Court of Appeal No. 44096
Vancouver Registry

IN THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

Between:

REGINA

Respondent

And:

PHILLIP JAMES TALLIO

Appellant

Appellant's Reply to Respondent's Revised Factum

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

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1. This Reply is to the Crown's Revised Factum filed March 2, 2020. The Crown has attempted to reorder the grounds of appeal. The appellant's position is that this significantly muddies the approach the appellant has taken to this appeal in terms of attempting to simplify and focus the issues. The appellant's approach to issues was to deal firstly with concepts that do not engage the guilty plea or ineffective assistance, concerning DNA, jurisdiction and inadequate investigation. If the Court agrees that any or a combination of those issues are dispositive, the appellant submits that it would be unnecessary to delve into the background of the plea and the conduct of trial counsel.

2. The appellant will present and argue the appeal as outlined in his Revised Factum filed on February 10, 2020 and posits that the concepts of miscarriage and the interests of justice are the overriding issues for the Court to consider.

3. The Crown attempts to frame the issue of withdrawal of the guilty plea as the primary driver of this appeal. In doing so, the Crown reductively turns to the traditional legal test (*Adgey/Wong*) and essentially disregards the concept of miscarriage as it relates to ineffective assistance of counsel.

4. In advancing its position, the Crown states that it now "appears" that the appellant agrees that his trial counsel had instructions (Respondent's Revised Factum "RRF", para. 14). The Crown simply ignores that the appellant specifically adverted to this issue: that there are clearly divergent accounts of what transpired in the Fall of 1983. The appellant does not resile from his account, that he did not instruct counsel to enter a plea, and recognises that there is a conflict in terms of that discrepancy. The appellant's position is that this Court may never fully be able to reconcile or adequately address that discrepancy. Nor is it necessary for the Court to do so.

5. The appellant asks this Court to focus on trial counsel's approach to the plea in the context of trial counsel's competence in evaluating admissibility, and duty to inform the appellant about the strength of the case against him. The Crown states that, because the appellant's position is that he never "even heard" any purported legal advice, that he apparently cannot then fall back on an analysis of the informed nature of the plea. The comments made by the SCC in *R. v. Wong*, 2018 SCC 25 at paragraph

36 provide guidance in this regard, adverting to the concept of "reasonable possibility" as the applicable standard.

6. The discrete issue that the appellant asks this court to consider is an assessment of what "informed" means in the context of a guilty plea. In *R. v. D.G.M.,* 2018 MBCA 88, the court made the following comments:

> [30] The next question is whether the failure to provide any advice regarding the tactical advantages and disadvantages of re-electing from a jury trial to a judge-alone trial and as to whether to testify affected the fairness of the trial process.
>
> [31] In R v Stark, 2017 ONCA 148, the accused was arguing ineffective assistance of counsel because he was not given an adequate opportunity to consider electing his mode of trial. Lauwers JA, speaking for the Court, stated (at paras 17-18, 20):
>
> > The elements of the defence that an accused person is entitled to control were discussed by G. Arthur Martin, as he then was, in his seminal article entitled *The Role and Responsibility of the Defence Advocate* (1969-70) 12 Crim. L.Q. 376. He mentioned three defence decisions that only the client can make: how to plead; whether to waive a trial by jury where that is permissible; and whether to testify on his own behalf. There are doubtless others. Mr. Martin made the following observation, at p. 387:
> >
> > > Obviously, neither counsel nor anyone else can deprive an accused of his fundamental rights. If the accused insists on giving evidence or insists on a jury trial, contrary to counsel's advice, counsel cannot, as a matter of law, prevent him from exercising those rights.
> >
> > In my view, the right to elect the mode of trial under s 536 of the Criminal Code is one of those fundamental rights that counsel cannot take from a client and on which the client is entitled to be adequately advised by counsel.
> >
> > If an accused receives no advice from counsel as to his options, or the advantages and disadvantages of the respective options, then the accused has effectively been denied his right to choose his mode of trial under s. 536 of the *Criminal Code*. The miscarriage of justice lies in proceeding against the accused without allowing him to make an informed election, and the accused need not establish further prejudice. What the accused might or might not have done had he been aware of his options is not relevant.
>
> [32] While the Court in *Stark* was dealing with the right to elect the mode of trial, these comments apply equally to the decision of whether to testify, which was identified in *Stark* as another fundamental right of an accused and about which

he was entitled to receive advice from his trial counsel before making a decision as to how to proceed.

7. *D.G.M.* addressed the issue of an accused decision to testify. It referenced the case of *R. v. Stark*, 2017 ONCA 148, which addressed the issue of mode of trial. Consistent with the reference to the "seminal article" *The Role and Responsibility of the Defence Advocate* (1969-70) 12 Crim. L.Q. 376, the appellant submits that the same considerations, relating to "advice about the advantages and disadvantages related to the crucial decisions" would also apply to advice relating to a decision to plead guilty.

8. Though the appellant states that he did not instruct his counsel to plead guilty, the existence of that position does not preclude this Court from engaging in an assessment of the informed component of the *Adgey/Wong* analysis, nor of an assessment of the appellant's subjective state of mind, as outlined in *Wong*. The Supreme Court's analysis in *Wong* is that, within the context of a subjective framework, where there is a *reasonable possibility* that the appellant would not have plead guilty, then the plea was uninformed. It is not predicated on issues related to communication between an accused and his lawyer. Rather, it is an objective analysis of what reasonably constitutes being 'informed'. The appellant has filed an affidavit that he would not have plead guilty. This affidavit does not conflict with his position that he never discussed the plea with his trial counsel. It is simply an acknowledgment of what the appellant has consistently stated over time.

Mr. Tallio's Cognition

9. Justice Davies recognized the appellant's cognitive limitations. In the *voir dire* regarding admissibility of the "evening statements", Justice Davies accepted that the appellant had the cognitive functioning of a 10 to 12-year old, "a boy with an intellectual level far below his years" (AB483). The scope of the appellant's cognitive limitations, and how those limitations impacted the context of communication between the appellant and his counsel, were not well understood in 1983. Advancements in the area of understanding cognition have unquestionably evolved in the intervening decades. Even with the intervening decades, the law in this area calls out for further refinement in terms of grappling with the issue of how cognition affects an accused's ability to instruct counsel and be 'informed', assuming, as here, that an accused is found fit to stand trial.

The Crown's approach is that there is essentially no difference between an accused with a limited '10-12' year old intellect (i.e., the appellant) and an accused with a law degree, in terms of analysis. What this suggests at the very least, is that an objective analysis of what informed means (within the *Wong* subjective framework) is perhaps the only fair way in which to assess the matter.

10. The appellant submits that this Court should, as a starting position, accept Justice Davies finding concerning the appellant's cognitive state and then engage in the 'informed' analysis. Because the Crown goes to considerable length to attempt to undermine evidence of the appellant's cognitive state, going so far as positing that the appellant was, and is in fact, "bright" (which is unfounded) the appellant is compelled to address the Crown's position.

11. The Crown relies upon the affidavit of Dr. Dugbartey, filed in December, 2019. Dr. Dugbartey attacks the report completed by the Asante Centre and attempts to undermine its approach. The appellant has filed a response by Dr. Conry, to address Dr. Dugbartey's claims. Dr. Conry practiced as a registered psychologist until her retirement in December 2016, with expertise in Fetal Alcohol Spectrum Disorder, and she provided the neuropsychological evaluations of the appellant at the Asante Centre.

12. The Asante Centre's evaluation offers the most comprehensive understanding of the appellant's cognitive abilities and his intellectual disabilities, which he suffered from at the time of trial and continues to suffer from today. The Asante Centre did not find that he does not have FASD, contrary to the Crown's claim (para. 154, RRF). At paragraph 65 of her affidavit, Dr. Conry confirms that the appellant *most likely does have FASD*, but that the Asante Centre was restrained in making this definitive diagnosis because they did not have access to his pre-natal records.

13. The Asante Centre/Dr. Conry's findings relied upon objective standardized testing and found that the appellant's thinking, reasoning and problem-solving abilities are concrete, not abstract, and that he has particular deficiencies in language processing. Other highlights from Dr. Conry's affidavit include her explanation that the Asante assessment is indeed a forensic assessment (paras. 7-8); and that there is no substantial change in the appellant's abilities from 1983 to today (paras. 60-63).

14. Dr. Conry reviewed Mr. Tallio's historical materials and social worker Bernard Macleod's statement, among many other documents. These records do not represent what the Crown argues they do. For example, the Mill Hill and Ravens Matrices tests are not reliable tests and they (like the other tests the Crown relies on) do not prove that Mr. Tallio is bright (paras. 31-33). Further, at para. 19 of her affidavit Dr. Conry explains: "A person with an IQ in the dull-normal or low average range may give the impression of being competent, while experiencing significant disabilities in other important cognitive areas." Exhibit "B" to Dr. Conry's affidavit assists greatly in understanding this reality in the FASD context, explaining that deficits caused by FASD "are often "invisible" in that there is no outward indicator of impairment, making the condition difficult to identify by laypersons such as police and lawyers" (p. 23, Ex. "B").

15. The Crown's characterization of Mr. Macleod's evidence is also misleading. Mr. Macleod's involvement with the appellant ended in 1981—*two years* before the period relevant to this appeal. Further, Mr. Macleod is not qualified to comment on what the appellant understood. He was a social worker, not a psychologist with decades of FASD expertise. He can only recount his own direct observations; his speculations as to the appellant's cognition are inadmissible.

16. There are many factual corrections to be made in the Crown's factum, too many to delve into in this limited Reply. The appellant will discuss only several as examples.

The Evidence of Blood and Semen

17. The Crown specifically states that "there was not much blood produced during the offence" (para. 207, RRF). This is a stark misstatement and is apparently an attempt to minimise the fact that there was no blood found on the appellant. Gert Mack saw "blood between her legs" (AB102, L18) and, more significantly, Dr. Taylor, who conducted the autopsy, stated (in chief) (AB85, L40-44):

> Firstly, there -- the degree of bleeding into the tissues surrounding the wound indicates that the child was alive when the injury occurred. Secondly, the wound was quite large and I would expect such a wound to bleed quite heavily.

18. Dr. McIlwain testified at the preliminary inquiry that he checked the appellant's pubic area and found no blood (AB197-198). The trace of blood that was found on the appellant's shorts was insufficient to test and could have been there for weeks or years

(AB219). Dr. Elsoff testified that there was no blood found on the appellant's undershorts (AB229) and he agreed that there was a likelihood that there would be traces of blood and semen from pulling one's undershorts up (AB231, L2-8).

19. The Crown states (para. 208, RRF) that the appellant had an opportunity to clean himself. If he did this, why then, did Angela King, Maureen, Louisa, and Godfrey Tallio not see any blood on his clothes while he ran from the Mack's house? These were the same clothes that Nina Tallio and Celestine Vickers recalled him wearing during the party and the same clothes he was detained in. And how, then, did Dr. McIlwain find traces of moist secretions under the foreskin? The Crown's attempt to recreate what happened is simply speculation and inconsistent with the physical facts that were found.

Mischaracterising Dr. Koopman's Evidence

20. The Crown argues that Dr. Koopmans 1983 notes "confirm that the appellant never denied speaking to Cpl. Mydlak, or for that matter Dr. Pos" (para. 105, RRF). Dr. Koopman's notes do not confirm this, nor do they support the other negative inference arguments the Crown makes. Dr. Koopman's notes do not contain any mention of discussing the statements to Cpl. Mydlak or Dr. Pos with the appellant. Further the appellant does not deny speaking to Cpl. Mydlak; rather he denies confessing to him.

Inaccurate Chronology

21. The Crown relies upon the "Solemn Declaration" signed by Marie Spetch in 2011. Mrs. Spetch's sworn affidavit should be relied on rather than this document. The meeting between Ms. Spetch and the appellant at the Vancouver pre-trial centre, as recounted by Mrs. Spetch, took place *prior* to when the trial commenced. Mr. Rankin states that he discussed the plea bargain with the appellant. Mr. Rankin states that he did so during the weekend between Oct. 28 and Oct. 31, 1983. The appellant *could not* have expressed that Mr. Rankin pushed him to take a plea bargain before the plea bargain discussion even took place. It is unclear whether Mrs. Spetch meant to refer to her understanding of what occurred in hindsight. The relevant part of her evidence concerns her own observations of the appellant related to his cognition, which is corroborated by Dr. Koopman's October 21, 1983 interview notes of Mrs. Spetch.

No Other Evidence

22. The Crown states that trial Crown's position, that the case would have gone to the jury even if the Pos statement was ruled inadmissible, is somehow supportive of the fact that the jury could have convicted the appellant because he was present at the scene (which the Crown *claims* was "highly incriminating"). This position is simply unfounded. Judge Pothecary stated that the case would have gone to the jury to preserve a Crown right of appeal. As confirmed by Judge Pothecary, there was no evidence that could have been relied upon to convict the appellant absent the Pos statement, with the alleged statement to Cpl Mydlak already found to be inadmissible.[1]

Dr. Marcus's Typographical Error

23. The Crown states (para. 128, RRF) that Dr. Marcus recounts that the appellant told him that "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." The word "myself" was a typographical error, as Dr. Marcus was clearly referring to a quote from the Mydlak interview. This is clear from the reading of the rest of the Marcus's letter. On page 4, Dr. Marcus wrote:

> "It is noteworthy that 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."

24. The letter further states; the "type of statements reported here" include the appellant's statements to Dr. Marcus that "I didn't do it" and "I know for a fact it wasn't me" (p. 4). Crown's reference to this Marcus passage as a separate inculpatory statement is troubling, as the issue of the "Mydlak" typographical error was discussed at the extension hearing, and in various case management conferences. The Crown's continued reference to this is an example of its tunnel vision towards this case.

Unqualified DNA Witnesses

25. With regards to DNA, the Crown relies on the affidavits of Mr. Steen Hartsen, Ms. Christine Crossman and Mr. Richard Mah. The appellant submits that these individuals

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[1] First Aff. Deirdre Pothecary, para. 12.

are not qualified to be giving the opinions they provide in their affidavits concerning the *Tallio* DNA evidence and will make detailed submissions to this effect at the appeal.

Contamination by BCIT

26. Dr. Hampikian attests in his fifth affidavit that BCIT failed a negative control while processing the *Tallio* samples.[2] BCIT *contaminated the samples,* which is extraordinarily ironic given that their task was to assess contamination. The contamination most likely came from BCIT's own lab personnel.[3] This is a cause of great concern.

27. Dr. Hampikian notes that BCIT used several enhancing methods that required extra manipulation of samples and are prone to detect very small amounts of contaminating DNA. These sensitive methods show that BCIT itself is contaminating low-level DNA samples, finding DNA that was not present prior to BCIT's own contamination of the samples. Orchid Cellmark—one of the most trusted laboratories in the world—did not contaminate any controls or evidence samples.[4] The contamination came from BCIT. BCIT also experienced other contamination events in other cases in the 24 months leading up to its *Tallio* testing.[5] Further, BCIT failed to utilize an independent auditor for its internal audit, which is required for impartial evaluation.[6]

28. The appellant submits that given the contamination caused by BCIT, none of the lab's testing can be relied upon. Even if the testing were relied upon, the partial profiles located by BCIT are not meaningful. The only samples of potential interest are two vaginal samples: 17j and 17k (corresponding BCIT numbers 01-C and 01-F). However, neither are statistically significant, with only a single locus located in 17j and four loci located in 17k. These loci are present in Phillip and Cyril Tallio's Y-STR profiles and were also found in the uterus sample (F-47523-129-11/FR11-0113-21.12.2) which is currently held by the Netherlands Forensic Institute. However, as is the case with the uterus sample, numerous males in the interrelated Nuxalk community (and elsewhere)

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[2] Fifth Aff. Dr. Hampikian, paras. 11-12.
[3] Fifth Aff. Dr. Hampikian, para. 12.
[4] Fifth Aff. Dr. Hampikian, para. 20.
[5] Fifth Aff. Dr. Hampikian, para. 18.
[6] Fifth Aff. Dr. Hampikian, para. 19.

would also possess the same loci in their own Y-STR profiles.[7] Therefore, even if 17j and 17k are not contaminant DNA, they cannot be utilized to incriminate the appellant.

"Psychiatric Confession"

29. The respondent submits (para. 182, RRF) that "[t]here was nothing preventing Crown counsel leading a 'psychiatric confession' at the time from Dr. Pos". If the respondent is referring to a confession obtained during a forensic psychiatric exam, then the confession could have only been used by the trier-of-fact to give weight to a psychiatric opinion that it informed. Under no circumstance could the trier-of-fact use the admission for its truth and a limited instruction had to be given to that effect.

30. The respondent submits that Mr. Rankin and Ms. Pothecary "anticipated that the admissibility of Dr. Pos' testimony would be decided after a *voir dire*."[8] This appears to be the case. Ms. Pothecary states, "I intended to call Dr. Pos in a *voir dire* to confirm the admissibility of the statements made by Mr. Tallio to him during his assessment."[9] Mr. Rankin states, "Because Dr. Pos was not a prototypical person in authority, I believed that I would likely have to call Mr. Tallio to give evidence on a voluntariness voir dire."[10]

31. Mr. Rankin believed that he would have "to establish" that Dr. Pos was "a person in authority", so that he could challenge the voluntariness of the appellant's putatively incriminating statement to Dr. Pos.[11] Ms. Pothecary "believed that Dr. Pos would be considered a person in authority, thereby necessitating a *voir dire.*"[12] The only reasonable and logical inference to draw from these depositions is that *both* Mr. Rankin and Ms. Pothecary presumed that the prevailing issue in relation to Dr. Pos would be whether the incriminating statement that the appellant purportedly made to Dr. Pos during a court-ordered forensic examination into the appellant's mental condition at the FPI would be admissible against the appellant for the truth of its contents.

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[7] Fifth Aff. Dr. Hampikian, paras. 22-23.
[8] Respondent's Revised Factum, para. 183.
[9] Second Aff. Deirdre Pothecary, para. 37.
[10] Aff. Phillip Rankin, para. 67.
[11] First Aff. Phillip Rankin, para. 67.
[12] Second Aff. Deirdre Pothecary, para. 37.

32. On this appeal the Crown seems to take this implication at face value, noting, "What the appellant does not substantively address in his revised factum is voluntariness."[13] The respondent wishes to make voluntariness significant to this appeal because the respondent submits that Ms. Pothecary did not intend to call Dr. Pos to testify as an expert witness ("Dr. Pos was not being called as an expert in the trial.").[14]

33. The submission that Ms. Pothecary intended to call Dr. Pos as a fact witness is contentious in its own right. The affidavits prepared by Ms. Pothecary or Mr. Rankin do not indicate or suggest that this was Ms. Pothecary's clear intention or Mr. Rankin's clear understanding.

34. The respondent takes the position that authoritative decisions about the potential evidentiary uses of expert opinion evidence, such as *Vaillancourt*, *Perras* and *Abbey*, are irrelevant to this appeal because they "were cases in which the statements were part of the *basis* for the doctor's expert opinion"[15] and, in the respondent's view, Ms. Pothecary never intended to call Dr. Pos to provide an expert opinion.

35. The Crown incorrectly limits the scope of the abovementioned cases when it submits that 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."[16] Rather than accept clear language from these cases to the contrary—for example, "The law is clear that, had evidence been led as to what, if anything, the accused told Dr. Demay in the course of his examination, it could not have been received as a confession"[17]—the respondent submits that a different line of authority was in place for forensic psychiatrists who might be called as fact-witnesses to reveal confessions by accused patients, but the Crown never establishes the authority for this proposition.

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[13] Respondent's Revised Factum, para. 187.
[14] Respondent's Revised Factum, para. 196.
[15] Respondent's Revised Factum, para. 196.
[16] Respondent's Revised Factum, para. 197. Emphasis added.
[17] *Perras* (CA), para. 18.

36. The only decision that the Crown submits to support this proposition is *Stewart* (Alta CA),[18] which stands for precisely the position that the appellant maintains on this appeal. The ratio of *Stewart*, conspicuously circumvented by the respondent, is that a forensic psychiatrist may indeed testify as a fact-witness for the Crown if the information he or she reveals was provided to him or her by the accused person *after* the psychiatrist has completed his or her formal assessment of the accused person and reached a relevant opinion in relation to the accused person's mental condition. Having been told incriminating information *outside of or beyond* his or her role as a forensic psychiatrist, the issue then becomes whether the psychiatrist was a non-obvious person in authority when he or she was provided incriminating information.

37. *Stewart* actually confirms the fundamental principle reflected in cases such as *Vaillancourt*, *Perras* and *Abbey*. Mr. Stewart revealed a piece of incriminating circumstantial evidence to a Dr. Cantor *after* Dr. Cantor told him that the was fit to stand trial: "there was some general discussion which resulted in Dr. Cantor concluding that the appellant was fit to stand trial. Dr. Cantor *then* advised the appellant that he had seen the body of the deceased and then the appellant blurted out the information in issue."[19] More critical yet, McGillivray, C.J.A. expressly distinguished the post-fitness opinion statement made by Stewart to Dr. Cantor from statements made by convicted persons to psychiatrists for the purpose of dangerous offender hearings: "Here," McGillivray, C.J.A. wrote, "the statement was not related to the doctor's opinion; indeed, he had arrived at his conclusion as to the appellant's fitness to stand trial *before* the statement was made."[20]

38. The respondent has no evidentiary basis for believing that the admissions that Ms. Pothecary intended to introduce into evidence through Dr. Pos were made by the appellant outside or beyond the parameters of Dr. Pos's fitness assessment, so *Stewart* had no relevance to the case at bar. It did not even purport to restrict the authority of *Vaillancourt* or *Perras* (*Abbey* was decided afterward). However, the respondent further relies upon *Stewart* because it "recognized that different considerations apply if the

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[18] Respondent's Revised Factum, paras. 199-200.
[19] See *Stewart* at para. 5. Emphasis added.
[20] See *Stewart* at para. 22. Emphasis added.

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].*"[21] The court in *Stewart* quoted approvingly from Gale, C.J.O. in *Vaillancourt* (CA), who interpreted the majority decision in *Perras* (SCC) as implying that a voluntariness *voir dire* might be necessary if the Crown wished to tender through a forensic psychiatrist "admissions by the accused as to facts which would be relied upon by the Crown to prove the guilt or innocence of the accused."[22] However, such an implication does not flow intelligibly or reasonably from *Perras* (SCC), for such an implication would open the door for Crown prosecutors to abuse the forensic psychiatric system that is in place for a compelling public purpose.

39. Such an implication would lead to a practical and theoretical absurdity. By the Crown's logic, Ms. Pothecary could have called Dr. Pos to testify at the appellant's trial, to give an expert opinion about the appellant's mental condition, if he had a relevant opinion to give. The Crown concedes that in this circumstance Dr. Pos could have revealed to the fact-finder admissions that the appellant had made to him during the interview, but that *Abbey* and associated cases prohibited those admissions from being used for their truth—that "the expert's recitation of the facts they relied upon is <u>not</u> proof of them."[23] However, the respondent asks this court to accept that, if Ms. Pothecary had in fact called Dr. Pos to give an expert opinion, she could have in turn asked the presiding judge to permit Dr. Pos *to switch his evidentiary role in the very same trial*–i.e. from expert to fact witness—and to instruct the jury that they could now consider the appellant's admission for the truth of its contents, presumably on the basis that Dr. Pos was a person in authority who obtained the admissions voluntarily. This is an absurd proposition that is not remotely supported by the common law. The trial judge would have had to give the jury a contradictory instruction to the effect that "anything" the appellant might have told Dr. Pos in the course of the psychiatric examination may not

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[21] Respondent's Revised Factum, para. 199.
[22] See *Stewart*, para. 22.
[23] Respondent's Revised Factum, para. 197. Emphasis added.

be used "as a confession,"[24] but it may be used as a confession because the Crown called Dr. Pos to testify about the same evidence in two distinctive capacities.

40. It is highly instructive that the Crown prosecutor in the *Perras* case assured the trial judge, "it was never my intention to attempt to lead from [Dr. Demay, a forensic psychiatrist] any statement *of any kind* which may or may not have been made by the accused person during the course of the examination."[25] The respondent on this appeal argues as if such a decision was idiosyncratic as opposed to having been based on fundamental ethical-legal principles. The appellant has been unable to locate a case in Canadian criminal law in which a Crown prosecutor has attempted to elicit an admission made by an accused person to a Crown-led forensic psychiatrist during a forensic examination for the truth of its contents. The respondent submits *without authority*[26] 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",[27] and yet does not point to a single piece of common law in support of this proposition. *Stewart* does not provide such authority because it turned upon the fact that the admission in question was provided *after* the psychiatric examination had taken place and the opinion had been formed.

41. Allan S. Manson commented upon the narrow approach that *Stewart* took to the issue of voluntariness (of the statement given *after* the expert opinion was formed), and observed specifically:

> A more comprehensive analysis, including consideration of psychiatric diagnostic techniques, may have persuaded the court that it is naive to assume that an assurance of confidentially could only produce truthful results in the circumstances. Moreover, the need for candour and co-operation to enhance the validity of the assessment may, in the context of an assessment requested by the court to assist in determining whether the accused is fit to stand trial, have persuaded the court to distinguish the statement made to the psychiatrist from other out-of-court statements. In this way, it could have been

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[24] Again, see *Perras* (CA), para. 18.
[25] See *Perras* (SCC), para. 3. Emphasis added.
[26] A singular, generic reference to a textbook on mental disorders and the criminal law, published in 2019, is *no* authority in this respect. See Respondent's Revised Factum, para. 201.
[27] Respondent's Revised Factum, para. 201. Emphasis added.

> argued that *the public interest in promoting the integrity of the administration of justice required the exclusion of the statement.*[28]

Such an argument is implicit in *Abbey* (SCC), which was delivered shortly after Manson's article was written.

42. Academic opinions from Paul Lindsay (published in 1977),[29] Professor Ed Ratushny (about self-incriminating statements generally, published in 1978),[30] and R. Rogers and C. Mitchell (published in 1991 as a handbook),[31] do provide *any* common law support for the respondent's submission 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."[32] They do not provide any authoritative support for the respondent's submission whatsoever. Neither does *Warren* (CA), a 1973 decision by the Nova Scotia Court of Appeal, support the respondent's contention.[33] In that case the trial judge permitted the Crown prosecutor to cross-examine a forensic psychiatrist (Dr. W. K. Caird) *called by Mr. Warren to provide expert opinion evidence—not* called by the Crown as a fact witness—in relation to statements that Mr. Warren had made to the psychiatrist. On appeal, Coffin, J.A. for the court concluded simply that information provided to a psychiatrist by an accused person during a forensic examine is not "privileged" and that a psychiatrist "when examining a patient" is not a person in authority.[34] The Nova Scotia Supreme Court (Appeal Division) clearly misapplied "person in authority" law, because a subject test was applicable to that issue, and it tritely concluded that statements made by accused persons to forensic psychiatrists were not "privileged". The common law had already established that such statements could be presented to the fact-finder in order to shed light on the expert opinion itself. *Warren* did not directly or indirectly broach the

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[28] Allan S. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality," (1982) 27 *McGill L. R.* 196 at 225. Emphasis added.
[29] See Respondent's Revised Factum, para. 200.
[30] See Respondent's Revised Factum, paras. 182 and 198.
[31] See Respondent's Revised Factum, paras. 182 198.
[32] Respondent's Revised Factum, para. 201. Emphasis added.
[33] See Respondent's Revised Factum, para. 196.
[34] *Warren* (CA), para. 51.

question of whether the information elicited by the Crown prosecutor from Dr. W. K. Caird could have been used by the jury as a confession.

43. The remarkable extent to which the respondent cites tenuous cases (that were not binding in BC), as well as outdated and otherwise unauthoritative publications, to support what it claims to be a general admissibility rule about statements obtained during psychiatric examinations is highly indicative of the great paucity of authority for its proposition. The great weight of the common law was that statements against interest made by a patient to a psychiatrist or other mental health professional *during* an assessment or were not "generally admissible" at the instance of the Crown".[35] They were not even *exceptionally* admissible for their truth precisely because of the distinctive socio-legal context in which they arise. The common law established by such Supreme Court of Canada decisions as *Vaillaincourt*, *Perras* and *Abbey* authoritatively governed in the absence of *Criminal Code* provision to the same effect.

44. Dr. Pos had *never* been called as a fact-witness, for good reasons. As of 1977 Crown prosecutors in Toronto *never* called psychiatrists at the METFORS clinic to provide "fact" information or evidence based on their forensic assessments of accused persons.[36] To do so would not only have been unethical; it would have been tantamount to an *abuse* of process. This is what B. T. Butler and R. E. Turner meant when they wrote, "[t]he potential for abuse of the psychiatric legal assessment is great."[37]

45. The respondent is asking this Court to believe that in 1983 a Crown prosecutor in British Columbia simply assumed that Canadian law permitted forensic psychiatrists to reveal to factfinders statements that patients told them (whether exculpatory or incriminatory) *for their truth*, even though Crown prosecutorial agencies elsewhere– consider Ontario and Saskatchewan (as revealed in the *Perras* case)— had given serious thought to the issue and concluded that calling forensic psychiatrists as fact-witnesses would undermine the integrity of the Canadian criminal justice system.

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[35] Respondent's Revised Factum, para. 201. Emphasis added.
[36] See Butler and Turner, "The Ethics of Pre-Arraignment Psychiatric Examination: One Canadian Viewpoint," ((1980) Criminal Reports, 12 CR-ART 84) at p. 88.
[37] Butler and Turner, *ibid*.

46. Ms. Pothecary *knew* that *as a result of a Crown application* the appellant had been detained at the FPI by court *order* when he was examined by Dr. Pos, and she surely must have known that the appellant would have felt obliged to answer the questions put to him by Dr. Pos, a "person in authority," as she understood him to be. A person *in authority* means that he or she has authority over someone else. Under circumstances, it is troubling that Ms. Pothecary, "did not know of *any* reason to believe that Mr. Tallio's statements to Dr. Pos were compelled."[38]

47. Two possibilities are implied by the fact that Ms. Pothecary had hoped to use the Dr. Pos admission for its truth and the fact that Mr. Rankin wished that the admission would not survive an admissibility *voir dire*. One possibility is that Ms. Pothecary intended to call Dr. Pos as an expert witness, that this was Mr. Rankin's understanding, and that neither Ms. Pothecary nor Mr. Rankin considered that *Abbey* and its line of cases governed the limited use to which statements made by accused persons to forensic psychiatrists could be put by the fact-finder. Such statements *were admissible* without the need for a *voir dire* because they could *not* be used for their truth.

48. The second possibility is that Ms. Pothecary did not intend to call Dr. Pos to testify as an expert witness ("Dr. Pos was not being called as an expert in the trial."),[39] but Ms. Pothecary's affidavits do not obviously or necessarily support this submission. Ms. Pothecary states in her first affidavit (at para. 12) that Crown prosecutors had "routinely" called Dr. Pos to provide the court with psychiatric opinions in the 1980s, and she believed that he had the reputation of having a "pro-Crown" bias. Such observations suggest that Ms. Pothecary intended to call Dr. Pos in an expert capacity—that is, to give *opinion* evidence. Ms. Pothecary also states that she intended to put before the fact-finder "Dr. Pos's anticipated testimony regarding these statements".[40] She does not clearly indicate whether she intended to call only the statements that the appellant had made to Dr. Pos during the forensic interview, for their truth, or to support an expert opinion (along with other relevant evidence) as to the appellant's mental condition.

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[38] Second Aff. Deirdre Pothecary, para. 37. Emphasis added.
[39] See the Respondent's Revised Factum at para. 196.
[40] First Aff. Deirdre Pothecary, para. 12.

49. Even if Ms. Pothecary intended to call Dr. Pos exclusively as a fact-witness, this was not Mr. Rankin's clear understanding. Mr. Rankin focussed his attention on Dr. Pos's letter. He states, "While there were some ambiguities in the way the letter was written, Dr. Pos would be able to clear up the ambiguities, if he testified....I was very concerned by this letter. If the conversation *as reported in Dr. Pos' letter* was admitted at trial, and accepted as true, the evidence of Dr. Pos would be very damaging. "[41] "There was a real risk that he [Dr. Pos] would, given an opportunity, amplify his evidence as compared to what was set out in his letter."[42]

50. As a matter of basic evidentiary law, if Ms. Pothecary sought to call Dr. Pos to testify, simply to recall incriminating statements that the appellant had made to him during an FPI examination, Dr. Pos's letter might never have been permitted into evidence. It might have been admissible to refresh Dr. Pos's memory, but this is clearly not how Mr. Rankin imagined the evidence of Dr. Pos unfolding. He contemplated that the letter itself would be the evidence he had to challenge. Indeed, this would have been the case if Dr. Pos had been called as an expert witness, so clearly Mr. Rankin was unclear about Ms. Pothecary's intentions in relation to Dr. Pos's evidence.

51. Mr. Rankin states:

> The Pos statement was a significant evidentiary obstacle in Mr. Tallio's case. I considered various ways of challenging it, including, for a time, discrediting Dr. Pos's evidence. But I was not satisfied that there was a strong possibility of successfully challenging this evidence, including his stature as a leader in the forensic community.[43]

If the mutually understood intent of Ms. Pothecary was to call Dr. Pos as a fact-witness—that is, to have him recall incriminating statements that the appellant had made to him—then the danger to the appellant's case would have simply been that Dr. Pos would have won a credibility contest. The appellant would have denied making the statements and Dr. Pos would have insisted that he had made them. However, if this was the pressing concern, it would seem that Dr. Pos's stature "as a leader in the forensic community" was irrelevant, as would be any "pro-Crown" bias Dr. Pos might

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[41] Aff. Phillip Rankin, paras. 25 and 26. Emphasis added.
[42] Aff. Phillip Rankin, para. 68.
[43] Aff. Phillip Rankin, para. 66.

have had. The issue would have simply been who, as between a psychiatrist and his patient, had the best memory of what was said during a forensic examination. Dr. Pos's credentials and whether Dr. Pos was a person in authority should have been irrelevant.

52. This Court must be concerned that a miscarriage of justice ensued simply because the appellant's plea resulted from plea negotiations in which the two negotiators were not *ad idem* or certainly were not *clearly ad idem* on what was at stake in the negotiation. What was Ms. Pothecary's intention in relation to Dr. Pos: to call him as an expert or as a fact witness? And what did Mr. Rankin understand Ms. Pothecary's intention in this respect to be? Surely Mr. Rankin should not have been bargaining on behalf of the appellant while he was unclear about such a critical issue. The prejudice caused to the appellant by this situation (i.e. a plea based on negotiations between two incompetent parties) is self-evident.

Remedy for Lack of Jurisdiction

53. The appellant disagrees with the respondent's contention that *Re Attorney-General of Saskatchewan and Attorney-General of Canada* (Sask CA) "directly considered" the issue of whether the trial judge had jurisdiction to make a s.465(1) order when he did.[44] Again, over and above the legal errors that the appellant attributes to this Saskatchewan Court of Appeal decision in the appellant's revised factum, the Crown in the Saskatchewan case actually argued about the magistrate's jurisdiction to make a remand order under *s.465(2)(a)*. It was the Court of Appeal's surmise that the magistrate had intended to make the order under s.465(1)(c)(i). Neither this flawed Saskatchewan decision nor the *Mitchell* (Ont. H.C.J.) decision cited by the respondent[45] stand for the proposition that a trial judge had jurisdiction in 1983 to make a s.465(1) order on what was effectively the accused person's first court appearance in a murder case. The same applies to the generic references to academic publications the respondent makes.[46]

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[44] See Respondent's Revised Factum, para. 215.
[45] See Respondent's Revised Factum, para. 215.
[46] See Respondent's Revised Factum, para. 215.

54. The respondent's central argument, that Judge Diebolt had jurisdiction to remand the appellant into the FPI for a forensic psychiatric examination, appears to be that everyone involved in the trial took his jurisdiction for granted. The respondent submits that "there was the jurisdiction to remand the appellant, as the provincial court judge, Crown and defence counsel recognized at the time,"[47] and that "Crown counsel, defence counsel and the judge at the time all understood there was the authority"[48] and thus that, whatever the lawyers and judges believed the law to be was therefore correct.

55. In 1982 James W. Jardine, a senior Crown prosecutor, addressed the *Vaillancourt* (SCC) in the context of psychiatric remands for the Continuing Legal Education seminar in British Columbia. He wrote that:

> "...several Provincial Court Judges in Vancouver are of the view that they do not have jurisdiction to deal with an order for remand under section 464(1)(c) [*sic*] or section 543(2) unless the accused has elected either preliminary hearing or has elected for trial by magistrate without jury, or the offence is an indictable offence where there is absolute jurisdiction in the magistrate to try the case."[49]

56. This Court can safely assume, therefore, that provincial court judges in B.C. in 1983 did not recognize or understand that they had jurisdiction to make s.464(1)(c) remands until certain procedures provided by the "Preliminary Inquiry" part of the *Criminal Code* had been followed. Because the appellant had been charged with murder, those procedures were unclear, and that lack of clarity or certainty of procedure precluded Judge Diebolt from exercising the remand power he purported to have. Mr. Jardine opined that provincial court judges who believed they lacked jurisdiction to exercise s.465(1) remand powers until certain procedures had been followed were "correct."[50]

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[47] Respondent's Revised Factum, para. 25
[48] Respondent's Revised Factum, para. 213.
[49] James W. Jardine, "Pre-Trial Procedures," in *Psychiatric Issues in Criminal Law* (Continuing Legal Education seminar, Vancouver, BC, December 4, 1982), at p.5. Emphasis added. Clearly Mr. Jardine made a typo by referring to s.464(1)(c). He was discussing *Vaillancourt*'s reference to "the applicability of section 465(1)(c) and 543(2)" and clearly meant to cross-refer back to section 465(1), not "section 464(1)," which is not even a remand provision.
[50] Jardine, *ibid*, at p.5.

57. The only remedy that could have followed from Judge Diebolt's decision to order the appellant into the FPI without jurisdiction to do so was categorical exclusion from evidence of any incriminating statements that the appellant made to psychiatric professionals at the FPI. Judge Diebolt's court order was a form of compulsion because it was an institutional detention order and, to use Allan Manson's expression, "candour and co-operation" was needed and expected from the appellant during the FPI examinations.[51] The efficacy of the entire process to which the appellant was subjected by court-order depended upon the applicant's earnest participation, failing which "the validity" of the psychiatric assessments produced thereby would be questionable.[52]

58. The appellant did not participate (i.e. speak) voluntarily with psychiatrists at the FPI and any statements that he made against his penal interests during psychiatric examinations deserved the very same protection provided by the confessions rule. This same submission is precisely the implication of Manson's observation in 1982, that statements made to forensic psychiatrists should be categorically excluded from evidence in order to serve "the public interest in promoting the integrity of the administration of justice".[53] This is sound logic that the appellant asks this Court to accept. The remedy for having made incriminating statements while incarcerated and examined at the FPI without lawful authority for having been placed in the FPI was the exclusion of those statements. This submission is supported by the logic of the confessions rule, but also has a deeper ethical foundation given the exceptional context of a court-ordered psychiatric remand.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of March 2020

for

Thomas Arbogast
Rachel Barsky
Counsel for the Appellant

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[51] Allan S. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality," (1982) 27 *McGill L. R.* 196 at 225.
[52] Manson, *ibid*, at 225
[53] Manson, *ibid*, at 225.

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