant. But there are no such factual absolutes when it comes to human behaviour. It is an incredible accusation to level against an individual, that he would fabricate a statement. Dr. Pos cannot defend himself as he died in 2008. Dr. Pos would have been alive had the appellant appealed in a timely way.

<u>Point 2: *Abbey* was not relevant to the admissibility of the appellant's admissions against interest to Dr. Pos</u>

195. The appellant argues that his statements to Dr. Pos were inadmissible because he was not required as an expert witness; and that in any event, the underlying facts of an expert's opinion are hearsay and therefore not admissible. *ARF, paras. 326-329* The appellant's argument is essentially that no psychiatric *witness* can ever testify to a "fact" that he learned in his capacity as an *expert*. He argues this as a matter of "law and policy".

196. The appellant relies on *R. v. Vaillancourt* (1974), 16 C.C.C. (3d) 137; aff'd [1976] S.C.R. 13 and *R. v. Abbey*, [1982] 2 S.C.R. 24 in support of his submission that the statements by the appellant could not be admitted for their truth. But these were cases in which the statements were part of the *basis* for the doctor's expert opinion. Dr. Pos was not being called as an expert in the trial. These decisions, and *R. v. Perras*, [1974] S.C.R. 659; aff'ing (1972), 8 C.C.C. (2d) 209 (Sask.C.A.); [1972] S.J. No. 281 (C.A.) held that it was not necessary to hold a *voir dire* with respect to statements made by an accused to a psychiatrist, who was not a person in authority, where such statements were not introduced to establish the truth of their contents but merely as part of the basis for the psychiatrist's opinion. In *Perras*, the Crown did not intend to lead any evidence of a statement, and the psychiatrist was being called to give a psychiatric opinion and "he was not a witness as to facts". See also *R. v. Warren* (1973), 14 C.C.C. (2d) 188 (N.S.C.A.); [1973] N.S.J. No. 98 (C.A.) at [39]-[51].

197. These cases only stand for the proposition that the party tendering the expert opinion must separately prove the facts underpinning the opinion, and that the expert's recitation of the facts they relied upon is not proof of them. In *Abbey*, for example, the psychiatrist relied on what the accused told him in providing his opinion on the issue of insanity, a self-serving version of events. It was considered *hearsay* and *inherently unreliable*, which is why it was not admissible through the psychiatrist: *Abbey*, p. 10 – 11. *Perras* and *Vaillancourt* both involved psychiatrists being called in rebuttal to refute expert testimony proffered by the defence, without the Crown seeking to admit any statements against interest. Neither case said, as the appellant has argued, that the psychiatrists' fact evidence would have been inadmissible. The Ontario Court of Appeal in *Vaillancourt* did comment that a *voir dire* may be necessary if the Crown sought to tender admissions against interest: *Vaillancourt (ONCA)*, para. 27.

198. It is implicit in these decisions that other considerations could apply if the Crown sought to introduce admissions made by the accused to the psychiatrist in furtherance of proof of guilt of the accused. This does not apply to the evidence the trial Crown intended to elicit from Dr. Pos, being a statement against interest. A statement against interest is *prima facie* admissible, as reliable, and can only be challenged on the basis

of voluntariness. This distinction is discussed in article written a few years before the time of the trial: *Self-Incrimination: Nailing the Coffin Shut*, Ed Ratushny; see also *Mental Health Experts and the Criminal Courts, A Handbook for Lawyers and Clinicians*, pp. 40, 42, 106-107, as further support that the prosecution could use statements made to a psychiatrist.

199. In contrast to the appellant's authorities, the court in *R. v. Stewart* (1980), 54 C.C.C. (2d) 93 (Alta.C.A.); partial reasons [1980] A.J. No. 631 (C.A.) recognized that different considerations apply if the Crown through its psychiatrists is 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: *at p. 102 (CCC), QL[21]*. In *Stewart*, the doctor was the Coroner who had attended at the scene of the murder, and was also responsible for examinations of the accused to assess if he was fit to stand trial. The doctor concluded that the accused was fit and then advised the accused that he had seen the body. The accused then provided information which was the only piece of direct evidence putting him at the scene of the crime.

200. The appellate court in *Stewart* concluded that the doctor was a person in authority but that there was no basis to find the statement involuntary. The result is that at the time of the trial "psychiatric assessments pursuant to court orders may produce an unexpected – even unsuspecting – Crown witness as to factual issues": *Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality*, at p. 226 (and pp. 224, 225, 227); *Ordering Psychiatric Examinations*; *Mental Disorder and the Criminal Trial Process*, Chapter 2. As also noted in *Fitness to Stand Trial in Canada: An Overview*:

> It is clear that anything said by the accused in respect of his actions at the time of the commission of the alleged offence may be admissible as a confession at the trial of the main issue. Communications between physicians/psychiatrists and their patients are not protected by the same privilege protecting communications between lawyers and their clients. Nor is it likely that the admissibility of inculpatory statements made pursuant to a compulsory psychiatric examination infringes the protection against self-crimination of s. 2(*d*) of the Canadian Bill of Rights. [1976-1977] 19 C.L.Q. 303 at p. 12 (QL)

201. Indeed, as discussed in the literature listed earlier, it was the *lack* of protection from statements being used, the uncertainty and controversy even that led to the amendments to the *Criminal Code* and the enactment of s. 672.21 of the *Criminal Code*. This statutory rule of evidence is procedural and cannot be applied retroactively to assist the appellant in this appeal. Prior to the 1992 amendments, the *Code* was silent as to the admissibility of statements made during the course of an assessment. Again, the respondent's position is that at common law, statements against interest made by a patient to a psychiatrist or other mental health professional during an assessment or were generally admissible at the instance of the Crown. *Mental Disorder in Canadian Criminal Law, Chapter 2.6, p. 2-40*

The appellant could have been convicted with or without the evidence from Dr. Pos

202. The only inference from the record is that the appellant and his counsel knew he had a potential challenge to the statement, and the appellant *chose not to pursue it* - he instructed his counsel to enter the plea to the included offence. This is trial counsel's evidence and it should be accepted. The appellant "got what he bargained for": *R. v. Riley*, 2011 NSCA 52 at [39]-[41]. The appellant waived his right to make this argument when he entered a guilty plea and cannot invoke it on appeal. He does not meet the standard of demonstrating professional incompetence: *R. v. Archer*, [2005] O.J. No. 4348 (C.A.) at [100].

203. The appellant and his counsel had heard most of the Crown witnesses at the earlier preliminary inquiry, several Crown witnesses at trial, had full disclosure and would have had a full appreciation of all of the available evidence. It was the duty of defence counsel to advise the appellant of the strengths and weaknesses of the case, and advise the appellant of the risk of pursuing the case and going to the jury, and getting informed instructions not to do so. As trial counsel has attested, he fulfilled these duties. This Court does not have the information to assess the issue of the strength of the case given the lack of record as this point, but his counsel and the appellant did. Furthermore, as described earlier, the appellant had experience with the

criminal justice system and had pled guilty and run a trial in the past, with the assistance of counsel: *R. v. Stockley*, 2009 NLCA 38 at [9]-[11], [13].

204. The appellant also argues that trial counsel's assessment that the Crown's case "remained very strong and that a conviction was likely, especially if the Pos statement was tendered by the Crown" was an incompetent assessment. *ARF, paras. 392, 395.* The appellant is incorrect in his assertion in 375, (and footnote 555, paragraph 374) of his revised factum that "there is nothing in the preliminary hearing transcripts, police statements, RCMP hair, fibre and serology reports, etc., indicating the appellant's guilt."

205. The appellant does not acknowledge that forensic testing was very limited in 1983, and could only ascertain whether blood or seminal fluid was present, and blood type (when possible). If the male who deposited the seminal fluid was a "secretor", then ABO typing could also be done and compared to a known sample, if obtained (not done in this case). *Prelim. T., Elsoff, p. 217, A.B., p. 229, see also CFE, Aff.Hulan, Vol. 2, Tab 7, paras. 40 - 41*

206. Both blood and semen were found on the appellant's clothing, entered through testimony from Mr. Elsoff. Blood was confirmed on the appellant's shorts (Prelim Exhibit S); semen was confirmed in the appellant's underpants (Prelim Exhibit T) (blood was not detected on the underpants, but the test could not be conclusive); and semen was confirmed on the front hem of the appellant's vest/T-shirt (Prelim Exhibit R).

207. There was not much blood produced during the offence, but both blood and semen were located in the same stain on the sock found at the scene (Prelim Exhibit B), on the swab taken of Delavina's anus (Prelim Exhibit J), and within the same area on the Delavina's PJ bottoms (Prelim Exhibit I). No blood or semen was detected on the swab of Delavina's vagina (Prelim Exhibit K), but the tests could not be conclusive. Three semen stains were also located on the blue blanket found on the window (Prelim Exhibit P), two of which were by one of the corners that was tied with string. *Prelim. T., Elsoff, p. 206 – 224, A.B., p. 218 – 236.*

208. The appellant also ignores that the appellant was in the bathroom by himself right after he returned to the Tallio home and woke up Nina Tallio; see, for example, the

affidavit of Celestine Vickers. *AFE, Aff.Vickers, Vol. 3, Tab 45, paras. 25 – 31.* The appellant, therefore, not only had the opportunity to clean himself of blood and semen using the sock at the scene, but also in the bathroom before he was detained.

209. The appellant's presence at the scene was a highly incriminating fact, essentially inexplicable at that time of day, along with his behaviour in not waking Delavina's grandparents up, somehow immediately identifying that Delavina had been raped, and some inconsistencies between his voluntary statement and other evidence, along with the blood and semen on his clothing.

210. Trial counsel was in the courtroom, and in the best position to assess the strength of the case having heard the witnesses. Crown counsel has advised that the case would have still gone to the jury, *even if Dr. Pos's evidence was not admitted.* 2nd Aff.Pothecary, AFE, Vol. 2, Tab 30B, para. 37Neither counsel can have a complete recall of the strengths or weaknesses of the case in light of the passage of time and lack of complete records or transcripts.

211. In summary, the appellant cannot demonstrate that Dr. Pos' evidence was *certainly* going to be ruled inadmissible, either pursuant to *Abbey* or because he was a person in authority. The case law and commentary from this time period support trial counsel's assessment of the admissibility and weight of the testimony from Dr. Pos. His counsel's advice was not ineffective.

212. The appellant also seems to argue that the evidence of Dr. Pos is such that regardless of whether his plea is valid, it would be a miscarriage of justice to dismiss his appeal, using a "*Kumar/Taillefer/Hanemaayer*" analysis. On this basis he alleges the inadmissibility of the Dr. Pos evidence as a separate ground of appeal. The respondent's submission that this, and the jurisdiction argument regarding the remand discussed next is not the kind of "free-standing" basis upon which a Court of Appeal should intervene. Certainly not in a case such as this where the lapse of time has been so prejudicial to the Crown's ability to re-try the case.

Issue III: The appellant cannot establish a remedy should this Court conclude that the provincial court judge did not have the jurisdiction to order the appellant remanded to FPI. In any event, the remand was valid.

213. The respondent understands that this also is not an allegation against the effectiveness of trial counsel, but an independent basis to argue that his plea was a miscarriage of justice. The appellant alleges that Judge Diebolt never had jurisdiction to order him into a 30-day psychiatric remand, as he had no authority to deal with the appellant's bail status, or remand pursuant to s. 465(1)(c)(i) as he was not presiding over a preliminary inquiry. He argues that "legal proceedings involving the appellant at the time were a nullity" and "evidence derived from the order was inadmissible", ARF, para. 323. He makes this argument even though Crown counsel, defence counsel and the judge at the time all understood there was the authority.

214. The appellant has not explained how this would provide him a remedy on appeal. Nor has he explained how trial counsel would have obtained a remedy at the trial, or otherwise had the evidence excluded, if it had been argued. The case on which the appellant relies, *R. v. Vaillancourt* (1974), 16 C.C.C. (2d) 137 (ONCA), aff'd [1976] 1 S.C.R. 13 (App. BOA, Vol. 3, Tabs 60, 61), confirms that the evidence of the evaluating psychiatrists is admissible even if an assessment order was never made (*Vaillancourt* (SCC), paras. 12 - 16). Accordingly, even if the s. 465(1)(c) order was a nullity, that would not render Dr. Pos' evidence inadmissible.

215. In any event, the respondent's position is that the judge had the jurisdiction to make the order that he did. *Re Attorney-General of Saskatchewan and Attorney-General of Canada* (1980), 57 C.C.C. (2d) 181 (Sask.C.A.) directly considered this issue and concluded that there is jurisdiction for a s.465(1)(c) order at any stage of the proceedings in advance of a preliminary inquiry. *R. v. Mitchell*, [1980] O.J. No. 753 (H.C.J.) is another example of the 30 day assessment being made before the preliminary inquiry (although the extension order in that case was invalid). See also *Ordering Psychiatric Examinations*, D.B. Menzies, 53 C.R. (3d) 387; *Remands for Psychiatric Examinations*, (1980-1981), 23 C.L.Q. 273.

216. Alternatively, by exercising jurisdiction under s. 465, Judge Diebolt commenced the preliminary inquiry and *became* seized of it with the only practical consequence being that the preliminary inquiry was conducted by the "wrong" judge. It is difficult to see how this Court could provide the appellant a remedy on this jurisdictional argument.

217. The appellant is also challenging the scope of the remand, as he argues that the issue of fitness had been resolved and the remand was unnecessary. It is important to recognize that the test at that time in the *Criminal Code* was to assess whether the appellant may be mentally ill. Fitness issues and mental health concerns justified the kind of remand that occurred in this case. Dr. Murphy expressed real concerns that the appellant was suffering from a mental illness. The fact that the Crown prepared the remand documents by ticking "fitness" as the issue did not restrict the actual mental health inquiry matter that was at issue.

218. This Court must consider what Dr. Murphy's written report said at the time, as this supported the need for a further assessment. She testified before Judge Diebolt at the hearing on April 26th, and he evidently satisfied himself that a remand was required, a discretion the *Code* afforded him. *R. v. Greenland*, [1986] O.J. No. 814 (H.C.J.) There is no transcript of Dr. Murphy's evidence or the submissions of counsel on April 26, 1983, but in light of what was known of the appellant's background, his history of depression and notations of "suicidal" on his police intake form, the fact that he admitted in a warned interview to a brutal rape and murder of a child, and with Dr. Murphy recommending a 30 day assessment, there was ample basis for a thorough inquiry by mental health professionals.

ISSUE IV: DNA evidence does not exonerate the appellant

Overview of testing and results

219. The appellant submits that there is fresh evidence relating to recent DNA testing of tissue sample blocks that were created in 1983 during the victim's autopsy that exclude the appellant from being the perpetrator. The respondent's position is that none of the partial male profiles have any probative value and that this Court can put no weight on the DNA results. They are almost certainly the product of contamination. The

appellant's interpretation of the DNA evidence ignores the fact that some of the key results would incriminate him, if reliable.

220. It is not possible to know the origin or source of the male DNA recovered from the tissue sample blocks. Indeed, it would be remarkable that the male DNA would be perpetrator DNA considering the process by which tissue sample blocks are created, in light of the results that have been obtained, and considered within the context of the case as a whole. DNA evidence did not even exist in 1983, and the police seized other exhibits as possibly having forensic value, such as swabs and hairs for serology testing. Pathology tissue samples have a different purpose and are not a reliable source of testing for perpetrator DNA.

221. The appellant relies on the affidavits of Dr. Greg Hampikian and Dr. Rick Staub. *AFE, Vol.1, Tab 16 and Vol. 2, Tab 35.* In support of its position the respondent relies on and applies to introduce as fresh evidence affidavits from four individuals it tenders as experts in DNA testing and analysis:

- Dr. Frederick Bieber, CFE, Vol. 1, Tab 1;
- Christine Crossman, CFE, Vol. 1, Tab 2;
- Huma Nasir, CFE, Vol. 2, Tab 11; and
- Steen Hartsen, CFE, Vol. 2, Tab 6

222. The Crown also relies on affidavits that provide the factual basis for the opinions of the experts; and background regarding the creation of the tissue sample blocks in 1983 and the testing, storage and handling of this material since 2011:

- Dr. Glen Taylor, CFE, Vol. 2, Tab 12 (forensic paediatric pathologist);
- Richard Mah, CFE, Vol. 2, Tab 10 (hospital lab technician);
- Insp. David Hall, CFE, Vol. 2, Tab 5 (RCMP investigator 2011-2014);
- S/Sgt. Laura Livingstone, CFE, Vol. 3, Tab 13 (RCMP investigator 2013-2017);
- Cpl. Kelly Katalinic, CFE, Vol. 4-7, Tab 14 (RCMP investigator 2016-present)

223. In brief, tissue was taken by the pathologist Dr. Glenn Taylor in **1983** during Delavina's autopsy at the *Vancouver Children's Hospital* ("*VCH*") for analysis for the presence of injury or disease. The tissue samples are small pieces of tissue, treated

with formalin for preservation and then embedded in paraffin wax, and each attached to their own plastic cassette. They are referred to as FFPE (formalin fixed paraffin embedded) tissue sample blocks. Very thin slices were then taken off the tissue blocks using a microtome, and placed onto slides for microscopic examination of the tissue. The tissue blocks are not forensic exhibits, nor are they intended for anything other than preparing the tissue to be viewed in a slide under the microscope. The obtaining of the tissue samples, and their treatment and creation of the tissue blocks in the lab of *VCH* is described in the affidavits of Dr. Glenn Taylor and Richard Mah. *CFE, Vol. 2, Tabs 10, 12.* There are photographs in the Mah affidavit and the 3rd affidavit of Cpl. Katalinic, CFE, Vol. 7, Tab LL, and page 6 of the Nasir affidavit. The shape of the tissue blocks can be described as small rectangular box shape, with six sides.

224. In **2011**, the *UBC Innocence Project* asked the RCMP to investigate whether any tissue sample blocks from Delavina's autopsy existed. The RCMP contacted the *VCH* and learned that the tissue sample blocks, 45 in total (and their slides) were still at the hospital. As described in greater detail later, the tissue sample blocks were seized by the RCMP and have been tested in four phases (before a Notice of Appeal was filed, 2011, 2012; and after, 2018, 2019), primarily for the presence of male DNA using Y-STR testing. This is a form of testing that isolates the male Y chromosome DNA, which was used to try to isolate any male DNA from the overwhelming amount of female DNA.

225. Y-STR testing cannot identify an individual male, as men in the same patrilineal line share the same Y chromosome, but it can be used to exclude an individual. The role of the RCMP in the seizure and testing of the DNA blocks is described in the affidavits of RCMP officers Dave Hall (CFE, Vol. 2, Tab 5), Kelly Katalinic (CFE, Vol. 4, paras. 77-136), and Laura Livingstone (CFE, Vol. 3, Tab 13).

226. The testing was carried out primarily by *Orchid Cellmark* ("*Orchid*") a private lab in Texas. The testing involved extracting or "scooping" the small tissue piece obtained during the autopsy out of the paraffin block. There are photographs of the tissue blocks in their cassettes in the affidavits of Richard Mah and Huma Nasir. *CFE, Aff.Mah, Vol. 2, Tab 10, para. 9, Ex. B*; *Aff.Nasir, Vol. 2, Tab 11, para. 16, figure 1.* The tissue was then "washed" with a xylene solution to remove any paraffin that remained. Both the tissue

and the wash were to be tested for the presence of male DNA. The concept was that the male DNA had to be external to the female tissue and could "come off with the wash".

227. *Orchid* ran the tests on some of the first seven tissue blocks, and, as will be discussed in more detail below, a partial male profile that the appellant claims is exculpatory came from a wash of one of the vaginal tissues. Once *Orchid* realized that one side of the tissue blocks was not encased in paraffin (the side that was "sliced" in order to make a slide), *Orchid* changed its testing procedure by adding a step: it swabbed the surface of the tissue block before washing it in xylene in an effort to ascertain whether the exposed surface had been contaminated. The testing procedures are described in the affidavit of *Orchid* employee Huma Nasir. *CFE, Vol. 2, Tab 11.*

228. Ultimately, partial male DNA profiles were identified from the tissue, the xylene wash of some tissues, and from swabs of the outside of the tissue blocks. The partial profiles have been compared to men who could have been contributors, the "reference samples". These men were involved in the original and current investigation, and men known to have been involved in the preparation and handling of the tissue sample blocks at *Children's Hospital* both in 1983 when they were prepared, and when located in 2011. The appellant's Y-STR profile was also generated, as was one for his uncle, Cyril Tallio and other individuals from the Bella Coola community. Cyril Tallio consented to provide his blood for analysis; he is now deceased. In the end the individuals that were profiled have been "included" or "excluded" as possible contributors to the partial DNA profiles found in

229. This is a description of the **four stages of testing**, followed by a table that summarizes the results:

2011 – Seven tissue sample blocks were seized by the RCMP to be tested by *Orchid Cellmark* for the presence of male DNA using the Yfiler test kit which could identify up to 17 markers. This testing was conducted by and under the direction of the *Innocence Project*. A partial male DNA profile (8 markers) was obtained from the washing of one of the vaginal tissue samples. The appellant in paragraph 247 of his factum describes

this as "the vaginal sample", but it should be clarified that the male DNA was extracted from the wash, not the tissue itself. All known reference samples are excluded as contributors to this profile. The appellant's position is that the partial male DNA profile found in the washing of the vaginal tissue is perpetrator DNA and exonerates him.

2012 – On October 23, 2012, the RCMP took conduct of the second stage of testing, the remaining tissue blocks were seized and sent to *Orchid Cellmark*. As described by Huma Nasir, another step was added to the testing protocol - swabbing the exposed side of the tissue sample block for male DNA *before* extracting the tissue sample from the larger paraffin block. During this phase of testing male DNA was identified on:

- the uterine tissue sample, and a partial profile was obtained (8 markers);
- partial profiles were also obtained from the swabbing of three samples (two brain tissue samples and one lung sample). *CFE, Aff.Nasir, Vol. 2, Tab 11, paras. 41–54*

The appellant is not excluded as a contributor to the partial profile found when testing the uterine tissue, itself. The appellant's position appears to be that this is consistent with his theory that the true perpetrator of the offence was his uncle Cyril Tallio. With respect to the male DNA found on the surface swabs of brain and lung tissue blocks, he argues that they are contamination.

2018 – The appellant applied to this Court for further testing of the DNA extract from the uterine tissue. It was considered by this Court on September 8, 2017, and this Court granted an order for further testing of the DNA extract and the uterine tissue sample on March 12, 2018: *2018 BCCA 83*. The appellant's initial application was for further testing of the uterine DNA extract by Dr. Sibte Hadi in Manchester, England, along with further testing of Phillip and Cyril Tallio's DNA profiles, in an effort to identify differences in their DNA profiles. The appellant ultimately applied for testing at the Netherlands Forensic Institute ("*NFI*") by Dr. Arnoud Kal. No results were obtained. NFI Report is attached to affidavit of Katherine Kirkpatrick, AFE, Vol. 1, Tab 19, Exhibit A. By order of this Court, the uterine tissue sample and the uterine DNA extract are to remain at the *NFI* until the conclusion of the appeal.

2019 – In September 2019, the respondent's application to this Court for further testing by British Columbia Institute of Technology ("*BCIT*") Forensics Lab of three vaginal tissue samples that were sent for testing, but not tested in 2011, and for testing of female DNA that had been extracted by *Orchid* from the washes and swabs of all of the tissue sample blocks to determine if there was female contamination was granted: *2019 BCCA 330*. During this most recent phase of testing male DNA was identified on two of the vaginal tissue samples (1 marker and 4 markers). The appellant and his uncle Cyril are not excluded as contributors to the sample which generated 4 markers, and the sample that generated 1 marker. Furthermore, when BCIT tested the DNA that had been extracted by Orchid from the washings and swabs it obtained partial and mixed profiles, and male DNA that had not been elucidated by the tests used by Orchid. The testing and results are described in the affidavit of Steen Hartsen. *CFE, Vol. 2, Tab 6.* The respondent's position is that these results provide further confirmation of the respondent's theory that the male DNA discovered from testing the tissue sample blocks are likely the product of a contamination event, or events, and that this Court cannot give any weight to the results. The respondent is not aware if the appellant's experts Drs. Staub and Hampikian have considered the impact of the new test results. The table describing all of these results is on the next page.

Yfiler markers	2011 vaginal *wash*	2013 brain (left motor) *swab*	2013 brain (left ganglia) *swab*	2013 uterine *tissue*	2013 lung lobe *swab*	2019 vaginal *tissue*	2019 vaginal *tissue*	Phillip & Cyril Tallio
DYS456	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]
DYS389 I	[redacted]	[redacted]		[redacted]				[redacted]
DYS390								[redacted]
DYS389 II								[redacted]
DYS458	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]
DYS19							[redacted]	[redacted]
DYS385 a/b								[redacted]
DYS393	[redacted]	[redacted]	[redacted]	[redacted]				[redacted]
DYS391	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]			[redacted]
DYS439								[redacted]
DYS635	[redacted]			[redacted]				[redacted]
DYS392								[redacted]
YGATA H4	[redacted]							[redacted]
DYS437	[redacted]	[redacted]		[redacted]	[redacted]		[redacted]	[redacted]
DYS438		[redacted]						[redacted]
DYS448			[redacted]					[redacted]

230. The respondent has prepared a detailed chronology after its argument that describes in more detail the seizure, storage, handling and testing of the tissue sample blocks since their discovery in 2011. But before providing this Court with this level of

detail, the respondent will address whether, even if the Court were to accept the appellant's DNA expert evidence, the DNA evidence exonerates or assists him in the appeal. Even on this basis the appellant cannot demonstrate that the DNA evidence should be admitted as fresh evidence as it would not, in the respondent's submission impact the validity of the guilty plea.

Understanding the probative value according to the appellant's experts

231. Dr. Hampikian and Dr. Staub have asserted that the partial Y-STR profiles located on the vaginal [wash] and uterine samples are "*extremely unlikely*" to be the result of contaminant DNA" (unlike the lung and brain samples, emphasis in original). As the appellant acknowledges in paragraph 275 of his revised factum he is therefore:

> ....left with the result that he is excluded as the donor of the male DNA found in the first washing of the vaginal sample [wash].
>
> 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.

232. The appellant's position must be that if neither is from contamination, then both partial – and different – profiles are from two perpetrators. Dr. Staub goes so far as to say "it is impossible to know whether there were two perpetrators involved in the crime, or whether male DNA had been deposited [in the vagina or uterus] through another incident in the days prior to her death". *AFE, 4th Aff.Staub, Vol. 2, Tab 35b, attaching 2nd Aff.Staub, paras. 27-28.* This is a highly improbable scenario, when there has never been any suggestion that more than one person committed this offence. The respondent's position is that it is a theory being advanced to explain DNA results that are inherently inconsistent.

233. The appellant's theory would mean that a 22 month old child was sometime in the days before her death, sexually assaulted by one "stranger" (her father and grandfather both excluded by the DNA on the defence theory), and then brutally sexually assaulted and suffocated by a different male, within minutes of the appellant

coincidentally entering the Mack home at 5:45 a.m. to "check" on her (the defence theory).

234. Furthermore, the appellant accepts that he *cannot be excluded* as a contributor to the DNA found on the uterine tissue. He attempts to disassociate himself by speculating that Cyril Tallio could have left this DNA, but does not commit himself to this theory as he says that he and Cyril are only one of 25,000 other males in the United States who may have the partial profile identified. The fact that the appellant is incriminated by his own DNA evidence and then has to suggest such an improbable scenario involving two perpetrators, one of who coincidentally has the same Y-STR profile as him, demonstrates that the appellant's DNA evidence neither exonerates him nor assists him in his appeal. The respondent does not see how the appellant can meet his burden to demonstrate that this evidence is "exclusionary". It is not the kind of reliable, cogent evidence that this Court could consider to have an impact on the validity of his guilty plea.

235. The appellant's factum was written before the further DNA testing was done in 2019. This recent testing further demonstrates the frailty and internal inconsistency of the appellant's DNA evidence and the theories about it. The *BCIT Forensic Lab* identified partial male DNA profile (4 markers) on a piece of vaginal tissue. This vaginal tissue piece was from the same tissue sample that generated a partial male profile in its wash. The respondent has added to the appellant's submission, underlined, to reflect the new results:

> ....left with the result that he is excluded as the donor of the male DNA found in the first washing of the vaginal sample, <u>but cannot be excluded as the donor of the partial male DNA profile found from a piece of the same vaginal tissue (tissue block 129VII, (11-0113-05.01.2)</u>. 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. *ARF, para. 275, underlined portion inserted by the respondent*

236. In other words, he is essentially *no longer excluded* from either the vaginal sample or the uterine sample, identified as the key "probative" tissue samples by his own experts.

237. The appellant also argues in his factum that Wilfred Tallio, Sr. (deceased) could have been the perpetrator of the offence. Yet, Wilfred's sons Ivan and Bill were *excluded* as possible contributors to the partial male profiles from both the vaginal wash *and* the uterine tissue. On the theory that Y-STR profiles run through generations of men in a family, it necessarily follows that Wilfred is also excluded. But in paragraph 265 of his factum the appellant theorizes as to how Wilfred could still be a viable alternate suspect on the basis that there appears to be a break in the Tallio patrilineal tree, and because Wilfred's profile was not obtained. The respondent's position is that it is speculation to suggest that Wilfred could have contributed to the partial DNA profile obtained.

238. In summary, the respondent's position is that even if one is to accept the opinions of the appellant's DNA experts, the DNA evidence has insufficient evidentiary value to be admitted by this Court as fresh evidence.

239. Alternatively, the respondent submits that the overwhelming inference is that the tissue samples were contaminated, and cannot provide reliable forensic evidence to this Court. In support of its position, the respondent submits that:

I. DNA as an investigative tool did not even exist;
II. Histology tissue sample blocks are not suited for detection of foreign male DNA;
III. *Orchid*'s methodology did not initially account for the exposed side;
IV. Exclusion of "knowns" – this is not possible or determinative; and
V. Appellant's experts acknowledge some contamination.

I. DNA evidence as an investigative tool did not exist

240. It has to be recognized that in 1983 forensic DNA testing was not being conducted or even contemplated. It was a novel science even in the 1990s: *R. v. Terceira*, [1998] O.J. No. 428 (C.A.); appeal dis'd, [1999] 3 S.C.R. 866. Accordingly, the police investigating the crime and the pathologist conducting the autopsy did not treat

the victim's body the way it would be handled today. S/Sgt. Livingstone in her affidavit refers to the changes in policies and procedures that have occurred in investigative techniques in light of the information that is now known about transfer of DNA, resulting contamination, and the increased sensitivity over the years. Dr. Taylor in his affidavit likewise notes that the initial external examination at an autopsy has changed now in light of DNA science. *CFE, Aff.Livingstone, Vol. 3, Tab 13, paras. 48 – 73; Aff.Taylor, Vol. 2, Tab 12, paras. 7, 10.*

241. Christine Crossman, Biology Team Leader of the RCMP Lab, addresses the modern day protocols or best practices to avoid DNA contamination in a lab, and the protocols in place to detect contamination. She also addresses the contamination issues that arise pertaining to the histology samples in this case. Her conclusion is that the "risk of cross-contamination during the processing of the tissue samples would be significant". *CFE, Aff.Crossman, Vol. 1, Tab 2, Exhibit A, report p. 4.* At the time of the child's autopsy, the only forensic science available to investigators was to take swabs to examine for semen, blood to look for blood type; and, hair for hair microscopy analysis.

II. Histology tissue sample blocks are not suited for detection of foreign male DNA

242. Also, the tissue samples were not taken for any police investigative or forensic purpose, and certainly not to glean information about the perpetrator of the offence. As Dr. Taylor, the pathologist explains in his affidavit tissue samples are taken for medical tissue analysis of the child. Anything of value to the investigators would have already been handed to them, for processing by the investigator's lab (swab samples, or hair samples, as occurred in this case.) The tissue sample blocks were not part of this investigative evidence capture. *CFE, Aff.Taylor, Vol. 2, Tab 12, paras. 6 – 12.*

243. The protocols of the autopsy were related to protecting the staff from being exposed to disease, rather than to prevent contamination of the body being autopsied. Certainly care was taken to avoid cross-tissue contamination, but that is not the same as protection from DNA transfer. For example, the same gloves were worn throughout the autopsy, [which would include handling the clothes or blanket the infant was wrapped in] and the scalpel blade only changed as needed. *CFE, Aff.Taylor, Vol. 2,*

Tab 12, paras. 6 - 9; Aff.Livingstone, Vol. 3, Tab 13, Exhibit B, Ontario Forensic Pathology Service Practice Manual for Pathologists.

244. Dr. Bieber explains in paragraphs 35 to 41 the different ways that DNA can be obtained from some exhibits in a criminal investigation, and effectively utilized for forensic purposes. This is in contrast to the DNA strategy employed by *Orchid* which had "limitations in both concept and execution". *CFE, Aff.Bieber, Vol. 1, Tab 1, paras. 58 - 55.*

245. The protocol developed by *Orchid* to test the tissue sample blocks for male DNA was unique, but in the respondent's submission fundamentally ill-suited to the detection of perpetrator DNA. The usual objective of DNA testing of tissue samples that have been processed and embedded in paraffin wax is to obtain the DNA profile of the *source* of the tissue itself, not to search for a foreign DNA profile on the surface of and adhering to the tissue sample. It is only the patient or deceased's DNA profile from the tissue itself that can provide any level of confidence as to its source. *AFE, Clay Aff., Vol. 1, Tab 6, paras. 5-7; 3rd Aff.Staub, Vol. 2, Tab 35a, attaching 1st Aff.Staub, paras. 11-12* The respondent understands that this is what Dr. Hampikian is referring to in paragraph 12 of his first affidavit, identification of DNA of the tissue - not something adhering to it, such as foreign male DNA. *AFE, Vol. 1, Tab 16a.* Neither Dr. Hampikian nor Dr. Staub have identified a single criminal case in which perpetrator DNA was located on a histology tissue sample from the victim's autopsy.

246. In contrast, the histology tissue samples were tested in this case to determine if cells with male DNA (found in sperm, hair, blood, sweat, urine, skin, saliva) "stuck" or adhered to the tissue samples. The process by which the tissue blocks were prepared is described in detail in the Mr. Mah's affidavit (the "Mah Affidavit"). The Mah Affidavit identifies the many opportunities for contamination in the processing of the tissues into blocks from which the slides are prepared, such as: while the samples were in permeable containers with holes or vents and sitting in formalin along with samples from other surgeries or autopsies; in the formalin "soup" (Mr. Mah's characterization); when going through the tissue processor; during the embedding process; or being cut on a microtome blade that has not been cleaned. As Mr. Mah states, "While it is possible

that a perpetrator's sperm could remain attached to a tissue sample through this process, the process also exposed the tissue to numerous other people's DNA profiles." *CFE, Aff.Mah, Vol. 2, Tab 10, para. 26; CFE, Aff.Bieber, Vol. 1, Tab 1, para. 76.*

247. Dr. Bieber is a pathologist and is experienced with histology laboratories and agrees with both Mr. Mah and Ms. Crossman regarding the potential for contamination arising from the manner in which tissue blocks are prepared. *CFE, Aff.Bieber, Vol. 1, Tab 1, paras. 80, 72, 73.*

248. Also, there is nothing to suggest that the biological material the DNA profiles come from is sperm. The appellant's expert Dr. Staub in his first affidavit seemed to imply the source was from sperm, but in the second affidavit he states he cannot determine the biological material. *AFE, 3rd Aff.Staub, Vol. 2, Tab 35a, attaching 1st Aff.Staub, para. 21; CFE, Aff.Crossman, Vol. 1, Tab 2, Exhibit A, report p. 5.* Furthermore, Dr. Taylor did not observe any sperm on the vaginal sample he examined and there was no seminal fluid located on the vaginal swab taken during the autopsy and submitted to the RCMP crime detection lab. *Aff.Taylor, Vol. 2, Tab 12, paras. 6, 10; Aff.Hulan, Vol. 2, Tab 7, para. 75(vii) (Police Exhibit 15, Lab Exhibit 7, Preliminary Inquiry Exhibit K); Prelim. T., Elsoff, p. 214 [18 – 36], AB, p. 226.* Epithelial cells (from the surface of the penis, or fingers, for example) could have been deposited on the vaginal tissue, but would not be in the uterus. And, the appellant's suggestion through proposed witnesses that Cyril Tallio and Wilfred Tallio are viable perpetrators cannot be reconciled with this DNA result, as they are excluded as sources of the vaginal tissue washing DNA. *CFE, Aff.Bieber, Vol. 1, Tab 1, para. 76.*

249. When the process by which the samples were prepared is considered, it is difficult to see how a cell from the perpetrator could "stay stuck" on the tissue sample as the appellant's experts seem to suggest; and likewise, how easy it would be for cells from other male histology tissue samples to "get stuck" to Delavina's tissue samples. As noted in the Crossman Report, "the risk of cross-contamination during the processing of the tissue samples would be significant". *CFE, Aff.Crossman, Vol. 1, Tab 2, Exhibit A, report p. 4.* This manner of specimen treatment must be contrasted to the strict modern day protocols to ensure DNA results are not the product of contamination.

250. *Orchid* recognized this concern at the time when it undertook to test the tissue sample blocks. After the partial male DNA profile was obtained from the vaginal wash, the *Innocence Project* and the RCMP were advised of two possible contamination scenarios:

- The tissue block was contaminated by a male during its preparation in the pathology lab and is unrelated to the crime;
- The previous sample (not from this case) was run through the laboratory's instruments which contaminated the sample and is unrelated to the crime CFE, Aff.Nasir, Vol. 2, Tab 11, para. 36; CFE, Aff. Hall, Vol. 2, Tab 5, para. 31

251. The appellant's experts did not adequately educate themselves on the manner in which the tissue samples were made. The appellant in his argument likewise does not address the contamination concerns raised in the Mah Affidavit. The appellant does not consider these numerous potential sources of contamination in his materials; rather, he and his experts, simply assumed they did not exist and, thereby, took too narrow a view of the possible sources of contamination. Dr. Staub supports the *Orchid* methodology because otherwise "why was it ever carried out?" *AFE, 6th Aff.Staub, Vol. 2, Tab 35d, para. 16.* It was carried out because he suggested it, as he was then a director at *Orchid.*

252. Dr. Staub appears to have misunderstood the process as he believed that the cassettes were enclosed: *AFE, 3rd Aff.Staub, Vol. 2, Tab 35a, attaching 1st Aff.Staub,, paras. 16-17; ARF, para. 282.* Likewise, Dr. Hampikian does not address the concerns raised in Mah Affidavit. Furthermore, Dr. Hampikian's conclusion in paragraph 20 of his first affidavit is irrelevant, as DNA from other cells in the formalin "soup" or "stew" (the description Mr. Mah gave to the process) would also appear to be "formalin degraded". *AFE, Vol. 1, Tab 16a.* It is critical to an assessment of the opinions of the appellant's experts that they assumed a lack of contamination based on a misunderstanding of the hospital processes.

III. *Orchid*'s methodology did not initially account for the exposed side;

253. In addition to setting aside the conceptual problem with testing tissue sample blocks, Dr. Hampikian appears to have fundamentally misunderstood a key feature about the tissue sample blocks, which is that one side was exposed through the creation of the slide. He repeatedly emphasizes the distinction between the "outside" of the paraffin tissue block and the "inside" of the paraffin tissue block. He uses many food analogies to support a lack of exposure to contaminants to the "inside" of the tissue block (setting aside the above submissions regarding exposure during the creation of the tissue blocks). *ARF, para. 265* He essentially compliments *Orchid's* "three-layer unmasking of male DNA" as providing reliable male perpetrator DNA. He is critical of Dr. Bieber at paragraph 15 for not recognizing that "paraffin protects the tissue from DNA contamination", and takes the position that the "handling" or "outside" of the tissue block is irrelevant to the interpretation of the "inside" DNA that was discovered. *AFE, 4th Aff.Hampikian, Vol. 1, Tab 16D.*

254. Also, Dr. Hampikian is in error with respect to the initial processing of the vaginal tissue sample by *Orchid*, as he asserts that "The sample was first shaved (microtomed) with a blade to remove excess paraffin from around the embedded tissue. This effectively removed any possible surface contaminants from the tissue block...". *AFE, 1st Aff.Hampikcian, Vol. 1, Tab 16a, para. 19.* In fact, the excess paraffin was removed from the sides in which it could be removed, but not from the "sixth" side from which the sample was extracted. *CFE, Aff.Nasir, Vol. 2, Tab 11, para. 37, 42.*

255. As explained in the affidavit from Ms. Nasir, this is why the paraffin from that tissue block was tested again. This is also why *Orchid* changed the testing protocol and added the third step of swabbing the outside of the tissue block, which was a swabbing of the sixth side. *CFE, Aff.Nasir, Vol. 2, Tab 11, para. 38, 42.* Dr. Staub was involved in setting up the first round of testing with Ms. Nasir, and recognized the exposed sixth side at that time, but did not advert to the testing being modified until his 6th affidavit. *CFE, Aff.Hall, Vol. 2, Tab 5, para. 35* (The respondent also notes that Dr. Staub should have been aware that the testing was not completed on the vaginal

tissues, as Ms. Nasir identified when the respondent interviewed her.) *CFE, Aff.Nasir, Vol. 2, Tab 11, para. 33*).

256. Dr. Bieber correctly identifies that a partial profile found on the outside of the tissue block is a factor for consideration in assessing whether there is contamination for all of the samples. The outside swab was a swab of the side of the block that had the tissue *at the surface* because it had been microtomed.

IV. Exclusion of "knowns" is not possible or determinative

257. After *Orchid* located a partial profile in the wash from the vaginal tissue the RCMP obtained DNA from individuals identified as having possibly been contributors to it as they were involved with the Tallio case. Excluded as the source of the DNA profiles were the police officers and medical personnel who are known to have had access to the tissue samples. Also excluded from the vaginal DNA result were the following people: Philip Tallio, Cyril Tallio, Blair Mack (and, accordingly, his father Sam Mack), Ivan and Bill Tallio (and, accordingly, their father Wilfred).

258. But this follow up only eliminated the contamination potential from the "known males" who could have been in physical contact with the samples, and the males who were viewed by the appellant as alternative suspects. *AFE, Aff.Clay, Tab 6, paras. 14-23; AFE, 3rd Aff.Staub, Vol. 2, Tab 35a, attaching 1st Aff.Staub, para. 17.* Again, it is unknown how many male DNA profiles of unknown origin, and from unrelated matters were in contact with the tissue samples during the formalin stage, the tissue processing stage, the wax embedding stage, the microtome, or the intervening years when the tissue blocks sat unprotected. Given the way in which tissue samples were processed, there are multiple other possible sources of this DNA sample. *CFE, Aff.Mah, Vol. 2, Tab 10, paras. 9 – 37.*

259. Dr. Bieber noted in paragraph 81 of his affidavit that "there was no way to know if even more of the tissue blocks show evidence of contamination by extraneous females" as this testing. *CFE, Vol. 1, Tab 1.* As a result, the respondent applied for further testing of the washes and swabs, and the results of the BCIT testing are in Mr. Hartsen's affidavit. *CFE, Vol. 2, Tab 6.* This further testing located male DNA that

Orchid had not identified, possibly because the test is more sensitive in 2019 than 2011, and many mixed profiles in the swabs. Neither Dr. Staub nor Dr. Hampikian identified this as a way in which the issue of contamination could be further assessed.

V. The appellant's experts acknowledge *some* contamination

260. The appellant accepts contamination of the brain and lung samples, and reconciles it on the basis that it came from swabbing the outside. These samples were contaminated by not only partial DNA of one male, but three, which again points to the likelihood of contamination of all the samples. It is another example of the reality that the tissue samples were not created or handled in a manner necessary for the DNA evidence to have probative value. As noted by Ms. Crossman, not a lot of material is needed for there to be transfer or to adhere to create detectable contamination. *CFE, Aff.Crossman, Vol. 1, Tab 2, Exhibit A, report p. 4.*

261. For this same reason, the respondent seriously questions Dr. Hampikian's statements at paragraphs 24 and 27, concluding lack of contamination on the basis that "only" two male DNA profiles were located. *AFE, 1st Aff.Hampikian, Vol. 1, Tab 16A*

262. In summary, Dr. Bieber responds in detail in paragraphs 72-91 to the opinions of Drs. Staub and Hampikian, and the respondent submits that this Court should accept his expertise and not ultimately admit the fresh evidence from the appellant's experts. As Dr. Bieber notes in his Summary and Conclusions:

> 96. The DNA results obtained from study of archival autopsy tissue samples is no substitute for that collected from original evidence. The many opportunities for inadvertent DNA transfer (i.e., contamination), and the missing key biological evidence limits the utility of DNA testing in this case.
> *****
> 98. It is not possible to know with any reasonable degree of certainty the origin or source of the male DNA recovered from the autopsy tissue samples in this case. *CFE, Vol. 1, Tab 1.*

Specific response to paragraph 274 of appellant's revised factum

263. The appellant in paragraph 274 makes two allegations: (1) that the respondent refused to release the DNA extract from the uterine tissue further testing; and (2) that

the RCMP mishandled or improperly stored the tissue blocks or DNA extracts. The appellant appears to be implying with this paragraph, read in conjunction with paragraph 275, that this somehow provides an explanation for why the *NFI* got no results when they tested the uterine tissue. Or, that this is some explanation that should mitigate the fact that he is not excluded from the uterine tissue result.

264. First, it is not clear why the appellant is alleging that the respondent "refused" to release the uterine tissue and the DNA previously extracted from that tissue for testing in 2015, when requested by the *Innocence Project*. The only issue on appeal is the probative value, if any, of the DNA results. When the testing occurred, and the position of the RCMP and respondent with respect to the further testing is irrelevant.

265. But in any event, the position that a court order was required for further testing of the uterine tissue sample block is explained in the affidavits of RCMP officers Dave Hall and Laura Livingstone. *CFE, Vol. 2, Tab 5; Vol 3, Tab 13.* These officers explain that the tissue sample blocks were originally seized in 2011 without consultation with the victim's family; that further testing was done in 2013 with the consent of the family; and, that the family did not consent in 2015 to the further testing proposed by the *Innocence Project*. The appellant had not even filed a notice of appeal or application for an extension of time to appeal when the request for further testing was made. The respondent and RCMP were entitled to take the position in light of the 2013 testing results – which identified five more male DNA profiles - that the results were from contamination and further testing unnecessary. *See, for example, RCMP officer Dave Hall's memo September 3, 2013, CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit 0, p. 339 – 340.* This, along with the opposition of Delavina's parents to further testing meant that court proceedings had to be instituted and a court order before there could be any further testing.

266. Lastly, the respondent and RCMP had reservations regarding the appellant's proposal to release the uterine tissue DNA extract to Dr. Hadi at Manchester University, a non-accredited university laboratory. These concerns were justified, as the appellant ultimately abandoned this proposal after the oral hearing, when in January 2018 he located an accredited lab that could do the testing, Dr. Arnoud Kal at the *NFI*.

267. The Third Affidavit of Cpl. Kelly Katalinic describes in detail the RCMP's handling of the tissue sample blocks and DNA extracts since their seizure by the RCMP from *VCH,* as detailed in the Appendix. Her evidence in this regard is a complete response to the appellant's allegation in paragraph 263 that the RCMP "incorrectly stored" the uterus sample from December 5, 2015 to July 21, 2017, as it was merely refrigerated when it should have been in a freezer. The appellant must be referring here to the DNA *extract from* the uterus sample. It also responds to his second assertion that there were also "several days" during the 1.5 year period that the uterus sample *and* the DNA extract from the uterus sample was kept at room temperature, for example during a ceremony in which the family blessed it before transfer to the *NFI. ARF, para. 274, ftnt 402.*

268. Again, the relevance of these submissions to the issue on appeal is not clear to the respondent. There is no evidence from any expert that testing of the tissue samples and DNA extracts has been compromised in any way by the RCMP's storage or handling of any of the tissue samples or the DNA extracts. Any reference to degradation by the experts relates to the fact that the samples were formalin fixed, and they are over 30 years old. As recently as February 25, 2019, Dr. Kal acknowledged DNA degradation *due to formalin fixation.* Nor would Dr. Kal be suggesting any kind of further testing if the DNA extract had been compromised. *AFE, 2nd Aff.Kirkpatrick, Vol. 1, Tab 19, Exhibit N, p. 31.*

269. Furthermore, the appellant is confused or careless in distinguishing between the uterine tissues samples and the DNA extracts obtained from the tissue samples. Storage and handling is explained in the Third Affidavit of Kelly Katalinic. *CFE, Vol. 4* The tissue sample blocks were not refrigerated for the more than 30 years that *VCH* created and stored them and have been stored at room temperature ever since. There is no suggestion by any expert that the tissue blocks, which have been formalin fixed for the very purpose of preservation, require refrigeration. The RCMP took the tissue sample block, at room temperature, to the family ceremony before it was transported to the *NFI*, where it remained sealed in its exhibit bag in a closed box. The RCMP did not take the DNA extract to the family ceremony.

270. With respect to storage of the uterine DNA extract for 1.5 years in refrigeration, rather than a freezer, the RCMP was advised in 2015, by *Orchid* when the DNA extracts were returned to the RCMP that the DNA extracts would be would be "fine if refrigerated...". It was not until the end of June 2017, that the RCMP Exhibits Facility raised with investigators the issue of whether the DNA extracts would be better preserved in a freezer, rather than a fridge. The investigators made efforts to clarify the storage status with *Orchid* and were ultimately advised on July 21, 2017 (and again on July 27, 2019), that the best practice for long term storage would be in the freezer. The *Orchid* representative also advised that it was not believed any damage would have been caused by storage in the fridge.

271. The result is that storage in the fridge was not necessarily incorrect, likely had no consequence, and there is no evidence presented to suggest that it did. Importantly, the DNA extracts were stored in a refrigerator as a result of advice from *Orchid*, which was the lab chosen by the *Innocence Project* to conduct the unusual DNA testing in this case. The fact is that the DNA extracts were at room temperature when shipped to the RCMP by *Orchid* from Texas, and without storage instructions. The RCMP cannot be faulted for the manner in which exhibits are sent from a lab, and following the advice of that lab when it was chosen by the appellant for the testing. In any event, *Cellmark* was not concerned about degradation due to storage temperature.

ISSUE V: The investigation was not inadequate, and there was no viable third party suspect.

272. The appellant argues his conviction was "a miscarriage of justice because the investigation into the murder of Delavina Mack was inadequate and fresh evidence points to a reasonable possibility that others perpetrated the crime and covered it up" (ARF, Issue V, page 53, paras. 402-411). The appellant does not expressly explain his purpose in presenting this fresh evidence, or how it provides this Court with the jurisdiction to allow his appeal, despite a valid guilty plea. The respondent understands the appellant may be arguing that his conviction is a miscarriage of justice because the case against him was a result of a poor investigation, and there were other possible offenders in the community.

273. Essentially, the appellant is attempting to undermine the case that did exist against him, as that evidence supports the fact that he would have been motivated to plead guilty to the lesser offence. The facts are that the appellant was at the scene of the crime, within the very narrow time frame in which the murder occurred, with no real reason for being there and behaving in a manner that suggested guilt. In the context of this case, the appellant had almost exclusive opportunity to commit the offence. The evidence is consistent with his admission of guilt.

274. The respondent's position is that, in light of the passage of time and the incomplete investigative record, the appellant cannot demonstrate that this was an inadequate police investigation, and there is no reliable evidence that another party committed this offence. As set out earlier, the appellant bears a large responsibility for the fact that his appeal was brought decades after his guilty plea. The extent to which the file has been put together or the case re-investigated is explained in the affidavits of RMCP members Hall, Katalinic, (rtd) Hulan and to some the Innocence Project, as described by Tamara Levy and in the Memorandums provided to the Innocence Project. The scope and results of this latter investigation is unknown to the respondent, or the Court. Yet even with this thorough investigation the appellant cannot demonstrate any real concern about his guilt. As set out earlier, the appellant bears a large responsibility for the fact that his appeal was brought decades after his guilty plea.

275. Before responding to the appellant's factual assertions in this regard, the respondent will address the extent to which: (1) alleged inadequacies in an investigation are even relevant to an appeal; and, (2) the test the appellant must meet before alleging a third party suspect is responsible for the crime. The case law establishes that these two "defences", at least in the trial context, intersect. There must be an air of reality or sufficient probative value before an accused can lead evidence of either. The respondent's position is that he cannot meet his burden in either regard.

276. Inadequate police investigation is not a freestanding defence, or ground of appeal. Rather, inadequacies in the police investigation (short of a *Charter* breach) are raised at trial as relevant only to extent that they can raise a reasonable doubt as to an accused's guilt. As noted in *R. v. Malley*, 2017 ABCA 186:

> [53] Although courts sometimes refer to the "defence" of inadequate investigation, this nomenclature is misleading. It suggests the Crown must establish that the police conducted a proper investigation in order to meet its burden of proof. Merely suggesting that *if* the police had conducted their investigation differently some exculpatory evidence *might* have turned up is, without more, pure speculation. Reasonable doubt must be rooted in the evidence or the lack of evidence, not speculation. A deficient investigation may sometimes influence whether the trier of fact has a reasonable doubt, but the trier of fact should focus on the quality of the evidence, not the quality of the police investigation.

277. The legal principles governing an accused's application to lead evidence to suggest some other person, either known or unknown, committed the offence is also described in *Malley*:

> [54] As with inadequate investigation, third party suspect is not a defence in the usual sense, but rather, an argument that the Crown has not met its burden of proof. The trier of fact must consider whether, on the totality of the evidence, the possible involvement of a third party suspect leaves them with a reasonable doubt about the accused's guilt: *R v Khan,* 2011 BCCA 382 (CanLII) at para 91, 89 CR (6th) 321.
>
> [55] As with any evidence adduced in a criminal trial, evidence of a possible third party suspect must comply with the basic rules of admissibility. The evidence must be relevant, material, and not barred by any exclusionary rule. As stated by Watt JA in *R v Tomlinson*, 2014 ONCA 158 (CanLII) at para 72, 307 CCC (3d) 36: "The proponent does not get a free ride through the admissibility thicket upon mere announcement of 'third party suspect'."
>
> [56] Where the defence alleges that a *known* third party suspect committed the offence, there must be a "sufficient connection between the third party and the crime" to justify admitting this evidence: *Grandinetti* at para 47. The accused must point to some evidence tending to connect the third party with the commission of the offence: *McMillan* at 757. Evidence of a third party's means, motive, or opportunity to commit the offence often establishes the requisite nexus: *Grant* at para 24. If there is no evidence to establish such a connection, however, the third party evidence is neither logically relevant nor probative, and is therefore inadmissible. Although the accused may rely upon circumstantial evidence to establish the connection, inferences arising from the evidence must be reasonable, not speculative: *Grandinetti* at para 47; *Tomlinson* at para 74. *Respondent's emphasis*

See also: *R. v. Grant*, 2015 SCC 9; *R. v. Assoun*, 2006 NSCA 47; *R. v. Darwish*, 2010 ONCA 124; *R. v. Spackman*, 2012 ONCA 905; *R. v. Zoraik*, 2010 BCPC 472 at [81], affirmed without addressing this issue, 2012 BCCA 283; *R. v. Mallory*, 2007 ONCA 46; *R. v. Kanthasamy*, [2006] O.J. No. 2198 (C.A.); *R. v. Gallant*, 2019 BCCA 193

The police investigation was not inadequate

278. The appellant in paragraphs 402 and 403(n) of his revised factum erroneously states that the investigation was "essentially completed in a period of 24 hours". Yet continuation reports were recovered in 2018 regarding investigative steps Cst. O'Halloran took months after the offence and after the preliminary inquiry, in September and October, 1983. Nor have the approximately 20 continuation reports he described at the preliminary inquiry been located. *Prelim. T., O'Halloran, p. 267(43) – 268(11), A.B., p. 279-280; CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 7 – 18, 48, 53.1.* But more fundamentally, the appellant makes this allegation and alleges the investigation was inadequate without acknowledging the "paucity" of formal records, or other expected documentation that is no longer available for review (ARF, para. 250). Quite simply, he cannot meet his burden to demonstrate that the investigation was inadequate when there is no complete record of the investigation, and in light of the passage of time.

279. Also, nothing in the list of "glaring inadequacies" the appellant identifies in paragraph 403 of his revised factum is "new". The facts the appellant points to, assuming but not accepting their accuracy or ability to cast doubt regarding his guilt, *would have been addressed at the trial* (of which there are no transcripts). Both trial Crown and defence counsel would have led evidence that filled, explained or highlighted possible "gaps" in the Crown's case, and would have addressed these matters in closing submissions had there not been a guilty plea. The fact that there were weaknesses in the case is not new, as indeed there are in almost every criminal case. The appellant should not be permitted to challenge the import of these weaknesses when he waived the right to do so by pleading guilty.

280. The respondent has filed an affidavit from now retired RCMP member Bruce Hulan, one of the investigators of the Delavina Mack murder in response to the

appellant's allegation that the investigation was inadequate: *CFE, Vol. 2, Tab 7.* He was the first investigator on the scene. He describes the investigation that followed to the best of his recollection in light of the passage of time and his role in the investigation as the exhibit officer, and the incomplete documentary record of the case. The second affidavit of trial Crown Deirdre Pothecary also speaks to the adequacy of the investigation: *AFE, Vol. 2, Tab 30b, paras. 41-45.* This Court should accept Mr. Hulan's description of how the investigation was conducted, understood in accordance with his factual descriptions of how criminal cases were investigated *at that time*, and how investigative steps were recorded by the police members.

281. In the alternative, there are explanations for many of the purported inadequacies, as follows.

No impact from the scene being unattended for a period of time, ARF, para. 403(a):

282. As described in his affidavit and his testimony, Mr. Hulan received a phone call at 6:11 a.m. from Penny Tallio. He was at the Mack home within four minutes, 6:15 a.m. He quickly learned that Delavina had been taken from the living room to the bedroom and found on the bed. As described in paragraph 48 of his affidavit, he collected and seized all items on the bed that would be relevant to the allegation that Delavina had been raped, so they could be forensically tested. This is amplified in his testimony from the preliminary inquiry, where he confirms he took "all the bedclothes": *Prelim. T., p. 4(2-4); p. 5(22-26), A.B., p. 12.* He seized a sock with a blood stain; a towel; another white sock; a white sheet; a red blanket; a pillow and pillowcase with a blood stain. Mr. Hulan told Sam Mack that no one was to enter the bedroom.

283. The appellant has not identified any harm caused to the investigation from the scene being left unattended or unsecured by police. Mr. Hulan had already seized most of the key exhibits from the bedroom *and* taken photographs of the bedroom. Furthermore, Cpls. Watson and Galenzoski searched and photographed the house later that day and potentially relevant evidence was still present and seized from the bedroom, such as Delavina's diaper and the blue blanket covering the window. The room was quite dusty and dirty, and was not ideal for obtaining identifiable fingerprints. Cpl. Galenzoski was not able to obtain any from the surfaces in the room (although Blair

Mack's fingerprint was on a beer bottle in that room). Without some reasonable possibility, grounded in evidence, that the investigation was impacted by the scene being left unsecured, this Court is being invited to speculate that some evidence *might* have been lost.

284. The explanation for why the Mack home was left unsecured is also perfectly legitimate. The police prioritized both the autopsy, which necessitated Mr. Hulan flying with the body to Vancouver, and Cst. O'Halloran interviewing witnesses in an effort to identify the suspect. As described in his affidavit, Mr. Hulan believed that the autopsy was an important source of evidence for the investigation and it needed to be completed as quickly as possible. Mr. Hulan also needed to take advantage of the favourable flying conditions, since poor weather regularly impacted air travel. From that autopsy, the police learned the cause of death, what other injuries occurred, and how the killing may have occurred. *CFE, Aff.Hulan, Vol. 2, Tab 7, paras. 69 – 81.* Cst. O'Halloran decided to interview Blair Mack, Delavina's father, and then to interview the person who had purportedly found the body, the appellant. Both were potentially important sources of information for the investigation and it was perfectly valid for Cst. O'Halloran to prioritize moving the investigation forward by interviewing witnesses, over maintaining a scene in which the most important exhibits had already been seized.

<u>There were neighbourhood inquiries and no critical witnesses would have been ignored, ARF, para. 403(f),(i):</u>

285. Mr. Hulan attests to the diligence and conscientiousness that he and the other members of the Bella Coola detachment applied with respect to the Delavina Mack murder, (*CFE, Vol. 2, Tab 7, paras. 105-114*):

- it was my practice, and the practice of my colleagues, to try to speak to everyone who might have relevant information, including conducting a "neighbourhood canvass";
- it was our practice to speak to anyone who came forward to us with information about a case, or to follow any leads if they were provided to us;
- we had an obligation to and would have investigated matters conscientiously and disclose all relevant evidence inculpatory or exculpatory;

- further investigation would have included trying to speak to the people who were at the Mack home, anyone at the party at Cyril's home, and trying to find people who knew about Phillip Tallio's whereabouts;
- enquiries would have been completed to confirm the information Phillip Tallio provided in his statement;
- the direction of the investigation was determined by interviewing witnesses and the collection of forensic evidence;
- it was not a case of identifying an individual and then building a case against that person but rather identifying a suspect based on witness interviews and conducting investigative enquiries based on fact.

286. Crown counsel in her second affidavit likewise states that she had no concerns that the police failed to follow up on any leads or lines of enquiry. Crown counsel was typically very rigorous in ensuring that the police did a thorough investigation and she would ask them to do further investigation if something needed follow-up, even if a charge had already been laid. *AFE, 2nd Aff.Pothecary #2, Vol. 2, Tab 30b, paras. 41 – 44.*

287. The copies of the continuation reports located by Cst. O'Halloran's widow at their home demonstrate that Cst. O'Halloran did continue to investigate – although, as already pointed out, the full extent of his efforts cannot now be known. The recovered continuation reports show that witnesses approached Cst. O'Halloran with information or with names of witnesses who may have information, and he spoke with several people to find out what they saw or knew. These people were Peter Tallio, Sylvia Brown, Andrene Saunders, Bradley King, Albert "Buddy" Siwallace, Roseanne Andy, Andrew Andy, Elise Andy, Phylis Svisdahl, Louisa Tallio, Ernie Beadle, and Godfrey Tallio. According to his continuation reports, Cst. O'Halloran took formal statements from Peter Tallio, Bradley King, Albert "Buddy" Siwallace, Andrew Andy, Elise Andy, and Phylis Svisdahl – but these statements have not been recovered. *CFE, 3rd Aff.Katalinic, Vol. 5, Exhibit P, p. 365 - 378.*

The police were entitled to consider the appellant's confession reliable and they did follow up on information, ARF, para. 403(j), (k), (l), (n):

288. The appellant submits that the police did not adequately prepare for interviewing the appellant, or assess his confession once obtained, essentially accepting it too readily. The circumstances surrounding the preparation for the interview were canvassed at the trial during the *voir dire*. Again, Mr. Hulan swears that after it was obtained, efforts would have been made to confirm the information Phillip Tallio provided in his statement, and that the police would have continued to investigate the offence. *AFE, Vol. 2, Tab 7, para. 107-110* The appellant refers to the malfunction of the Uher tape during the first part of the appellant's interview using quotation marks and it is apparent he is skeptical of Cpl. Mydlak's testimony – skeptical that the appellant confessed at all. But as set out previously, neither the preliminary inquiry nor trial judge considered the lack of recording anything other than inadvertent human error, and nor did either judge question that the statement was made.

289. Also, although the appellant's confession provided approximately 14 hours after the offence was ultimately ruled inadmissible, it had indicia of reliability that the investigators were entitled to take comfort in. In addition to the inconsistencies between his three statements, there were inherent improbabilities with what he told the police:

- he did not try to wake the grandparents upon "discovering" Delavina;
- he immediately identified the cause of Delavina's injury, that she had been "raped";
- assuming Delavina's mother had asked him to check on the baby or bring the baby to her the time to do so had passed;
- he admitted to standing on Delavina's bed, "to see if the window was open" (the police theory was that he stood on the bed to hang the blanket);
- he said he put a pillow on her head to stop her from crying, which was consistent with the cause of death, suffocation;
- he said he blacked out (which is ultimately consistent with what Dr. Marcus and Dr. Koopman describe);
- he told Cpl. Mydlak he had "sex with a blonde white girl" earlier that night, but was unable to provide any details about her, and then later said that he had sex last a week and a half before (yet there was secretion under his foreskin

consistent with sexual intercourse), *AFE, Aff.McIlwain, Vol. 2, Tab 23, para. 13*; and

- he was arrested without socks on, socks in the bedroom had blood and semen on them, something the investigators could consider (although at the preliminary Gert Mack appears to have identified them as Blair's socks)

290. In addition to the neighbourhood enquiries that would have been done, even the partial police materials that have been located show that the police did follow up on what the appellant said in his warned interviews. Theresa Hood, the appellant's then girlfriend, for example, was interviewed by the police about what she knew about the appellant's whereabouts before the murder, which revealed that either Ms. Hood or the appellant was lying about where he was. Crown counsel had notes in the Crown file about interviews of additional witnesses, including "Buddy Siwallace" who advised that the appellant had not been at his residence before the murder (as the appellant had claimed in his police interview). Cst. O'Halloran interviewed these witnesses and told Crown counsel about what them and/or Crown counsel also interviewed them. *AFE, 2nd Aff.Pothecary, Vol. 2, Tab 30b, para. 44; CFE, 3rd Aff.Katalinic, Vol. 5, Exhibit P, p. 365 - 378.*

<u>The other purported inadequacies are not probative:</u>

291. The appellant considers the police investigation to be inadequate because they disregarded Blair Mack's statement and accepted Lotta Bolton's assertion that she never asked the appellant to check on Delavina (para. 403(b)). He ignores the reality that even if that request had been made, the time to check on Delavina had passed. According to Celestine Vickers, for example, Ms. Bolton had apparently asked the appellant to check on Delavina when she first arrived at the Tallio residence, which apparently would have been about 1:30 or 2 a.m. By 3:30 a.m. (or earlier) Ms. Bolton was asleep on a couch with Blair Mack. It makes no sense that the appellant would need to check on Delavina more than three hours after the request was made, more than two hours after Ms. Bolton had gone to sleep, and when it was already morning. And in the appellant's voluntary statement to Cst. O'Halloran, he stated that she asked him to check on Delavina around 6 a.m., when she was by all accounts asleep. *Prelim.*

T., Vickers, p. 170(31) – 173(16), A.B., p. 181; Nina Tallio, p. 154(8) – 156(5), A.B., p. 165; AFE, Aff.Vickers, Vol. 3, Tab 45, paras. 12 – 24 (for the timing)

292. He argues that there was no follow up with respect to identifying footprints found at the scene (para. 403(m)). What is known is that none of them came from the pair of shoes seized from the appellant when he was detained, a fact trial counsel would obviously have drawn to the jury's attention had there not been a guilty plea. *Prelim. T., Galenzoski, p. 32 – 54, A.B., p. 41 - 63.* He argues that a search warrant should have been obtained to search the Mack house (ARF, para. 403(e)). This was not necessary as Cst. Hulan had already searched the bedroom with Sam and Gert Mack's consent, and officers searched and seized evidence later that day. If the appellant means to allege that the police did not search Cyril Tallio's home, it is not possible without the complete police file to be certain whether the police searched that residence, or whether Nina Tallio or Cyril Tallio provided consent.

293. There is no basis for the appellant's argument that the police should have considered the victim's grandfather an "obvious suspect" (para. 403(d)). There was no evidence at the time to suggest that Sam Mack was a suspect, and if anyone had suggested that he was involved in Delavina's death, the police would have investigated whether he was involved. *CFE, Aff.Hulan, Vol. 2, Tab 7, para. 113.* Given the evidence from the preliminary inquiry, including Sam Mack's, there was nothing at the time (or even now) to suggest that he should have been investigated.

294. Dr. McIlwain conducted a full physical examination of the appellant (para. 403(c)). There is no consequence to the fact that the police did not take a written statement from the mother of the deceased the day her daughter was killed (para. 403(g)), or any purported inconsistency in statements from Blair Mack (para. 403(h)).

295. The appellant alleges that Cyril Tallio's whereabouts were unaccounted for after Delavina was discovered (para. 403(i)), but in fact both Celestine Vickers and Nina Tallio's testimony at the preliminary inquiry establish that Cyril Tallio must have been at the Tallio home. Both testified that Cyril Tallio was asleep on the couch when they went to bed, and that once the alarm was raised he was with them when Blair Mack wanted

them to go to the Mack home. While no one specifically states that Cyril Tallio was in the Tallio home when the appellant first woke up Nina Tallio, it would have only been worthy of comment if he had not been there. *Prelim. T., Nina Tallio, p. 155(26) – 156(5); p. 157(19) – 159(12), A.B., pp. 166-170*

The appellant's fresh evidence does not demonstrate the investigation was inadequate:

296. The appellant in paragraphs 63-69, 76-80 and 404(iii) of his revised factum presents this Court with fresh evidence from individuals who allegedly saw the appellant on the street walking to and from the Mack house: Angela King, Louisa Tallio, Godfrey Tallio and Maureen Tallio. The appellant's purpose in tendering this evidence is apparently to demonstrate that had the police properly investigated they would have interviewed these witnesses, and discovered evidence that is inconsistent with the appellant being the perpetrator of the offence. The respondent's position is that this evidence is not reliable and has little if any probative value.

297. The respondent will be cross-examining Angela King and Maureen Tallio, who say they noted the timing of the appellant walking on the street. After they testify, the respondent will provide further submissions about the potential relevance of the "walking" evidence in general and the admissibility of Angela King and Maureen Tallio's evidence.

298. The respondent objects to the admissibility of the affidavits of Louisa Tallio and Godfrey Tallio. They are both deceased, and the respondent cannot therefore cross-examine them. The appellant has not addressed the admissibility of this hearsay evidence, which cannot be tested. A relevant feature to the respondent's argument is that the appellant apparently has audio recorded statements from these witnesses, what would clearly be the best evidence from these witnesses. The burden is on the appellant to satisfy the Court that these affidavits should be admitted, and he has chosen not to provide the statements to the respondent, or the Court.

299. The respondent's position is that this situation is analogous to the situation in which a witness is testifying having refreshed his or her memory in some way from reading a previous statement. A party is entitled to explore the impact of the statement

on the witness's recollection of the events in question: *R. v. Mitchell*, 2018 BCCA 52, and cases considered within. In the Court of Appeal filing an affidavit is the legal equivalent of calling a witness to the stand. Tamara Levy's affidavit describes the process of interviewing these witnesses (CFE, Vol. 2, Tab 8, paras. 15, 16, 44, 77), and the Memorandums provided to the RCMP describe the previous statements (3rd Aff.Katalinic, CFE, Vol. 4, Tab F, page 84), so if any privilege did exist it has been waived.

300. Regardless, the affidavits are clearly unreliable, and not credible. Louisa's and Godfrey's affidavits are almost identical, including the phrasing of their observations. An affidavit containing language identical to that of another witness may be given less weight: *Wood-Tod v. The Superintendent of Motor Vehicles*, 2020 BCSC 155 at [94]. They are "boilerplates" of each other, yet affidavits should carefully set out the personal evidence of the affiant in the words of the affiant. Furthermore, nothing is said about the quality of their eyesight, whether either of them actually noted the time on a watch or clock within view, and why either of them would have taken note of and remembered the timing of the appellant walking on the street.

301. The appellant in paragraphs 87-102, 121-130 and 404(iv)(1), 404(iv)(2), 404(iv)(3) of his revised factum presents this Court with fresh evidence from individuals who he alleges "saw suspicious activity after the crime", such as evidence of "burning": Roseanne Andy, Colleen Gabriel, Jennifer Andy. The appellant's purpose in tendering this evidence is again to apparently demonstrate that had the police properly investigated they would have interviewed these witnesses, and discovered important evidence that is potentially inconsistent with the appellant being the perpetrator of the offence. The respondent's position is that this evidence is not reliable and has little if any probative value. Roseanne Andy is deceased, so the respondent objects to the admissibility of her affidavit for the reasons earlier presented. Furthermore, she was interviewed by Cst. O'Halloran on October 2, 1983; he wrote a continuation report summarizing what she had to say. She did <u>not</u> report during that interview what she now says in her affidavit. All she reported to O'Halloran was that her son Andrew and her sister Phylis saw some things. The continuation report regarding O'Halloran's

interview with Roseanne Andy is in the 3rd Aff.Katalinic, CFE, Vol. 5, Exhibit P, p. 372 – 373.

302. The appellant's burning evidence lacks any cogency in identifying a third party suspect, undermining the investigation or relevance to the grounds of appeal. The evidence relied on by the appellant indicates two different burning locations, several types of items burned, and several people involved. The two locations are the smokehouse, and the creek. The people implicated in the supposedly burnings are: (i) a woman *believed* to be Gert Mack, (ii) a male who may have been Blair Mack, and (iii) Cyril Tallio, discussed later. Different things were supposedly burned depending on the witness: a green garbage bag, a baby's crib spring (mattress?), sheets and a doll. Further, the time or times of these burnings is unclear, and certainly cannot be said to have occurred before Cst. Hulan attended and seized the most relevant evidence. In particular, the sworn evidence at the preliminary inquiry was that the witnesses' first actions were to call the authorities and to rush Delavina to the hospital.

303. Mr. Hulan has sworn that no fires were burning in the area when he attended the scene at 6:15 a.m. *CFE, Vol. 2, Tab 7, para. 51.* Mr. Hulan also remembers that Cpl. Defer heard a rumour about burning, investigated it, and learned that it occurred days after the murder. *CFE, Vol. 2, Tab 7, para. 110.* The appellant cannot demonstrate that this evidence is reliable or relevant enough to be admitted on appeal.

304. This is an appropriate opportunity for the respondent to comment on the admissibility or relevance of the fresh evidence the appellant has filed and refers to in his statement of facts that speaks generally to (1) sexual assault being rampant in the Bella Coola community at the time; (2) the unwillingness of Nuxalk individuals to speak to authorities; and (3) the "culture of secrecy", such that sexual assaults were not reported. This type of evidence arises in the affidavits of several individuals, as well as the affidavit of Dr. Bruce Miller, AFE, Vol. 2, Tab 24, ARF, set out in the appellant's revised factum in paragraphs 5, 6, 7, 8. These are generalized assertions regarding the "atmosphere" in the community in a further effort, the respondent believes, to undermine the adequacy of the RCMP investigation and the general feasibility of there being many

other unknown individuals in the community who could have committed this horrible crime. This, in turn, is theoretically meant to bolster the appellant's assertion that he did not commit the offence.

305. The respondent's position is that this type of generalized "community character evidence" should not be admitted as it does not further the resolution of the issues on this appeal. It is not probative in that it does not provide a sufficient nexus between a third party and the offence. The presence of other sexual offenders in the community does not mean that they had any connection to the offence. This was the appellant's first sexual offence, as indeed the other sexual offenders at one time were first offenders.

306. This evidence is potentially prejudicial in the sense of wasting the court's time on factual allegations that are of no value to the core triable issues (akin to that described in the context of leading similar fact evidence, *R. v. Handy*, 2002 SCC 56 at [144]-[146]). It also undermines the materiality of the appellant's allegation that the police investigation was inadequate: based on the picture painted by the appellant's evidence, witnesses were not going to tell the police anything anyway.

<u>The appellant cannot demonstrate that Cyril Tallio or Wilfred Tallio were viable alternate suspects that the police could have investigated.</u>

307. The appellant alleges that it is reasonably possible that either Cyril Tallio or Wilfred Tallio are alternate suspects. He argues "there is more 'than a sufficient connection' between" them and the crime in this case, as both are now known child sex abusers in the community. *ARF, paras. 404, 410* He argues that as a result of police tunnel vision they were not properly investigated. He relies on fresh evidence in the form of affidavits from members of the Bella Coola community in support of this submission, described in his revised factum at paragraphs 49-62, 404(iv)(4)-404(v), 405: Person Y, Person X, Bill Tallio, Nina Tallio, Larry Moody, Anna Edgar, Lorna George, Gwen Edgar, Gordon Tallio, Olivia Mack and his own evidence regarding sexual abuse by Cyril. Much of the evidence that the appellant relies upon in these affidavits is inadmissible hearsay, or otherwise inadmissible as irrelevant or speculative.

308. As set out earlier, in order for the appellant to introduce evidence that a third party committed the offence:

- The evidence upon which an accused relies to demonstrate the involvement of a third party in the commission of the offence with which the accused is charged must be relevant to and admissible on the material issue of identity;
- It is essential that there be a sufficient connection between the third party and the crime;
- The 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;
- Courts have shown a disinclination to admit such evidence unless the third party is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value;
- Absent a sufficient connection, the 'defence' of third party authorship lacks an air of reality and cannot be considered by the trier of fact.

309. The respondent's position is that there is no connection between Cyril or Wilfred Tallio and the murder of Delavina Mack, or any possible connection is too remote as a matter of law for this Court to consider. The appellant's general assertion in paragraphs 405 and 410 that each had "opportunity and a history of assaultive behaviour" is not a sufficient connection. The facts upon which he relies are not reliable or sufficiently probative.

Cyril Tallio, deceased

310. The appellant argues that Cyril Tallio is sufficiently connected and a viable third party suspect by proffering the following evidence:

- He was a *convicted* sexual offender and intoxicated that night (Affidavits of Lorna George, Gwen Edgar, Gordon Tallio, the appellant);
- He was seen walking on the street near the Mack house in the early morning hours (Anna Edgar);
- He seen leaving the Mack home with a garbage bag after the offence and smoke was seen coming from the smokehouse ([redacted] (Person Y), Bill Tallio);

- Elsewhere in his revised factum the appellant argues that Cyril is not excluded as a contributor to the partial male DNA profile obtained on the uterine and vaginal tissue samples.

311. The respondent acknowledges that there is evidence that Cyril Tallio was an *opportunistic* sexual offender who lived in the community. What matters is what occurred on the day of the offence. The fact that Gwen Edgar, who was 14 years old at the time said that Cyril Tallio said "obnoxious" things to her and other "young girls" when they attended the party at his house is irrelevant. *ARFE, Tab 5, para. 10.* The appellant's reference to evidence from Richard Edgar (para. 404(ii)) is inadmissible hearsay from a RCMP Memorandum.

312. The evidence that he was seen near the Mack home is not reliable. Cyril Tallio testified at the preliminary inquiry that he fell asleep at 3:15 a.m. and only awoke when Blair Mack was pounding the floor, distraught over Delavina's death, and this sworn evidence should be accepted. *Prelim. T. p. 140(29) – 141(11), AB p. 151 - 152.*

313. In any event, the appellant in his first statement which was admitted at trial placed Cyril asleep and at home when the offence was committed – he told Cst. O'Halloran "everyone had gone to bed", *AFE, Aff. Pembroke, Tab 25, pages 2, 4.* The appellant in his 4th affidavit, sworn July 2019, for the first time suggests that he was in the kitchen before going to the Mack house, implying he would not have seen Cyril if he left the house during the short period of time that the offence occurred. This is not credible, as it is a material change in his evidence.

314. It is irrelevant if Cyril took garbage from the Mack home and burned it, even assuming the fresh evidence that he did is reliable. As set out earlier, Mr. Hulan had already seized all the relevant bedding and items from the bedroom and photographed it. The other investigators attended later and seized, amongst other things, the blanket that the perpetrator been hung over the window and the used diaper. If these items were still at the scene hours later, it is unclear what evidence Cyril supposedly took and burned.

315. He provided a blood sample to the RCMP for the purpose of DNA testing. He provided a statement to the police on July 13, 2011 in which he denied the offence: *CFE, 3rd Aff.Katalinic, Vol. 4, Exhibit H.* He is deceased now, and the appellant never confronted him as being the actual perpetrator. As set out earlier, the DNA evidence is almost certainly the product of contamination, or if the appellant's reliance on it is correct, actually connects him to the offence as much as it does Cyril.

Wilfred Tallio, Sr. - deceased

316. The appellant argues that Wilfred Tallio, Sr. is sufficiently connected and a viable third party suspect by proffering the following evidence:

- He was a sexual offender ([redacted] (Person Y), [redacted] (Person X), Olivia Mack)
- He was seen at the Mack home around 5 to 5:30 a.m. (Anna Edgar);
- His wife Daisy arranged for his "bloody clothes" to be burned (Larry Moody)

317. Again, fresh evidence *alleging* that Wilfred was an *opportunistic* sexual offender living in the community is not enough to establish a sufficient connection to this offence, a murder. The fresh evidence that Wilfred was at the Mack home is unreliable, as Ms. Edgar did not tell the police this when they interviewed her in 2011, and it means nothing other than Wilfred Tallio was awake and on the street, not acting suspiciously, where several of his immediate family members lived.

318. The appellant also alleges that the police failed to interview Larry Moody, from whom they could have learned information about Wilfred Tallio, and that "these facts were never investigated". *AFE, Aff.Larry Moody., Vol. 2, Tab 27; ARF, para. 410.* The appellant's annotation to Mr. Moody's affidavit states that it is admissible as "context concerning the affiant's understanding and as relevant to investigative hearsay". In addition to this not being admissible as "investigative hearsay", the Court cannot consider the "fact" that the box contained bloody clothes belonging to Wilfred Tallio for any purpose without relying on the hearsay from Daisy Tallio for its truth. What is admissible from Mr. Moody's affidavit is only that Daisy Tallio handed him a box and asked him to burn it, and that he saw blood in the bathroom sink. Even so, as set out

earlier, this was not a "bloody crime scene" case, and it appears that blood on the offender was wiped off onto a sock left at the scene. The evidence regarding Olivia Mack's allegations against Wilfred are likewise inadmissible hearsay.

319. Lastly, as discussed earlier, there is no connection between Wilfred Tallio, Sr. and the partial male DNA profiles that appellant relies on as perpetrator DNA.

PART IV NATURE OF ORDER SOUGHT

320. The respondent respectfully submits that the appellant's applications for fresh evidence be dismissed, and the conviction appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Mary T. Ainslie, Q.C.
Counsel for the respondent

Janet Dickie
Counsel for the respondent

Vancouver, B.C.
March 2, 2020

PART V LIST OF AUTHORITIES

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APPENDIX

Detailed statement of facts regarding tissue sample block testing

I. First Testing by Orchid Cellmark in 2011-2012

321. July 6, 2011 - RCMP officers Hall and Robinson attended at the *BC Children and Women's Hospital* and seized seven "tissue samples" (out of a total of 45) from the autopsy of Delavina Mack. The "tissue samples" are small pieces of tissue that had been obtained during Delavina Mack's autopsy, treated with formalin for preservation and then embedded in paraffin wax, and each attached to their own plastic cassette. They are referred to as FFPE – formalin fixed paraffin embedded - tissue blocks. Very thin slices of tissue were taken off the tissue blocks and placed onto slides for microscopic examination. *CFE, Aff.Hall, Vol. 2, Tab 5, paras. 10 – 16*; *Aff.Mah, Vol. 2, Tab 10, paras. 9 – 31*; *Aff.Nasir, Vol. 2, Tab 11, paras. 15 – 16; Aff.Bieber, Vol. 1, Tab 1, paras. 42 – 47; 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 77, 81, 107 and Exhibits LL and VV (photographs of some of the tissue blocks, in Vol. 7).*

322. They were handed to the RCMP by Tony Borodovsky, who advised that they had been stored at room temperature, and could be stored at room temperature. (The respondent notes that the tissue blocks have been kept at room temperature ever since their seizure.) Sgt. Hall transferred the exhibits to the E Division Major Crime Section exhibit custodian (the "Exhibits Facility"). *CFE, Aff.Hall, Vol. 2, Tab 5, paras.10 – 16; 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 79 – 80, 136.* The CMP were advised on May 9, 2017, that, amongst other things, there is no chain of custody for tissue blocks at the BC Children's Hospital; and the tissue blocks were stored in various forensic files, adjacent to tissue blocks from other cases. *2nd Aff.Katalinic, not in the CFE, but filed at the Crown's DNA Application*

323. The seven paraffin blocks were comprised of three vaginal tissue samples (right, mid, rear), a tissue block labelled vaginal laceration, and three tissue samples identified as lesions from the left leg/thigh. Delavina Mack's parents and the coroner were not advised that the samples existed and seized for an investigative purpose. *CFE, Aff.Hall, Vol. 2, Tab 5, paras. 10, 39 – 45*

324. July 19, 2011 – The RCMP made the decision that the police would not proceed with DNA testing of the tissue blocks: *CFE, Aff.Hall, Vol. 2, Tab 5, para. 21.*

325. August 18, 2011 – The appellant's counsel and the *Innocence Project* at that time requested that the tissue blocks be forwarded to *Orchid Cellmark* (later also known

as *Cellmark Forensics* and then *Bode Cellmark*, but will be referred to throughout as "*Orchid*"), a forensic lab. The tissue samples were removed from RCMP Exhibits Facility and submitted to *Orchid* for testing. Jennifer Clay was the *Orchid* representative in New Westminster, B.C. The testing was to occur at *Orchid*'s lab in Dallas, Texas, U.S.A. Dr. Staub was the Forensics Laboratory Director, and Ms. Nasir was the Supervisor of Forensic Casework and the Technical Reviewer. *CFE, Aff.Nasir, Vol. 2, Tab 11, paras. 12, 15.*

326. The object of the testing was to identify male DNA present on the female tissue using Y-STR testing. To do this, *Orchid* proposed a modified extraction process. First, the wax was removed from five of the six sides of the tissue block – the lab attempted to dig out the *entire tissue* from the wax. The tissue was then washed with xylene in order to remove the remaining paraffin wax from the tissue. Both the tissue and the xylene wash were tested for the presence of male DNA. (Although in the end the three vaginal tissues were not tested, just the washes, which is the basis for the respondent Crown's Application in 2019.) *CFE, Aff.Hall, Vol. 2, Tab 5, paras. 22, 35-36*

327. <u>February 8, 2012</u> – A partial male profile was obtained from one of the vaginal washes. This profile was compared to the appellant's DNA profile and he was excluded as a contributor. DNA profiles were obtained from other men who may have been contributors and they were also excluded.

328. <u>June 15, 2012</u> – Jennifer Clay of *Orchid Cellmark* returned the exhibits to Cpl. Robinson in two envelopes that contained any remains from the testing. This included whatever remained from the tissue blocks that were tested, tubes with the DNA extracts, and reagent blanks (which is a device used to ensure the lab's testing conditions are not compromised, and do not have any tissue or DNA from the case itself). *Orchid Cellmark*'s return of the exhibits included instructions which indicated that the DNA extracts had been "dried down", and could be stored at room temperature. Drying down is a process in which liquid is removed from a DNA extract, to ensure long term stability of the DNA. The two envelopes were secured in a temporary exhibit locker. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 83 – 86.*

329. <u>August 2, 2012</u> – The two envelopes were turned over to the Exhibits Facility, where they were stored at room temperature. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 85.*

II. Second Testing by Orchid Cellmark in 2012-2013

330. October 23, 2012 – The RCMP attended at *Children's Hospital* and seized the remaining 38 tissue blocks. The blocks were in a total of two plastic trays, each wrapped in bubble wrap and contained within a manila envelope. They were stored in a temporary exhibit locker, at room temperature. In December 2013, Delavina Mack's parents consented to the RCMP's request for further testing. *CFE, Aff.Hall, Vol. 2, Tab 5, paras. 37-45; CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 92.*

331. December 17, 2012 – The 38 remaining tissue blocks were provided to *Orchid*. The samples were again sent to Texas for testing. The protocol for testing the 38 tissue sample blocks was modified in two ways. First, this time the lab swabbed the outside of the tissue block before removing the tissue sample. Second, *Orchid* only cut out a small piece of tissue from the wax (approximately 20 percent of the tissue), which was consumed during testing. The xylene wash and tissue from the tissue block were tested. Partial male DNA profiles were obtained, one extracted from the uterine tissue, which provided a profile that the appellant cannot be excluded from. Nor can his uncle, Cyril Tallio. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 93; Aff.Nasir, Vol. 2, Tab 11, paras. 37, 41 – 43.*

332. September 2015 – Approximately three years later, the *Innocence Project* on behalf of the appellant requested further testing of the male DNA extracted from uterine tissue sample, by Dr. Sidhu Hadi in Manchester England. *R. v. Tallio*, 2017 BCCA 259, chronology, page 11-13.

333. December 9, 2015 – *Orchid* returned the tissue samples and DNA extracts to the RCMP in a cardboard box, which assigned the following exhibit numbers and methods of storage (*CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 95 – 98, 119*):

- Exhibit 30 – a Styrofoam box was inside the box; with an envelope containing exhibits relating to the DNA sample of Anfin Siwallace (a sample submitted to *Orchid* by the Innocence Project, as a possible contributor). They appeared to have been cooled initially, however were room temperature when they arrived (the ice packs had melted);

- Exhibit 29 - also in the cardboard box were the 38 tissue blocks in their cassettes (with what remained of the tissue sample); at room temperature (and these tissue blocks remain at room temperature);

- Exhibit 28 – also in the cardboard box were the DNA extracts from the testing of the 38 tissue blocks; also at room temperature; and

- reagent blanks from the testing.

334. Everything returned from *Orchid* was placed in a temporary exhibit locker, and stored at room temperature. On December 10, 2015, they were removed from the exhibit locker. Exhibit 28 was opened and the uterine tissue sample DNA Extract tube (marked FR11-0113.21.12.2p) was removed, and exhibit 28 resealed. The uterine tissue sample DNA Extract was designated Exhibit 31. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 97, 99.*

335. Sgt. Robinson contacted Ms. Nasir at *Orchid* on December 10, 2015 and confirmed that the DNA extracts were not refrigerated during transport. Ms. Nasir indicated the exhibits would be "fine if refrigerated now". Sgt. Robinson secured the DNA extracts into a temporary exhibit fridge (uterine tissue DNA extract, ex. 31 and all other DNA extracts, ex. 28). The tissue blocks (ex, 29) and DNA extract of Anfin Siwallace (ex. 30) were placed in a room temperature locker. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 100 – 101.*

336. February 2016 - The RCMP sought the consent of the father of the victim for further testing. It was not provided. The *Innocence Project* was advised that a court order would have to be obtained before the RCMP would release the uterine tissue DNA Extract for further testing. *CFE, Aff.Livingstone, Vol. 3, Tab 13, paras. 34-40.*

337. November 30, 2016 – Notice of Appeal / Application for Extension of Time filed.

338. Between January 19, 2016 to June 2017 – Sgt. Robinson received emails from the Exhibits Facility wanting to know if the DNA Extract exhibits should be kept in a fridge, or moved to a freezer. He advised they could remain in a fridge as this had been the advice from *Orchid*. Generally, the Exhibits Facility was looking to free up space in the fridge, until the end of June when it was raised that the freezer would better preserve the DNA extracts. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 103.*

339. June and July, 2017 – Sgt. Robinson and Cpl. Katalinic contacted *Orchid* regarding exhibit storage. On July 21, 2017, Kelly Damiano, Technical Services Rep for *Orchid* advised that the best practice for long storage would be the freezer (this was confirmed on July 27, 2017). She also advised that *Orchid* did not believe any damage would have been caused by the exhibits being stored in the fridge. This was

communicated to RCMP Exhibits Facility who moved the DNA extract exhibits to the freezer. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 104 – 106.*

III. Testing at The Hague by the NFI

340. June 30, 2017 – The appellant was granted an extension of time to appeal: *2017 BCCA 259 (in Chambers)*.

341. September 7, 2017 – February 22, 2018 – The appellant filed his argument in support of an Application for Release and Further Testing of the Uterine Tissue Sample. (It is heard by the Court on November 7, with supplemental written submissions on January 19, 30, February 16, 20 and 22, 2018).

342. March 12, 2018 – The BCCA ordered that the DNA extract and the uterine tissue sample be sent to the *NFI* for testing: *2018 BCCA 83.*

343. March 15, 2018 – The family planned a ceremony, and the RCMP were requested to attend and bring the remains of Delavina that were to go to The Hague. The uterine tissue block (exhibit 29(a)) was retrieved from exhibits. It was kept in its plastic exhibit bag. It was placed in a small wooden box provided by a victim services employee. The box was never opened during the ceremony and was returned the next day to the Exhibits Facility. The tissue block was at room temperature as it has always been. The uterine DNA extract was not taken out of the freezer or taken to the ceremony, as the appellant alleges in paragraph 17, footnote 7. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 108 – 111.*

344. April 6, 2018 – Cpl. Katalinic contacted *Orchid* regarding transport of the DNA extract to The Hague, and was advised that since the DNA extract had been stored in a freezer, it would be best to transport it at that temperature, to reduce the likelihood of any condensation inside the tube, which could alter the re-hydration process. A scientist at the RCMP National Forensic Lab agreed that the DNA extract should be transported frozen. It was recommended that the DNA Extract be packaged in a cooler with ice packs or dried ice. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 112 – 113.*

345. April 7 – April 9, 2018 – The RCMP transported the uterine tissue block and the DNA Extract to The Hague. The DNA extract was transported in a Yeti Brand cooler with ice packs. The uterine tissue block was transported at room temperature. On April 12, 2018, the lab technicians at the *NFI* confirmed the DNA extract was cold when they received it. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, paras. 114 – 116.*

346. August 31, 2018 – Dr. Kal of the *NFI* provided his Report, which includes a description of the "Possibility for Further Testing". *AFE, 2nd Aff.Kirkpatrick, Tab 19 – the affidavit is missing alternate pages despite the stamped pagination*

347. September 11, 2018 – As a result of defence disclosure request, Dr. Kal advised that the uterine DNA extract had not been dried down (which would have been *Cellmark's* responsibility). *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 118.*

348. September 18, 2018 – *Orchid* was consulted, as the RCMP located manifests establishing that all of the DNA extracts were dried down, except that one could not be located in relation to the uterine DNA extract. *Orchid* stated that when the exhibits were being returned in December 2015, there was a rush to return evidence, and that it takes time to dry down samples. *CFE, 3rd Aff.Katalinic, Vol. 4, Tab 14, para. 119.*

349. May 9, 2019 – At case management the respondent advised that it is contemplating an application for further testing in light of an interview in late April with Huma Nasir regarding the *Orchid* testing. That application could not be heard until September 3, 2019 due to the anticipated opposition of the appellant and the intervenor, and counsel's schedules.

350. September 6, 2019 - The Court granted the respondent's application for further testing: 2019 BCCA 330. The tissue samples and DNA extracts were delivered to the *BCIT Forensics Lab* on September 9, 2019. The order was later varied to permit testing of male DNA discovered in the wash and swab extracts.

351. November 4, 2019 – The *BCIT Forensics Lab* provided its Report. *CFE, Aff.Steen, Vol. 1, Tab 6*