COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rees, 2025 ONCA 812
DATE: 20251127
DOCKET: COA-23-CR-0867

Fairburn A.C.J.O., Trotter and Zarnett JJ.A.

In the matter of a reference ordered pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. c-46, by the Minister of Justice to the Court of Appeal for Ontario concerning the criminal conviction of Timothy Rees entered on September 15, 1990.

BETWEEN

His Majesty the King

Respondent

and

Timothy Rees

Appellant

James Lockyer, Jerome Kennedy, K.C. and Jeffery Couse, for the appellant

Karen Papadopoulos and Rebecca De Filippis, for the respondent

Heard: December 10 and 11, 2024, with witness examinations June 24, 25, 26, 27 and 28, 2024 and with additional written submissions June 24, 27 and July 2, 2025

On a reference from the conviction entered by Justice Edward F. Then of the Ontario Court of Justice (General Division), sitting with a jury, on September 15, 1990.

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By the Court:

I. INTRODUCTION

[1] Ten-year-old Darla Thurrott was a precious child who was murdered in her home in March 1989. She had gone to bed on March 16 and her lifeless body was discovered in her bed on the morning of March 17. The postmortem report revealed that the cause of her death was “asphyxia from pressure on the neck” consistent with “manual strangulation”.

[2] The appellant, a friend of Darla’s parents who stayed over at the family home on the night Darla was killed, confessed to her murder in May 1989. Although he later resiled from the confession, he was convicted of second-degree murder and sentenced to life imprisonment with a 15-year period of parole ineligibility in September 1990. This court dismissed his appeal from conviction in June 1994 and, in September 1995, the Supreme Court of Canada refused his application for leave to appeal: *R. v. Rees (T.)* (1994), 19 O.R. (3d) 123 (C.A.) (“*Rees (ONCA)*”), leave to appeal refused [1995] S.C.C.A. No. 72.

[3] The appellant’s challenge to his conviction returns to this court by way of a referral by the Minister of Justice, made pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Minister found that there was a reasonable basis to conclude that a miscarriage of justice had occurred and referred the matter to this court for a “new appeal from conviction”.

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[4] Central to the appellant's challenge is the fact that the police had in their possession, but never disclosed, the "Raymer tape" – a recording of a conversation which took place on March 17, 1989 between James (Jim) Raymer, who lived in the same home as Darla and her family, and a police officer. In the recorded conversation, in response to questioning, Mr. Raymer denied killing Darla, made some statements suggesting prior sexual contact with her, and made others suggesting that he had encountered her on the night of her death and also denying that he had. The appellant submits that the Raymer tape, as well as other evidence led at the appeal before us, points to Mr. Raymer (who is now deceased) as the real killer. The appellant says it also points to a police conspiracy to frame him by suppressing the Raymer tape and fabricating his confession.

[5] On appeal, the Crown accepts that the failure to disclose the Raymer tape led to a miscarriage of justice and that the appeal must therefore be allowed and the conviction quashed.

[6] The main point of division between the parties is on the question of remedy.

[7] The appellant asks that we enter an acquittal. He submits that no properly instructed jury, acting reasonably, could convict the appellant given the fresh evidence, which includes but is not limited to the Raymer tape. In the alternative, the appellant submits that he is entitled to an acquittal based on an application of this court's *Truscott* test and the minority decision in *Bouvette*, which is the latest

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word from the Supreme Court of Canada on remedies in miscarriage of justice cases such as these: *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321; *R. v. Bouvette*, 2025 SCC 18, 448 C.C.C. (3d) 319. In the appellant's submission, it is "clearly more probable than not" that he would be acquitted at a hypothetical new trial. The appellant also maintains, in the further alternative, that the court should engage its remedial discretion and enter an acquittal on other grounds. If this court is not inclined to acquit him, the appellant asks that we order a new trial rather than enter a stay of proceedings.

[8] In contrast, the Crown submits that an acquittal is not available under any of the routes suggested by the appellant.

[9] On the Crown's submission, an acquittal is unavailable through the first route because a properly instructed jury, acting reasonably, could convict the appellant. The Crown argues that even with the new evidence, the case against the appellant remains strong, especially given his confession to murdering Darla, which was ruled voluntary at his trial, and fresh evidence showing that the appellant's DNA was on the shirt Darla was wearing when she was murdered. The Crown maintains that the appellant has failed to show that there was any police conspiracy, which is key to the appellant's case. Nor, contends the Crown, is the case against Mr. Raymer as strong as the appellant says it is.

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[10] The Crown also resists the other routes to acquittal advanced by the appellant. The Crown points out that it is only in an appeal that falls "outside the norm" (*Truscott*, at para. 259) that it is appropriate for an appellate court to engage in the "hypothetical new trial" analysis to determine remedy. In the Crown's submission, appellate courts should limit the use of the hypothetical new trial to "the most exceptional of cases". Here, says the Crown, we do not have such a case and so we should apply the normal test – could a properly instructed jury, acting reasonably, convict – for determining whether an acquittal is available. Nor, according to the Crown, are there other grounds to justify an acquittal.

[11] The Crown takes the position that a judicial stay is an appropriate remedy. If this court instead orders a new trial, the Crown says that it will not proceed because it would not be in the interests of justice. The Crown leaves open the following three options should a new trial be ordered: (1) withdraw the charge; (2) have the appellant arraigned and call no evidence, which would inevitably result in an acquittal; or (3) stay the charge pursuant to s. 579 of the *Criminal Code*.

[12] For the reasons that follow, we admit the fresh evidence. We agree that the conviction must be quashed on the basis of the non-disclosure of the Raymer tape, but conclude that an acquittal is not an appropriate remedy. As we explain, we decline to grant an acquittal because: (1) a properly instructed jury, acting reasonably, could convict the appellant; (2) it is not clearly more probable that the appellant would be acquitted at a hypothetical new trial; and (3) there is no other

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basis upon which to grant an acquittal. Central to our decision not to acquit are the appellant's confession to the murder, the equivocacy of the Raymer tape, and the fact that the appellant's DNA has since been found on the shirt Darla died in. Also key to our decision not to acquit is our conclusion that the appellant has failed to demonstrate that the police were engaged in a conspiracy. Instead, we order a new trial, in keeping with the appellant's position that a new trial would be preferable to a judicial stay of proceedings.

[13] Before explaining our reasoning, it is necessary to go back more than three decades to explain how events have unfolded.

II. BACKGROUND

A. FACTUAL BACKGROUND

1. The people present at 15 Smithfield Dr. on the night of the murder

[14] In September 1987, about 18 months before Darla was murdered, Darla, her mother, Darlene Thurrott,[1] and her mother's partner, Bill Wilson, moved into 15 Smithfield Dr. in Etobicoke. Darla's baby brother, Maurice, was born after they moved in.

[15] Mr. Raymer, who was in his fifties at the time, also lived at 15 Smithfield Dr. His aunt, Margaret Lockhart, explained that, after his mother passed away in 1982, the home was left in the "estate" and held for the benefit for Mr. Raymer. Ms.

[1] Sadly, Ms. Thurrott was murdered in 1997.

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Lockhart arranged for Ms. Thurrott and Mr. Wilson to pay minimal rent in exchange for helping Mr. Raymer with daily tasks, including keeping the home clean and preparing meals for him. She also helped manage Mr. Raymer's affairs because he had physical and intellectual disabilities. He was born with infantile paralysis, which affected the right side of his body. While he could use his right arm, it did not function properly or well, and he walked with a limp. His intellectual challenges were noted by others.

[16] Jim Venditti, a friend of Ms. Thurrott's, moved into 15 Smithfield Dr. after Ms. Thurrott and her family became tenants. Mr. Venditti lived in the basement.

[17] Therefore, at the time of the murder, Darla lived with four adults and one child: her mother; her mother's partner, Bill Wilson; her baby brother, Maurice; Mr. Raymer; and Mr. Venditti. They were all present at Smithfield Dr. on the night of Darla's murder.

[18] The appellant, a friend of Ms. Thurrott and Mr. Wilson, did not live at 15 Smithfield Dr. but stayed there on the night of Darla's murder.

[19] Since there was no evidence of an intruder in the home on the night in question, the pool of suspects was limited to the five adults who slept at the home that night.

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2. The events of March 16 and into the morning of March 17, 1989

[20] Darla was killed sometime after going to bed around 9:00 p.m. on Thursday, March 16, 1989, the last day before her March break began. Her mother discovered her dead body the next morning around 10:00 a.m. Therefore, the events of March 16 and 17 are critical.

[21] The appellant arranged to come over that evening to visit Ms. Thurrott and Mr. Wilson and then to stay the night. At that time, the appellant was working at Islington Ave. and the Queensway, and it was a shorter commute from 15 Smithfield Dr. to his work than it was from his home in Scarborough where, at the time, he lived with his brother, his brother's girlfriend, and her infant child.

[22] That evening, Ms. Thurrott, Mr. Wilson, Mr. Venditti and the appellant partied together, consuming drugs and alcohol. Both Ms. Thurrott and Mr. Wilson repeatedly consumed cocaine in the washroom on the second floor of the home.

[23] The appellant was slurring his speech and "staggering" a "little bit" that evening but needed no assistance in walking, according to Ms. Thurrott at trial. In fact, she had seen him "a lot worse".

[24] Around 9:00 p.m., Darla went upstairs to bed. Darla had one of three small bedrooms on the second floor. Her room was across the hall from Mr. Raymer's bedroom and down the hall from Maurice's bedroom and the washroom. The

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sketch found at Appendix “A” depicts where these rooms were in relation to one another.

[25] Ms. Thurrott initially went upstairs with Darla and read her a bedtime story, “Pinocchio and the Isle of Fun”. That book was still beside the bed when Darla was found murdered the following morning.

[26] After about 20 minutes, Ms. Thurrott left her daughter’s bedroom with the television still on. She did that because, as she said, if you turned Darla’s television off, Darla would wake up. It operated like a night light to her.

[27] When Ms. Thurrott returned downstairs, Mr. Wilson, Mr. Venditti and the appellant were still in the living room, along with baby Maurice.

[28] Around 10:30 p.m., the appellant went upstairs to sleep on the floor in Maurice’s room. Ms. Thurrott gave the appellant a blanket, a sheet and a pillow to use. He asked Ms. Thurrott to set the alarm for 7:00 a.m., to ensure that he did not oversleep for work.

[29] Just before he went to bed, the appellant gave Ms. Thurrott $100 and asked that she buy him some cannabis. At trial, she testified that they had an arrangement that he was going to pick up the cannabis from her after work the next day. She was asked at trial: “Was there any discussion about the marijuana being available in the morning?” She answered: “No, sir.”

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[30] Mr. Raymer, who worked a day shift at Taco Bell on March 16, did not return home until late that evening. After work, he went to St. Wilfred's Anglican Church for choir practice. He arrived home shortly after 11:00 p.m., which was his normal routine on Thursday evenings. After arriving home, he had something to eat and then went up to bed. By the time he went upstairs to bed, the appellant was already in the baby's room with the door closed.

[31] Ms. Thurrott testified that, a short time after Mr. Raymer returned home, she and Mr. Wilson went upstairs to do "the last line of coke" in the washroom. She did not see the appellant at that time, as the baby's door was closed. Darla's door appeared to be in the same position, partly open with the light from the television still projecting into the hallway. As for Mr. Raymer, Ms. Thurrott recalled seeing him, still dressed in his Taco Bell uniform, lying across his bed. To Ms. Thurrott, he appeared to be sleeping.

[32] As for Mr. Venditti, he fell asleep in a chair in the living room, shortly after the appellant went to bed. Mr. Wilson woke him up and told him to go to bed. Mr. Venditti went upstairs to the washroom and then downstairs to his bed in the basement around midnight. He did not notice anything out of the ordinary while going to and from the washroom. He was a deep sleeper, and he slept through the night until approximately 8:30 or 9:00 a.m. the next morning.

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[33] Around 1:00 a.m., Mr. Wilson and Ms. Thurrott went to sleep. They slept on the main floor: he slept on the living room couch and she, along with Maurice, settled onto the lounge chair. Shortly after she turned the lights out, Ms. Thurrott heard some footsteps upstairs in the hallway. She recalled thinking that someone was getting up to use the washroom. Mr. Wilson testified that, just prior to 1:00 a.m., he heard a thump coming from upstairs and thought it sounded like a shoe falling. No other sounds were heard. Even the family's pit bull did not stir.

[34] The next thing Ms. Thurrott remembered was the appellant waking her up, ahead of the alarm, at 6:30 a.m. She testified as follows: "He woke me up and asked me for his money, and I asked him to turn the alarm clock off and he did, and he went in the kitchen and took a beer and left." He did not say why he wanted the $100 back, but she gave it to him and assumed he was on his way to work.

[35] Eventually, Ms. Thurrott woke up Mr. Venditti, had some breakfast, and took care of the baby. At some point she became concerned that Darla was sleeping too late and went to check on her around 10:00 a.m. She found her dead in her bed. Emergency services were called.

3. Mr. Raymer's post-offence conduct and statements

[36] In pointing the finger at Mr. Raymer, the appellant relies on evidence regarding Mr. Raymer's conduct and the statements he made to police following the murder. Mr. Raymer, who testified at trial, died in 1999.

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[37] Mr. Raymer was still at home in his room – the room across the hall from Darla's – when Darla's body was discovered, even though he usually left the house early to go to work. The fact he was in his room at 10:00 a.m. was considered a change of his routine. Ms. Thurrott testified at trial that Mr. Raymer was typically up at between 5:00 and 6:00 a.m. and this was the "first time" he had stayed late in his room. Mr. Wilson and Mr. Venditti also confirmed that this was a break in Mr. Raymer's routine and that it was unusual for him to be in his room at that time.

[38] From police notes, it appears that Det. David Rose, a sergeant with 22 Division, was the first to have contact with Mr. Raymer on March 17. He first saw Mr. Raymer at the house just before 11:00 a.m. Det. Rose's note refers, in what is now outdated and inappropriate language, to the fact that Mr. Raymer "appeared somewhat possibly retarded" – a comment that was consistent with other descriptions of Mr. Raymer in the police file.[2] Det. Rose instructed Mr. Raymer to remain in his room.

[39] About four hours later, two officers entered Mr. Raymer's room: S/Sgt. Wayne Cotgreave, a staff sergeant with the homicide unit and the officer in charge of Darla's case, and Det. Doug Massey, a detective with the homicide unit. They

[2] Thirty-five years ago, some of the inappropriate expressions recorded in police notes that were used to describe Mr. Raymer included that he was "slightly retarded", "possibly retarded", "mentally deficient", "the retarded guy", "a child" and "not much of a person".

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spent a few minutes with Mr. Raymer, but nothing of import came from that interaction. They again told him to remain in his room.

[40] Then, just before 5:00 p.m., Det. Rose and Cst. George Clanfield, a police constable with the marine unit who had been seconded to the homicide unit for the winter months, took Mr. Raymer to 22 Division. En route to the police station, they stopped at Mr. Raymer's bank. Mr. Raymer went into the bank and then returned to the car where the officers were waiting.

[41] Upon arrival at 22 Division, Mr. Raymer was placed in an interview room, where Det. Rose and Cst. Clanfield started taking a statement. Mr. Raymer recounted his memory of the previous evening and into the morning when Darla's body was discovered.

[42] At some point during that statement, S/Sgt. Cotgreave and Det. Massey arrived at 22 Division and updated the other officers. As reflected in S/Sgt. Cotgreave's notes, after updating the officers, including on the preliminary cause of death, S/Sgt. Cotgreave and Det. Massey continued the Raymer interview. The change in interviewers is reflected in a change in handwriting in the police statement. The first five pages of the statement are in Cst. Clanfield's writing and the final two pages are in S/Sgt. Cotgreave's writing. On appeal, the appellant suggests, based on the Raymer tape, that the final two pages do not reflect what actually transpired during the interview. Rather, those two pages are said to have

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been added later on, part and parcel of a police conspiracy to protect Mr. Raymer from suspicion and to exclusively focus on the appellant as the murderer. We will return to this suggestion later.

[43] The content of that handwritten statement largely corresponded with what Mr. Raymer testified to at trial.

[44] According to the statement, he had no real problem with the tenants living in his home and that the worst he could say about Ms. Thurrott and Mr. Wilson was that they drank beer and smoked “pot”. He described the ways in which Ms. Thurrott helped him with his everyday life. He also explained how he had taken Darla to church a few times and to a church Christmas party. He said she was hard to take care of because she was “so active”, and so he “didn’t take her anymore”.

[45] He explained that he had been in Darla’s room a couple of times in the past, but that he had never touched her or hugged her or “anything.” The last time he was in her room was to play checkers about a month before her death.

[46] Mr. Raymer further explained how, on March 16, he had worked a regular shift at Taco Bell and then gone to choir practice, which started at 8:00 p.m. and ended at 10:00 p.m. He received a drive to the subway and arrived home at around 11:00 p.m. He described who was present in the home when he returned, consistent with what has already been summarized.

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[47] After he ate his dinner, he put his dirty dishes in the sink and went up to bed. He used the washroom and noticed that Darla's bedroom door was partially open and the light from her television was on. He got into his pyjamas, went to bed and went to sleep. He woke up when he heard Darlene yelling that her daughter was dead. He told the police: "I stayed in my room until you brought me here."

[48] As for the Raymer tape, it was not disclosed until it was located many years later. We will return to the Raymer tape in due course, as it is central to this appeal. For now, though, we turn our attention to the appellant's conduct after Darla was murdered.

4. The appellant's post-offence conduct and statements

[49] The appellant left 15 Smithfield Dr. during the early morning hours of March 17 in unusual circumstances. As noted, he got up before the alarm that he had asked Ms. Thurrott to set, he asked her for his $100 back without getting the drugs he had asked her to purchase, and instead of going to work, he went home and did not work that day. This was inconsistent with his request to stay over so that he had a shorter commute to work, and with his plan to obtain drugs from Ms. Thurrott after work.

[50] The police put out the word on March 17 that they were interested in speaking with the appellant. Accordingly, he went to the police station the following day, on March 18. He was cooperative and said nothing incriminating. He spoke

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with the police again on April 5 and, again, said nothing incriminating. He also took a polygraph.

[51] The third time that the police attempted to interview the appellant was on April 11, after an apparent suicide attempt. Det. Massey learned that the appellant had attempted to kill himself at his brother's home by slashing his wrists. The police proceeded to the hospital, but the appellant did not wish to speak with them.

[52] It turned out that the appellant left a suicide note that included reference to the fact that taking his life had nothing to do with Darla's death, but was instead attributable to his cocaine abuse, debts and his wish to be with his sister who had died as a young child. The appellant wrote in the note: "I did not do that to Darla. This is not the reason why I killed myself" and in the margin he wrote, "It don't matter but I did not." Those sentences were then crossed out but still visible. There were other words immediately following those sentences that could not be made out. No other sentences were crossed out.

[53] After recovering from the attempted suicide, the appellant went back to live with his brother and his brother's partner.

[54] A few weeks later, on May 19, the appellant attacked his brother with a machete, causing him very serious injuries, which required 80 stitches to close. When his brother's partner, Lori, gave a statement to the police, she told them that the appellant had not only attacked his brother, but that he had previously attacked

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a taxi driver with a knife, slashing the taxi driver's throat. The police were quickly able to identify the taxi incident. The police started searching for the appellant.

[55] A couple of days later, he was located and arrested at gunpoint. At his trial, the appellant testified that, prior to his arrest, he had consumed beer, cocaine and carpet cleaner, all in another attempt to kill himself.

[56] The appellant was cautioned, given his right to counsel and questioned, first about the aggravated assault of the taxi driver, second about the aggravated assault of his brother, and finally, about the murder of Darla. The interviews, none of which were audio- or video-recorded, were conducted by three separate sets of officers. The three interviews resulted in three written confessions.

[57] Starting at 7:14 p.m., the appellant told the first set of officers that, in November 1988, he slit the throat of a taxi driver and left him for dead. According to the appellant, who had a serious drug and alcohol problem during that period of his life, he was high on cocaine at the time.

[58] At 7:50 p.m., he told the second set of officers that in May 1989 (two days earlier), he had attacked his brother with a knife. He said he was high on cocaine at that time as well.

[59] Shortly after that interview, at 8:30 p.m., the appellant spoke with a third set of officers: S/Sgt. Cotgreave and Det. Massey. The officers told him that, based on what they knew to that point in the murder investigation, the only conclusion they

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could draw was that he had “strangled” Darla. That statement was not true, but rather an intentional ploy used by the homicide investigators to see if the appellant would confess to killing Darla. In response to the police statement, the appellant asked: “Strangled her?” When S/Sgt. Cotgreave confirmed that was how she died, the appellant said: “I didn’t strangle her. I don’t know what happened to me. I went into her room. I sat on her bed. I choked her.” He said that he later went back and she was “cold.” Det. Massey testified at trial that the appellant “let out a sob” during this confession.

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[60] Again, the police cautioned the appellant and gave him his right to counsel. He said that he understood the caution and confirmed that the other officers had also cautioned him in the same way. The appellant said he did not wish to speak to counsel.

[61] S/Sgt. Cotgreave then left the room and returned with a typewriter. The appellant was asked “[w]hat, if anything, [he] wish[ed] to tell [the police] about this?” The salient parts of the statement follow:

> A. Bill came and picked me up at work we went and bought some beer and went back to his house. Everybody sat around partying and I got all fucked up. I went upstairs to the room Bill and Darlene sent me. I lied down in that room first on the floor. And then I don’t know what was in my head, I got up and went into Darla's room and sat on her bed. We sat there and talked about something – I don’t remember. And then I guess it went through my head that I should take her away from all the bullshit she was going through. I choked her, she kind of

> went limp – she made a squeak, she went limp. Then I more or less sat there and told her nobody would hurt her anymore. Then I took my hands off her and left her like that. I went back to the baby's room and laid on the floor. I just lied there and was hoping she was ok. In the morning I went back into her room, I looked at her she was lying down – there was foam stuff around her mouth and on her pillow and she was cold. Then I left the house.
>
> Q. Tim could you tell me where Darla was when you went into her room the first time that night?
>
> A. She was in bed and the blanket was on her.
>
> Q. Do you know what Darla was wearing?
>
> A. A white shirt or something, I'm not sure what it was.
>
> Q. Did you speak to anyone before you left the house?
>
> A. Just Darlene to get my money off her – that was it.
>
> Q. Is there anything further you wish to say?
>
> A. I have a problem with dope and booze, I'm like Jekyl[l] and Hyde when I'm straight I'm a nice person.

[62] The appellant was asked to review the statement, which he did, and initialed mistakes. He then signed the statement, as did Det. Massey. No further questions were asked at this point.

[63] The appellant never backtracked from his first two confessions. He subsequently pleaded guilty to both crimes following his conviction for murder. In

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contrast, he has maintained for 35 years that he falsely confessed to Darla's murder.

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B. PROCEDURAL HISTORY

1. The trial

a. The voluntariness *voir dire*

[64] The admissibility of the appellant's confession to Darla's murder was obviously a key issue at trial. The appellant put the Crown to proof of the voluntariness of his statement. This was done in a pre-trial motion.

[65] Every police witness who had contact with the appellant, of which there were many, testified at the *voir dire*, as did the appellant.

[66] As for the appellant, he claimed that he only confessed to the murder because S/Sgt. Cotgreave and Det. Massey overbore his will by what he described as them badgering him. He said that he was in a vulnerable state, as he was tired and hungry and his stomach was burning from having consumed the carpet cleaner. He maintained that he told the police "whatever came into [his] head" and that he gave them what he thought "they wanted" so that he could "be left alone and rest."

[67] The appellant went further and suggested that S/Sgt. Cotgreave and Det. Massey had threatened him with a charge of first-degree murder if he did not make a statement. He also said that they "persisted" and kept going in and out of the

room, “I guess to get their little plans going.” He disagreed that he called himself “Jekyll and Hyde”, instead maintaining that he only said that he felt as though the officers were accusing him of being like “Jekyll and Hyde”. He said that he signed the statement just to be left alone.

[68] We return to the voluntariness of this statement later. For now, we note that the trial judge found beyond a reasonable doubt that the statement was voluntary. In doing so, he concluded that S/Sgt. Cotgreave and Det. Massey’s evidence regarding the statement was credible, that the statement was accurately recorded and that the appellant’s version of the statement and its circumstances was “manifestly unreliable and incredible.”

[69] Indeed, the trial judge rejected the appellant’s version of what occurred on many points, including the movement of the officers during the interview. He also concluded that the appellant’s will was not overborne by the police. Throughout, the appellant was “lucid and responsive, and his demeanour [was] consistently described as calm and relaxed and aware.”

b. The trial proper

[70] By today’s standards, this was a very short murder trial. The appellant was first arraigned, prior to the admissibility *voir dire*, on September 4, 1990. The jury was charged on September 13 and 14, 1990. And the jury returned a verdict of guilty to second-degree murder the next day on September 15, 1990.

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[71] Mr. Raymer was the first lay witness to testify. He was followed by Ms. Thurrott, Mr. Venditti and then Mr. Wilson. There were also police and forensic witnesses.

[72] The defence called four witnesses. The appellant testified, including offering an explanation before the jury as to why he allegedly falsely confessed. He acknowledged that he knew he had a right to speak with a lawyer and that he was offered the opportunity to do so but declined. He also acknowledged that the police did not physically abuse him. He testified about having consumed carpet cleaner as part of a suicide attempt. He said that he confessed because the police would not leave him alone: they were relentless in trying to obtain the confession and "basically" hinted to him what they wanted him to say, and he picked up on what they wanted to hear.

[73] The defence closed to the jury, encouraging them to find that the appellant was a deep sleeper and, once asleep that night on the floor of the baby's room, slept throughout the entire evening. Counsel pointed out that Mr. Raymer was in closer proximity to Darla's room and had the opportunity to access her room from the "shortest distance". The defence emphasized that the "more telling aspect" was that Mr. Raymer did not go to work the following day "for the first time since anybody could remember". Defence counsel suggested that the reason Mr. Raymer did not go to work was that he had killed Darla:

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> Why is that? Why was this the one day that he didn't go to work and was up, out of the house, before the rest of them got up? Why? And why was he up in his room? Was it because he was like a child who knew he had done something wrong and was staying in the sanctity of his bedroom, the little part of the world that was his and nobody else's[?] Is that why?
>
> I ask you to consider that. Not once that anybody can remember was he [not] up and out of that house by 8:00 o'clock.

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[74] Crown counsel, in his closing, suggested to the jury that they should reject that it was Mr. Raymer who killed the child and that they should not entertain a reasonable doubt on that point. The Crown put it this way:

> Mr. Burke reminds you that he didn't go to work that day, that Raymer didn't go to work that day. Well, Mr. Raymer was never asked that by Mr. Burke. He was never given an opportunity to say why. Maybe it was a day off. We'll never know. That question wasn't asked by Mr. Burke.

[75] On this appeal, the appellant emphasizes that although the defence did not object at trial, Crown counsel was wrong to suggest that Mr. Raymer was not asked why he did not go to work that day. The appellant points out that Crown counsel did ask whether he had gone to work on March 17, 1989, to which Mr. Raymer responded "no, sir." When asked why not, this is when he gave the response that he had "heard in the wings that Darla was dead." A police officer later told him to stay in his room and he did.

[76] The appellant emphasizes that Mr. Raymer said he was supposed to go to work “at 9:00 o’clock” on March 17 but, for some inexplicable reason, was still at home at 10:00 a.m. when Darla’s body was discovered. This is said to be highly incriminating evidence, a suggestion to which we will return.

[77] The jury returned a guilty verdict.

2. The original appeal

[78] On June 16, 1994, this court dismissed the appeal from conviction, with Finlayson J.A. writing for the majority and Carthy J.A. concurring.

[79] The appellant raised several issues before this court, including that the statement that he gave to police implicating himself in the murder of Darla ought not to have been admitted into evidence because he had not been properly informed of his right to counsel.

[80] In the course of rejecting that argument, Finlayson J.A. stated:

> … [I]t is obvious from … the transcript that there is no merit to this argument which, no doubt, explains why it was not raised at trial by counsel. The appellant was no stranger to the criminal justice system and he could have been left in no doubt from the language employed by Sgt. Westover as to the nature and availability of the right to counsel, including duty counsel and legal aid generally. Indeed, it is difficult to imagine what more the police officers could have said to encourage him to retain counsel.
>
> …

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> The appellant was 26 years of age, he had significant previous convictions, and he did not testify that he was unaware that he could receive free legal advice from duty counsel. In fact, his position on the voir dire and at the trial was that he was fully aware of his right to counsel, but that he did not need a lawyer because he had nothing to hide. There was no impediment to his understanding of his rights either. All the findings of fact by the trial judge, in his ruling on the voluntariness of the statements, make it clear that while the appellant was tired, he was not under the influence of drugs or alcohol, and his confessions were free and voluntary.

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[81] Just over a year following this court's decision, the Supreme Court dismissed the appellant's application for leave to appeal.

3. The ministerial review and referral

[82] In January 2018, Innocence Canada filed an application for ministerial review of the appellant's conviction for second-degree murder pursuant to s. 696.1 of the *Criminal Code*. The review was predicated upon the alleged non-disclosure of information.

[83] In August 2023, outgoing Minister of Justice David Lametti, supported by incoming Minister of Justice Arif Virani, advised that they were satisfied that there was a reasonable basis to conclude that a miscarriage of justice likely occurred and referred the matter to this court pursuant to s. 696.3(3)(a)(ii) for a "new appeal from conviction."

4. The new appeal

[84] There were three parts to the proceeding before this court.

[85] In the first part, we heard *viva voce* evidence from seven witnesses over the course of five days. This included evidence about the circumstances under which it became known to the appellant that the Raymer tape existed and had not been disclosed.

[86] Lead homicide investigator S/Sgt. Cotgreave testified that he was not present for the recorded conversation captured on the Raymer tape and that he had no knowledge of its existence or the nature of its contents until he was made aware of it in the process leading up to the Minister's referral.

[87] Cst. Clanfield testified that, although he recognized his voice as the person conducting the interview recorded on the Raymer tape, he had no memory of the recorded conversation, why he conducted the interview alone or how it came to be recorded, and no memory of what, if anything, he did with the Raymer tape. He assumed that he told S/Sgt. Cotgreave and Det. Massey about his conversation with Mr. Raymer.

[88] The court also heard from Det. Rose, who had contact with Mr. Raymer at the time, and Det. Bradshaw, who worked in the Cold Case unit and who discovered the Raymer tape in 2009. Unfortunately, Det. Massey was not available to testify as he passed away in May 2023.

[89] The appellant also testified, continuing to maintain his innocence.

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[90] In addition, the court heard from pathologist Dr. David Chiasson, who confirmed the cause of death and that there were no signs of sexual trauma, and Mark Urban, a neighbour and former tenant of Mr. Raymer. As discussed below, the appellant contends that Mr. Urban offers valuable insights into Mr. Raymer's abilities and character. The Crown, on the other hand, says that he should not be believed.

[91] In the second part of the proceeding, we heard the appeal proper, including the appellant's and the Crown's fresh evidence applications.

[92] In the third part, we received written submissions from the parties regarding the impact of the Supreme Court's newly released decision in *Bouvette*.

III. DISCUSSION

[93] As we will explain, the first question in a case such as this is whether there has been a miscarriage of justice, in which case the conviction must be quashed. Once a conviction is quashed, the next question becomes whether the appropriate remedy is to order an acquittal, to grant a stay or to order a new trial.

[94] Accordingly, we begin by explaining our basis for concluding that there was a miscarriage of justice such that the appellant's conviction must be quashed. We then explain why an acquittal is not the appropriate remedy under any of the three routes proposed by the appellant, and why we would instead order a new trial as opposed to a stay.

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A. QUASHING A CONVICTION BECAUSE OF A MISCARRIAGE OF JUSTICE

1. The statutory scheme for quashing a conviction

[95] As noted, this appeal comes back to this court by way of a ministerial reference pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*. That provision allows the Minister to send an appeal back where there is a "reasonable basis to conclude that a miscarriage of justice likely occurred." The appeal is to be treated "as if it were an appeal by the convicted person." In other words, the appeal is to be treated in the normal course, as if it were a "normal" appeal from conviction, carried out in compliance with the statutory provisions of Part XXI of the *Criminal Code*. Those provisions guide this court as to the procedural, substantive and remedial powers available: *Truscott*, at para. 70.

[96] Given the appellate nature of the proceeding, the appellant carries "the burden of demonstrating based on evidence admitted on this Reference that there has been a miscarriage of justice": *Truscott*, at para. 74; *R. v. Phillion*, 2009 ONCA 202, 241 C.C.C. (3d) 193, at para. 71. 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": *Truscott*, at para. 75; *Phillion*, at para. 71.

[97] This court's powers on a conviction appeal are set out in s. 686(1) of the *Criminal Code*. Section 686(1)(a)(iii) allows the court, on an appeal from

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conviction, to allow an appeal where it is of the opinion that there has been a miscarriage of justice:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice; [Emphasis added.]

[98] Section 686(2) of the *Criminal Code* dictates that where an appeal is allowed on these grounds, it is mandatory to quash the conviction:

> 686 (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction … [Emphasis added.]

[99] In the words of the majority in *Bouvette*, when an appeal has been allowed under s. 686(1)(a), the court of appeal must, "looking backwards", quash the conviction: at para. 54.

2. The failure to disclose the Raymer tape was a miscarriage of justice

[100] Here, the appellant alleges that the miscarriage of justice rests upon a denial of the right under the *Canadian Charter of Rights and Freedoms* to make full answer and defence due to non-disclosure of the Raymer tape and other evidence.

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a. The legal framework for the right to disclosure

[101] The right to disclosure is only one facet of the right to make full answer and defence. As such, a breach of the right to disclosure does not, in and of itself, mean that the *Charter* right to make full answer and defence has been violated. As noted in *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 23, "[t]he initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial."

[102] Therefore, when we evaluate allegations of historical non-disclosure raised on an appeal from conviction, the fact that the material should have been disclosed at the time does not, on its own, necessarily mean that there has been a breach of the right to make full answer and defence. When looking at these matters *ex post facto*, as we are in this case, we must consider the impact of the failed disclosure on the reliability of the result of the trial and the overall fairness of the trial. Accordingly, despite a failure to disclose something that should have found its way to the defence, we must ask on appeal from conviction whether the non-disclosure resulted in prejudice: *Dixon*, at para. 23.

[103] In sum, the appellant bears the onus of establishing on a balance of probabilities that: (a) the prosecution failed in its disclosure obligations, as they existed at the time of the trial; and (b) there exists a "reasonable possibility" that the non-disclosure affected the outcome at trial or the overall fairness of the trial process: *Dixon*, at paras. 20-23, 31-36; *R. v. Taillefer*, 2003 SCC 70, [2003] 3

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S.C.R. 307, at para. 71. The “reasonable possibility” test “strikes a fair balance between an accused’s interest in a fair trial and the public’s interest in the efficient administration of justice”: *Dixon*, at para. 34.

[104] As underscored by Cory J. in *Dixon*, a reasonable possibility that the non-disclosure affected the outcome or the overall fairness of the trial process cannot be rooted in speculation: at para. 34. Rather, it must be the result of exploring whether there would have existed “reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure”: *Dixon*, at para. 34 (emphasis in original). The appellant emphasizes that this test incorporates reasonable avenues of further investigation alongside other possible uses of the non-disclosed evidence, including the ability to use it in raising a doubt as to the credibility of the theory put forward by the Crown and impeaching the credibility of Crown witnesses: *Taillefer*, at para. 29.

[105] How is the issue of non-disclosure to be approached 35 years later? In a “time-sensitive” way. “A time-sensitive approach governs this inquiry as it would be unfair to consider allegations of failed disclosure through the lens of current day rules and practices”: *R. v. Biddle*, 2018 ONCA 520, 141 O.R. (3d) 401, at para. 18. Applying present-day disclosure standards to actions that occurred when current standards were not in place would be “akin to using present-day medical standards

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to decide whether a diagnostic protocol followed [long ago] amounted to malpractice": *Truscott*, at para. 122; see also *Phillion*, at para. 150.

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b. The Crown's concession that the conviction should be quashed because the Raymer tape was not disclosed

[106] The Crown concedes that this court should quash the conviction because the police should have disclosed the Raymer tape. Importantly, the Crown's concession is related solely to the Raymer tape and its impact under the second branch of the *Dixon* test, specifically that there exists a reasonable possibility that the non-disclosure of the tape affected the overall fairness of the trial process by denying the appellant reasonably possible uses of the non-disclosed evidence. As noted in *Dixon*, at para. 34, "[i]f this possibility is shown to exist, then the right to make full answer and defence was impaired."

[107] To be clear, the Crown concession does not acknowledge that, had the Raymer tape been disclosed, it would have affected the outcome of the trial. The tape, argues the Crown, is unreliable on its face. And although the appellant argues that the improper non-disclosure extended beyond the Raymer tape to other information the police had about Mr. Raymer, the Crown does not acknowledge that the non-disclosure of the other information (discussed below) entitles the appellant to a remedy. Rather, the Crown submits that a comprehensive review of the non-disclosure, apart from the Raymer tape, demonstrates a consistent application of the disclosure standards of the time.

[108] As we will explain, we accept the Crown's reasonable concession that the Raymer tape should have been disclosed and that the failure to do so diminished the overall fairness of the trial process by denying the appellant "reasonably possible" uses of the evidence at trial: *Dixon*, at paras. 31-34. We begin by describing the discovery of the Raymer tape and its content before discussing the disclosure standards at the time.

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c. The discovery of the Raymer tape and its contents

[109] In 1999, the appellant asked the Association in Defence of the Wrongly Convicted, now Innocence Canada, to review his conviction. Heather Pringle, now a judge of the Ontario Court of Justice, took on his case. She requested full disclosure from the Crown.

[110] In 2009, Det. Bradshaw was assigned to process the request for disclosure. All agree that his work was commendable.

[111] Det. Bradshaw located two boxes that appear to be those of S/Sgt. Cotgreave. They were found in the Office of the Chief of Police, which was the final unit where S/Sgt. Cotgreave worked before he retired in 2005. Those boxes were found to contain numerous cassette tapes, two of which relate to the investigation into Darla's murder. One of those tapes contained the 9-1-1 call following the discovery of her body. The other is the Raymer tape.

[112] The Raymer tape is unmarked and undated. When Det. Bradshaw located it and realized what it was, he provided it to Crown counsel, who in turn provided it to counsel for the appellant.

[113] Although the taped interview did not begin with the ordinary formalities, including identifying the parties to the interview, there is no dispute that the voices captured on this tape are those of Cst. Clanfield and Mr. Raymer.

[114] The Raymer tape has been transcribed. With minor exceptions, the parties agree that the transcript is accurate. It is 38 pages long.

[115] Although there is no indication as to where the statement was taken or the date or time it was taken, the appellant maintains that the date and time can be gleaned from what is said on the tape. Based on the contents of the conversation, he says it was recorded somewhere between 8:40 p.m. and just after 10:10 p.m. on March 17, the day Darla's murder was discovered. On the tape, there are references to the fact that Mr. Raymer had just used the washroom and we know from S/Sgt. Cotgreave's notes that Mr. Raymer was taken to the washroom at 22 Division at 8:40 p.m. We also know from his notes that Mr. Raymer was driven from 22 Division to his Aunt Margaret's place at around 10:15 p.m. Therefore, according to the appellant, it is clear that the recorded statement was made somewhere between Mr. Raymer's washroom visit and his departure from the police station to go to his aunt's home.

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[116] The Crown says we simply do not know when the Raymer tape was made and counsel cautions us not to guess.

[117] Although we cannot be certain about the timing of the creation of the Raymer tape, it seems fairly certain that the tape was made at the Toronto Police Service's 22 Division on the day the murder was discovered. We are prepared to accept, without definitively deciding, that the conversation took place after the 8:40 p.m. washroom visit. This would have been not long after the seven-page handwritten statement from Mr. Raymer had already been taken, which, as we have noted, was in the handwriting of both Cst. Clanfield and S/Sgt. Cotgreave.

[118] As for the content of the Raymer tape, the appellant describes it as "gold". The appellant points to multiple parts of the interview where Mr. Raymer was questioned about whether he was attracted to Darla, whether he had sexual contact with her, whether he had been in her room, whether she had touched him and so on. It is said to demonstrate his "prurient desires" for Darla and reveal his contact with Darla. The appellant says that the Raymer tape may also include Mr. Raymer's implicit admission to murder.

[119] Mr. Raymer did agree with some of the propositions put to him by Cst. Clanfield but rejected some, qualified some, and then recanted others. While testifying in this court, S/Sgt. Cotgreave, an experienced homicide investigator, observed that he had only recently been provided with the opportunity to listen to

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the Raymer tape and it was the “most confusing interview” that he had ever heard. He testified that it is very unusual for any recording to begin with a “blank start”, without introductions and without identification of the date and time of the recording, and described Cst. Clanfield’s interview techniques and questions as confusing, confounding and improperly suggestive, leading to both parties misinterpreting what the other was saying.

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[120] We agree that the interview is confusing and not the “gold” that the appellant says it is. With that said, there are aspects of the statement that would have undoubtedly been important to the defence position at trial and, as we will come back to, it should have been disclosed.

[121] It is important to view the entire statement in context, since cherry-picking parts of it can be misleading. Therefore, we attach the entire transcript as Appendix “B” to these reasons. That said, we include some highlights from the statement, which help show why disclosure of the Raymer tape could have assisted the defence but also why the Crown describes it as confusing.

[122] At the beginning of the tape, Cst. Clanfield greeted Mr. Raymer and asked him “what’s the matter?” In response, Mr. Raymer complained that he had been asked the same thing over and over “but they won’t believe me. They think I’m the killer”. Cst. Clanfield asked what he had told “them”. The interview continued:

> Raymer: I kept telling them I didn’t see them, see her because it was too late but they won’t believe me.

> Cst. Clanfield: Well you, you said to me that you went in her room to kiss her goodnight.
>
> Raymer: Kiss her goodnight and that was it but, but they won't believe me. He said, "where did you kiss her, her body?" (sighs)
>
> Cst. Clanfield: What did you tell them, where did you kiss her? I forget.
>
> Raymer: I kissed her in the cheek. But I told her the belly button, just to make the fun of it….I…
>
> Raymer: ... I don't go around kissing everybody goodnight.
>
> Cst. Clanfield: No I know, it's just last night you …
>
> Raymer: I didn't, not especially her, but I do kiss her.
>
> Cst. Clanfield: Yeah. Did you last night?
>
> Raymer: Not last night. I dunno everything circles.
>
> …
>
> Raymer: Well, I don't kiss her in the body. I don't, I'd never do that.
>
> Cst. Clanfield: Okay so you …
>
> Raymer: I kiss her in the cheek.

[123] A bit later, Mr. Raymer described having gone into Darla's room the previous evening. He said Darla did not look at him because she was very tired. Cst.

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Clanfield said, “But [Darla’s] eyes were open”, to which Mr. Raymer replied that she could have been “gone”. The conversation continued:

> Cst. Clanfield: Gone where?
>
> Raymer: Well nobody’s tellin – me anything. When did she die?
>
> Cst. Clanfield: I don’t know I told you. Remember I’ve been here with you with the whole time.
>
> Raymer: I know. She coulda died last night and she could’ve died in her sleep this morning.
>
> Cst. Clanfield: Yeah? But when you went in, what was she doing?
>
> Raymer: Nuttin’-
>
> Cst. Clanfield: But she was awake.
>
> Raymer: Yeah she was awake.
>
> Cst. Clanfield: Did she talk to you?
>
> Raymer: Well she said hello Jim.
>
> Cst. Clanfield: And what did you say?
>
> Raymer: Hello.
>
> Cst. Clanfield: And then what happened?
>
> Raymer: Nuttin’ – that was it.
>
> Cst. Clanfield: You left?

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Raymer: Yeah.

[124] Mr. Raymer goes on to say that the previous evening they "didn't meet up with each other." When asked whether they had met up previously, Mr. Raymer confirmed that they had, including in Darla's room. When asked what they would do together, Mr. Raymer said, "Well we played with each other. … Played games." When asked what they would do, Mr. Raymer reiterated, "Nothing. We played games."

[125] Mr. Raymer said that they would also, sometimes, watch movies together. Then the following exchange occurred:

> Cst. Clanfield: You touched me when we were in the washroom here.
>
> Raymer: Yeah, her chin.
>
> Cst. Clanfield: Yeah, you gave her a kiss?
>
> Raymer: Yeah.
>
> Cst. Clanfield: You did, did ya?
>
> Raymer: Yeah.
>
> Cst. Clanfield: Yeah. And you, you held her as well, you were saying?
>
> Raymer: No, I didn't hold her.
>
> Cst. Clanfield: No? What did you … touch her with your hands?

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Raymer: Yes.

Cst. Clanfield: Where did you touch her?

Raymer: In her body. Right here, and kissed her goodnight.

Cst. Clanfield: Mmhm.

Raymer: What everybody else does. My aunt does it to me.

Cst. Clanfield: Mmhm.

Raymer: Say goodnight baby.

[126] Cst. Clanfield continued to press Mr. Raymer and asked why he had told "us" that he had gone into Darla's room the night before. Mr. Raymer responded: "I didn't know what to say. I was too scared to do anything. I didn't know what to say. I know I lied, but this time I'm telling the truth. I didn't go in her room. I didn't touch it. I didn't do anything." He was then asked why he had said those things, to which Mr. Raymer said it was because "you don't believe me." When pressed again on why he had said that he had gone into Darla's room, Mr. Raymer said that he did not know why he had said it, "but I did 'cause they keep asking me over and over, 'did you go into her room? Did you go into her room? Did you kiss her? Did you kiss her?' It's fear."

[127] Cst. Clanfield said that "they" were not saying that, but Mr. Raymer was saying it to "them." He said: "Yes but I know I made up a story but this time I tried

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to tell them I didn't go in there but they won't believe me." He then settled on the fact that although he had not kissed Darla the night before, he had kissed her on "other nights."

[128] Although it is entirely unclear whether he understood the sexual connotation of the following series of questions, he was asked if Darla and he got "excited" when he would kiss her on previous occasions. He answered, "Oh yeah". Then he was asked if she made him have a "little spurt" and he asked what that meant. When Cst. Clanfield clarified, Mr. Raymer denied those propositions. When asked if he rubbed her "down there", Mr. Raymer said "[s]ometimes" and that she liked it and it was fun.

[129] Mr. Raymer said sometimes he did not want to play with her: "I played with her once and when I said no and that was it from that day, day on…. She wanted to play with me…. I was too tired." He then said they had only played "once or twice", which was about a month previously.

[130] Then the following exchange took place:

> Cst. Clanfield: About a month ago you and her played together. Did she make you hard?
>
> Raymer: Oh yeah.
>
> Cst. Clanfield: Yeah? Did she …

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Raymer: Not too hard, but (UI)[3]

Cst. Clanfield: Did she take, yeah did she take you in her mouth, take you in her mouth? Rub ya?

Raymer: Nothing like that.

Cst. Clanfield: Not touch you at all?

Raymer: No.

Cst. Clanfield: But you got excited and oh you just touched her?

Raymer: Yeah.

Cst. Clanfield: Oh she didn't touch you.

Raymer: Yeah.

Cst. Clanfield: Oh she did touch ya.

Raymer: Not really, like, like that.

Cst. Clanfield: I see. So she, you touched her trying to get her excited eh? Did she giggle and laugh?

Raymer: Oh yea.

Cst. Clanfield: Yeah it was fun wasn't it.

Raymer: True.

[131] This theme continued until Cst. Clanfield started talking about making a "movie" with Mr. Raymer. He described going through a movie scenario and asked

[3] It is difficult to make out some parts of the recording. "UI" is used to signify that the words are unintelligible.

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Mr. Raymer to think about the previous evening like he was making a movie. In doing so, Mr. Raymer denied having gone into Darla's room. He said he went upstairs, got undressed and then went to bed. Although he usually said his prayers before going to bed, his hand was too sore to reach down. Then he went to bed.

[132] Mr. Raymer later recounted having gone to the washroom in the middle of the night and Darla was waiting to get in: "I came out and she went in." Mr. Raymer said she was wearing a white "nightie." It was likely around midnight. He again denied going into her room and kissing her goodnight.

[133] When asked what he thought happened to Darla, Mr. Raymer said that she may have "been poisoned by the grapes" or "killed from the smoke … I don't know. She might've died in her sleep."

[134] Cst. Clanfield then returned to the theme of Darla and Mr. Raymer "playing" together, which Mr. Raymer confirmed happened "sometimes." Asked if she "seduced" him, Mr. Raymer said, "Well sometimes", but then quickly said she had "nothin' – to do with me from that time on." He said he was "confused" and then said, "If she wanted to have fun, yes, she would seduce my body, if, it's a great big if." Then he said that she had no part of him "'cause I'm too old for her." He said, "I don't go around seducing little girls", but that "they think they do, they think I do." He said he had "nothing to do with it", and she was "only a friend."

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[135] Mr. Raymer said that Darla would bathe his hand and say he was getting old. Then he mentioned that Ms. Thurrott would tell Darla to get the ice packs for "Jimmy", since he needed them for his hand. He denied ever saying that he washed Darla. He insisted he was being honest and he had "nothing to do with her."

[136] He said that she once washed off his chin. He also talked about a few things of his that Darla had taken, such as a cassette player and a quilt. Told by Cst. Clanfield to be "truthful" because "Christians don't lie", Mr. Raymer said he did not lie. He confirmed he knew how important the truth was and that the minister reinforced that at church on Sundays, but said he was not lying. He was asked if he knew that a "confession is the best part of redemption" to which he responded "Yeah". Asked if he wanted to be redeemed, he said, "Sure". When told to "redeem [himself] now", he said, "Want me to tell you I kissed Darla on the head? No I didn't kiss her on the cheek … I didn't see her last night. (UI) No you won't believe me until heavens on earth. That's one story they didn't get 'cause I didn't see her. I didn't."

[137] Mr. Raymer accused Cst. Clanfield of wanting him to die so that "you can take them all of the money." There was then a discussion about money, after which Mr. Raymer insisted that he did not see Darla the previous evening and that was the "honest truth." Despite repeated efforts by Cst. Clanfield, Mr. Raymer continued to deny that he saw Darla the previous evening.

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[138] Eventually, Mr. Raymer was told: “Okay, just a minute. I’ll go see who it is. You wait here. Alright?” Mr. Raymer responded: “I’ve had enough of this.” Voices can be heard outside the room, although one cannot make out what is being said. Then the tape goes silent.

[139] What we have, then, is a recording that includes both admissions and denials. The subject of the recording, Mr. Raymer, is a person with intellectual challenges. The recording is replete with inconsistencies about Mr. Raymer’s contact with Darla on the night in question. And, much of the focus of the recording is possible sexual touching in a case where the murder had no sexual element to it.

[140] Although we do not agree with the appellant that this tape is “gold”, we do agree that it ought to have been disclosed. In the following section, we explain why the failure to disclose this tape amounts to a breach of the right to disclosure.

d. Even on the disclosure standards in 1989-90, the Raymer tape should have been disclosed

[141] As explained, we must position ourselves back in time to determine whether there has been a breach of the right to disclosure, since disclosure standards of today do not dictate whether there was a breach of the right to disclosure at the time of trial.

[142] In 1989, when the charge was laid in this case, and in 1990 when the appellant was tried, disclosure standards were different than they are today.

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Indeed, *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, was not decided until about a year after the verdict was returned in this case.

[143] In *R. v. Wood*, decided the same year as Darla's murder, Griffiths J.A. described the s. 7 *Charter* right to disclosure as guaranteeing the accused "the right only to such disclosure from the Crown as is necessary to make full answer and defence" and that disclosure pursuant to *Charter* requirements only had to be "sufficient to fairly apprise the accused of the case to be met in sufficient time and substance to enable the accused to adequately prepare and defend that case": (1989), 51 C.C.C. (3d) 201 (Ont. C.A.), at p. 236, leave to appeal refused, [1990] S.C.C.A. No. 73.

[144] However, the court noted in *Wood* that "[i]n general, … it has been the practice of Crown counsel in Ontario to furnish to the accused more than what was provided through the preliminary inquiry, and to comply with the published guidelines of the Attorney General to Crown attorneys": at p. 235; see also Hon. G.A. Martin (Chair), *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993), at pp. 144-45.

[145] On October 1, 1989, the Ministry of the Attorney General for Ontario released a new disclosure directive, entitled "*Charge Screening*" Appendix "A" of that document reads as follows:

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> It is recognized that there is a general duty upon the Crown to disclose the case-in-chief for the prosecution to counsel for the accused, and to make counsel for the accused aware of the existence of all other evidence relevant to guilt or innocence of the accused.
>
> …
>
> The purpose of disclosure by the Crown is threefold:
>
> (a) To ensure that the defence is aware of the case-in-chief for the prosecution and all other evidence relevant to the guilt or innocence of the accused;
>
> …
>
> The guiding principle is always full disclosure of the case-in-chief for the prosecution and all other evidence relevant to the guilt or innocence of the accused. [Emphasis added.]

[146] The appellant fairly describes in his factum the disclosure practice in Ontario before *Stinchcombe*:

> … [D]isclosure in all serious cases took the form of a Crown Brief consisting of a series of typed willsays for police officers and civilian witnesses. Police willsays were usually typed from their police notebook entries and civilian willsays were prepared from their police-handwritten witness statements.

[147] In *Stinchcombe*, Sopinka J. noted that "[t]he circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled": at p. 331. *Stinchcombe* put that uncertainty to rest, placing an obligation on the Crown to disclose all relevant, non-privileged

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information in its possession or control. This included both inculpatory and exculpatory evidence whether the Crown intended to produce the information as part of its case or not, as well as all relevant witness statements, recordings and police notes: *Stinchcombe*, at pp. 343-46.

[148] Peter Griffiths (now the Honourable Peter Griffiths) was the Crown counsel who prosecuted this case. He was later appointed a judge and then appointed to the position of the Associate Chief Justice of the Ontario Court of Justice. He is now retired.

[149] In the agreed statement of facts before this court, Mr. Griffiths explained that prior to this trial, the police provided him with the Crown brief. There is no dispute that it was prepared by S/Sgt. Cotgreave and Det. Massey.

[150] Mr. Griffiths had a practice of disclosing all material in his possession to the defence and believes he did that in this case. Accordingly, he believes that the Crown brief that he received would have been provided to the defence. It was not his practice to second-guess how those briefs were put together. The practice at that time was not to disclose copies of officer notes, although they could be viewed upon request by defence counsel.

[151] Mr. Griffiths was not provided with the Raymer tape. Although the Crown brief contained a willsay for Mr. Raymer, nothing in it reflected the contents of what was said on the Raymer tape. It is agreed that, at the time of trial, Mr. Griffiths was

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not aware of the existence or contents of the Raymer tape. Had he been aware of it, he would have disclosed it to the defence.

[152] We agree with the Crown's appropriate concession on appeal that, even in the pre-*Stinchcombe* world, the Raymer tape should have been disclosed to the defence. We are entirely satisfied that the prosecuting Crown had no knowledge of the existence of the tape and, if he had had such knowledge, it would have been disclosed.

[153] As confusing as the tape is (something to which we will return), there is a reasonable possibility that withholding the content of that tape from the appellant diminished the overall fairness of the trial process by denying him the ability to further advance his third-party suspect defence. The defence was already pointing at Mr. Raymer as a third-party suspect. Clearly, if the tape had been disclosed, the defence would have had a lot more to work with on that front, including when cross-examining Mr. Raymer.

[154] Undoubtedly, the tape would have provided helpful ammunition during that cross-examination. For instance, at various points on the tape, Mr. Raymer acknowledged: (i) kissing and touching Darla; (ii) lying to the police; (iii) seeing Darla in the bathroom on March 16 before he went to sleep; and (iv) going to Darla's room the night she died. Of course, he walked back many of these

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statements during the same interview, but that does not take away from the fact that they would have been helpful ammunition during cross-examination at trial.

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3. The conviction must be quashed

[155] For these reasons, we accept the Crown concession, based upon the Raymer tape alone, that there was non-disclosure and that there exists a reasonable possibility that the non-disclosure impacted the overall fairness of the trial process. This was a miscarriage of justice and requires that the appellant's conviction be quashed.

[156] At this stage, and in light of our conclusion regarding the failure to disclose the Raymer tape, it is unnecessary to determine whether the balance of the alleged non-disclosure should have been provided to the defence prior to *Stinchcombe.* Instead, we will consider the additional alleged non-disclosed materials in determining the appropriate remedy.

B. THE ISSUE OF REMEDY: AN AQUITTAL, STAY OR NEW TRIAL?

[157] In the words of the majority in *Bouvette*, the focus of the analysis now "shifts from a retrospective inquiry into whether the 'conviction … constitutes a miscarriage of justice', to a prospective 'second stage of [the] analysis: having quashed the conviction what is the appropriate remedy?'": *Bouvette*, at para. 54, citing *Truscott*, at para. 245. At this stage, "the appellate court's remaining remedial

task is to select the appropriate path forward, now that the conviction has been effaced, by ordering either an acquittal, a new trial or a judicial stay": at para. 54.

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1. The positions of the parties

[158] The appellant requests the admission of all fresh evidence and the entry of an acquittal.

[159] For the appellant, this matter comes down to what he described in oral submissions as a balancing of Mr. Raymer against the appellant. According to the appellant, the fresh evidence has tipped the balance by strengthening the case against Mr. Raymer and weakening the case against the appellant. The new evidence points to Mr. Raymer, because it shows he had pedophilic desires for Darla, he saw her on the night she died and he was more physically and intellectually capable than he let on. The new evidence points away from the appellant because it undermines the believability of his confession. Specifically, the appellant contends that there was a police conspiracy to suppress evidence that Mr. Raymer killed Darla and fabricate evidence that the appellant killed Darla. The intentional suppression of the Raymer tape is said to be part and parcel of this police conspiracy.

[160] Accordingly, the appellant says that an acquittal would flow on three separate bases, all of which are rooted in what he says is the now proven police conspiracy that existed.

[161] First, the appellant argues that, having regard to the strength of the fresh evidence, especially the Raymer tape and evidence revealing the police conspiracy to suppress it, no properly instructed jury, acting reasonably, could convict at a retrial. As for the appellant's confession, which would otherwise represent a formidable roadblock to this route to an acquittal, the appellant says that we should find that his statement would not be admissible at a retrial and, therefore, remove it from the equation when measuring whether a properly instructed jury, acting reasonably, could convict.

[162] Second, the appellant argues, relying on *Truscott*, that it is clearly more probable than not that he would be acquitted at a hypothetical new trial. If this court has any doubt about whether that is so, we are encouraged to reach into the minority opinion in *Bouvette* to conclude that an acquittal is nonetheless appropriate because it is the egregious state conduct in this case that has deprived the appellant of the ability to meet the *Truscott* threshold.

[163] Finally, the appellant argues that an acquittal should flow, in any event, on a discretionary basis. He leans on case law that suggests that, even if a properly instructed jury acting reasonably could convict at a new trial, and even if it is not "clearly more probable than not" that an acquittal would be entered, an acquittal can still flow in the interests of justice.

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[164] In the alternative, if the court does not enter an acquittal, the appellant seeks a new trial instead of a stay of proceedings.

[165] The Crown responds by also bringing a fresh evidence application. The Crown sees the matter differently, taking the position that an acquittal is not available on any of the avenues presented by the appellant.

[166] First, in the Crown's submission, a properly instructed jury acting reasonably could convict. Quite simply, the Crown position is that there is too much evidence pointing toward guilt to enter an acquittal here, including the appellant's voluntary confession to murder and his DNA on the shirt worn by Darla when she was murdered.

[167] Second, the Crown takes the position that the *Truscott* test remains the law in Ontario post-*Bouvette* and sets the legal framework for how we should proceed when it comes to discretionary acquittals. However, it is not open to this court to acquit, even on the basis of the *Truscott* test, since the exceptional threshold requirements for the appellant to access the *Truscott* framework are not satisfied and, even if they are satisfied, the appellant has failed to demonstrate why it is "clearly more probable than not that the appellant would be acquitted at a hypothetical new trial": at para. 268. The appellant has not, says the Crown, demonstrated that there was a police conspiracy. And, absent a conspiracy, a strong case remains against the appellant.

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[168] Finally, there is no other basis upon which to enter a “discretionary acquittal” in this case outside the *Truscott* framework.

[169] The Crown is clear that, should this court order a new trial, the appellant will not be retried. This is certain. What the Crown is not committing to, and what the Crown does not need to commit to at this stage, is how they will exercise their discretion should a new trial be ordered: *Phillion*, at para. 242; *Bouvette*, at para. 85. As explained in *Bouvette*, there remain three options for the Crown, apart from retrying the case, if we do not acquit: (i) have the accused arraigned, call no evidence and allow an acquittal to be entered; (ii) withdraw the charges; or (iii) stay the proceedings pursuant to s. 579 of the *Criminal Code*: at para. 63.

[170] Rather than exercising those options, the Crown would prefer that this court enter a judicial stay of proceedings on the basis that the appellant can no longer obtain a fair trial and “society has no interest in unfair trials”: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 34, 39-40.

2. The statutory framework for remedy

[171] We must determine which of three remedial options is appropriate in the circumstances of this case – an order directing an acquittal (the remedy requested by the appellant), a judicial stay (the remedy requested by the Crown), or a new trial (the alternative remedy requested by the appellant). We begin with a review of the statutory framework and then consider the three options.

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[172] Section 686(2) of the *Criminal Code* provides for two options – an acquittal or new trial – following the quashing of the conviction:

> **686 (2)** Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> **(a)** direct a judgment or verdict of acquittal to be entered; or
>
> **(b)** order a new trial.

[173] In addition to these two options, this court has jurisdiction to grant a stay on the basis of s. 686(8):

> **686 (8)** Where a court of appeal exercises any of the powers conferred by subsection (2) … it may make any order, in addition, that justice requires.

[174] Although s. 686(8) does not make explicit reference to a stay, a stay is one of the orders the court may make where "justice requires": *R. v. Hinse*, [1995] 4 S.C.R. 597, at pp. 619-20; *Bouvette*, at para. 57.

[175] The quashing of a conviction under s. 686(2) is sufficient, in and of itself, to engage the powers under s. 686(8) to stay the proceedings: *Bouvette*, at para. 59. In other words, an appellate court can order a stay pursuant to s. 686(8) without first ordering a new trial pursuant to s. 686(2)(b). The exercise of power "conferred by subsection (2)", as referred to in s. 686(8), has been interpreted to mean the quashing of the conviction alone pursuant to s. 686(2).

[176] Importantly, a judicial stay of proceedings brings a definitive end to criminal proceedings and is considered the "most drastic remedy a criminal court can

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order”: *Babos*, at para. 30; see also *R. v. Regan*, 2002 SCC 12, [2002] S.C.R. 297, at para. 53.

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3. *Bouvette* and *Truscott*

[177] At the time this appeal was heard, *Bouvette* had been argued in the Supreme Court of Canada and was under reserve. *Bouvette* has since been released and the parties have provided helpful written submissions as to how *Bouvette* impacts this appeal. We have considered those submissions.

[178] Ms. Bouvette pled guilty to criminal negligence causing the death of a child whom she was babysitting. The resulting conviction was quashed by the Court of Appeal for British Columbia based on failed disclosure that resulted in a miscarriage of justice: *R. v. Bouvette*, 2023 BCCA 152, 424 C.C.C. (3d) 513.

[179] The parties had jointly asked the Court of Appeal for British Columbia to set aside the conviction and enter an acquittal. The court declined to do so, instead entering a stay of proceedings. The court chose that remedy because there was evidence on the record upon which a reasonable jury, properly instructed, could convict Ms. Bouvette.

[180] The Supreme Court granted leave to appeal: *R. v. Bouvette*, [2023] S.C.C.A. No. 235. The focus of the appeal was on the remedy available to Ms. Bouvette considering the miscarriage of justice that resulted from the failed disclosure.

[181] In the Supreme Court of Canada, the parties continued to agree that the Crown had breached Crown disclosure obligations, Ms. Bouvette's guilty plea had been tainted by that non-disclosure, and, therefore, the guilty plea had to be set aside. The parties also continued to advance the position that the only correct remedy in the circumstances was an acquittal. In their view, the Court of Appeal's order to stay the proceedings was wrong and an acquittal was required to "remove both the stigma of conviction and the stain of an unresolved allegation of this serious crime": *Bouvette*, at para. 4. The Crown took that position even though it acknowledged, for the first time, that there was evidence on the record that could lead a reasonable jury, properly instructed, to convict at a new trial.

[182] *Bouvett*e gave the Supreme Court the opportunity to consider the remedial framework to be followed upon setting aside a conviction for a miscarriage of justice.

[183] The court was divided on the analytical framework, although not on the result of the case. Both the five-judge majority and the four-judge minority agreed that it was appropriate to grant an acquittal, although on different grounds. Despite the divergence between the majority and minority, *Bouvette* provides important guidance for our purposes.

[184] First, Kasirer J., on behalf of the majority, noted that there is a specific order to considering remedies. Where the court quashes a conviction in the wake of

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finding a miscarriage of justice, the first remedy the court must look to is the appropriateness of an acquittal: *Bouvette*, at para. 55. Only where an acquittal is rejected should the other remedial options be considered: *Bouvette*, at para. 57.

[185] Second, the majority stressed that in determining the proper remedy, the "focus is not on the past miscarriage of justice" that resulted in conviction, as "that conviction has already been quashed": *Bouvette*, at para 5. "The issue is whether, going forward, an acquittal represents the proper and just exercise of the appellate court's statutory power": *Bouvette*, at para. 5.

[186] Third, the majority addressed the different possible paths to an acquittal.

[187] The first path is an acquittal on the basis that there is insufficient evidence to ground a conviction: *Bouvette*, at para. 72. Where no reasonable jury could convict on the basis of the evidence, as augmented by the fresh evidence on appeal, the appellate court must exercise its discretion in favour of acquitting the appellant: *Bouvette*, at paras 73-75. The logic of this approach is inescapable because if there is insufficient evidence to allow a reasonable trier of fact, properly instructed, to convict, then any conviction that may result from a new trial would have to be quashed on appeal as an unreasonable verdict. We will refer to this path, which is already well established, as the "unreasonable verdict" path.

[188] According to the majority, a second path to an acquittal is the one that arose in *Bouvette.* As Kasirer J. explained, "[u]nless it would be contrary to the public

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interest, an appellate court must acquit where the Crown seeks an acquittal and says that it would call no evidence at a new trial to ensure that an acquittal will be entered": *Bouvette*, at para. 79 (emphasis added). The appellant does not suggest that the second route to an acquittal is operative in this case since the Crown is not inviting an acquittal, even though the Crown has indicated that it would not proceed were a new trial to be ordered.

[189] The third path to an acquittal – "acquittals based on appellate discretion" – was described by the majority as a "route that is uncertain and fraught": at para. 94. In *Bouvette*, both the Crown and Ms. Bouvette argued that "discretionary acquittals" should be available on a broader basis than this court described in *Truscott*. They put forward factors to be considered in granting a discretionary acquittal. For instance, the Crown proposed a constellation of broadly worded factors, including: (1) the history of the proceedings; (2) the circumstances of the accused; (3) whether some or all of the sentence has been served; (4) the position of the parties on the "factual matrix on appeal"; (5) the nature of the proceedings in the court below; (6) the nature of the basis for overturning the conviction; and (7) the impact of the passage of time on the availability and weight of the evidence. Ms. Bouvette expressed general agreement with these factors.

[190] The majority declined to endorse this broad discretionary framework for acquittals. As Kasirer J. explained, it was unnecessary to define "comprehensively" when it is appropriate to grant a "discretionary acquittal" since the case before

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them could be decided on the basis of the Crown's request for an immediate acquittal – the second path to an acquittal: *Bouvette*, at para. 94. Furthermore, the majority was concerned about the "lack of true adversarial engagement" on the issue: at paras. 10, 89, 92-94, 101. Kasirer J. left it to "future courts to scrutinize other purported grounds for acquittal, including those conferring on the appellate court appropriate discretion, in cases where such grounds would actually affect the disposition": at para. 102.

[191] In the meantime, the majority expressed concern that adopting the parties' proposals would "place at risk both the understood meaning of an acquittal and the proper role of the appellate courts within our system of criminal justice": *Bouvette*, at para. 95. To this end, the majority cautioned that discretionary acquittals should not be "routinely" resorted to: at para. 70.

[192] As for *Truscott*, the *Bouvette* majority found that it was decided in a very different and distinguishable context. In *Truscott*, the Crown requested a new trial, the passage of time rendered a new trial impossible, and the nature of the miscarriage of justice was "completely different": *Bouvette*, at para. 124.

[193] The minority decision in *Bouvette*, authored by Martin J., adopted a decidedly different approach. The minority did not feel constrained by what the majority saw as a lack of adversarial engagement as to whether the discretionary route to an acquittal should be changed: *Bouvette*, at paras. 140-42. Instead, the

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minority took the opportunity to clear up what they described as "confusion and inconsistency" in the case law: *Bouvette*, at para. 139.

[194] Martin J., at para. 144, summarized the minority's legal framework as follows:

> As I will explain, for cases that fall "outside of the norm" (*Truscott*, at para. 259), the jurisprudence supports a framework which straightforwardly asks whether an acquittal is in the interests of justice for this narrow set of cases which bear the hallmarks of wrongful convictions. In so doing, courts of appeal should consider the nature of the miscarriage, the remaining merits of the case, including the likelihood of the trial taking place, and the overall equities of the case. Primary weight must be given to the court's consideration of the merits. A court's finding that an acquittal is more probable than not is thus generally a pre-requisite to that court entering an acquittal. Furthermore, though the equities cannot be the sole basis upon which to enter an acquittal, they may inform the court's final balancing in determining whether an acquittal is appropriate. [Emphasis added,]

[195] In fleshing out this framework, Martin J. discussed *Truscott* at some length. She highlighted that, "'[a]s a general rule' the appeal court will order a new trial for a miscarriage of justice where the record on appeal admits of a reasonable possibility of conviction": para. 232, citing *Truscott*, at para. 248. Martin J. noted that the court in *Truscott* "did not purport to establish an exhaustive or exclusive framework": *Bouvette*, at para. 236. The fact that a new trial was not possible for Mr. Truscott was a relevant factor but "not a legal prerequisite for an acquittal": at para. 238. She also noted that "[n]ot every appeal will have … a record resembling

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the one in *Truscott*", sometimes as a result of the very nature of the miscarriage of justice: at para. 240.

[196] Martin J., at para. 246, endorsed the "flexible approach" applied in *Truscott*, since the *Truscott* "standard" struck an appropriate balance:

> In my view, when considering whether an acquittal is justified in the interests of justice, the standard applied by the *Truscott* court — whether the augmented or varied record establishes clearly that it is more probable than not that an acquittal would result at a retrial based on a reasonable doubt standard (para. 268) — strikes an appropriate balance between the importance of the merits of a case and the circumstances of cases bearing the hallmarks of wrongful convictions. This flexible approach is justified by the challenges and unfairness that may be occasioned by applying strict tests in these cases that fall outside the norm, as well as the proper use of limited judicial resources. [Emphasis added.]

[197] Therefore, it appears to us that the minority endorsed the "*Truscott* standard", that being whether it is clearly more probable than not that the appellant would be acquitted at a new trial. That said, we note that in some parts of her reasons, Martin J. omitted the word "clearly" in articulating the standard: see, e.g., paras. 236, 247-48, 265, 274-75, 281, 297.

[198] In summary, we read *Bouvette* as providing the following guidance relating to *Truscott.* The majority has not overruled the *Truscott* framework – rather, it left consideration of *Truscott* for another day. In contrast, the minority accepted the "*Truscott* standard", and built upon that standard in clarifying when a discretionary

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acquittal is available. The minority also clarified that “equities alone cannot form a standalone basis to substitute an acquittal for a new trial”: at para. 268.

[199] To state the obvious, to the extent that the minority’s analysis conflicts with the majority’s, the majority’s analysis prevails. The majority in *Bouvette* did not overrule *Truscott* as a source of authority as to when an acquittal may be granted, and the minority’s expansion of *Truscott* was not accepted by the majority. Although we draw insight from *Bouvette* and guidance from the majority reasons, the *Truscott* test, decided by a panel of five judges of this court, remains binding on us.

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C. AN ACQUITTAL IS NOT APPROPRIATE

[200] Should the appellant be acquitted? The short answer is “no” because: (i) a properly instructed jury, acting reasonably, could convict the appellant; (ii) it is not clearly more probable that the appellant would be acquitted at a hypothetical new trial; and (iii) there is no basis upon which to exercise our residual discretion.

1. A properly instructed jury, acting reasonably, could convict

[201] In oral argument and his supplementary written submissions, the appellant maintained that because his statement to police confessing to the murder of Darla would be excluded at a new trial, a conviction would constitute an unreasonable verdict pursuant to s. 686(1)(a)(i).[4]

[4] The appellant did not advance this position in his original factum.

[202] The Crown position is that there is simply too much evidence pointing to guilt to enter an acquittal here. This evidence of guilt includes: (i) the appellant voluntarily confessed to the murder; (ii) he was the only new person in the home on the night of the murder; (iii) he did not go to work as planned the following morning, but instead went home; (iv) he took back the money he had given Ms. Thurrott to purchase drugs before he left the home unexpectedly and early; (v) he was the only person in the home that night who had an injury on his face; and (vi) his DNA was on the chest area of the shirt Darla was wearing when she was murdered (and Mr. Raymer's is not). As for the evidence pointing to Mr. Raymer, the Crown submits that it does not go nearly as far as the appellant contends. Considered as a whole, the evidence is such that this court cannot acquit the appellant on the basis that no reasonable jury could convict: see *Phillion*, at para. 244.

[203] In our view, an acquittal is not available pursuant to this path.

[204] The biggest roadblock in the way of an acquittal under this route is the fact that the appellant confessed to killing Darla, a confession that was ruled admissible at trial.

[205] The appellant argues that we should reconsider the voluntariness of his confession through an *Oickle* lens*: R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3. In his submission, a judge today would likely not be satisfied beyond a reasonable

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doubt that the appellant said the things captured in the written statement. A judge would also likely find that the statement was involuntary because the appellant, who was in a fragile state at the time, was improperly cajoled by police and was given an inducement to confess. Accordingly, he submits that we should find that the statement is inadmissible.

[206] Considering the appellant's 1989 statement through a current legal lens and taking into account the record before this court, we are not satisfied that the statement was involuntary and therefore inadmissible. The law of voluntariness has changed little since 1990, and we have been provided with nothing new that would shake our confidence in the confession.

[207] As previously noted, the voluntariness of the appellant's statement was thoroughly canvassed at trial.

[208] At the voluntariness *voir dire*, the appellant went back and forth on whether he made the inculpatory statements attributed to him by the police. He suggested that he told the police "just – whatever came into [his] head" and that the police were hinting at what they wanted him to say and he gave "them whatever they wanted." He admitted at the *voir dire* that he knew that he was not obligated to speak to the police and that what he said could be used against him.

[209] In finding that the Crown had proven the voluntariness of the statement beyond a reasonable doubt, the trial judge was required to make multiple findings

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of fact. In doing so, he concluded that, contrary to the appellant's version of events, he had made the admissions attributable to him. He also came to a devastating credibility finding: that the "version of the accused is in my view manifestly unreliable and incredible" (emphasis added).

[210] At the trial proper, the appellant claimed that he confessed because he wanted to be left alone. He testified that he "picked things up that [the police] wanted to hear, and I just said whatever." As he said, the police "just suggested what to say. And so I just said it."

[211] In cross-examination before this court some 35 years later, the appellant, who has long maintained his innocence, confirmed that he signed the statement after it was made but said that he did so without reading it. There was serious equivocation about whether he said the words in the statement or whether the police fabricated the content of it, but at one point, the appellant testified that he had spent "35 years" thinking about "why I would confess to something I didn't do."

[212] In oral argument, counsel encouraged the court to take into account that his client is "not the most articulate man" but, taking his testimony as a whole, the appellant is saying that he told the police what they wanted to hear.

[213] Back in 1990, as today, the common law confessions rule mandated that a confession could not be admitted into evidence unless it was freely and voluntarily made: *Boudreau v. The King*, [1949] S.C.R. 262, at pp. 269-270, *per* Rand J., citing

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Ibrahim v. The King, [1914] A.C. 599 (U.K.), *R. v. Voisin*, [1918] 1 K.B. 531 (U.K.) and *Prosko v. The King* (1922), 63 S.C.R. 226; *Rex v. Howlett*, [1950] O.R. 181 (C.A.), leave to appeal refused, 96 C.C.C. 190 (S.C.C.). The Crown bore the onus of proving the voluntariness of the confession beyond a reasonable doubt: *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), leave to appeal refused, [1977] 1 S.C.R. xi (note)*; R. v. Pickett* (1975), 28 C.C.C. (2d) 297 (Ont. C.A.), at p. 302. A confession could still be excluded, despite the fact that there had been no fear of prejudice or hope of advantage, if the statement was not the utterance of an operating mind*: Ward v. Her Majesty the Queen*, [1979] 2 S.C.R. 30, at p. 40, *per* Spence J.; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 670, *per* Martland J. And even if a statement was not involuntary, the trial judge held a residual discretion to exclude it if "its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute": *Rothman*, at p. 696, *per* Lamer J. (concurring). While this third category was set out by Lamer J. in concurrence, it was formally adopted in *R. v. Collins*, [1987] 1 S.C.R. 265.

[214] Although differently articulated and categorized today, the voluntariness rule did not undergo a sea change in *Oickle*. To the contrary, the same factors are largely at play, albeit considered in a more disciplined framework than pre-*Oickle*. In applying an *Oickle* framework, there are four considerations.

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[215] First, the court looks to whether the police made threats or offered promises: *Oickle*, at para. 48. Some threats and promises – such as moral and spiritual inducements – will not generally produce involuntary confessions: at para. 56. Rather, the "most important consideration" is "to look for a *quid pro quo*": at para. 57.

[216] Second, a court should consider if the circumstances underlying the confession were "oppressive": *Oickle*, at para. 58. Oppressive circumstances include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; excessively aggressive, intimidating questioning for a prolonged period of time; relentlessly accusing the suspect of guilt; and, using non-existent evidence: at paras. 58-61.

[217] Third, a court should assess whether the suspect is of an "operating mind": *Oickle*, at para. 63. The operating mind test asks if the suspect is aware of what they are saying and of the consequences of making the statement, including that it can be used in evidence: *R. v. Whittle*, [1994] 2 S.C.R. 914, at pp. 934-39. In *Oickle*, the court clarified that the operating mind doctrine is not a discrete inquiry divorced from the confessions rule, but rather is part of the voluntariness analysis: at paras. 63-64.

[218] Fourth, a court should determine whether police trickery was used in obtaining a confession: *Oickle*, at para. 65. Reiterating Lamer J.'s concurrence in

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Rothman, the court in *Oickle* explained that a judge has discretion to exclude a confession stemming from a police tactic that would shock the community: *Oickle*, at para. 66-67, citing *Rothman*, at pp. 691, 697. This analysis is a distinct inquiry from the rest of the analysis because it relates more to upholding the integrity of the criminal justice system than to voluntariness: *Oickle*, at para. 65.

[219] Since *Oickle* was decided in 2000, there have been no significant changes to the voluntariness rule: *R. v. Tessier*, 2022 SCC 35, [2022] 2 S.C.R. 660, at para. 68. Kasirer J. commented in *Tessier* on the settled nature of the law, citing *Oickle*:

> The law relating to the modern confessions rule is settled. A confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness (*Oickle*, at para. 68).

See also *R. v. Beaver*, 2022 SCC 54, 420 C.C.C. (3d) 421, at paras. 45-48.

[220] Although the law is settled, undoubtedly courts have come to better appreciate, over time, the importance of remaining vigilant in guarding against wrongful convictions arising from false confessions: see, e.g., *R. v. Ordonio*, 2025 ONCA 135, 176 O.R. (3d) 1.

[221] Remaining alive to the reality of false confessions, we see nothing in the record, even as enhanced on appeal, that causes us to question the voluntariness of the confession in this case.

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[222] We begin by noting that the appellant's submissions were largely made, in the words of the appellant's counsel, through an "innocence lens" as opposed to a "voluntariness lens". The main argument was that, at a retrial, the confession would not be believed because the officers who took the confession would not be believed. Given this focus, the argument related to voluntariness was very limited. We move through the voluntariness analysis with what we have.

[223] We acknowledge the lack of a video- or audio-recorded statement. The appellant's statement was taken in 1989 at a time before video was becoming even close to commonplace. S/Sgt. Cotgreave was questioned at trial about not having videotaped the interview on May 21, 1989, to which he responded that, to that point, he had "never performed a videotape". He was asked, at trial in 1990, where videos would have been recorded at that point and he said that there was "only one throughout Metropolitan Toronto" and he thought it was "out at 41 Division, I believe, is where it's set up."

[224] S/Sgt. Cotgreave also explained, at trial, why the interview of the appellant proceeded as it did. As he noted, this was the third statement in a series of statements the appellant had given to the police that day. In the first, he admitted to slitting a taxi driver's throat and in the second he admitted to using a machete to attack his brother. No video or audio was used for the first two statements and S/Sgt. Cotgreave testified that he thought he would keep things the same. And, as S/Sgt. Cotgreave explained during the voluntariness *voir dire* at trial, he and Det.

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Massey had no idea that a confession was about to be made: “[T]here was no idea that he was going to confess to the murder prior to us going in”.

[225] In this court, well over three decades later, S/Sgt. Cotgreave was again asked why the statement was not video- or even audio-taped. He said that it was his recollection that back in 1989, homicide investigators did not carry their own tape recorders. He went on:

> We didn't have the infrastructure to get it all transcribed and track it all. So tapes — tapes were coming into more and more activity, but we didn't have tapes issued to us individually. So if we were in a station and there was a tape available, we'd use it. We'd ask to use them or, same as video. I'm not even sure that video was available in all police stations back then.
>
> I was involved with a project in the mid-'90s with Chief Fantino or Chief Boothby, and we did a project then to equip all the police stations with carts with videotaping devices, but that was not for some five or six years later.

[226] S/Sgt. Cotgreave was then asked about the “Linden Report”. This was a reference to “The Report on the Investigation of Allegations Made Against Some Members of the Metropolitan Hold-Up Squad”, published by the Office of the Public Complaints Commissioner in 1984. The Linden Report was commissioned in response to allegations that the Hold-Up Squad used violent tactics during interrogations. The report included a recommendation that police interrogations be videotaped. S/Sgt. Cotgreave testified that he was not familiar with the report.

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[227] When it was suggested to S/Sgt. Cotgreave that he had intentionally failed to tape the interview because it would not have supported "what [he] claimed happened during the interview", he resisted that suggestion: "You're absolutely wrong with that." S/Sgt. Cotgreave explained in his testimony before this court that he and Det. Massey had not been planning the interview and were taken by surprise when they received the call to come to the station that day, which was their day off. They were further surprised – "shocked" even – when the appellant confessed. As S/Sgt. Cotgreave said:

> Remember, we're — we're sitting to talk to [the appellant] just to, as our, part of our second round, we've talked to others as we've seen them. We had not planned to talk to Mr. Rees that weekend. We had taken one day off, got a call in the afternoon. We had no plans to talk to Mr. Rees. We got a call to go and see him. We took advantage of the opportunity with — with no, no idea that he was going to confess to this crime. I think I said in the trial, I was shocked when he told us that he had suffocated her. Shocked. And so, that could be why we wouldn't go into what you think should have been asked. We — we spoke to him. We didn't take it any further. We didn't suggest anything, ask him anything. But — but I think we got the statement of what he said and — and moved on.

[228] We accept S/Sgt. Cotgreave's evidence that it was far from commonplace back in 1989 to make audio- or video-recordings. Indeed, we need go no further than this court's own jurisprudence on this point to gain some insight into the general practice at the time. It would not be for another decade before this court started to comment that, although recording statements was not required to

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establish admissibility, doing so would go a long way toward the Crown meeting their onus of establishing a sufficient record of the police-suspect interaction: *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 (C.A.), at paras. 60-65. In *Oickle* itself, decided in 2000, Iacobucci J. described a "growing practice of recording police interrogations, preferably by video tape": at para. 46. And, in *Moore-McFarlane*, decided in 2001, Charron J.A. said, at para. 65:

> … [T]he Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.

[229] Notably, Charron J.A. did not make this statement until ten years after the confession in this case was taken.

[230] In these circumstances, although it would obviously be preferable if we had a recorded statement to consider on appeal in 2025, the fact that there is no recording of the statement from 1989 does not make that statement inherently suspicious. Therefore, the question becomes whether there is anything else that

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calls into question the ruling that the appellant's statement was voluntary. In our view, there is not.

[231] As noted by this court on the original appeal, the appellant was no stranger to the criminal justice system and was well versed in his rights upon arrest.

[232] He was repeatedly advised of his *Charter* right to counsel prior to each of the three incriminating statements he provided in the wake of his arrest. He did not suggest that he was not advised of that right. The appellant declined on each occasion to speak with a lawyer. As Finlayson J.A. noted on appeal in 1994, "it [was] difficult to imagine what more the police officers could have said to encourage him to retain counsel": *Rees (ONCA),* at p. 131.

[233] The appellant himself, at the voluntariness *voir dire*, acknowledged that the police did not mistreat him, that he was comfortable with them and that, in relation to S/Sgt. Cotgreave and Det. Massey, "[t]hey were all right." He said that, as they were trying to get their plan going, S/Sgt. Cotgreave and Det. Massey kept going in and out of the interview room. The police, including the officer who was sitting outside of the interview room and had an eye on it, denied that this was the case, although it was clear that, at one point, S/Sgt. Cotgreave and perhaps Det. Massey left the room to get the typewriter. The trial judge specifically rejected the appellant's evidence on this point, finding that there was no repeated in and out by the officers.

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[234] The appellant was described as alert, cooperative and responsive. He himself admitted that he was speaking normally and not slurring his words. This was confirmed by the police. Although the appellant testified that he had consumed carpet cleaner in an attempted suicide earlier, he told the police in his statements that he had not consumed alcohol or drugs that day. He may have been hungry, thirsty and tired, but he did not complain about this, as confirmed both at the *voir dire* prior to trial and before this court. S/Sgt. Cotgreave testified at the *voir dire* that although the appellant appeared a "little more tired" than he had previously seen him, "his demeanour was the same."

[235] The trial judge found that the appellant "was not intoxicated in any way during the taking of the statements in issue." He also found that there was "no evidence in the nature of the responses made by the accused [during the third interview] that such responses were affected by fatigue or emotional fragility." As the trial judge noted, the collective evidence of the twelve police officers who testified at the *voir dire* underscored that the appellant was suffering from no intellectual impairment.

[236] In our view, the appellant was capable of exercising his right to silence. He had done so previously, even in the context of this investigation. For instance, after the original suicide attempt, he told the police that he had no interest in speaking to them and the police respected that.

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[237] There have never been any allegations of violence or oppressive conduct in relation to the appellant's confession to murder. There was nothing that could have overborne the appellant's will. Although he was undoubtedly tired and may have been hungry and thirsty, it was not such as to impact his obvious desire to give statements to the police, one after another.

[238] We also reject the appellant's claim made before this court that he did not read his confession to murder before he signed it. The confession is less than two full pages long. It took but minutes to give. Both pages start with a caution at the top and set out his rights. The appellant initialed parts of the statement and signed his name after the final sentence: "I have a problem with dope and booze, I'm like Jekyl[l] and Hyde when I'm straight I'm a nice person."

[239] This brings us to the appellant's main contention that, at a retrial, his confession would no longer be considered voluntary because the fresh evidence points to a police conspiracy involving the two officers who recorded the appellant's confession. Indeed, in oral argument, the appellant's primary submission relating to the confession was that, given that S/Sgt. Cotgreave and Det. Massey conspired to frame him, no jury would find the confession believable.

[240] Even assuming, for the purpose of argument, that all the new evidence relied on by the appellant in raising this conspiracy would be admissible, we are not satisfied that there was a police conspiracy that would remove the appellant's

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confession from the equation. In an effort to avoid undue repetition, we will address why we reach that conclusion in the context of our *Truscott* analysis.

[241] For now, we conclude that absent a conspiracy, there is no basis to find that the appellant's confession was involuntary.

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2. An acquittal is not appropriate under *Truscott*

a. The *Truscott* framework applies in this case

[242] In *Truscott*, this court held that it was in the interests of justice to deviate from the usual approach to remedy. As the court noted: "[t]he remedial discretion in s. 686(2) is sufficiently broad to permit resort to a more vigorous review of the evidentiary record in those cases where that approach is required in the interests of justice": at para. 259. Instead of asking whether a reasonable jury could convict on the trial evidence, as augmented by the fresh evidence on appeal, the court may instead engage in a hypothetical new trial to determine if it is "clearly more probable than not that the appellant would be acquitted at a new trial": at para. 268.

[243] Once the decision to quash a conviction is made on the basis of some fresh evidence admitted on appeal under the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, (in this case, the Raymer tape), it is no longer necessary to determine whether the rest of the evidence meets the *Palmer* criteria: *Truscott*, at para. 270. The focus instead shifts to remedy and how all of the new evidence could

reasonably be expected to affect the respective cases of the Crown and defence at a new trial.

[244] In this context, the fact-finding power of this court is limited to interpretations of the material and inferences to be drawn from facts that are not only reasonable but that are readily available from the material: *Truscott*, at para. 278. Speculation must be avoided and a cautious approach taken: at para. 278.

[245] Before engaging in the hypothetical new trial analysis, it is necessary to first address the Crown's argument that resort to such an analysis is not appropriate in this case.

[246] In the Crown's submission, the *Truscott* framework "should be reserved for the most exceptional of cases", ones that involve: (1) extraordinary prejudice suffered; (2) a sufficient appellate record on key issues; (3) fresh evidence that unambiguously and substantially weakens key pillars of the Crown's case; and (4) no forum better placed than the appeal court to assess culpability. The Crown maintains that only where these "preconditions" are met may an appeal court engage in a hypothetical new trial. According to the Crown, "the exceptional threshold requirements for [the appellant] to access the *Truscott* framework are not satisfied" in this case.

[247] There is no question that, "[i]n a routine appeal, if a conviction would be a reasonable verdict on a retrial, the court should remit the matter to the trial court

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for that retrial": *Truscott*, at para. 258. Both the majority and minority in *Bouvette* agree with that proposition: see paras. 76, 197.

[248] It is only where a case falls "outside of the norm" that a more vigorous review of the evidentiary record may be appropriate "in the interests of justice". *Truscott*, at para. 259. Here, the Crown asks us to clarify when a case will fall "outside of the norm".

[249] It is important, in addressing this issue, to distinguish between two different questions: (1) when is it appropriate to engage in a more vigorous review of the evidence in accordance with *Truscott*? and (2) when is it appropriate to grant an acquittal, even though it is possible a reasonable jury could convict? As illustrated below, these are two different questions, and a more vigorous review of the evidence, assuming one is appropriate, will not always result in the conclusion that an acquittal should be ordered.

[250] In considering when it is appropriate to engage in a more vigorous evidentiary review, we are alive to the majority's caution in *Bouvette*, that "inquiring into whether it is more probable than not that an acquittal would result at a retrial looks very much like the substantive weighing that is squarely within the competence of a trial court": at para. 96.

[251] Indeed, in *Truscott*, this court recognized "the limits of appellate review", but concluded that "[f]airness to the appellant dictat[ed] that this court should …

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endeavour to bring this matter to a conclusive end": at para. 266. The court also recognized that a hypothetical new trial could be viewed as "artificial and speculative": at para. 278. Without a doubt, "an actual new trial would be preferable to this process": at para. 278. That, however, was not an option. In the "unique circumstances" of the case, the court determined the appropriate remedy by envisioning how a hypothetical new trial would proceed in light of the entirety of the new information that was before the court: at para. 268.

[252] We note that, in *Truscott*, the court did not depart from the usual approach to remedy simply because the case involved a miscarriage of justice. Rather, the court took into account other factors that made the case "far from a routine appeal": at para. 260. In other words, the court signaled that it will not be in every miscarriage of justice case that it is appropriate to apply a different analytical approach to remedy.

[253] In this case, there is an extensive record before this court, including the original trial record and a significant amount of new evidence. The appellant's primary argument is that he is entitled to an acquittal based on a *Truscott* analysis. Although the Crown disagrees that it is appropriate to engage in such an analysis, the Crown fully engaged on that issue as well. The appellant, through no fault of his own, was denied a fair trial and therefore suffered a miscarriage of justice. It is clear that no new trial will ever occur because the Crown concedes that it would be unfair to retry the appellant.

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[254] In our view, and for all of those reasons, this is a case that falls “outside of the norm” and, therefore, it is appropriate, in the interests of justice, to engage in a *Truscott* analysis and apply the “clearly more probable than not” test. We do so in the following sections.

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b. The new evidence

[255] The record before this court is voluminous, including the original record and new evidence. In addition to the critical Raymer tape, the new evidence includes other categories of information. We begin by outlining this other information before turning our focus to the Raymer tape, which is central to this appeal.

i. Mark Urban

[256] Absent from the original disclosure was an audio recording of a conversation between Mark Urban and Det. Massey (now deceased).

[257] Mr. Urban and his family lived with Mr. Raymer for approximately two years before Ms. Thurrott and her family moved into 15 Smithfield Drive. Mr. Urban had known Mr. Raymer for 20 years before that because he grew up on that same street.

[258] After Darla’s death, Mr. Urban spoke to Det. Massey, giving a description of Mr. Raymer’s “severe deviant behavior”. That phone conversation was recorded and we have reviewed the transcript of the recording. We have also reviewed Mr. Urban’s evidence tendered on this appeal.

[259] The appellant says that the information Mr. Urban provided should have raised alarm bells for police at the time. He also submits that this court should reject S/Sgt. Cotgreave's explanation as to why it did not, since it lacks any credibility.

[260] Mr. Urban is of the view that, despite his "physical disability", Mr. Raymer had "considerable physical strength … particularly when he was angry because things did not go his way." In Mr. Urban's opinion, Mr. Raymer "liked to hide who he was physically and mentally." He was, in Mr. Urban's view, "more capable" and "more cunning" than he would "show himself to be." Mr. Urban said that he had seen Mr. Raymer doing things around the house that "required physical strength."

[261] Mr. Urban also informed Det. Massey that Mr. Raymer would bring "strays" home. He said that Mr. Raymer was "trying to hustle boys, young children" and that he engaged in "severe deviant behaviour". He referred to three of the individuals with whom Mr. Raymer apparently had sexual relations by name, calling them "Goddamn animals", "street grubbies", and saying that they suffered from "deviant behaviour". He also said that he thought Mr. Raymer kept pictures of "Sunshine boys", which were published in the *Toronto Sun* newspaper.

[262] Mr. Urban told Det. Massey that the police should look into Mr. Raymer because he was "very very dangerous … around children". He also said that he had warned Mr. Wilson and Ms. Thurrott not to move into Mr. Raymer's home and

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that he had moved his own family out for the “safety of [his] children”. He alleged that, on one occasion, Mr. Raymer slapped his son and so he slapped Mr. Raymer in the face. When Det. Massey said he was “surprised” that Mr. Urban stayed in the home as long as he did “if it was that bad”, Mr. Urban responded that Mr. Raymer was “okay” in the first year and then started getting worse. When Det. Massey inquired, Mr. Urban admitted that he had never called the police about these alleged assaults.

[263] S/Sgt. Cotgreave testified before this court that it was Det. Massey who spoke to Mr. Urban on the phone. Having reviewed the audiotaped conversation, S/Sgt. Cotgreave was of the view that Mr. Urban was “upset about Mr. Raymer bringing 17, 18-year-old males home when he wasn’t there.” S/Sgt. Cotgreave also pointed out, among other things, that Mr. Urban complained about his young son being assaulted by Mr. Raymer, and yet “instead of calling the police or dealing with it, he ended up locking his three-and-a-half-year-old in a second-floor bedroom overnight to protect him from Raymer”. S/Sgt Cotgreave said he found that “just a little bizarre.” S/Sgt. Cotgreave also commented on the irrelevance, in his view, of Mr. Raymer having “sexual proclivities maybe” for almost-adult males. Much of what Mr. Urban talked about was “neighbourhood gossip” and S/Sgt. Cotgreave thought that he and Det. Massey would have put a follow-up interview with Mr. Urban “low … on our list to go and re-interview or to follow up.”

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[264] Mr. Urban testified virtually before this court. He said that, in his view, Mr. Raymer hid who he was physically and mentally and that he was more capable than he had shown himself to be. He said that Mr. Raymer had a "violent streak" that "wasn't normal." This apparently involved an "uncontrollable anger in him on occasion."

[265] Mr. Urban also testified that Mr. Raymer apparently confessed that he had pushed his brother, causing his brother to hit his head and die, and that he had also later pushed his mother down the stairs, and she too had died.

[266] In the end, Mr. Urban was asked while testifying before us if he had any "actual evidence" of any of the claims he was making about Mr. Raymer, and he said, "I never said I did, I said I had an opinion."

ii. Other undisclosed statements and evidence

[267] There are other witness statements that the appellant says should have been disclosed either because: (a) they would have assisted in advancing the alternate suspect claim as it related to Mr. Raymer; and/or (b) they show a conspiracy to suppress all evidence related to Mr. Raymer.

[268] These include statements from Daphne and George Thurrott (Darla's aunt and uncle), Winnie Thurrott (her grandmother), Fred Cornish (Winnie's partner), Kari Hogben (Darla's teacher), Edward Housego (Darla's vice principal), Linda Rushton (a friend of Darla's parents), and the polygraph results of Ms. Thurrott,

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Mr. Wilson and Mr. Venditti. According to the appellant, this evidence reveals, among other things, Darla's fear of Mr. Raymer.

[269] The appellant also says that two information to obtain ("ITO") search warrants in connection with 15 Smithfield Dr., including for Mr. Raymer's room, were not disclosed but should have been. The ITO for Mr. Raymer's bedroom included instructions to search for "clothing and women[']s accessories". It also stated that: (1) Darla had been with Mr. Raymer in his bedroom, as well as he in her bedroom; (2) Mr. Wilson and Mr. Venditti had seen Mr. Raymer staring at Darla in the past as she slept in her room; and (3) Mr. Raymer said that he would play with Darla in her room and that she would also play in his room.

[270] There was also a coroner's investigation statement in which the coroner who had attended at the scene made note of a comment made by Mr. Wilson while in the kitchen: "While I was writing out the warrants her common-law husband came into the kitchen --- paid no attention to the fact that I was sitting at the kitchen table, and suddenly said to his wife: 'I never did want her sleeping up there ---- and our baby is not going up to the second floor'".

iii. DNA results

[271] In the years between when Darla was murdered and now, DNA evidence has evolved substantially. Accordingly, the Centre of Forensic Sciences was asked to examine the shirt Darla was wearing when she was murdered. On October 10,

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2012, the Centre of Forensic Sciences provided a report comparing the appellant's DNA profile with the DNA profile found on Darla's shirt. This report was also submitted as fresh evidence. There is no dispute that the results reveal the appellant's DNA on the chest area of that shirt. The results also show that Mr. Raymer's DNA was not located on that shirt.

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c. How a hypothetical new trial would unfold

[272] We now turn to the unfolding of the hypothetical new trial.

i. The conspiracy claim would fail

[273] Central to the appellant's argument that it is clearly more probable than not that he would be acquitted at a hypothetical new trial is his claim that the police engaged in a conspiracy. At the heart of that claim is the fact that the Raymer tape was not disclosed. The appellant strenuously submits that S/Sgt. Cotgreave and Det. Massey were aware of the Raymer tape and its contents and that they actively suppressed it, along with other evidence that pointed to Mr. Raymer.

[274] As we explain, we are not satisfied that the inferences and interpretations that the appellant asks us to draw are available, let alone readily available. We say that for several reasons.

[275] First, in our view, the evidence does not support the claim that S/Sgt. Cotgreave or Det. Massey directed or authorized Cst. Clanfield to conduct the interview with Mr. Raymer.

[276] At the time of the interview, Cst. Clanfield was a police constable with the Toronto Police Service marine unit. He was seconded to the homicide division during the slower winter months for the marine unit. He assisted on this murder investigation from March 17 (the day Darla's murder was discovered) to mid-April 1989. He had never previously worked with officers Cotgreave or Massey. He described his role on the homicide unit as that of a "gopher", mainly "babysitting" and driving people around, getting dinners and typing documents. He had no training in interviewing suspects or conducting homicide investigations, let alone interviewing individuals with cognitive limitations.

[277] For anyone involved in criminal law for any period of time, it defies belief that Cst. Clanfield would be tasked with interviewing Mr. Raymer alone. It presses the bounds of credulity to suggest that seasoned homicide investigators, at the helm of a fresh investigation into the murder of a child, would, on the day the murder was discovered and after confirmation that this was indeed a murder, place an inexperienced marine unit officer into a room, all alone, with the man who slept in the room across the hall from the deceased child.

[278] S/Sgt. Cotgreave made this point when testifying in this court. As the officer-in-charge of the investigation, he testified that he would not have allowed a seconded officer from the marine unit to try and obtain a confession, especially on his own. That was particularly true at such an early stage, only hours into the

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homicide investigation when so little was known. And, to be sure, Cst. Clanfield conducted no other interviews on his own in this case.

[279] S/Sgt. Cotgreave also explained that it would have been inadvisable for anyone, no matter their experience, to conduct an adversarial interview at such an early stage of the investigation while police were still gathering basic information. He noted that, in contrast, none of the other initial interviews conducted with any of the other potential suspects, including the interview with the appellant, were adversarial in nature.

[280] Before this court, Cst. Clanfield, who retired from police work many years ago, testified that he does not recall taking Mr. Raymer to the bank en route to 22 Division on March 17, 1989. He also testified that he does not recall taking a statement from Mr. Raymer, although he acknowledged his own handwriting on the March 17 handwritten seven-page statement. He also acknowledged that it was his voice on the tape but testified that he had no memory of interviewing Mr. Raymer, no memory of why he conducted the interview, and no memory of recording the conversation. He admitted that, in the circumstances, it was improper for him to interview Mr. Raymer alone like he did. He also recognized that the interview was poorly done, including that there was no date, location or anything of the sort at the outset of the interview. He later learned not to do interviews alone and acknowledged that he inappropriately pressured Mr. Raymer in the interview and that this could produce unreliable results.

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[281] We find that the new evidence simply does not establish that S/Sgt. Cotgreave or Det. Massey directed or authorized Cst. Clanfield to conduct the interview of Mr. Raymer that was captured on the Raymer tape.

[282] We also find that it is much more likely than not that Cst. Clanfield kept this recorded interview to himself. The inference that he told S/Sgt. Cotgreave or Det. Massey about the Raymer tape is not "readily available". Indeed, as we will explain, we find to the contrary.

[283] Before us, S/Sgt. Cotgreave, who worked with the Toronto Police Service for 35 years and ultimately served as a superintendent before retiring, unequivocally denied knowledge of the interview. He testified that he was not present for the recorded conversation and had no knowledge of its existence until it was brought to his attention in the context of the appeal now before us. He also said he had no knowledge of how the cassette tape got placed in the boxes located at police headquarters.

[284] Sadly, Det. Massey, who retired in 2000, passed away in 2023. Accordingly, he was not available as a witness in this case. Even so, prior to his death, he was contacted by an officer from Professional Standards after the Raymer tape was discovered. According to notes of the call, he had very limited memory of the investigation or of Mr. Raymer even at that point. He recalled having spoken to Mr. Raymer at some point with S/Sgt. Cotgreave. He also recalled that Mr. Raymer

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was “mentally challenged” and had “atrophy”, which discounted him as a suspect. He had no memory of ever receiving a tape from Cst. Clanfield and was unaware of any recorded conversation between that officer and Mr. Raymer.

[285] As for Det. Rose, who retired in 2007, he testified before this court but, unfortunately, owing to a brain injury, had significant difficulty with his memory. Although he recalled that he and Cst. Clanfield took Mr. Raymer to the bank, and that he may have thought that was strange, he does not recall any of the details of the day. He only had a vague memory of speaking to Mr. Raymer on March 17, 1989. He had no memory of taking a statement from him and denied any knowledge of a tape or its contents.

[286] In short, the evidence before this court is that S/Sgt. Cotgreave and Det. Massey denied any knowledge of that tape. We are asked to reject their evidence on this point as lacking in credibility. According to the appellant, not only did S/Sgt Cotgreave know about the taped interview, but he and Det. Massey, as the officers in charge of the investigation, actively conspired to suppress that interview so as to avoid weakening the case against the appellant.

[287] In making this argument, the appellant points to the many references to “they” and “them” on the Raymer tape. By way of only one of many examples, Mr. Raymer repeatedly referred to the fact that he “kept telling them” that he did not

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see her, but that “they won’t believe me.” Cst. Clanfield also referred to “they” and “them” in the course of the interview.

[288] The appellant contends that the repeated references to “they” and “them” on the tape are references to S/Sgt. Cotgreave and Det. Massey. On the appellant’s version, when they failed to get a confession, Cst. Clanfield tried to extract one. When no confession was obtained, they suppressed the Raymer tape and doctored the seven-page handwritten statement that had been previously taken. We know it is doctored, says the appellant, because the handwriting shifts from Cst. Clanfield’s to S/Sgt. Cotgreave’s on the last two pages and because the statement does not correspond to the description on the Raymer tape of what happened between Mr. Raymer and “they” and “them”. The appellant argues that those two pages must have been written after-the-fact, once the pressure to obtain a confession from Mr. Raymer failed.

[289] We accept that the reference to “they” and “them” could be a reference to S/Sgt. Cotgreave and Det. Massey. That, however, does not enable us to “readily” infer that they were part of a conspiracy to suppress evidence. Whatever Mr. Raymer may have meant by his references to the homicide investigators, and whatever concerns he may have had as to whether they suspected him or believed him, there is no basis to leap to the conclusion that they instructed Cst. Clanfield to take a statement from Mr. Raymer, suppressed its existence and content, and decided to frame the appellant.

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[290] In our view, based on the record before us, if anyone lacks credibility as to what occurred during the Raymer interactions in the wake of Darla's murder, it is Cst. Clanfield. Although he testified before this court that he assumes that he would have passed along the Raymer tape to the lead investigators, his motivation in 1989 not to do so would have been strong. We say this for several reasons.

[291] First, a junior marine unit officer conducting an interview of a potential suspect in a murder case in these circumstances, with no direction from his superior officers, would have been inappropriate.

[292] Second, he failed to achieve his objective: to obtain a confession from this intellectually challenged man. The recording undoubtedly had information that would have been helpful to the defence and should have been disclosed. But, it also had Mr. Raymer denying over 30 times that he had any interaction with Darla the night she was killed, unequivocally denying any involvement in her murder, and, at best, equivocating on possible prior sexual touching.

[293] Against that factual backdrop, Cst. Clanfield would not have been anxious to provide the Raymer tape to his superior officers.

[294] Cst. Clanfield testified that he has no memory of even interviewing Mr. Raymer, no memory of why he conducted the interview, no memory of recording it, and no memory of providing the tape to his senior officers. Cst. Clanfield's suggestion that he would have passed the tape along is nothing more than an

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assumption based upon his current day view that it would have been a “career ender” not to do so.

[295] The fact that S/Sgt. Cotgreave and Det. Massey continued to investigate Mr. Raymer after the Raymer tape was recorded also cuts against the inference the appellant asks us to draw, which is that the officers wanted to suppress the tape and other evidence pointing to Mr. Raymer. For instance, following the creation of the Raymer tape, the police executed a search warrant on Mr. Raymer’s room and tracked down various claims made against him, including by Mr. Urban. They interviewed his aunt and others, trying to obtain more insight into Mr. Raymer. They ran a criminal record check on him. And they attended at his workplace a week after the murder to speak to him again. If the police were so intent on suppressing the Raymer tape, one must ask why they would take all of these follow-up steps to investigate him.

[296] Contrary to the appellant’s suggestion, we would not infer from the fact that Mr. Raymer did not take a polygraph or that the police did not take bodily samples from him that they were engaged in a conspiracy. His bodily samples would not have been terribly useful in the pre-DNA world, nor would their presence have been surprising, considering Mr. Raymer lived in the same home as Darla. As for the polygraph, it is understandable that police may not have put this intellectually challenged man through that process or may have had concerns about the reliability of any result arising from a polygraph.

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[297] The appellant suggests that the police may have decided to purge the Raymer tape and other evidence from their investigation of Mr. Raymer later on, after they focussed on the appellant as the primary suspect. Respectfully, this suggestion does not make sense either. If that were the case – an *ex post facto* purging – one must ask why there was no reference to the Clanfield-Raymer interview in the ITO for Mr. Raymer's bedroom, which was prepared before the suggested "purging". That information would have been, as S/Sgt. Cotgreave testified before us, "absolutely" relevant to include in support of the search warrant, which was executed just two days later. This is particularly true as, at that time, there was some suggestion from the pathologist that Darla may have been sexually assaulted in and around the time of death (a concern that was later dropped).

[298] We do not agree that it is readily clear that Cst. Clanfield told S/Sgt. Cotgreave and Det. Massey about the tape, and that they later decided to deep-six the tape and the information about it. The more readily available conclusion is that Cst. Clanfield did not tell S/Sgt. Cotgreave or Det. Massey about the Raymer tape or its contents, because he did not want anyone to know about what he had done.

[299] The appellant says that it has been definitively proven that the Raymer tape came out of a box, found at police headquarters, with S/Sgt. Cotgreave's handwritten name on it and from that it is clear that S/Sgt. Cotgreave knew of its

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existence. The Crown, on the other hand, says the suggestion rests on shaky ground.

[300] At the end of the day, in our view, nothing turns on exactly where the Raymer tape was found and in which box. Even accepting that it came from one of the boxes with S/Sgt. Cotgreave's handwriting on it, there is simply no evidence as to where that tape originated or where it was over the many years since it was recorded. Although 58 cassette tapes were discovered in 2009, we do not know who put the items into those boxes and who had access to those boxes, especially in the years following S/Sgt. Cotgreave's retirement in 2005.

[301] There is not much known about the provenance of those boxes, including when they were delivered to the unit they were discovered in, whether that occurred before or after S/Sgt. Cotgreave's retirement, who had access to the boxes, and so on. Only 2 of the 58 tapes in the box even related to this investigation, one of which was the Raymer tape. The boxes were found in 2009, but S/Sgt. Cotgreave last worked in the office where they were found in 2005.

[302] For these reasons, we are unable to infer, let alone readily infer, that S/Sgt. Cotgreave knew of the existence of the Raymer tape or that he and Det. Massey conspired to suppress it. If there had really been a conspiracy to suppress the tape, one is left wondering why in the pre-electronic age, the police would not have gone the distance and gotten rid of the tape. Storing it all of these years would risk their

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conspiracy being discovered, putting their jobs and reputations at risk. That would be an odd way to go about achieving their supposed goal.

[303] Furthermore, if there was no conspiracy to suppress the Raymer tape, it would hardly make sense for the two officers to conspire to suppress the other undisclosed evidence that the appellant relies on. It is difficult to understand why the police would conspire to suppress some evidence on that point but not other evidence. The disclosure choices made are more readily explained by the disclosure practices at the time. For instance, in Ms. Thurrott's will-say, which was disclosed, she stated that "[i]f [Mr. Raymer] got pissed off he would walk around and talk to himself … and he'd just be like a pig." This is hardly a description one would disclose as part of a conspiracy to make Mr. Raymer look good.

[304] It is also notable that the police failed to disclose information that would have been damaging to the appellant, which is inconsistent with the theory that the purpose of the conspiracy was to take the spotlight off Mr. Raymer and place it onto the appellant. Take, for instance, the undisclosed statement of Heinz Sparmblek, who worked and socialized with the appellant. Mr. Sparmblek reported to the police that the appellant had told him about doing "[c]oke" and drinking the night Darla died and therefore not remembering much about it. Mr. Sparmblek also told the police that the appellant had recounted an incident, which occurred just a few months before Darla's murder, where he had been doing drugs and drinking with a woman and not long after found himself in the bed of her daughter.

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According to Mr. Sparmblek, the appellant told him: “Holy shit, I couldn’t believe it. I woke up in her daughter’s bed. … The last thing I remember was passing out on the couch.”

[305] The child in question and her mother provided statements. From the information available to us, it would appear that these were also not disclosed. In these statements, they recounted how the 16-year-old woke up and found the appellant at the foot of her bed staring at her. The appellant had previously done drugs with the child’s mother. It would appear that none of this was disclosed and yet it all happened in the weeks and months just prior to the murder.

[306] It would be a strange police conspiracy to tunnel in on the appellant and try to make the case as strong as possible against him, yet not disclose any of these statements.

[307] In the end, the appellant has not met his onus in trying to show that there was a police conspiracy.

ii. It is not clearly more probable that a hypothetical new trial would result in an acquittal

[308] Absent a police conspiracy, the case against the appellant would remain strong at a hypothetical new trial. We are not satisfied that an acquittal would clearly be the more likely result given the entirety of the record now available.

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[309] The appellant's confession would remain a formidable factor against acquittal, absent a police conspiracy. Specifically, the appellant's argument - that a jury would have a reasonable doubt that the appellant confessed because of the police conspiracy – falls away. What we are left with, then, is a voluntary confession, and one that is factually compelling.

[310] In the confession, the appellant accurately noted the colour of the nightshirt Darla was wearing on the night she was murdered: white. His description of how she looked matched her appearance when she was found the next morning: with foam around her mouth. He provided an explanation for why he killed her: to put her out of what he perceived as her misery. He also explained that drugs and alcohol made him into another person.

[311] The appellant had the opportunity to kill Darla, since he spent the night in the baby's room, which was near Darla's room.

[312] The appellant was the only overnight visitor to the home on the night that Darla was murdered.

[313] There is also after-the-fact evidence that is probative of guilt. This includes the appellant having deviated from the arrangements he had made with Ms. Thurrott earlier in the evening. Instead: (i) he rose earlier than intended without an alarm, despite evidence that he was an incredibly deep sleeper; (ii) he retrieved the money he had given Ms. Thurrott, despite the fact that he had wanted her to

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use it to buy him drugs; and (iii) he left the residence and went home to his brother's place, rather than show up to his scheduled work.

[314] In addition, at a hypothetical new trial, the new DNA evidence would form a key part of the Crown's case. Darla had none of Mr. Raymer's DNA on the samples taken from her night clothing. In contrast, the appellant's DNA was on what she was wearing when she was murdered.

[315] The appellant quite properly notes how easily DNA can come to rest on another's clothing and suggests that his DNA could have been transferred to Darla while playing with her. However, he testified at trial (when DNA was not an issue) that he "most likely" played with Darla earlier in the week when he had gone to the home, and not the night she was murdered.

[316] Finally, the DNA evidence would be particularly incriminating alongside the injuries the appellant was seen to have suffered. The police photographed him on March 18, 1989. He had a puffy and split lip and scratches on his arm and back. Darla was 94 pounds when she was murdered, certainly big enough to fight for her life. Although the appellant has provided a different explanation for those injuries – that they resulted from a police arrest about a week and half before the murder – there is no independent evidence supporting that claim. And there has been no explanation offered for the scratches on his arms and back.

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[317] This is not to discount the fact that there would remain a viable third-party suspect in the case: Mr. Raymer. He was a viable suspect at the time of trial and would be an even better one at a hypothetical new trial, given the Raymer tape. With that said, the Raymer tape, combined with the other information said to have been undisclosed, does not tip the scales to a conclusion that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial. We say this for the following reasons.

[318] Unlike the appellant, Mr. Raymer did not confess to murdering Darla. And, unlike the appellant, despite living in the same home as the child, Mr. Raymer's DNA was not on Darla's garments.

[319] Mr. Raymer, at 52 years of age, had no criminal record.

[320] As for the Raymer tape, it is not conclusive of whether Raymer had any sexual contact with Darla, before her murder – a murder which did not involve a sexual element. Even if it was conclusive of that, it is not evidence that he killed her, something he specifically denied.

[321] In our view, it is very difficult to determine exactly what Mr. Raymer was acknowledging when speaking to Cst. Clanfield. At no point did he suggest that he wanted Darla dead or even that she was anything other than a "friend" or "friend of a friend" to this intellectually challenged man.

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[322] Importantly, at the original trial, the defence knew that Mr. Raymer had been in Darla's room and that they had played checkers in the past and passed time together. He testified about having taken her to church. He also agreed at trial that he hugged her once in the past. Although the Raymer tape would undoubtedly be important additional information, it would not introduce a whole new concept into the trial.

[323] What would be new is the suggestion that Mr. Raymer had admitted to sexually touching Darla. When assessing his admission to having done so, the trier of fact would also undoubtedly take into account his cognitive challenges, and the leading nature of Cst. Clanfield's questions, in an effort to understand what exactly he had admitted to and where the truth lay. To this end, we note what Moldaver J. said in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 103 (citation omitted):

> Special note should be taken of the mental health and age of the accused. In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing.

[324] We are satisfied that Mr. Raymer operated with significant physical and intellectual deficits. We say this based upon the objective evidence available to us, including the following:

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- Ms. Thurrott's evidence at trial was that he needed assistance, including on tasks as simple as opening jars.
- His Aunt Margaret acted as a guardian. In doing so, she arranged for tenants to provide him with help.
- He did not live by himself because of his need for help.
- He broke his arm at Taco Bell simply cleaning a table.
- His statement to police demonstrates that he was easily confused and challenged intellectually.

[325] This objective evidence is consistent with the many observations found in the record that Mr. Raymer had both physical and intellectual challenges.

[326] The appellant relies on Mr. Urban's evidence to suggest that Mr. Raymer was more capable than others thought.

[327] In our view, Mr. Urban would have little admissible evidence to give at a new trial and any evidence he did give would be questionable from a credibility perspective. The Crown's theory on appeal – that Mr. Urban's dislike of Mr. Raymer seemed to arise from his perception that, perhaps, Mr. Raymer liked the company of men – has merit. Although Mr. Urban seemed to suggest to Det. Massey that Mr. Raymer engaged in "deviant behaviour" with males and that he was engaged in crime, in the very same call he said he had no evidence of these crimes and was not aware of police ever being called on Mr. Raymer. He also

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acknowledged that he had no information about Mr. Raymer having had any inappropriate contact with little girls.

[328] Despite Mr. Urban's claims, including that Mr. Raymer had struck Mr. Urban's child, he never contacted police while he was living at the house, even though he intimated to Det. Massey that Mr. Raymer had possibly killed his own mother and brother.[5]

[329] The appellant suggests that the fact that Det. Massey followed up on some of Mr. Urban's claims gives them more credibility. We do not reach this conclusion. To the contrary, it is our view that it demonstrates how seriously the police took this investigation, following up on all threads, including Mr. Urban's rather peculiar claims. In testifying before this court, S/Sgt. Cotgreave explained why Mr. Urban's call would not have been a priority:

> This, to me, had no real relevance to the murder. … Mr. Urban was upset about Mr. Raymer bringing 17, 18-year-old males home when he wasn't there. He alleges, … his … three, three and a half year old son, was assaulted by Raymer, would lose his temper, would kick at him, would swear at him, would do all kinds of acts, it sounded like almost every day. And the, what he did was, instead of calling the police or dealing with it, he ended up locking his three and a half year old in a second floor bedroom overnight to protect him from Raymer, which I found a little bizarre, but – and the other – the other issue was that there was a fire every morning in the kitchen when Raymer was making breakfast. So – so when I looked at

[5] The brother's death certificate suggests he died from a cerebral hemorrhage arising from an accidental fall from the steps of a milk wagon.

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> this, there was – this was all two, three years old, so it was low on, it would have been put low on our – on our list to go and re-interview or to follow up. I mean, Massey even says to him, "Did you call the police? I'm surprised … you stayed there through all of this". So I just don't see how it – other than the violence towards, allegedly towards his three and a half year old, I don't see the relevance of the sexual proclivities maybe, but with male – male, almost adult. I don't – I don't see why we would put it in the brief.
>
> We get all kinds of calls of neighbourhood gossip and other situations, and if we took everyone in hand, we would – we've got to stay focused on this was a homicide. I know there were sexual assault elements around Darla, and they would have come – come into the play once we – once we got into it, if that's – if that's what – what had happened, but we weren't there yet. And so, I understand Mr. Urban called, and I understand he gave us this information, but if Massey had spoken to me, I wouldn't have rushed out to interview Mr. Urban on what he had said. We may very well have gotten back to him, but I don't see the direct relevance to dealing with a ten-year-old girl, and no – no apparent violence. Mom and Dad never indicated any kind of violence towards her by Raymer – by Raymer in that house for two years. So, anyway, that's my thoughts, my reasons.

[330] As for the allegation that Mr. Raymer engaged in sexual activity with young boys, Mr. Urban acknowledged when cross-examined in this court that he did not know the ages of the boys and, indeed, some of them might have been adults. When asked why he said in his affidavit that the photos of “Sunshine Boys” in Mr. Raymer’s room were an indication that he was a pedophile, Mr. Urban said he found it “odd”. He admits, even to this day, that it “bothered” him. Of course, these are photos of adult males published in the newspaper. Before this court, Mr. Urban

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seemed to backtrack on whether collecting photos of Sunshine Boys was evidence of pedophilic behaviour. As he explained, “Jimmy might have just collected those so he could envision himself as one of those guys. As a perfect specimen of manhood. I don’t know. It just – it just seemed odd to me that he had, he was collecting Sunshine Boys. He didn’t collect much else.”

[331] Mr. Urban was pressed in cross-examination before this court as to why he thought the “street grubbies” that Mr. Raymer allegedly brought home with him were underage boys. Mr. Urban’s evidence was inconsistent. At points he suggested that the boys were not even allowed in the home and that sometimes Mr. Raymer would sneak them in. He was unable to say why he thought some of them were underage, although he did know the ages of others as they were purportedly friends of his brother. He never personally observed any sexual activity taking place. But he was certain that “Jimmy”’s “predilection was towards younger boys”, a “penchant towards young boys.”

[332] In our view, the Urban statement and Mr. Urban’s evidence would do nothing to undermine the strength of the Crown’s case at a hypothetical new trial. It is, as he admitted, really nothing more than an “opinion” that Mr. Raymer was, to use Mr. Urban’s language, “not right”.

[333] The remaining information that was previously undisclosed would have made no difference. As described earlier, this information includes the statements

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of Daphne and George Thurrott (Darla's aunt and uncle), Winnie Thurrott (her grandmother), Fred Cornish (Winnie's partner), Kari Hogben (Darla's teacher), and Edward Housego (Darla's vice principal); Linda Rushton (a friend of Darla's parents); and the polygraph results of Ms. Thurrott, Mr. Wilson and Mr. Venditti.

[334] The appellant relies on a number of these statements, including the following:

- Darla told her grandmother that she was sometimes left alone with Mr. Raymer and that she was afraid of him.
- A friend of Ms. Thurrott and Mr. Wilson said that Mr. Venditti told her that he had seen Mr. Raymer staring at Darla.
- Darla urinated on the floor when staying at her aunt and uncle's place because she was afraid to come out and ask to use the washroom.
- Darla's teacher and school vice-principal variously reported that Darla seemed lonely, unkempt and in need of attention, yet she never complained of abuse and did not exhibit signs of it. She attended school on March 13, 1989 with cash in her pocket, which she said was not her money but rather money she had been given by "the boarder".

[335] In our view, these statements, taken individually or as a whole, would not advance anything at a new trial; when contextualized they can only be described as containing peripheral information, innuendo and speculation.

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[336] The suggestion that Darla told her grandmother that she was sometimes left alone with Mr. Raymer and was afraid of him, was conveyed to the police, not by the grandmother, but by the daughter of the grandmother (Darlene's sister Daphne).In other words, the suggestion that Darla was afraid of Mr. Raymer was, at best, double hearsay. It was also followed by Darlene telling the police that she did not think that "Old Jim" or "anybody in the house did it." As well, when the grandmother was interviewed, she did not mention to the police what Darla is purported to have told her.

[337] The vice principal's and teacher's statements largely reveal that Darla was lonely, unkempt and in need of attention. This may well be why she was afraid to use the washroom at night: a frightened, insecure child of tender years whose mother and mother's partner were doing lines of cocaine in the washroom. As for the money from the "boarder", the boarder at Smithfield was Mr. Venditti, not Mr. Raymer.

[338] Further undermining the importance of the statements relied on by the appellant is that the respondent relies upon statements pointing in the other direction. For instance, the partner of Darla's grandmother, Fred Cornish, said of Mr. Raymer that he was "crippled" and "harmless"; Mr. Cornish had a "gut feeling" that Mr. Wilson might actually be responsible. As for George Thurrott, he had opinions about each of the residents of the home. And Daphne Thurrott speculated to police that it was not someone in the house who had killed Darla. These feelings

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and speculation would also not advance anything at a new trial. There is, quite simply, nothing concrete that arises from any of the statements that would assist either party at a new trial.

[339] For these reasons, it cannot be said that it is clearly more probable than not that a hypothetical new trial would result in an acquittal. It is far from clear that the fresh evidence would undermine the most powerful evidence against the appellant: his confession to murder, his DNA on Darla's shirt, the coincidence of a murder on the same night he stayed over, and his behaviour following the murder.

3. An acquittal is also not appropriate under the residual category

[340] The appellant submits that even if he fails under the *Truscott* test, an acquittal is still warranted in the interests of justice. He served 23 years of his life sentence in custody and it has been more than 36 years since his arrest. His refusal to admit his guilt meant that his chances for earlier parole were denied and he has suffered tremendous stigma for murdering a ten-year-old girl, which has had a serious impact on his ability to retain employment and get his "self-respect back."

[341] Although we accept that there is case law where this has happened, there is no basis to do it here.

[342] In *Bouvette*, at paras. 90-91, the majority recognized that *Dunlop v. The Queen*, [1979] 2 S.C.R. 881, at p. 900, provided a jurisprudential basis for a

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discretionary acquittal based in part on factors unrelated to the merits of the appeal, in particular where the sentence had been served. However, the majority noted that the Supreme Court's later decision in *Brouillard v. The Queen* "makes plain that the appellant having served their sentence provides no necessary ground for an acquittal on its own": *Bouvette*, at para. 91, citing *Brouillard*, [1985] 1 S.C.R. 39; see also *R v. Vickerson*, 2020 ONCA 434, at para. 8. More generally, as previously noted, the majority expressed significant concern about undermining the meaning of an acquittal by granting an acquittal on factors unrelated to the merits: *Bouvette*, at para. 97.

[343] Even the minority in *Bouvette* acknowledged that "consideration of the equities alone cannot form a standalone basis to substitute an acquittal for a new trial": at para. 298. The minority also instructed courts of appeal to "give primary weight to their consideration of the potential for a new trial and the likelihood of acquittal or conviction": at para. 273.

[344] Therefore, although acquittals have been granted in the past on the basis of factors divorced from the merits, *Bouvette* signals a move toward shutting that door. Even if the jurisprudential door remains open a crack, we see no basis to grant an acquittal here.

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D. STAY OR NEW TRIAL

[345] Since an acquittal is not appropriate, we must determine whether to order a stay or a new trial.

[346] The Crown asks that we stay the proceedings under *Babos* since it would not be in the public interest to prosecute. In the Crown's submission, a stay is the most public and transparent way to bring this matter to a conclusion.

[347] The appellant, on the other hand, asks us not to stay the proceedings. He wants his acquittal and says that if we stay the proceedings, he will be deprived of all possibility of that acquittal at a new trial.

[348] We accept that we have jurisdiction to stay the proceedings under *Babos*. In *Babos*, the court held that a stay of proceedings is a discretionary remedy, one that flows in the clearest of cases where one of two things is operative: (i) the state conduct has compromised the fairness of the accused's trial (often referred to as the "main category"); or (ii) where the state conduct may not compromise trial fairness, but it risks undermining the integrity of the judicial process (often referred to as the "residual category"): at para. 31.

[349] Although there are two categories, the test remains the same for both, involving as it does three elements: (i) prejudice to the accused's right to a fair trial or the integrity of the justice system; (ii) no alternative remedy capable of redressing the prejudice; and (iii) if there is still uncertainty after (i) and (ii), a

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balancing of various factors, including the societal interest in a final decision on the merits: *Babos*, at para. 32.

[350] The Crown argues that we should enter a stay of proceedings under the main category because of a clear unfairness to the appellant's fair trial interests going forward. Quite simply, argues the Crown, there can be no fair trial this many years later. Therefore, we should stay the proceedings.

[351] We agree with the Crown that there can be no fair trial, but disagree that we should stay the proceedings.

[352] In our view, a fundamental concern in applying *Babos* is fairness to the accused. To grant a stay without regard to fairness from the appellant's perspective would be paternalistic, especially in the wake of a miscarriage of justice. In this case, the appellant holds out hope for an acquittal if a new trial is ordered.

[353] Whether ordering a new trial will result in an acquittal remains to be seen. Although it is clear that the Crown will not be prosecuting this matter again, it is not at all clear what the Crown will do if the matter is returned to the Superior Court. This is very much unlike *Bouvette,* where the Crown made clear that if the Supreme Court did not enter the acquittal, the Crown would ask that Ms. Bouvette be arraigned, call no evidence and invite the acquittal. Returning the matter was *pro forma* in those circumstances: *Bouvette*, at para. 83.

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[354] But those are not the circumstances here. Here, the Crown has left open which avenue it will pursue. It may (i) arraign and call no evidence (which would result in an acquittal); (ii) withdraw the charge; or (iii) enter a stay of proceedings pursuant to s. 579 of the *Criminal Code.*

[355] There was a good deal of discussion at the hearing of this appeal about the third option, the Crown stay of proceedings. Because it was suggested that this is a route that the Crown might choose, we offer brief comment on the subject in an effort to avoid the matter returning to this court in any subsequent proceedings.

[356] The Attorney General and counsel instructed by the Attorney General are entrusted with significant powers and discretion. The s. 579 Crown stay is one such exercise of discretion:

> **579 (1)** The Attorney General or counsel instructed by the Attorney General for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by the Attorney General's or counsel's direction, as the case may be, and the entry shall then be made, at which time the proceedings shall be stayed accordingly and any undertaking or release order relating to the proceedings is vacated.

[357] If a proceeding is stayed under s. 579(1), it may either be recommenced or, where that does not happen "within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced": s. 579(2).

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[358] As the Crown Prosecution Manual for Ontario recognizes, a s. 579 stay is not appropriate unless there is an expectation of recommencing the proceeding within one year: *Ontario Crown Prosecution Manual*, “Charge Screening” at D.3. This policy follows the recommendation of former Chief Justice of Canada Antonio Lamer. In his 2006 commission of inquiry report, he criticized the use of the stay as a way to dispose of prosecutions and drafted model guidelines indicating that stays should only be used where “there is a reasonable likelihood of recommencement of proceedings”: The Right Honourable Antonio Lamer, P.C., C.C., C.D., *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken: Report and Annexes* (St. John’s: Office of the Queen’s Printer, 2006), at pp. 303-325. In other words, s. 579 should not be used in circumstances where the objective is simply to allow a charge to wither on the vine.

[359] We agree. A Crown stay is not to be used to make a charge disappear. Rather, it is to be used to provide an opportunity for the Crown to put a case it wishes to advance in order. Here, it appears that the Crown is not intending to put a case in order. To the contrary, it appears that the Crown is not intending to ever proceed with a new trial.

[360] With that said, we order a new trial and leave it for the Crown to exercise its discretion in an appropriate manner.

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IV. CONCLUSION

[361] There was a miscarriage of justice in this case. The conviction is set aside. A new trial is ordered.

[362] We wish to extend our gratitude to all counsel who provided the court with great assistance.

Released: “November 27, 2025 JMF”

“Fairburn A.C.J.O.”
“G.T. Trotter J.A.”
“B. Zarnett J.A.”

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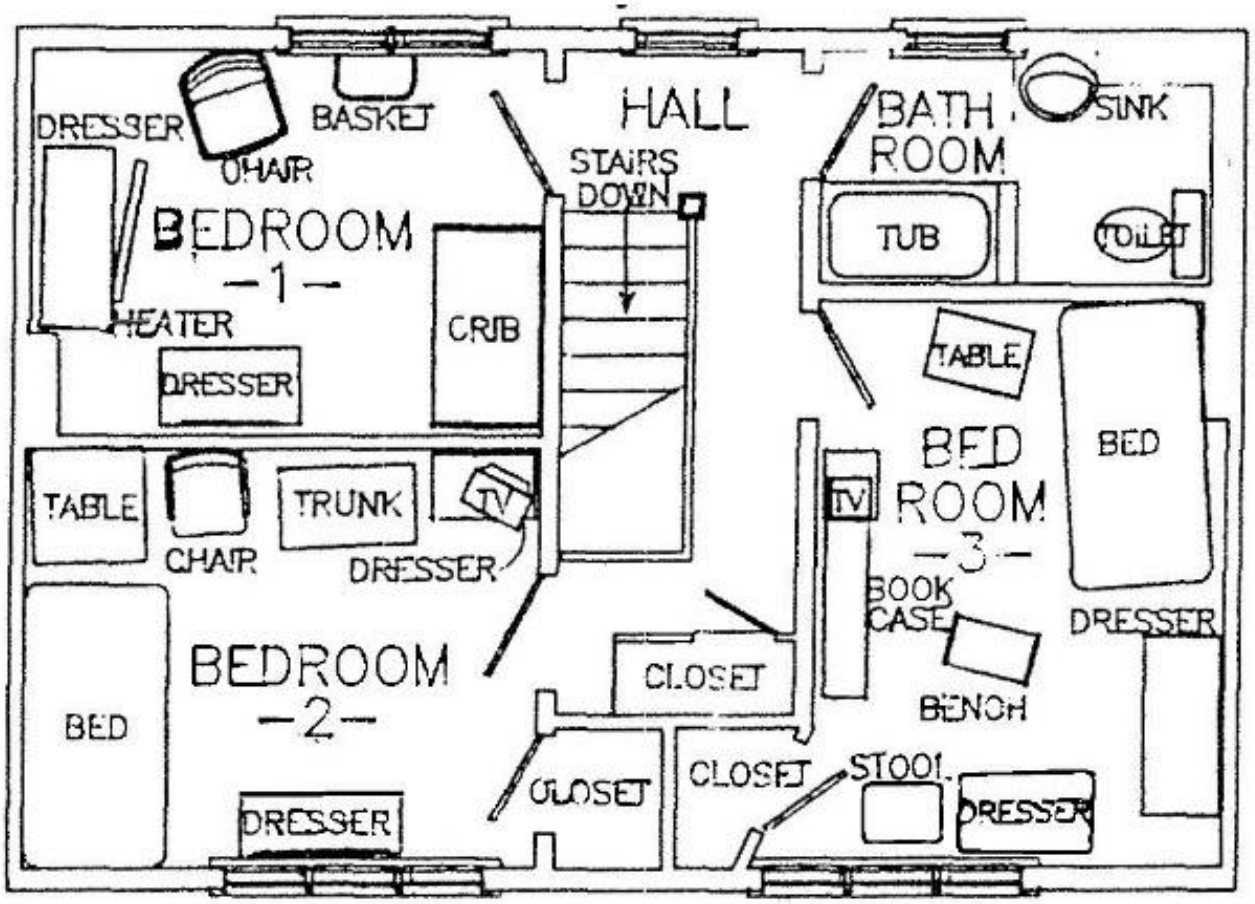
A. APPENDIX A: DIAGRAM OF 15 SMITHFIELD DR.



Bedroom 1	The room the appellant stayed in
Bedroom 2	Darla’s room
Bedroom 3	Mr. Raymer’s room

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B. APPENDIX B: TRANSCRIPT OF THE RAYMER TAPE

As agreed to by the parties to the appeal.

*(UI) indicates that the recording is unintelligible.

*(Crown) and (Appellant) indicate the positions of the parties on disputed portions of the transcript.

CST. CLANFIELD: Hi, how are you doing Jim?

RAYMER: Not you again.

CST. CLANFIELD: Hm?

RAYMER: Not you again.

CST. CLANFIELD: Why what's the matter?

RAYMER: It's just that you've asked me the same thing over and over and I try to tell them but they won't believe me. They think I'm a killer.

CST. CLANFIELD: So what did you tell them? What did you tell them?

RAYMER: I kept telling them I didn't see them, see her because it was too late but they won't believe me.

CST. CLANFIELD: Well you, you said to me that you went in her room to kiss her goodnight.

RAYMER: Kiss her goodnight and that was it but, but they won't believe me. He said, "where did you kiss her, her body?". (sighs)

CST. CLANFIELD: What did you tell them, where did you kiss her? I forget.

RAYMER: I kissed her in the cheek. But I told her the belly button, just to make the fun of it. I can't take this anymore. I…

CST. CLANFIELD: Kinda tough eh?

RAYMER: Well it is kinda, it's kinda tough on me, but what can I do about it? I don't go around kissing everybody goodnight.

CST. CLANFIELD: No I know, it's just last night you …

RAYMER: I didn't, not especially her, but I do kiss her.

CST. CLANFIELD: Yeah. Did you last night?

RAYMER: Not last night. I dunno everything circles.

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CST. CLANFIELD: Well hold on ah, Jim, remember we were ah…

RAYMER: (UI) late.

CST. CLANFIELD: Okay, no problem. Have a coffee.

RAYMER: Please. I don't…

CST. CLANFIELD: Have a coffee and settle down then.

RAYMER: I can't stand it any longer. It's awful to say.

CST. CLANFIELD: Yeah that's alright.

RAYMER: I don't wanna lose, lose my patience but what could I do? They, they won't believe me, and I…ahhh they get you frazzled.

CST. CLANFIELD: Mmhm. Well I don't see anything wrong with what you mentioned to me when we went to the washroom.

RAYMER: But they won't believe me.

CST. CLANFIELD: So when you went to the washroom, when I just took you down there to go to the bathroom.

RAYMER: Yeah.

CST. CLANFIELD: What were you telling me? 'Cause if you tell me that I'll, I'll try ah, I'll try and explain it to them for ya.

RAYMER: Well I don't kiss her in the body. I don't, I'd never do that.

CST. CLANFIELD: Okay so you…

RAYMER: I kiss her in the cheek.

CST. CLANFIELD: So you went, this is last night.

RAYMER: Yeah.

CST. CLANFIELD: So you went in the room and what happened?

RAYMER: Well before…I kiss her in the cheek.

CST. CLANFIELD: Last night.

RAYMER: Yeah last night but not the other nights.

CST. CLANFIELD: Just last night.

RAYMER: Just last night.

CST. CLANFIELD: Was the first time you said?

RAYMER: Yeah.

CST. CLANFIELD: So you went in the room and then what?

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RAYMER: I kissed her goodnight.

CST. CLANFIELD: Where was she at that time?

RAYMER: In bed.

CST. CLANFIELD: She was wearing what?

RAYMER: Her nightie.

CST. CLANFIELD: Which one?

RAYMER: I think blue or white for all I know.

CST. CLANFIELD: Okay.

RAYMER: That's all I know.

CST. CLANFIELD: So how was she laying in the bed?

RAYMER: This way.

CST. CLANFIELD: Which way?

RAYMER: The back.

CST. CLANFIELD: On her back eh? And what was she doing?

RAYMER: Probably saying her prayers, why would she, she's not a Christian.

CST. CLANFIELD: Yeah? So what…

RAYMER: No.

CST. CLANFIELD: …was she doing?

RAYMER: She could've, she could've listened to her music for all I know.

CST. CLANFIELD: Yeah.

RAYMER: She had it on a, I told ya, she had one of those things that I, I didn't give it to her. She took it.

CST. CLANFIELD: Yeah so she's awake listening to her music, yeah, and so what did you, did she say anything to you?

RAYMER: She hadn't fallen asleep.

CST. CLANFIELD: Were, were her eyes open?

RAYMER: I guess so.

CST. CLANFIELD: Her eyes were open when she was awake?

RAYMER: Yeah.

CST. CLANFIELD: She didn't say anything to you?

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RAYMER: No.

CST. CLANFIELD: She didn't even look at you?

RAYMER: Well not last night.

CST. CLANFIELD: No? How come?

RAYMER: Well she, she, she's tired.

CST. CLANFIELD: But her eyes were open.

RAYMER: She, she could've been gone for all I know.

CST. CLANFIELD: Gone where?

RAYMER: Well nobody's tellin'- me anything. When did she die?

CST. CLANFIELD: I don't know I told you. Remember I've been here with you with the whole time.

RAYMER: I know. She coulda died last night and she could've died in her sleep this morning.

CST. CLANFIELD: Yeah? But when you went in, what was she doing?

RAYMER: Nuttin'-.

CST. CLANFIELD: But she was awake.

RAYMER: Yeah she was awake.

CST. CLANFIELD: Did she talk to you?

RAYMER: Well she said hello Jim.

CST. CLANFIELD: And what did you say?

RAYMER: Hello

CST. CLANFIELD: And then what happened?

RAYMER: Nuttin'-that was it.

CST. CLANFIELD: You left?

RAYMER: Yeah.

CST. CLANFIELD: Well you were telling me something else?

RAYMER: I know that. It's, it's, it's frazzled.

CST. CLANFIELD: Mmhm.

RAYMER: (Crown) Long time ago (UI) with

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RAYMER: (Appellant) Long time ago I think I fell in love with her

CST. CLANFIELD: Mmhm.

RAYMER: I never did.

CST. CLANFIELD: Yeah.

RAYMER: Never to this life. Last night we didn't meet up with each other.

CST. CLANFIELD: We what?

RAYMER: We didn't meet up.

CST. CLANFIELD: Mmhm. Had you met up with her before?

RAYMER: Yes.

CST. CLANFIELD: Yeah? In, in her room?

RAYMER: Yeah, yeah.

CST. CLANFIELD: In your room?

RAYMER: No, her room.

CST. CLANFIELD: You've never met up with her in your room though?

RAYMER: Sometimes. She wanted to watch my T.V.

CST. CLANFIELD: Mmhm.

RAYMER: Like my V-C-R, but the me'-…

CST. CLANFIELD: Sure.

RAYMER: …she messed it up.

CST. CLANFIELD: So what would you guys do when you're meetin'-up?

RAYMER: Well we played with each other.

CST. CLANFIELD: Mmhm.

RAYMER: Played games.

CST. CLANFIELD: What would you do when she was playing with you? What would she do?

RAYMER: Nothing. We played games.

CST. CLANFIELD: Mmhm. What would you watch on the V-C-R?

RAYMER: Movies.

CST. CLANFIELD: What movies?

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RAYMER: Well like ah Dr. Do, not Dr. Doolittle, ah Little Lulu.

CST. CLANFIELD: Little Lulu? Who stars in Little Lulu?

RAYMER: No, the stars of Little Rascals. Ever heard of the Little Rascals?

CST. CLANFIELD: Oh yeah.

RAYMER: I don't know the name…

CST. CLANFIELD: So last night when you went in her room, were you gonna watch a video or something?

RAYMER: No 'cause they were all downstairs, watching a video. (UI)

CST. CLANFIELD: So you went into her room and she was awake.

RAYMER: Yeah.

CST. CLANFIELD: That's what happened, and then what happened?

RAYMER: Nothing, that was it.

CST. CLANFIELD: What did you tell me, remember you were touching me, when we were in the bathroom, like when you went to the washroom.

RAYMER: Oh that.

CST. CLANFIELD: Yeah.

RAYMER: She said goodnight, she said 'hello, Jim'.

CST. CLANFIELD: Mmhm.

RAYMER: And goodnight.

CST. CLANFIELD: Mmhm.

RAYMER: That was it.

CST. CLANFIELD: Then you showed me something. You touched me when we were in the washroom here.

RAYMER: Yeah, her chin.

CST. CLANFIELD: Yeah, you gave her a kiss?

RAYMER: Yeah.

CST. CLANFIELD: You did, did ya?

RAYMER: Yeah.

CST. CLANFIELD: Yeah. And you, you held her as well, you were saying?

RAYMER: No, I didn't hold her.

CST. CLANFIELD: No? What did you…touch her with your hands?

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RAYMER: Yes.

CST. CLANFIELD: Where did you touch her?

RAYMER: In her body. Right here, and kissed her goodnight.

CST. CLANFIELD: Mmhm.

RAYMER: What everybody else does. My aunt does it to me.

CST. CLANFIELD: Mmhm.

RAYMER: Say goodnight baby.

CST. CLANFIELD: Mmhm.

RAYMER: I don't go around callin'- her baby.

CST. CLANFIELD: No. But ah and then when you left, how was she laying when you left?

RAYMER: Like on the back.

CST. CLANFIELD: She was on her back when you left? Was she facing the T.V. or…?

RAYMER: How could she, the T.V. was here and she was there.

CST. CLANFIELD: Okay, so which way was she facing?

RAYMER: This is the wall.

CST. CLANFIELD: The wall. So she was laying on what?

RAYMER: A bed.

CST. CLANFIELD: Yeah I know but her position.

RAYMER: Oh this way.

CST. CLANFIELD: So what's that, on her, what side?

RAYMER: On her right side.

CST. CLANFIELD: Right, right side?

RAYMER: Yeah. Oh it could've been left or right. Ah oh I just don't know.

CST. CLANFIELD: You don't know eh?

RAYMER: Well, I don't know if I'm expected to remember…

CST. CLANFIELD: Yeah I know but like just you, you were there and you've got a good memory.

RAYMER: Yeah.

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CST. CLANFIELD: You remembered a few things. You started work and everything.

RAYMER: Well that night I didn't see anything because I was too tired. I didn't think about her.

CST. CLANFIELD: Yeah but Jim, the problem is you do have a good memory and you're…

RAYMER: I have a good memory.

CST. CLANFIELD: …and you're a smart man.

RAYMER: …right, forget it. And I tried to tell them but they won't believe me.

CST. CLANFIELD: Well you tell me right now exactly. You went into her room…

RAYMER: Other times I went into her room, but this last night I didn't.

CST. CLANFIELD: Well you said you did go into her room.

RAYMER: I know but you keep asking me the same thing over and over.

CST. CLANFIELD: Mmhm.

RAYMER: Over and over, over and over, and over and over. You won't believe me. But this is the truth. (UI)

CST. CLANFIELD: Okay the truth.

RAYMER: I didn't go into her room.

CST. CLANFIELD: Well why did you tell us before that you did?

RAYMER: I didn't know what to say. I was too scared to do anything. I didn't know what to say. I know I lied, but this time I'm telling the truth. I didn't go in her room. I didn't touch it. I didn't do anything.

CST. CLANFIELD: Well why would you say those things to me?

RAYMER: I just, 'cause you don't believe me.

CST. CLANFIELD: But it doesn't sound very Christian you know. I believe, I believed that you went into her room. And that you talked to her and that you kissed her.

RAYMER: These other people…

CST. CLANFIELD: Well I believed ya. And if that's the truth then you tell me the truth and…

RAYMER: (undertalking -UI)

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CST. CLANFIELD: …I'll believe you, but I think you're lying when you say you didn't go in that room, 'cause I believed you before. I thought you were an honest man and you and I were having a good conversation.

RAYMER: I know but, listen on that night I didn't.

CST. CLANFIELD: But why would you say that you did?

RAYMER: Well, because I don't know why I did, but I did 'cause they keep asking me over and over, 'did you go into her room? Did you go into her room? Did you kiss her? Did you kiss her?' It's fear.

CST. CLANFIELD: I know. Yeah but they weren't saying that. You were saying this to them.

RAYMER: Yes but I know I made up a story but this time I tried to tell them I didn't go in there but they won't believe me.

CST. CLANFIELD: Mmhm.

RAYMER: I tried but they won't, 'oh you kissed her, you kissed her. So I went along with it.

CST. CLANFIELD: Yeah?

RAYMER: This one night I didn't.

CST. CLANFIELD: You've got me convinced but you kissed her other nights.

RAYMER: Yeah other nights but not this last night, no.

CST. CLANFIELD: But she, ah okay, not last, forgot last night, other nights, have you touched each other before…

RAYMER: Yes.

CST. CLANFIELD: …did you used to do that for fun?

RAYMER: Just for the fun of it.

CST. CLANFIELD: Yeah? Did she get excited?

RAYMER: Yeah.

CST. CLANFIELD: Did you get excited?

RAYMER: Oh yeah.

CST. CLANFIELD: Did she make you have a little spurt?

RAYMER: What do you mean?

CST. CLANFIELD: Did ya, did you come from this excitement?

RAYMER: No.

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CST. CLANFIELD: Did you get hard?

RAYMER: No.

CST. CLANFIELD: Never got hard? Did she rub you there?

RAYMER: No.

CST. CLANFIELD: On other occasions, other times.

RAYMER: Ah ha.

CST. CLANFIELD: Yeah she did eh? And you got excited and had fun?

RAYMER: Yeah.

CST. CLANFIELD: Did you rub her down there on other occasions?

RAYMER: Sometimes.

CST. CLANFIELD: Yeah? Did she like it?

RAYMER: Yeah.

CST. CLANFIELD: She did, did she? She thought it was fun? Was it your little secret and hers?

RAYMER: I guess so.

CST. CLANFIELD: Well did you tell her that keep that little secret and we'll be best friends?

RAYMER: Well she tried to tell me I'm her, I'm, I'm one of her friends so sure.

CST. CLANFIELD: So then you rubbed her between her legs and you guys had fun?

RAYMER: Yeah.

CST. CLANFIELD: On other times eh?

RAYMER: Other… but sometimes, no.

CST. CLANFIELD: How come, she didn't want to?

RAYMER: True but she, I'm a lot older than she is.

CST. CLANFIELD: Yeah?

RAYMER: Or she was, I mean.

CST. CLANFIELD: She'd, she'd want to and you wouldn't or she wouldn't and you would?

RAYMER: She wouldn't.

CST. CLANFIELD: She wouldn't. She'd say 'no Jim, not tonight'.

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RAYMER: I played with her once and when I said no and that was it from that day, day on.

CST. CLANFIELD: You what, what?

RAYMER: She wanted to play with me.

CST. CLANFIELD: Yeah.

RAYMER: I was too tired.

CST. CLANFIELD: Mmhm.

RAYMER: From work.

CST. CLANFIELD: Mmhm.

RAYMER: So I said, ‘sorry Darla, we will have to leave it to another night.

CST. CLANFIELD: Mmhm.

RAYMER: Which she did.

CST. CLANFIELD: Yeah?

RAYMER: And that was it. We played once or twice and that was it.

CST. CLANFIELD: How long ago was that?

RAYMER: About a month ago.

CST. CLANFIELD: About a month ago you and her played together. Did she make you hard?

RAYMER: Oh yeah.

CST. CLANFIELD: Yeah? Did she…

RAYMER: Not too hard, but (UI).

CST. CLANFIELD: Did she take, yeah did she take you in her mouth, take you in her mouth? Rub ya?

RAYMER: Nothing like that.

CST. CLANFIELD: Not touch you at all?

RAYMER: No.

CST. CLANFIELD: But you got excited and oh you just touched her?

RAYMER: Yeah.

CST. CLANFIELD: Oh she didn’t touch you.

RAYMER: Yeah.

CST. CLANFIELD: Oh she did touch ya.

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RAYMER: Not really, like, like that.

CST. CLANFIELD: I see. So she, you touched her trying to get her excited eh? Did she giggle and laugh?

RAYMER: Oh yeah.

CST. CLANFIELD: Yeah it was fun wasn't it?

RAYMER: True.

CST. CLANFIELD: Did you wanna try it last night? It would've been good wouldn't it?

RAYMER: No. I think I'm too tired and I kept on…coming from bowling and

I hadn't eaten and they're all watching T.V., every one of them.

CST. CLANFIELD: Mmhm.

RAYMER: Darla comes upstairs after me…

CST. CLANFIELD: Mmhm.

RAYMER: … and we said our goodnights.

CST. CLANFIELD: Mmhm.

RAYMER: And that was it. I didn't go near her, not last night.

CST. CLANFIELD: Well the bowling is Wednesday night.

RAYMER: Yeah.

CST. CLANFIELD: Yeah but this is, that was Thursday night.

RAYMER: No Thursday night is prayer practice.

CST. CLANFIELD: Yeah so it wasn't bowling. Bowling was, so Darla followed,

followed you upstairs Wednesday night.

RAYMER: Yeah.

CST. CLANFIELD: After bowling but you were too tired.

RAYMER: Yes, I was too tired.

CST. CLANFIELD: To have fun with her. So Wednesday night Darla come up and said 'let's have fun?'.

RAYMER: Yeah.

CST. CLANFIELD: Well you tell me 'cause I, you know, I don't want you to think I'm trying to make…

RAYMER: (UI) when you tell them and they won't believe ya. (UI)

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CST. CLANFIELD: I promise ya I'll convince them (UI).

RAYMER: Please.

CST. CLANFIELD: No, I promise you. Now you tell me, Wednesday night you came home from bowling.

RAYMER: Bowling.

CST. CLANFIELD: Yeah.

RAYMER: And it's the honest truth. I didn't go near her either. That's the honest truth.

CST. CLANFIELD: But you just told me something about …

RAYMER: I…

CST. CLANFIELD: …(UI).

RAYMER: … that was the other night, Tuesday.

CST. CLANFIELD: Tuesday? And you said 'no 'cause I'm too tired'?

RAYMER: Yeah.

CST. CLANFIELD: So then last night…when you, remember we were making a movie of last night.

RAYMER: Yeah.

CST. CLANFIELD: Yeah. So you went, you went to the washroom you said. Was that true?

RAYMER: Yeah.

CST. CLANFIELD: That was true and then you came out and you looked into her room.

RAYMER: Yeah.

CST. CLANFIELD: And what did you see?

RAYMER: Only her lights…

CST. CLANFIELD: Only…

RAYMER: …out from the T.V.

CST. CLANFIELD: And that's true.

RAYMER: Yeah that's true. That's true...

CST. CLANFIELD: Okay, and then what did you do?

RAYMER: Nothing. I didn't tell her to shut it off 'cause it's her own business shutting it off. It isn't my T.V.

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CST. CLANFIELD: Mmhm.

RAYMER: It's hers.

CST. CLANFIELD: Mmhm.

RAYMER: She can do anything she likes to her own T.V. but if it was my T.V. I'd tell her to shut it off.

CST. CLANFIELD: Yeah? So then what did you do? Like the movie, now remember, if you just look ahead. Like I don't know, like if I'm a director and I…

RAYMER: Yeah.

CST. CLANFIELD: … make a movie. So if you find a place to look, if you wanna sit beside me we can look and make this movie of what happened.

RAYMER: Yeah.

CST. CLANFIELD: And, and, and it's fun. Have you ever done that?

RAYMER: Yeah.

CST. CLANFIELD: Well why don't we make that movie now.

RAYMER: I didn't go into her room. I just…went halfways.

CST. CLANFIELD: Mmhm.

RAYMER: Before I went into mine.

CST. CLANFIELD: Okay, yeah. So if you just look at something and keep the movie. So that's what happened. And then what happened?

RAYMER: I got undressed.

CST. CLANFIELD: Mmhm.

RAYMER: And then I went to bed. I usually say my prayers but my hand's so sore I couldn't reach down.

CST. CLANFIELD: Mmhm.

RAYMER: I went into bed.

CST. CLANFIELD: Mmhm.

RAYMER: And everything was dark.

CST. CLANFIELD: Yeah.

RAYMER: All except the T.V.

CST. CLANFIELD: Yeah.

RAYMER: And we both went to asleep.

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CST. CLANFIELD: Mmhm.

RAYMER: Now usually in the mornings…

CST. CLANFIELD: Yeah.

RAYMER: …about five o'clock I hear a noise.

CST. CLANFIELD: Yeah.

RAYMER: Unfortunately this morning I didn't.

CST. CLANFIELD: Mmhm.

RAYMER: Seven o'clock I usually hear a noise.

CST. CLANFIELD: Yeah.

RAYMER: Like Darla waking up but I forgot this is the school break.

CST. CLANFIELD: Mmhm.

RAYMER: So she sleep in, she slept in, slept in.

CST. CLANFIELD: Yeah.

RAYMER: Lo and behold two hours later I heard her mother saying, 'Darla's dead, Darla's dead'.

CST. CLANFIELD: Mmhm.

RAYMER: And that's all I heard… till this day. That's the honest truth I'm just trying to say. I had nothing to do with Darla at all from then on.

CST. CLANFIELD: From when on?

RAYMER: Well from last night.

CST. CLANFIELD: So you had something to do with Darla last night, but since then you had nothing to do with her.

RAYMER: Nothing.

CST. CLANFIELD: What did you have to do with her last night?

RAYMER: (Crown) Well (UI) like when we (UI) each other, like we went to the bathroom at the same time. Which ain't easy because she's a girl and I'm a boy, and girls can't go in with the boys, and that's why (UI) two hours later, (UI) two hours later. (UI) so (UI). This time (UI). (UI) to the bathroom but she (UI). /

RAYMER: (Appellant) Well originally, we went to the bathroom with each other, like we went to the bathroom at the same time. Which ain't easy because she's a girl and I'm a boy and girls can't go in with the boys, and so that's why I get out of

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bed two hours later. I mean earlier. So I don't have to clash with her. I guess I don't mind her, but when you want to go to the bathroom and she's walked in, what are you going to do?

CST. CLANFIELD: Yeah.

RAYMER: And that's the honest truth. It is.

CST. CLANFIELD: So she's in the bathroom with you?

RAYMER: Oh no, no, I wasn't in the bathroom with her.

CST. CLANFIELD: But you were in the bathroom and she wanted in?

RAYMER: Yeah.

CST. CLANFIELD: Last night.

RAYMER: Yeah.

CST. CLANFIELD: And then what happened? So did she come in?

RAYMER: No she, she had to wait for me.

CST. CLANFIELD: And then you came out.

RAYMER: I came out and she went in.

CST. CLANFIELD: And she was standing, what was she wearing when she was standing in the hall?

RAYMER: Her nightie.

CST. CLANFIELD: What colour was her nightie? Like the movie, so think.

RAYMER: White.

CST. CLANFIELD: Her white nightie. What time is this about?

RAYMER: Well I came out, well it must've been twelve o'clock.

CST. CLANFIELD: Twelve o'clock. Okay, and then so she was, went in the bathroom at twelve o'clock in her white nightie last night.

RAYMER: Yeah.

CST. CLANFIELD: And did you think maybe it would be a good time for fun or did she think …

RAYMER: No.

CST. CLANFIELD: …did she think maybe it would be a good time for fun?

RAYMER: No.

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CST. CLANFIELD: No?

RAYMER: Not at that time of night.

CST. CLANFIELD: Mmhm. So then you did, did you wait for her outside?

RAYMER: No, I just went into bed myself.

CST. CLANFIELD: Did she close the door when she went out?

RAYMER: Oh yeah, yeah. Shut off the light.

CST. CLANFIELD: Mmhm. So then she went in and you came out.

RAYMER: Yeah.

CST. CLANFIELD: Okay. And she, you shut off what light?

RAYMER: My own light.

CST. CLANFIELD: Oh your own light. So did you hear her go by?

RAYMER: Yeah, I heard a little banging.

CST. CLANFIELD: A little what?

RAYMER: You know, some footsteps.

CST. CLANFIELD: Yeah? Then what did you do?

RAYMER: Well nothing. We all said goodnight and that was it.

CST. CLANFIELD: Who did you say goodnight to?

RAYMER: Darla.

CST. CLANFIELD: Where was she when you said goodnight to her?

RAYMER: She just passed by on her way back to her bedroom.

CST. CLANFIELD: On your her way back from the bathroom?

RAYMER: Yeah.

CST. CLANFIELD: I see. What did she say?

RAYMER: Goodnight.

CST. CLANFIELD: Yeah? Did you go in and, you know, give her a kiss goodnight then?

RAYMER: No.

CST. CLANFIELD: No?

RAYMER: I was too tired.

CST. CLANFIELD: Mmhm. Did she come in your room and ask for some fun?

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RAYMER: No, not that time of night, no.

CST. CLANFIELD: What time did she usually go in and ask for fun?

RAYMER: Ten o'clock.

CST. CLANFIELD: Ten o'clock's the time?

RAYMER: Oh sorry, nine o'clock.

CST. CLANFIELD: Nine o'clock when you had two had fun together?

RAYMER: Yeah.

CST. CLANFIELD: Her mother's gone downstairs?

RAYMER: She's with them.

CST. CLANFIELD: I see. So whose room do you have fun?

RAYMER: Hers.

CST. CLANFIELD: I see. (pause) But not last night.

RAYMER: No.

CST. CLANFIELD: (UI) what happened to her?

RAYMER: I don't know. She could've been poisoned by the grapes.

CST. CLANFIELD: Mhmm.

RAYMER: Did you know that, that she could've done…

CST. CLANFIELD: Yeah, yeah you told me that, yeah, yeah she (UI)

RAYMER: She could've gotten killed from the smoke. She could've died in her sleep.

CST. CLANFIELD: Mmhm.

RAYMER: I don't know. She might've died in her sleep.

CST. CLANFIELD: Ten years old?

RAYMER: Well it happened to my brother, John.

CST. CLANFIELD: Yeah, but he (UI).

RAYMER: Yeah, well she could've had problems without telling me.

CST. CLANFIELD: Yeah she could've.

RAYMER: People don't tell.

CST. CLANFIELD: Mmhm.

RAYMER: Which I don't know everything.

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CST. CLANFIELD: So did she get excited when you were playing with her?

RAYMER: Sometimes.

CST. CLANFIELD: Yeah? Have you played with other people before that night?

RAYMER: No.

CST. CLANFIELD: She was your first time? Did you get it started or she did?

RAYMER: She did.

CST. CLANFIELD: Oh she seduced ya?

RAYMER: Well sometimes.

CST. CLANFIELD: Yeah? And what would, have you ever done that to her?

RAYMER: No.

CST. CLANFIELD: Mhmm. When did it first start?

RAYMER: A few weeks ago.

CST. CLANFIELD: A few weeks ago was the very first time?

RAYMER: Yeah.

CST. CLANFIELD: And how did that start?

RAYMER: Ah dear, dear god. I told you, she had nothin'- to do with me from that time on.

CST. CLANFIELD: Oh I know. Don't get upset.

RAYMER: But you already keep asking me the same old thing over and over and over.

CST. CLANFIELD: You know why? Because you confuse me.

RAYMER: I'm confused too, you keep asking the same over and over.

CST. CLANFIELD: We are not talking about last night. We're talking about the fun you had with Darla and how it started.

RAYMER: If she wanted to have fun, yes, she would seduce my body, if, it's a great big if.

CST. CLANFIELD: If she wanted to.

RAYMER: If she wanted to she could have fun. But she doesn't have any part of me 'cause I'm too old for her.

CST. CLANFIELD: Mmhm.

RAYMER: For one thing…

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CST. CLANFIELD: Mmhm.

RAYMER: …I don't go around seducing little girls.

CST. CLANFIELD: NnNn, NnNn.

RAYMER: But they think they do, they think I do.

CST. CLANFIELD: I know I didn't say that though.

RAYMER: They think I do.

CST. CLANFIELD: I know I didn't say that. This was just a happenstance with Darla that it happened.

RAYMER: I know but I had nothing to do with it. She's only a friend.

CST. CLANFIELD: Mmhm.

RAYMER: A friend of a friend.

CST. CLANFIELD: Yeah. And you had a little fun with her a couple of times and then…

RAYMER: True and that was it. Ah not last night, no.

CST. CLANFIELD: What, you didn't have any fun with her, but you talked to her.

RAYMER: Yeah well, well I'm forty years older than she is.

CST. CLANFIELD: Four?

RAYMER: Forty two years older than she is.

CST. CLANFIELD: Yeah.

RAYMER: She's only ten and I'm fifty two.

CST. CLANFIELD: Did you talk about that with her last night?

RAYMER: No.

CST. CLANFIELD: No?

RAYMER: I don't go around discussing ages. But she did with me.

CST. CLANFIELD: Yeah? When did she tell you were such an old man?

RAYMER: The other day.

CST. CLANFIELD: Yeah, when you guys were having fun together?

RAYMER: No, when she was bathing my hand.

CST. CLANFIELD: Why was she bathing your hand?

RAYMER: She says, 'you're getting old, Jim'. 'Stop it, Darla'.

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CST. CLANFIELD: Why was she bathing your hand?

RAYMER: ‘Cause I asked her for, the doctor asked me to put ice packs on my arm.

CST. CLANFIELD: Mmhm.

RAYMER: They did.

CST. CLANFIELD: Mmhm.

RAYMER: And so I told her mother. I said, ‘Darla, get some ice packs for Jimmy’. So she did right away.

CST. CLANFIELD: Oh I see and so she did that. Remember you were telling me you had to wash her once?

RAYMER: The washer was broken.

CST. CLANFIELD: No wash her, wash Darla.

RAYMER: I didn’t wash her.

CST. CLANFIELD: You had to clean her off or something.

RAYMER: Not me.

CST. CLANFIELD: No? No? Okay.

RAYMER: Not me. I’ve never washed her in my whole life.

CST. CLANFIELD: Never washed her off or had anything on her that had to be cleaned off?

RAYMER: Her mother does that.

CST. CLANFIELD: Anything you spilt on her that had to be cleaned up?

RAYMER: Why? Well I never spilt anything on her. Never in my lifetime.

CST. CLANFIELD: Mmhm. So you never did that?

RAYMER: No.

CST. CLANFIELD: Okay. I don’t know what to say.

RAYMER: I told you I…

CST. CLANFIELD: Jim, it’s just, you know, I’m talking to you and I’m honest with you.

RAYMER: I’m honest I told you I had nothing to do with her.

CST. CLANFIELD: Well you had something to do with her. She’s been your friend and you’ve done some playing together.

RAYMER: Yeah but not last night.

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CST. CLANFIELD: …No not last night.

RAYMER: Oh no, please, we're going back over that again. Not last night, no.

CST. CLANFIELD: Okay.

RAYMER: I had nothing to do with er ever since she washed me off my ah only, she's only a friend of a friend and that's it.

CST. CLANFIELD: Washed off your what?

RAYMER: Washed, well I told you she wanted to play with me and that was, I told you I'm too tired to play with her.

CST. CLANFIELD: Mmhm.

RAYMER: And then she's washing off my chin. She didn't bo'- bother me anymore. She doesn't bug me. Not then. Ever since I didn't want to play with her. Sure if I got over at four o'clock and I wasn't too tired but eight o'clock, nine o'clock, ten o'clock, no. It's true. You think I'm lying?

CST. CLANFIELD: No.

RAYMER: But everything, everybody does think I am. When can I go?

CST. CLANFIELD: Oh soon. Not just yet. I don't wanna hold you up too long. It's you know, it's confusing for you. It's confusing for us.

RAYMER: I'm not going home though. I'm going to stay at a hotel or something. I'm not gettin'- near that house.

CST. CLANFIELD: Mmhm. How come?

RAYMER: Well after what happened today. (pause) I have to go somewhere, to sleep.

CST. CLANFIELD: Yeah.

RAYMER: I just can't go in that dismal old house and everybody fighting. I have to do something.

CST. CLANFIELD: Yeah.

RAYMER: I just can't stay there. If I do, I'll just go straight up to bed and that's it.

CST. CLANFIELD: Mmhm. Will you go into Darla's room to…

RAYMER: How can I go into Darla's room? She's dead.

CST. CLANFIELD: She's not there anymore.

RAYMER: I know, she's dead. Her artefacts are there. How could you sleep in her…could I go gettin'-her, gettin'- her things what she's took off me.

CST. CLANFIELD: Wha'd she take off?

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RAYMER: She took off my, she took my ah cassette player and my quilt (ph).

CST. CLANFIELD: Mmhm. And your quilt (ph)?

RAYMER: My quilt (ph).

CST. CLANFIELD: When did she take them?

RAYMER: Two months after I got them. I bought them. Was a hu', sixty bucks, a hundred bucks…

CST. CLANFIELD: Mmhm.

RAYMER: …for my cassette player and she took it right off me. Am I in my right mind to take it back?

CST. CLANFIELD: Well when you get back in, yeah. If it's yours.

RAYMER: It's mine.

CST. CLANFIELD: Okay. Did you give it to her ah or she just…

RAYMER: She just took it. She just took it to hold on to. She she's… had it ever since.

CST. CLANFIELD: Okay, Jim. You wanna get this straightened away and so do I. Right?

RAYMER: Now.

CST. CLANFIELD: Well let's get this straightened away then. Be truthful with me, be honest with me. You know Christians don't lie.

RAYMER: I don't lie.

CST. CLANFIELD: And in the face of God in this room we need to hear the truth. You know how important the truth is.

RAYMER: Yeah.

CST. CLANFIELD: Your minister tells you that on Sunday, doesn't he?

RAYMER: Yeah.

CST. CLANFIELD: Well then why don't you listen to him. Do you not believe him?

RAYMER: I don't, I believe him, yes.

CST. CLANFIELD: Do those good people at that church of yours…

RAYMER: Yeah.

CST. CLANFIELD: …wanna believe that you're a liar?

RAYMER: If you tell them, I'm gonna do something about it.

CST. CLANFIELD: I won't tell them if you tell me the truth.

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RAYMER: I…

CST. CLANFIELD: If you know confession is the best part of redemption.

RAYMER: Yeah.

CST. CLANFIELD: Isn't it? So don't you wanna be redeemed?

RAYMER: Sure.

CST. CLANFIELD: Well then redeem yourself now.

RAYMER: Want me to tell you I kissed Darla on the head? No I didn't kiss her on the cheek.

CST. CLANFIELD: I want you to tell me the truth and redeem yourself.

RAYMER: I didn't see her last night. (UI) No you won't believe me until heavens on earth. That's one story they didn't get 'cause I didn't see her. I didn't.

CST. CLANFIELD: Okay, well we don't wanna get upset.

RAYMER: Oh sure you won't get upset and die on me.

CST. CLANFIELD: I'm gonna die on you?

RAYMER: No, me. You want me to die so you can take them all of the money.

CST. CLANFIELD: You know it's got nothin'- to do with your money and I don't even like your aunt.

RAYMER: You don't?

CST. CLANFIELD: Or your cousin who wants to take all your money. I'm on your side.

RAYMER: Oh sure.

CST. CLANFIELD: I bought you dinner, a coffee, I believe ya.

RAYMER: I know that but you keep asking the same old thing over and over and over and over, and over. I keep telling you, no I didn't see her.

CST. CLANFIELD: No you don't. You tell me you see her, and you tell me go in the room and then you tell me you don't and then you tell me you

hugged her…

RAYMER: Oh-h-h.

CST. CLANFIELD: …and then you tell me you kissed her and t…

RAYMER: You keep asking the same, oh brother.

CST. CLANFIELD: No I'm not asking you anything. I'm telling you things, that's all.

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RAYMER: I didn't see her last night. I seen her other nights, but not last night.

CST. CLANFIELD: Oh.

RAYMER: That's the truth.

CST. CLANFIELD: Okay, I told you okay.

RAYMER: It's the honest truth.

CST. CLANFIELD: I told you okay. (Long pause) Jim, it will be difficult to go back to the church choir.

RAYMER: They won't let me. I have nothing to do with them…at all.

CST. CLANFIELD: With whom?

RAYMER: Darlene and Bill.

CST. CLANFIELD: I know, it's Darla you've been with.

RAYMER: I have no difficulty at all. I am my own master.

CST. CLANFIELD: Right on. Of course.

RAYMER: I had nothing to do with her.

CST. CLANFIELD: But you spent time with Darla. She became your friend. Is that not true?

RAYMER: That's true but. She didn't…

CST. CLANFIELD: You and her got excited and had fun on some occasions. Is that not true?

RAYMER: That's true.

CST. CLANFIELD: That's true. You touched Darla and got her excited and, and you got all excited and everything. Right?

RAYMER: Yeah.

CST. CLANFIELD: Right.

RAYMER: Nothing's gonna bother me.

CST. CLANFIELD: No, I don't want it to bother you.

RAYMER: It's nothing.

CST. CLANFIELD: We're just talking about it. Does it bother me that they smoke pot downstairs? No it doesn't bother me.

RAYMER: I wanna know how you knew.

CST. CLANFIELD: You told me.

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RAYMER: Yeah but you knew that before I told ya.

CST. CLANFIELD: No I didn't.

RAYMER: That's true.

CST. CLANFIELD: You mentioned it. You were talking about the smell in there and I said, 'yeah it's like pot'. 'Yeah, yeah'.

RAYMER: I thought you already knew.

CST. CLANFIELD: Well if I knew that, I know something else as well.

RAYMER: What? I'm lying, is that it?

CST. CLANFIELD: Mmhm.

RAYMER: Well it's the same truth. I didn't see her last night.

CST. CLANFIELD: I know that they smoke pot there and I know what kind of people they are down there and you say they're good people and …

RAYMER: Well to me they…

CST. CLANFIELD: …And I don't think that's true either. They're bad, they use drugs, they don't get married, they live in sin.

RAYMER: Well they're good to me.

CST. CLANFIELD: And they're good to you. So what you told me about last night has not been all there, it's just not there.

RAYMER: Ohh brother.

CST. CLANFIELD: I know, I know. I don't know what your mother would say to you either.

RAYMER: Oh leave my mother out of it please.

CST. CLANFIELD: Well then you set me straight and get me out of this room.

RAYMER: I told you I didn't see her.

CST. CLANFIELD: That's a lie.

RAYMER: (Crown) It is not. (UI) a victim?

RAYMER: (Appellant) It is not. Want me to make you a victim?

CST. CLANFIELD: No.

RAYMER: I didn't see her.

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CST. CLANFIELD: Don’t you get violent now.

RAYMER: I told you I didn’t see her. (sighs)

CST. CLANFIELD: Now don’t get upset with me.

RAYMER: But you keep asking me the same, over, did you see her, did you see her, did you see her.

CST. CLANFIELD: (Crown) No, I didn’t. I haven't asked you that one question but (UI) ...

RAYMER: (Crown) Oh yes you did. Yes you did. And don't you dare come in here.

RAYMER: (Appellant) If I ever answered that one question,

CST. CLANFIELD: (Appellant) Oh yes you did. Yes you did.

RAYMER: (Appellant) and don't you dare come in here.

CST. CLANFIELD: Okay, just a minute. I’ll go see who it is. You wait here. Alright?

RAYMER: I’ve had enough of this.

(voices outside room – UI)

(END OF INTERVIEW)

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