

**COURT OF APPEAL**

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE  
JUDGMENT OF THE HONOURABLE MR. JUSTICE HARVEY AND JURY  
PRONOUNCED THE 25<sup>TH</sup> DAY OF JANUARY, 2016 AND SENTENCED THE 24<sup>TH</sup>  
DAY OF MARCH, 2016 AT NANAIMO BRITISH COLUMBIA

BETWEEN:

**REGINA**

Respondent

AND:

**JONATHAN DAVID BALL**

Appellant

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**FACTUM OF THE APPELLANT  
JONATHAN DAVID BALL**

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## OPENING STATEMENT

On June 27, 2013, an abandoned cabin and garage on a rural property in Coombs, British Columbia caught fire. Initially, the RCMP suspected the property owner, who ultimately earned a net profit of \$450,000 in consequence of the fire. When questioned, the property owner alleged that, in the days prior to the fire, he had received violent threats from a neighbour, including a specific threat to “burn down his house”. The RCMP arrested the neighbour and subjected him to a lengthy interrogation. The interrogation was unsuccessful and the case went cold.

Weeks later, the RCMP were approached by a woman who informed them that her ex-boyfriend, the appellant Jonathan Ball, had admitted to lighting the fires. Mr. Ball was quickly arrested and interrogated. At the time of his arrest, Mr. Ball suffered from severe mental illness, including delusions and psychosis, which had resulted in his repeated involuntary hospitalization.

Prior to his interrogation, Mr. Ball requested his antipsychotic medication which he had failed to take that morning. The RCMP refused and proceeded with the interrogation. For the first hour, Mr. Ball repeatedly and consistently denied the charges. Finally, after experiencing dissociation and discontinuation syndrome, Mr. Ball adopted his interrogators’ suggestions.

At trial, the only evidence connecting Mr. Ball to the fires was his statement and his ex-girlfriend’s discredited testimony. There were no eyewitnesses, no forensics, no fingerprints, no DNA. Mr. Ball testified, confirming that his alleged confession was false and was the product of his terror, confusion, and psychiatric illness. He provided an alibi which was corroborated by both witness testimony and documentary evidence.

However, Mr. Ball’s trial lawyer, contrary to Mr. Ball’s instructions, failed to call any supporting evidence concerning Mr. Ball’s mental illness and the trial judge failed to adequately instruct the jury concerning the phenomenon of false confessions. Without this needed assistance, and plagued by the misconception that false confessions are a “myth”, the jury, unsurprisingly, returned a verdict of guilty. The cumulative failures of the trial judge and counsel deprived Mr. Ball of his right to a fair trial and resulted in a miscarriage of justice. The below verdict must be set aside.

## PART 1: STATEMENT OF FACTS

1. On June 26 and June 27, 2013, an unoccupied garage and an unoccupied cabin on a rural property near Coombs, British Columbia caught fire (the "Fires").

Testimony of Constable Michael Kiperchuk, Transcript pp. 37-39.

2. At first, the RCMP investigators suspected David Maskell, the owner of the property. Mr. Maskell did not reside on the property and, in fact, had been attempting to sell the property for the previous five years without success. In consequence of the Fires, Mr. Maskell received nearly \$250,000 in insurance payout and later put the subject property on the market for \$550,000, resulting in a net \$450,000 windfall in consequence of the Fires.

Testimony of Constable Michael Kiperchuk, Transcript p. 42;  
Testimony of David Maskell, Transcript p. 137; Coast Claims  
Insurance Services Report, Appeal Book p. 96.

3. The RCMP took a statement from Mr. Maskell, who informed the RCMP that, in the days prior to the Fires, Mr. Maskell fled to Port Alberni because he had received death threats, including a threat to "burn down his house", from a David Mrychka.

Testimony of Constable Michael Kiperchuk, Transcript pp. 42, 49.

4. Accordingly, the RCMP arrested Mr. Mrychka and subjected him to interrogation. During the interrogation, the RCMP repeatedly informed Mr. Mrychka that "they knew he did it", shouted profanity at him, claimed that they were in possession of fabricated inculpatory evidence, and called him a "psychopath". Mr. Mrychka, a strong man of fifty-five years old, informed the RCMP that he did not light the Fires and, in fact, that he believed that Mr. Maskell lit the fires for insurance purposes. The RCMP concluded the interrogation and released Mr. Mrychka without recommending arson charges.

Testimony of David Mrychka, Transcript pp. 159, 161

5. The case of the Fires thus went cold until, in July, 2013, a woman named Carmen Lacey contacted the RCMP and claimed that her ex-boyfriend, Jonathan Ball, informed her that he started the Fires. Mr. Ball was thereafter arrested.

Testimony of Carmen Lacey, Transcript pp. 107, 108, 113

6. At the time of his arrest, Mr. Ball was on permanent disability due to a long-suffered mental illness. He lived with his parents, suffered from severe social impairment, and was unable to hold down a job. He suffers from intermittent psychosis and has previously been involuntarily hospitalized in provincial psychiatric units. He has been diagnosed with prodromal schizophrenia, dissociation, traumatic brain injury, major depressive disorder, and venlafaxine discontinuation syndrome.

Testimony of Jonathan Ball, Transcript pp. 174-175; Affidavit of Jonathan Ball

7. The RCMP subsequently arrested Mr. Ball and subjected him to a prolonged interrogation. Prior to the interrogation, Mr. Ball informed the RCMP that he suffered from mental illness, was prescribed anti-psychotic medication, had not had the opportunity to take his medication the morning of the interrogation, and was experiencing discontinuation syndrome. Mr. Ball requested his medication prior to the interrogation. The RCMP denied his request.

Testimony of Carmen Lacey, Transcript, pp. 122-123;  
Testimony of Jason Racz, Transcript pp. 89-91

8. The RCMP proceeded with the interrogation. Two officers interrogated Mr. Ball for over two hours. As with Mr. Mrychka, they utilized the controversial "Reid Technique", informing Mr. Ball that they knew he was guilty, refusing to listen to his protestations to the contrary, and repeatedly appealing to his favour, engaging in the dubious "minimization tactic". For the first hour, Mr. Ball repeatedly and consistently denied any involvement with the Fires. Finally, after stating repeatedly that he was scared and that he wanted to go home, Mr. Ball

began to agree with the officers' suggestions. When the interrogation was completed, the RCMP allowed Mr. Ball to take his medication.

See Statement of Jonathan Ball, Appeal Book, pp. 27-83;  
Affidavit of Jonathan Ball; Testimony of Jason Racz,  
Transcript pp. 89-91

9. Mr. Ball immediately recanted his alleged confession, describing the interrogation as follows:

The police interrogated me for what seemed like a very long time. I was kept confined in a small, steel room. I was frightened. I kept telling them that I did not set the fire and that I did not know why they were accusing me. I kept telling them this but they wouldn't listen. They just kept saying that they knew I did it. I felt like they were trying to force a false memory in my mind. They would leave the room and then come back in one at a time. I kept telling them I wanted to go home. The steel room began closing in and I started to disassociate. I felt like I was in a dream where I had to agree with them or I would never get out. I eventually repeated back to them what they told me so that they would let me out and I could escape and see my family.

Affidavit of Jonathan Ball at para. 9

10. Based on this purported confession, the RCMP charged Mr. Ball with the subject crimes. Mr. Ball pleaded not guilty and the matter went before judge and jury.
11. Ms. Lacey testified at trial and acknowledged that she reported to the RCMP on the same day that Mr. Ball informed her he was in a relationship with a new partner. Ms. Lacey acknowledged that she made her report, in part, out of "vindictiveness". She further claimed that the reason she had waited so long to report the matter to the police was that she had understood Mr. Ball to be joking about setting the Fires. Ms. Lacey also provided screenshots of Facebook posts which she alleged contained inculpatory statements made by Mr. Ball. On cross-examination, Ms. Ball admitted that she had accessed Mr. Ball's Facebook account and had previously posted in his name.

Testimony of Carmen Lacey, Transcript pp. 107, 108, 113, 116, 120, 121-123

12. Mr. Ball testified that his confession was false, that he did not set the Fires, and that he was frightened during the interrogation and simply wanted to go home. He explained to the court:

I started to feel like maybe the police knew my memory better than I did, and I started to feel convinced that they might be right and I'm not.

Testimony of Jonathan Ball, Transcript p. 187

I continued to try to [object], but I was also raising in my head a lot and seeing what they had told me as if it had really happened.

Testimony of Jonathan Ball, Transcript p. 187

"[The police] were trying to force a false memory into my mind".

Testimony of Jonathan Ball, Transcript p. 189

"[The police] were trying to get me to say and agree with exactly what they had said".

Testimony of Jonathan Ball, Transcript p. 189

"I was almost starting to feel like I was in some sort of dream where I wasn't going to get out of the situation unless I started telling them exactly what they wanted to hear. "

Testimony of Jonathan Ball, Transcript p. 190

At that point, I was starting to feel like the officer was trying to tell me that my memories were false and that what he was telling me was, in fact, the truth, and I was feeling very convinced at that point.

Testimony of Jonathan Ball, Transcript p. 191

When Mr. Kiperchuk would make extremely long paragraphs like this with multiple questions, I became extremely disoriented and confused and started to daydream the entire event as if it had actually happened and started to believe the entire event as if it had actually happened.

Testimony of Jonathan Ball, Transcript p. 191

I felt that [agreeing with the RCMP accusations] was the only correct thing to do at that point. I felt they were not going to take no for an answer and ever let me out of there.

Testimony of Jonathan Ball, Transcript p. 192

13. Mr. Ball maintained throughout the trial that he had succumbed to the interrogation due to his state of disassociation and discontinuation syndrome. Despite his testimony, and his instructions to counsel, canvassed below, no psychiatric evidence was called with respect to Mr. Ball.

See Affidavit of Jonathan Ball and Affidavit #1 of Stephen Taylor

14. The followed viva voce testimony was given at trial with respect to Mr. Ball's psychiatric illnesses:

(a) **Carmen Lacey:**

- (i) Mr. Ball had previously spent time in the "psych ward";
- (ii) Mr. Ball was on permanent disability due to his psychiatric illness;
- (iii) Mr. Ball takes psychiatric medication;
- (iv) Mr. Ball had previously suffered mental health attacks in her presence, which required emergency ambulance care and ultimate hospitalization;

Testimony of Carmen Lacey, Transcript, p. 122-123

(b) **Jonathan Ball:**

- (i) Mr. Ball suffered head trauma which led to fainting spells, memory loss, and cognitive impairment
- (ii) Mr. Ball has, throughout his life, been under regular psychiatric care.
- (iii) He has previously been diagnosed with anxiety, depression, and other conditions that he cannot recall.



- (iv) He takes the antipsychotic medication venlafaxine. When he misses a dose, he experiences discontinuation syndrome and becomes ill.
- (v) He has been hospitalized for psychiatric issues.
- (vi) He is on permanent disability due to his psychiatric issues

Testimony of Jonathan Ball, Transcript, pp. 174-175

(c) **Constable Kiperchuk:**

- (i) Mr. Ball suffers from anxiety and was prescribed psychiatric medication at the time of the interrogation.

Testimony of Michael Kiperchuk, Transcript, pp. 51-52

(d) **Constable Racz:**

- (i) Mr. Ball presented at the interrogation with anxiety, admitted to suffering from mental health issues, and requested venlafaxine, his prescribed antipsychotic medication. The medication was not provided to him until after the interrogation.

Testimony of Jason Racz, Transcript, pp. 52, 89, 91

15. Based on the above evidence, the Crown insisted upon, and the Court ordered, mandatory psychiatric counseling as part of Mr. Ball's sentence.

Reasons for Sentence at para. 36, Appeal Book, p. 121

16. At trial, the only evidence connecting Mr. Ball to the Fires was Mr. Ball's statement and Ms. Lacey's testimony, the latter which was discredited on cross-examination. There were no eyewitnesses, no forensics, no fingerprints, no DNA. The arson investigators who attended the scene were not called as witnesses.

Charge to the Jury, Transcript, p. 288

17. Mr. Ball testified that he was at his grandmother's on the day in question. They had watched the "Wayne Brady Show", which was their ritual, and Mr. Ball had borrowed twenty dollars from his grandmother. Mr. Ball's grandmother testified, corroborating Mr. Ball's alibi, and produced documentary evidence in the form of

calendar notations she had made with respect to the twenty dollars she had lent Mr. Ball on the day in question.

Testimony of Loretta Ostman, Transcript pp. 228-229

18. Following the close of evidence, the trial judge charged the jury. With respect to Mr. Ball's psychiatric illness and particular vulnerability to custodial interrogation, and his defence of false confession, the trial judge instructed as follows:

Here, the suggestion is that a combination of his personality, combined with a lack of medication and the manner of the interview led to what the accused said is a false confession. The accused's medical condition is self-reported.

Charge to Jury, Transcript, p. 291.

19. The jury, following deliberation, convicted Mr. Ball on all counts.
20. At the request of the court, a psychiatric assessment and pre-sentence report was produced by Dr. Murray Furgeson. Dr. Ferguson's evidence was as follows:
- (a) Mr. Ball impressed as a fragile and vulnerable young man who lacks coping skills to manage stressful situations. He relies heavily on others to take care of him. He would struggle to live independently;
  - (b) Mr. Ball's medical history demonstrates the following:
    - (i) Mr. Ball has been diagnosed with:
      - (A) Depression
      - (B) Anxiety
      - (C) Social phobia
      - (D) Dysthymic disorder
      - (E) Social anxiety
      - (F) Panic disorder
      - (G) Generalized anxiety disorder
      - (H) Attention Deficit Hyperactivity Disorder

- (i) Venlafaxine discontinuation syndrome
- (ii) Mr. Ball has a long history of suicidal thoughts and has attempted suicide multiple times
- (iii) Mr. Ball has been involuntarily hospitalized in psychiatric care due to delusional beliefs and episodes of psychosis
- (iv) Mr. Ball suffers from venlafaxine discontinuation syndrome
- (v) Mr. Ball has received regular psychiatric care through the Vancouver Island Health Authority and/or his family physician for the majority of his life;

Pre-Sentence Report and Psychiatric Assessment by Dr. Murray Ferguson, Appeal Book, pp. 97-107.

21. In conclusion, Dr. Ferguson opined as follows about Mr. Ball:

He continues to struggle with depression and anxiety, low self-esteem, and dependant personality traits. He has limited coping and problem solving skills, low self-confidence, limited skills in being assertive and as a result feels very disempowered when in conflict. These have consistently been significant issues for Mr. Ball since childhood and his experiences of bullying, difficult work environments, his previous relationship and avoidance of conflict have reinforced such feelings over time. He struggles socially as a result of his experiences growing up and while he desperately wants to have social outlets, he struggles with social connections as a result of his low self-confidence and likely social anxiety.

Pre-Sentence Report, Appeal Book, p. 106

### **Mr. Ball's Instructions to Counsel**

22. Mr. Ball successfully applied for legal aid funding from the Legal Services Society and first met with his trial counsel, Mr. Stephen Taylor, on August 1, 2013. Mr. Ball provided Mr. Taylor with his psychiatric clinical records, which evidenced his various psychiatric diagnoses, including prodromal schizophrenia, dissociation, psychosis, traumatic brain injury, major depressive disorder, and venlafaxine discontinuation syndrome.

Affidavit of Jonathan Ball at paras. 3, 10

23. Mr. Ball explicitly instructed Mr. Taylor to lead evidence concerning his susceptibility to interrogation. Mr. Ball explains as follows:

I met with Mr. Taylor numerous times between that meeting in September, 2013 and the beginning of trial in January, 2016. I cannot recall all of the dates of the meeting but I do recall that at every meeting I stressed to Mr. Taylor that my psychiatric illness and discontinuation syndrome was the cause of my false confession. My mother, who accompanied me to these meetings, also stressed to Mr. Taylor the importance of my psychiatric history. We both urged Mr. Taylor to review my Clinical Records.

Affidavit of Jonathan Ball at para. 12.

24. As their relationship progressed, Mr. Ball grew concerned that Mr. Taylor did not fully appreciate his psychiatric condition:

During some point in our relationship, Mr. Taylor began to tell me that he didn't think there was anything wrong with me and that I did not have a mental illness. I tried to show him documentation, in addition to the Clinical Records, which showed the psychiatric medication I was on and the discontinuation effect when not taking the medication. Mr. Taylor did not appear interested in this documentation or explanation. During one meeting, I brought Mr. Taylor documentation from Pfizer, which manufactures the venlafaxine medication I was taking, which explains the serious and immediate effects of discontinuation syndrome when even one dosage of medication is missed. Mr. Taylor rejected this scientific documentation and informed me that it takes several weeks for venlafaxine to leave my system, which I understand from my personal experience with the medication, the advice of my doctors, and the warnings from the manufacturer is incorrect.

Affidavit of Jonathan Ball at para. 14.

25. Despite his instructions, Mr. Ball explains that Mr. Taylor did not lead supporting psychiatric evidence at trial:

At the trial of my matter, Mr. Taylor called no evidence concerning my psychiatric illness, despite my repeated and

urgent instructions for him to show my Clinical Records to the jury and to hire a psychiatrist to explain the effect of my illness on my interrogation. I observed that Justice Harvey remarked to the jury during his jury charge that I testified that I had a mental illness which affected my interrogation, but that such mental illness was only self-reported and not supported by any other evidence. I felt that this remark, considering my psychiatric history and my urging of my counsel to show my Clinical Records to the Court, was unfair in the circumstances.

Affidavit of Jonathan Ball at para. 22.

26. Mr. Taylor does not dispute Mr. Ball's recollection of their relationship. He agrees that Mr. Ball provided him with psychiatric clinical records and explained his various psychiatric illnesses to him. He further agrees that his primary objective was to raise reasonable doubt with respect to the veracity of the confession.

Affidavit of Stephen Taylor at paras. 2-3

27. For this purpose, Mr. Taylor advises that he retained an expert on police interrogation, Dr. Yule, to opine on whether the application of the RCMP's utilization of the Reid Technique of interrogation on Mr. Ball was improper. Mr. Taylor advises that Dr. Yule did not find fault with the RCMP conduct, leading Mr. Taylor to grow discouraged:

I had become discouraged about his defence by this time, due to Dr. Yule's report. I indicated that Dr. Yule's results would not help us, and pretty much put an end possible [sic] defence of an induced false confession...

Dr. Yule's report was unambiguous and thorough. The police in no way conducted themselves improperly or in any way that would give rise to false confession. Secondly, if the accused has certain characteristics or mental deficiencies which make them more likely to give a false confession is a relevant point if combined with oppressive or unfair police conduct.

Affidavit of Stephen Tyler at paras. 10 and 17

28. Accordingly, in Mr. Taylor's view, Mr. Ball's defence of false confession was bound to fail. As he would advise Mr. Ball during trial preparation, there was "no likely chance of creating reasonable doubt". The expected outcome was "grim".

Affidavit of Jonathan Ball at para. 19

**PART 2: ERRORS IN JUDGMENT**

29. Mr. Ball alleges the following errors:
- (a) The trial judge erred by failing to adequately instruct the jury about the relevance of Mr. Ball's psychiatric illness to his defence of false confession, which amounted to a reversible legal error within the meaning of s. 681(a)(ii) of the *Code*;
  - (b) Mr. Ball did not enjoy the benefit of effective assistance of counsel, which resulted in a miscarriage of justice within the meaning of s. 681(a)(iii) of the *Code*; and
  - (c) Additionally, and in the alternative, the cumulative effect of (a) and (b) resulted in an unfair trial and ultimately a miscarriage of justice within the meaning of s. 681(a)(iii) of the *Code*.
30. It is respectfully submitted that the jury's verdict cannot stand and that a new trial must be ordered.

### PART 3: ARGUMENT

31. A confession is like no other evidence. An accused can be, and often is, convicted solely on the basis of their own confession without any confirmatory evidence of its truth, as was the case with Mr. Ball. A confession is seen as such a powerful piece of evidence because of the logic that an innocent person is unlikely to incriminate themselves. Even when a confession is recanted, and even when DNA evidence led at trial demonstrates unequivocally that an accused is factually innocent, juries will almost always convict, so strong are our biases towards confessions.

*R. v. Pearce*, 2014 MBCA 70 at para. 50; Sara C. Appleby, Lisa E. Hasel & Saul M. Kassin, "Police-induced confessions: an empirical analysis of their content and impact" (2010), 19 *Psychology, Crime & Law* 2, at p. 112.

32. The impugned verdict turned on whether the jury had a reasonable doubt about the veracity of Mr. Ball's alleged false confession. Mr. Ball maintained that his psychiatric illnesses left him vulnerable to, and ultimately caused him to, falsely confess. Mr. Ball's trial counsel, Mr. Taylor, failed to adduce psychiatric evidence to support Mr. Ball's defence, despite repeated instructions to the contrary, due to his understanding that false confessions are necessarily the result of improper police conduct, which, according to Dr. Yule, was not evidenced during Mr. Ball's interrogation.
33. Mr. Taylor's understanding was incorrect. As the Supreme Court of Canada has repeatedly confirmed, and as canvassed below, false confessions may be the product of (a) improper police conduct or (b) the particular vulnerabilities of the accused.
34. Once a false confession is ruled admissible, the only safeguard against a wrongful conviction is either expert evidence or appropriate instructions to the trier of fact. In the present case, the jury was left without the proper tools necessary to adjudicate this issue. It is almost certain that the jury shared Mr.



Taylor's misconception that false confessions do not occur without improper police misconduct. As Mr. Taylor wrote in an email to Mr. Ball:

What we've got is no expert on police tactics and therefore no evidence of any impropriety by the state that would even open the door to that argument [re: false confession], let alone prevail...To sum up. No expert. No psychiatrist [sic]. No likely chance of creating reasonable doubt. Outcome, grim.

Affidavit of Jonathan Ball, Ex. E

35. With his trial counsel's fundamental misunderstanding, the outcome at trial for Mr. Ball was, indeed, "grim". Coupled with the jury's inarguable misconception about the "myth" of false conceptions, Mr. Ball did not stand a chance.
36. It is respectfully submitted that fault lies with both the trial judge and Mr. Ball's trial counsel. The trial judge's failure to provide adequate instruction amounted to a reversible error of law. Mr. Ball's trial counsel's misunderstanding of the theory of Mr. Ball's defence and ultimately failure to adduce any supporting psychiatric evidence, despite his client's repeated insistence, rendered his assistance ineffective and caused a miscarriage of justice. Each error, on its own, was troubling and resulted in an unfair trial. Combined, there can be no doubt, it is respectfully submitted, that the below verdict must be set aside.
37. These submissions will canvas the law on false confessions, generally, and then apply the law to each of the impugned errors.

**(a) The Problem with False Confessions**

38. False confessions are consistently one of the leading, yet most misunderstood, causes of error in our legal system and thus remain one of the most prejudicial sources of false evidence that lead to wrongful conviction. The false confessions of innocents are a known contributing factor in an astonishing 25% of all DNA exoneration cases.

*R. v. Hart*, 2014 SCC 52 at para. 6; Richard A. Leo, "False Confessions: Causes, Consequences, and Implications"

(2009), 37 J. Am Acad Psychiatry Law 3, at p. 332; Appleby & Kassin, *supra*, at p. 111.

39. The Supreme Court of Canada has itself called false confessions “a blight on our justice system”, one which presents a unique danger: triers of fact have immense difficulty accepting that an innocent person would confess to a crime he did not commit. Indeed, social science evidence establishes that juries believe that false confessions are more or less a myth. Yet our experience shows that innocent people can, and do, falsely confess.

*Hart* at para. 6; *Pearce* at para. 130; *R. v. Oickle*, 2000 SCC 38 at paras. 32-34; S. M. Kassin et al, "Police-Induced Confessions: Risk Factors and Recommendations" (2010), 34 Law & Hum. Behav. 3, at p. 24.

40. Professor Saul Kassin, whose work was relied on by the Supreme Court of Canada in *R. v. Hart*, explains as follows:

Research on the impact of confessions in the criminal justice system is unequivocal. When false confessors have pled not guilty and proceeded to trial, the jury conviction rates have ranged from 73% (Leo & Ofshe, 1998) to 81% (Drizin & Leo, 2004). In addition, mock jury studies have shown that confessions have more impact on verdicts than other potent forms of evidence (Kassin & Neumann, 1997) and that people do not fully discount confessions even when they are judged to be the result of coercion (Kassin & Sukel, 1997; Kassin & Wrightsman, 1980; Redlich, Ghatti, & Quas, 2008), even when jurors are told that the confessor suffered from psychological illness or interrogation-induced stress (Henkel, 2008), and even when the confessions are provided not by the defendant himself but by an informant who is incentivized to falsely implicate the defendant (Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008). Most people reasonably believe that they would never confess to a crime they did not commit, evaluate others accordingly, and have only rudimentary understanding of the dispositional and situational factors that would lead someone to do so (Bandon-Gitlin, Sperry, & Leo, 2010; Henkel, Coffman, & Dailey, 2008; Leo & Liu, 2009).

Appleby & Kassin, *supra*, at p. 112.

41. The law on false confessions has evolved. Until recently, the common law has praised confessions, recognizing them as “the highest and most satisfactory proof of guilt”. However, in *R. v. Oickle*, the Supreme Court of Canada recognized that false confessions during police interrogations do occur and can contribute to wrongful convictions. The Court called the phenomenon “counterintuitive”, explaining:

It may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely...

However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence.

*Oickle* at paras. 34-35

42. As the Court observed in *Oickle*, the history of police interrogations is not without its unsavoury chapters. Physical abuse, if not routine, was certainly not unknown. Today such practices are much less common with modern law enforcement utilizing psychological, and not physical, interrogation techniques. The preferred method of interrogation utilized by North American authorities, and indeed used by the RCMP during the interrogation of Mr. Ball, is called the “Reid Technique” and utilizes the following basic procedure:

Detectives present themselves as sympathetic individuals who imply that suspects are good people in bad situations. They imply that they want to help the suspects achieve the best outcome. Interrogators often deceive suspects about the nature and extent of evidence against them, the nature of the suspects' rights, the short- and long-term consequences of confession versus denial, and much more. All the while, interrogators will dominate the conversation, interrupt attempts by suspects to deny involvement, distract them from thinking of facts and information inconsistent with the interrogators' claims, accuse suspects of lying, and explicitly and implicitly threaten suspects with dire

consequences for denying wrongdoing and promise leniency for a confession.

William C. Follette, Deborah Davis, and Richard A. Leo, "Mental health status and vulnerability to police interrogation tactics" (2007), 22 *Crim. Just.* 42, at p. 32

43. Professor Leo describes the Reid Technique as a "strategic, multi-stage, goal-directed, stress-driven exercise in persuasion and deception, one designed to produce a very specific set of psychological effects and reactions in order to move the suspect from denial to admission." As Professor Kassin explains, the goal of the Reid Technique is to "alter a suspect's decision making by increasing the anxiety associated with denial and reducing the anxiety associated with confession".

Richard A. Leo, *Police Interrogation and American Justice* (Cambridge: Harvard UP, 2008) at p. 119; Kassin, *supra* at p. 15.

44. Of course there is nothing *per se* illegal or improper about the Reid Technique or other contemporary psychological approaches to interrogation. As the Supreme Court of Canada observed, criminal investigations have never been a game to be carried out according to the Marquess of Queensbury rules. Law enforcement, when dealing with sophisticated criminals, should not be unduly hampered in their work.

*R. v. Rothman*, [1981] 1 S.C.R. 640 at p. 697

45. Indeed, the explanation offered by Mr. Ball's trial counsel is that Mr. Ball was subjected to an appropriate application of the Reid Technique with no obvious evidence of improper police conduct. According to Mr. Ball's trial counsel, a false confession has as its mandatory cause "oppressive or unfair police conduct". The lack of such conduct by the RCMP, in Mr. Taylor's estimation, "pretty much put an end" to Mr. Ball's defence re: false confession.

Affidavit of Stephen Taylor at paras. 10 and 17

46. Mr. Taylor was mistaken. The Supreme Court of Canada has recognized, supported by overwhelming academic research, that there are types of false confessions that do not result from improper police conduct but are rather the product of particular vulnerability of the accused, caused, for example, by the social phobia and distrust of memory brought on by mental illness.

*Oickle* at paras. 38-41; *Pearce* at para. 60; Kassin, *supra* at pp. 14-15; Leo, *supra*.

**(b) The Particular Vulnerabilities of Jonathan Ball**

47. In both *Oickle* and *Hart*, the Supreme Court of Canada cautioned special scrutiny when the alleged false confessor was suffering from mental illness.
48. As the Supreme Court of Canada warned in *Oickle*, quoting academic research:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.

*Oickle* at para. 42.

49. The Court reiterated its warning in *Hart*:

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 (Garrett, at p. 1064).

*Hart* at para. 103.

50. Professor Leo identifies pathological anxiety and social phobia disorders as prevalent causes of false confessions:

One would expect that persons with anxiety disorders would find the additional stress of an interrogation extremely aversive and seek a quick end to the proceedings, even if it meant a poor distal consequence. Generalized anxiety disorder, social phobia, panic disorder or specific phobias related to confinement or health-related concerns could hasten a false confession. One feature of anxious individuals is a tendency to overestimate how aversive an event is and to make risk averse decisions. Interrogators implicitly and often explicitly threaten that if individuals do not explain how they were caught up in a bad situation, the district attorney, the judge, and a jury will surely infer that there is no "good" story and, unless the suspects explain what happened (i.e., confess), the worst story will have to be believed and acted upon—risks anxious persons, in particular, will be more motivated to avoid. The interrogator offers an apparent way out through suggestions of how and why the crime was committed that give suspects the impression it would not be a legally serious offense to confess to (commonly referred to as "minimization").

Leo, "Mental Health", *supra* at p. 48.

51. Mr. Ball's psychiatric illnesses, memory impairment, and social phobia have been canvassed above. Mr. Ball explained his disassociation and social anxiety, his recurrent episodes of psychosis and delusional thinking, his profound memory impairment, and his repeated and lengthy psychiatric hospitalizations. Assessing Mr. Ball's fitness for sentencing, court-appointed expert Dr. Ferguson opines that Mr. Ball is a "fragile and vulnerable young man who lacks coping skills to manage stressful situations", he is impaired by anxiety and "dependent personality traits", he has "limited coping and problem solving skills, low self-confidence, limited skills in being assertive", and "feels very disempowered when in conflict". Dr. Ferguson further opines that, while Mr. Ball "desperately wants to have social outlets", he is unable to socialize due to his social anxiety.
52. It is respectfully submitted that Mr. Ball's psychiatric and behavioral disorders coupled with his interrogators' use of minimization and guilt-confirmation techniques provide a textbook example of a confession that warrants caution and scrutiny.

53. In his affidavit, Mr. Taylor attempts to justify his failure to call psychiatric evidence by observing that Mr. Ball, after one hour of strenuous psychological interrogation, provided details concerning the execution of and motive for the alleged arson. The suggestion, it seems, is that Mr. Ball would not have provided such details were he truly innocent.

Affidavit of Stephen Taylor at para. 6

54. Again, and with respect, Mr. Taylor's theory is incorrect. Overwhelming research demonstrates that such details are a fundamental component of and nearly always accompany false confessions. A false confession is, by definition, an admission ("I did it") plus a post-admission narrative (a detailed description of how and why the crime occurred) of a crime that the confessor did not commit. As Professor Kassin observes, in most documented false confessions, the statements ultimately presented in court contain not only an admission of guilt but vivid details about the crime that became known to the innocent suspect both through secondhand sources invisible to the naïve observer and as the product of the traumatized suspect's disordered imagination. Professor Kassin proposes a variety of complex reasons for this phenomenon but, suffice it to say, such details support, not contradict, Mr. Ball's position.

Kassin, *supra* at p. 25; Leo, *supra* at p. 333

**(c) The trial judge misdirected the jury, resulting in a reversible error of law**

55. A fair trial cannot occur unless the trial judge's instructions to the jury are adequate. The approach to appellate review of a jury charge considers the charge in the context of the conduct of the trial as a whole, including the nature of the evidence, the raised live issues, and the position of the parties, including the theory of any raised defence.

See *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 2 and *Pearce* at paras. 111-112.

56. A trial judge has no obligation to instruct the jury about the potential of a false confession absent an air of reality to such defence. When a claim of false confession does have an air of reality, the trial judge must, in addition to outlining the theory of the defence, “relate the essential evidence to the claim of false confession so that the jurors may appreciate the value and effect of that evidence in arriving at a just conclusion”. The appropriate caution “will vary with the facts of a particular case” but should provide the jury with the tools to weigh the relevance of any particular risk factors, such as mental illness, to the issue of the reliability of the confession.

*Pearce* at paras. 105, 118, 135; *Colpitts v. The Queen*  
*Colpitts*, [1965] S.C.R. 739 at pp. 752-753.

57. In the present case, the trial judge provided a brief, general instruction on the theoretical existence of false confessions. The trial judge did not, however, explain how the jury should weigh the relevance of Mr. Ball’s particular psychiatric illness, and increased vulnerability to custodial interrogations, to the issue of the reliability of the confession.
58. In some cases, a general caution concerning the phenomenon of false confessions may be sufficient. For example, in *Pearce*, the Manitoba Court of Appeal held that it would have been sufficient to provide a general caution on the phenomenon of false confessions because the particular accused, although emotionally upset, did not present with any “distinct behavior characteristics” such as mental illness or personality disorder.

*Pearce* at para. 105, 135

59. However, when the accused does present with distinct behavior characteristics which are outside the experience and knowledge of the jury, the jury will require assistance weighing the relevance of these individual circumstances to the reliability of the confession. As the Supreme Court of Canada has repeatedly instructed, “special note” must be taken when evaluating the reliability of an alleged statement from an accused with psychiatric illness.



See *Pearce* at 105, 135; *Hart* at 103; *Oickle* at 42

60. It cannot be seriously disputed that Mr. Ball presented with the contemplated “distinct” behavioural characteristics. Mr. Ball described a history of severe mental illness, which included psychotic breaks, involuntary hospitalization, and antipsychotic medication. Mr. Ball’s evidence was that, without his medication and faced with hours of interrogation, he entered a dissociative state and finally agreed with the RCMP officers’ suggestions because he was scared and wished to go home. It is submitted that these circumstances are clearly outside a typical jury’s knowledge and experience. Accordingly, without instruction, the jury was left in the dark concerning how to weigh the relevance of this evidence to raised defence.

Testimony of Jonathan Ball, Transcript, pp. 187-192

61. The interaction between mental illness and false confessions was recently considered in *R. v. Perreault*, 2015 QCCA 694. In that case, the Quebec Court of Appeal confirmed that particular caution is required when examining confessions made by an accused suffering from mental illness.

*R. v. Perreault*, 2015 QCCA 694 at paras. 87-89.

62. The trial judge’s one passing reference to Mr. Ball’s psychiatric condition only exacerbated this problem. When reviewing the defence of false confession, the trial judge, after failing to adequately review the evidence concerning Mr. Ball’s particular vulnerabilities, remarked that the “the accused’s mental condition is self-reported”. First, this is an error of fact. As canvassed above, both Constables Kiperchuk and Racz testified that they were aware, prior to speaking with Mr. Ball, that he suffered from anxiety. Carmen Lacey testified that Mr. Ball had previously spent time in the “psych ward”, was on permanent disability due to psychiatric illness, takes antipsychotic medication, and had previously suffered mental health attacks in her presence, for which she had to arrange an emergency ambulance to transfer Mr. Ball to the hospital. Mr. Ball’s “mental condition” was decidedly not “self-reported”.

Charge to Jury, Transcript, p. 291

63. Second, the comment clearly evidenced inferential disbelief in Mr. Ball's "self-reported" condition. The Supreme Court of Canada has explicitly held that this type of partial statement of a defence accompanied by inferential disbelief during a jury charge is reversible error:

In the light of these authorities, I agree with the contention of counsel for the appellant that the charge by the learned trial judge, in its failure to state the theory of the defence, and particularly in the partial statement of it accompanied by the inferential disbelief of it and not accompanied by any reference to evidence which bore upon it, was a failure to properly instruct the jury and was prejudicial to the accused.

*Colpitts* at p. 753.

64. The veracity of Mr. Ball's confession was the key issue at trial. Proper instruction on how the jury should weigh the relevance of Mr. Ball's personal circumstance to the issue of the reliability his confession was mandatory. Accordingly, this is a case of non-direction amounting to misdirection which prejudiced Mr. Ball's ability to have a fair trial. The trial judge's failure to instruct amounts to legal error within the meaning of s. 686(1)(a)(ii) of the *Code*.

*Pearce* at para. 145.

**(d) Mr. Ball received ineffective assistance of counsel, resulting in a miscarriage of justice**

65. The right to effective assistance of counsel is a right guaranteed by s. 650(3) of the Criminal Code and ss. 7 and 11(d) of the Charter.

*R. v. Joannis* (1995), 102 C.C.C. (3d) 35 at paras. 62-64.

66. As this Court has confirmed, ineffective assistance of counsel will result in a miscarriage of justice when either (a) it affects the reliability of the verdict, or (b) it affects the adjudicative fairness of the process of arriving at the verdict. In either case, the *Criminal Code* mandates that the conviction must be quashed and a verdict of acquittal entered or a new trial ordered.

*R. v. Aulakh*, 2012 BCCA 340 at para. 41

67. For the present purpose, the appropriate test is whether there is a reasonable possibility that but for counsel's error(s) the result of the proceeding would have been different. The standard of reasonable possibility falls somewhere between a mere possibility and a likelihood.

*Aulakh* at para. 42

68. The below verdict turned on whether Mr. Ball's defence of false confession raised a reasonable doubt. It is submitted that Mr. Ball's trial counsel made four related errors and that but for these errors there is a reasonable possibility the jury would have been left with reasonable doubt by Mr. Ball's defence.
69. The errors flowed from Mr. Ball's trial counsel's primary misconception: false confessions only occur as the product of improper police conduct. As Mr. Taylor explained, once he had determined, through Dr. Yule's report, that the RCMP's application of the controversial Reid Technique was not improper, he ended the inquiry:

I had become discouraged about his defence by this time, due to Dr. Yule's report. I indicated that Dr. Yule's results would not help us, and pretty much put an end possible [sic] defence of an induced false confession...

Dr. Yule's report was unambiguous and thorough. The police in no way conducted themselves improperly or in any way that would give rise to false confession. Secondly, if the accused has certain characteristics or mental deficiencies which make them more likely to give a false confession is a relevant point if combined with oppressive or unfair police conduct. [emphasis added]

Affidavit of Stephen Tyler at paras. 10 and 17

70. As explained above, Mr. Taylor was mistaken. A false confession can be the product of either (a) improper police conduct or (b) the particular vulnerabilities of the accused. Mr. Taylor's remaining three errors flowed from this misunderstanding:

- (a) Failure to introduce expert evidence to assist the jury in understanding Mr. Ball's psychiatric illness and how his illness is relevant to the defence of false confession;
  - (b) Failure to introduce Mr. Ball's psychiatric clinical records, contrary to Mr. Ball's explicit, repeated instruction; and
  - (c) Failing to object when the trial judge erred in law by not including the appropriate limiting instruction, canvassed above, in his jury charge.
71. As observed in *Pearce*, it is common for an accused to adduce expert evidence to explain why a confession, declared voluntary within the meaning of the confessions rule, is nevertheless false or unreliable. No such evidence was adduced here, despite Mr. Ball's repeated instruction to the contrary. The failure to retain an expert for trial has been found to result in ineffective assistance.
- Pearce* at 64; Affidavit of Jonathan Ball paras 10-24; *R. v. Lam*, 2012 ONSC 1243 at para. 10.
72. Mr. Taylor compounded this problem by failing to lead into evidence the clinical records which Mr. Ball had provided him and had repeatedly instructed him to present to the jury:

At the trial of my matter, Mr. Taylor called no evidence concerning my psychiatric illness, despite my repeated and urgent instructions for him to show my Clinical Records to the jury and to hire a psychiatrist to explain the effect of my illness on my interrogation. I observed that Justice Harvey remarked to the jury during his jury charge that I testified that I had a mental illness which affected my interrogation, but that such mental illness was only self-reported and not supported by any other evidence. I felt that this remark, considering my psychiatric history and my urging of my counsel to show my Clinical Records to the Court, was unfair in the circumstances.

Affidavit of Jonathan Ball at para. 22

73. Notably, during sentencing submissions, Mr. Taylor appeared somewhat surprised by the detailed history of Mr. Ball's psychiatric illnesses that was provided by court-appointed expert Dr. Ferguson:

Again, the top paragraph of page 5 also goes into the background. This is what we didn't get out of Mr. Ball during his testimony. This gives us a much more detailed background. This – the author of this report did a very complete and comprehensive search of the medical records.

Submissions on Sentence by Mr. Taylor, Transcript at p. 329.

74. With the greatest of respect, it was incumbent on Mr. Taylor himself to do a complete and comprehensive search of the medical records, which were provided to him at the commencement of his representation and which were urged by his client to be submitted into evidence. Further, Dr. Ferguson, an objective, court-appointed psychiatrist, was available to opine on Mr. Ball's illness for the purpose of sentencing; Mr. Taylor should have procured such evidence for the trial proper.
75. Finally, Mr. Taylor erred by not insisting that the trial judge provide the appropriate limiting instruction to the jury, as explained above.
76. These four errors resulted in the trier of fact being left without the appropriate tools to consider Mr. Ball's defence.
77. It must be recalled that the present is not a case where there existed independently verifiable corroborating evidence. There was no physical evidence connecting Mr. Ball to his alleged crime: there was no DNA evidence, no fingerprint evidence, no forensic evidence of any sort. In fact, there was no evidence proffered to demonstrate that the Fires were the result of any criminal conduct whatsoever. The arson investigator who attended the scene did not testify. The Crown offered no direct evidence concerning the ignition of the Fires but for Mr. Ball's statement.

78. For his part, Mr. Ball denied the Fires and provided an alibi: he was visiting his grandmother during the time in question. His grandmother testified and corroborated Mr. Ball's alibi, offering documentary evidence in the form of her calendar, on which she had noted that she had lent Mr. Ball twenty dollars on the day in question.

Testimony of Loretta Ostman, Transcript pp. 228-229

79. Prior to Mr. Ball, the RCMP pursued two suspects, each with strong motive to ignite the Fires: Mr. Maskell, who had attempted, for five years, to sell his unoccupied cabin and who, in consequence of the Fires, enjoyed a net \$450,000 profit; and Mr. Mrychka, who, in the days leading up the Fires, threatened to kill Mr. Maskell and burn down his cabin, a threat that was taken so seriously by Mr. Maskell that he fled with his family to Port Alberni.

Testimony of David Mrychka, Transcript pp. 159, 161;  
Testimony of Constable Michael Kiperchuk, Transcript pp. 42, 49.

80. It is reasonably possible, as that standard is understood, that if the jury was provided with the appropriate tools to evaluate Mr. Ball's defence and fairly weigh the relevance of his psychiatric illness to the reliability of his impugned statement, the jury would have been left with reasonable doubt.

**(e) The cumulative effect of the errors of the trial judge and trial counsel resulted in miscarriage of justice**

81. Mr. Ball explains his experience with our criminal justice system as follows:

I tried repeatedly to get the justice system – from the police, to my lawyer, to the judge and jury – to take my psychiatric illness seriously but nobody seemed to want to hear anything about it.

I repeat again that I did not commit the crimes for which I have been convicted. I was terrified and experiencing dissociative psychiatric illness during my interrogation when I finally, after categorically denying the accusations for over

an hour of persistent interrogation, accepted what the police told me so that I could go home.

Affidavit of Jonathon Ball at paras. 23-24

82. Should this Court find that the impugned errors of trial judge and counsel do not individually meet the required threshold to respectively engage either ss. 686(1)(a)(ii) or 686(1)(a)(iii) of the *Code*, it is submitted that these errors, considered cumulatively and functionally in the context of the entire proceeding, resulted in a demonstrable miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*.

### **PART 3A: FRESH EVIDENCE APPLICATION**

83. Mr. Ball applies, pursuant to both s. 683(1) of the *Criminal Code* and the relevant practice directive from this Court, to admit as fresh evidence, for the limited purpose of determining whether a miscarriage of justice occurred, the affidavits of Mr. Ball and Mr. Taylor. Mr. Ball also applies, to the extent necessary, to admit as fresh evidence the pre-sentence report and psychiatric assessment of Dr. Murray Ferguson that was before the trial judge on sentencing and is included in the within proceeding's Appeal Book.

Ineffective Assistance of Trial Counsel (Criminal Practice Directive, 12 November 2013); Pre-Sentence Report, Appeal Book, pp. 97-107.

84. The test for admission of fresh evidence is typically governed by that set out in *R. v. Palmer*, [1980] 1 S.C.R. 759. However, as in the present case, when the fresh evidence is adduced not to impugn a finding made at trial but to challenge the validity of the trial process, the *Palmer* test is substantially relaxed or ignored. The governing evidentiary test allows that, when adduced to impugn the trial process, evidence should be admitted on appeal if it is relevant and credible, even if it would not have been admissible pursuant to the strict rules of evidence at trial.

*Aulakh* at pp. 56-62, 81

85. It is respectfully submitted that the identified materials easily satisfy this test and, accordingly, should be considered by this Court.

**PART 4: NATURE OF ORDER SOUGHT**

THAT:

- (a) the application for fresh evidence be granted; and
- (b) the guilty verdict for Mr. Ball be set aside and a new trial ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: June 30, 2017

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Graham Kosakoski  
Counsel for the Appellant



## LIST OF AUTHORITIES

Tab No.	Case	Paragraph
1.	<i>Colpitts v. The Queen Colpitts</i> , [1965] S.C.R. 739	56, 63
2.	<i>R. v. Aulakh</i> , 2012 BCCA 340	66, 67, 84
3.	<i>R. v. Hart</i> , 2014 SCC 52	38, 39, 40, 47, 49, 59
4.	<i>R. v. Jacquard</i> , [1997] 1 S.C.R. 314	55
5.	<i>R. v. Joanisse</i> (1995), 102 C.C.C. (3d) 35	65
6.	<i>R. v. Lam</i> , 2012 ONSC 1243	71
7.	<i>R. v. Oickle</i> , 2000 SC 38	39, 41, 42, 46, 47, 48, 59
8.	<i>R. v. Palmer</i> , [1980] 1 S.C.R. 759	84
9.	<i>R. v. Pearce</i> , 2014 MBCA 70	31, 39, 46, 55, 56, 58, 59, 64, 71
10.	<i>R. v. Perreault</i> , 2015 QCCA 694	61
11.	<i>R. v. Rothman</i> , [1981] 1 S.C.R. 640	44
<b>Academic</b>		
12.	Sara C. Appleby, Lisa E. Hasel & Saul M. Kassin, <i>“Police-induced confessions: an empirical analysis of their content and impact”</i> (2010) 19 <i>Psychology, Crime &amp; Law</i> 2	31, 38, 40
13.	S. M. Kassin et al, <i>“Police-Induced Confessions: Risk Factors and Recommendations”</i> (2010), 34 <i>Law &amp; Hum. Behav.</i> 3	39, 43, 46, 54
14.	Richard A. Leo, <i>“False Confessions: Causes, Consequences, and Implications”</i> (2009), 37 <i>J. Am Acad Psychiatry Law</i> 3	38, 46, 54
15.	Richard A. Leo, <i>Police Interrogation and American Justice</i> (Cambridge: Harvard UP, 2008)	43, 46, 54
16.	William C. Follette, Deborah Davis, and Richard A. Leo, <i>“Mental health status and vulnerability to police interrogation tactics”</i> (2007), 22 <i>Crim. Jus.</i> 42	42, 50