

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 3/2026

UNDER the Senior Courts Act 2016
IN THE MATTER an appeal with leave under s 74
BETWEEN **Ethan Webster**
Appellant
AND **the King**
Respondent

App Submissions

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Counsel for the appellant certify that this submission contains
no suppressed information and is suitable for publication

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MAY IT PLEASE THE COURT

1. Introduction

- 1.1. When Ethan Webster was in Year 6, he could only identify some numbers between 6 and 10.¹ When remanded into custody aged 18, he did not know his birthdate.² When counsel saw Ethan to explain the result on his first appeal, he asked if it could be represented in a picture.
- 1.2. Nobody knew that Ethan was living with Foetal Alcohol Spectrum Disorder (**FASD**) when he pleaded guilty to reckless murder, aged 18. An expert engaged by the defence did not pick up on the condition. Reports obtained on appeal revealed that Ethan suffers from FASD, has deficits that may rise to the level of intellectual disability, and may have been unfit to stand trial in late-2022. He would be fit today, if provided with adapted trial and communications procedures to scaffold the required capacities.
- 1.3. A miscarriage of justice has occurred because Ethan was not provided with necessary communications assistance, was unfit to stand trial when the plea was entered, and because the post-conviction evidence creates doubt about whether he had murderous intent. That his first conviction appeal was dismissed reflects that the Court of Appeal applied the wrong fitness test, exercised the wrong jurisdiction under s 232(4) of the Criminal Procedure Act 2011 and made evaluative errors.

2. Summary of argument

- 2.1. All roads on appeal lead back to the safety of the plea. The miscarriage can be understood in the following ways, although its causes overlap:
 - i. Ethan should not have been called on to enter a plea, because he was unfit to stand trial. The Court of Appeal erred in asking whether he was *fit to plead* rather than *fit to stand trial* on the miscarriage analysis. Both appellate standards are available on

¹ CA Add Mats, p 20 at 22.

² CA Add Mats, p 17 at 9.

authority. But the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP Act**) recognises an indivisible test of *fitness to stand trial* and that standard must be applied on an appeal.

- ii. Ethan required communications assistance. The Court of Appeal erred in finding Ethan fit, when that fitness was contingent on a counter-factual of communications assistance and none had been provided at time of plea. Contingent fitness is not fitness in law.
- iii. Ethan was unfit to plead or stand trial. The Court of Appeal erred in finding him fit, encompassing the failure to conclude whether he needed to give evidence to secure a fair trial and the reliance on accounts of his abilities formed in total ignorance of his FASD.
- iv. The plea was not *informed* in the required sense, because evidence of Ethan's FASD only emerged post-conviction. It was impossible to advise Ethan that his condition could be marshalled as a source of doubt as to murderous intent. The Court erred in:
 - a) Proceeding under s 232(4)(a) rather than s 232(4)(b); and
 - b) If the Court was correct to proceed under s 232(4)(a), its conclusions were wrong. The lack of evidence about Ethan's FASD plainly affected the plea. To the extent that an evaluation of the trial defence was required, the Court acted on untested and possibly inadmissible evidence. An intent defence is inherently arguable. Recognising the possibility of such a defence requires the appeal to be allowed.

2.2. All grounds except the last lead to a conclusion of unfairness.

3. Background

- 3.1. Ethan was born on 18 February 2003. His mother was not aware that she was pregnant until she went into labour and drank heavily throughout her pregnancy.³ Ethan did not reach developmental

³ CA Add Mats, p 88 at 32.

milestones. He left school at 13,⁴ illiterate. Ethan was home-schooled until the age of about 15, continuing with a degree of correspondence education.⁵ Around this time, he left home to live with his sister and her partner and began work in dairy farming.

- 3.2. Ethan had no criminal history or Youth Court notations prior to the index events. Nor was there any apparent history of violence.

The events of 29 July 2022

- 3.3. Care is required talking about the events, because the evidence has not been tested for admissibility or reliability. But an outline is possible.
- 3.4. In July 2022, Ethan (18), William Candy (39) and Jacob Ramsey (33), were employed as dairy milkers on a farm in South Taranaki. Mr Candy was in a relationship with another co-defendant, Jodie Hughes.
- 3.5. Mr Ramsey had a serious methamphetamine problem and had become (modestly) indebted to Mr Candy, Ethan and/or Ms Hughes.
- 3.6. On the morning of 29 July, Ms Hughes burgled Mr Ramsey's property. That evening, Ms Hughes and Mr Candy drove to Ōakura to locate Mr Ramsey, with the intention of assaulting him. Ethan was not involved. Mr Ramsey was located and savagely beaten by Mr Candy in a cemetery. He was then placed in the back of the vehicle. Mr Candy continued the assault during the 30-minute drive back to the farm.
- 3.7. At 7.15 p.m. the group arrived at the farm and was met by Ethan and two others. Ethan had consumed alcohol and cannabis and may have been somewhat intoxicated. Mr Candy pushed Mr Ramsey out of the car. Ethan said in his ERI that Mr Ramsey looked "pretty fucked up".⁶
- 3.8. Ethan then assaulted Mr Ramsey near the vehicle, which he later accepted to police involved punching and kicking.⁷

⁴ An event that his mother attributed to him being hit by a teacher (CA Casebook, p 41 at (29)).

⁵ CA Casebook, p 42 at 40.

⁶ Ethan's ERI, p 32.

⁷ Ethan's ERI, p 13 and 17.

- 3.9. It bears emphasis that Ethan’s police interview (**ERI**) admitted a less extensive assault than the one alleged by the Crown.⁸ Trial counsel, Mr Bourke, accepts that Ethan did not accept the summary in full, and maintained that the assault lasted for 3 – 4 minutes.⁹
- 3.10. Mr Candy then sourced a length of chain which he attached to Mr Ramsey’s feet and then to the vehicle, before starting to drive slowly towards a rubbish pit, around 900 meters away. Ethan caught up to the vehicle and got into the passenger seat. In his ERI, Ethan said that half way down the track, Mr Candy said: “You don’t want to be here for this, this is serious shit, he might be dead by the time we get to the end of the track.”¹⁰ Mr Candy did not recall making this comment.¹¹
- 3.11. Ethan remained in the vehicle and Mr Candy drove to the pit. The pair then dragged Mr Ramsey to the edge of the pit where they dumped his body. Mr Ramsey died as a result of multiple blunt force injuries.

Procedural history

- 3.12. Ethan gave an ERI on 3 August under caution but without speaking to a lawyer. He initially sought (unrealistically) to take sole responsibility for the events, before acknowledging Mr Candy’s role.¹² He was then charged as a joint principal to reckless murder.
- 3.13. Trial counsel, Mr Bourke, found Ethan to be “a deer in the headlights” but did not suspect impairment, putting the client’s presentation down to his age and the gravity of the situation.¹³ Mr Bourke faced challenges explaining the mental elements of murder, was unable to develop ideas around intent, and formed the view that Ethan would struggle to give evidence. In those circumstances, Mr Bourke advised that it would be reasonable to plead guilty. He explains that Ethan deferred to him:¹⁴

⁸ CA Add Mats, p 94

⁹ First affidavit of Nathan Bourke at 17. See also: CA Add Mats, p 94 at 59.

¹⁰ Ethan’s ERI, p 35.

¹¹ Candy ERI dated 3 August 2022, p 8-9.

¹² Ethan’s ERI, p 21. He later explained: “I don’t know. I just didn’t want nothing to happen to [Mr Candy]”.

¹³ First affidavit of Nathan Bourke at 7.

¹⁴ At 33.

...it is apparent that Mr Webster was heavily reliant upon my advice. Although I told him that plea was his choice, I consider that in reality he would have adopted whatever course of action I suggested and presented to him as his best option.

- 3.14. Prior to entering the plea, Mr Bourke cautiously obtained a report from Paul Carlyon (psychologist). That report did not suggest a fitness issue. But Mr Carlyon had not been able to speak to Ethan's family and did not administer any testing. Mr Bourke took the report at face value.
- 3.15. On 2 December 2022, Mr Bourke confirmed to the Crown that Ethan would plead guilty. He sought some changes to the summary of facts, although this did not include a change to reflect Ethan's instructions about the duration of the assault.
- 3.16. The plea was entered. Pre-sentence and s 27 reports were obtained, both referring to Ethan's difficulties with comprehension and verbal communication. At sentencing, Churchman J sentenced Ethan to life imprisonment with an MPI of 12 years.
- 3.17. A sentence appeal was filed. Preparation of that appeal triggered a cascade of health assessor reports, which (*inter alia*) identified Ethan's deficits and gave opinions about whether he was fit to stand trial when the plea was entered. The appeal was expanded to conviction and Mr Bourke stepped away to allow him to give evidence, later providing two affidavits. The first concluded:¹⁵

Given the information I now have around Mr Webster's cognitive functioning, I confirm that my advice around the issues of foreseeability and recklessness would have been different, as would my assessment of his trial prospects and ability to defend the charge of murder.

- 3.18. The appeal argued that Ethan was unfit to stand trial and the post-conviction evidence gave rise to a reasonable doubt about whether he had reckless intent. The conviction appeal was dismissed but the sentence appeal was allowed. Ethan brings a second appeal with leave.

¹⁵ CA Add Mats, p 40.

4. The test on appeal – *fitness to plead* or *fitness to stand trial*?

- 4.1. The Court of Appeal proceeded on the basis that *fitness to plead* was the issue on appeal, and concluded that Ethan was fit to enter the plea.¹⁶
- 4.2. The argument is that Ethan was not *fit* in the sense required by s 4 of the CPMIP Act – namely he was not fit to plead *not guilty* and proceed to trial, with all of the cognitive demands implied. Whether he was *fit to stand trial* ought to have been the question on appeal. The Court of Appeal did not ask this question and therefore did not answer it.
- 4.3. The right of appeal has adapted to respond to the plight of defendants whose fitness only comes into question following a guilty plea. In a series of cases, retrospective fitness assessments have been used to determine whether a miscarriage of justice has occurred.¹⁷
- 4.4. In these cases, the constant is the guilty plea. The counter-factual is the trial. The issue on appeal is – almost always¹⁸ – fitness. But fitness to do what? Fitness to have entered the plea? Or fitness to have effectively participated – per *Nonu* and *Tihema* – in a trial that never occurred?¹⁹
- 4.5. Without deciding the issue, some cases proceed on an assumption that fitness to stand trial is at the core of the enquiry.²⁰ The most common approach has been to avoid the question, to use *fitness to plead* and *fitness to stand trial* interchangeably, and/or to narrowly focus on fitness to enter the plea.²¹ The correct approach has not been rationalised.

¹⁶ *Webster v R* [2025] NZCA 679 at [53]-[54], [56]-[57] and [71].

¹⁷ *Erskine & Williams v R*, [2009] EWCA Crim 1425 (Williams only); *Walton v R* [2010] EWCA Crim 2255; *Leapai v Police* [2012] NZHC 708; *Britz v R* [2012] NZCA 606 (leave declined in *Britz v R* [2013] NZSC 38); *Lawler v R* [2013] NZCA 308; *RC v R* [2014] NZHC 1267; *Wilkinson v R* [2017] NZHC 1737; *R v AAM*; *ex parte A-G (Qld)* [2010] QCA 305; *Epere v Police* [2022] NZHC 866; *Paraba v Police* [2017] NZHC 2001; *Trow v Police* [2021] NZHC 2012; *Trow v Police* [2021] NZHC 2828; *Christie v Police* [2018] NZHC 2149; *GC v Police* [2021] NZHC 645; *CG v R* [2022] NZCA 389; *Wheble v R* [2024] NZCA 541; *Tarrant v R* [2026] NZCA 148.

¹⁸ A question has arisen about whether the procedural failure to commence or conclude fitness procedures can occasion a miscarriage of justice of itself; *Britz v R*, above n 17 at [28]; *Dalley v R* [2009] NZCA 419; *R v McKay* [2009] NZCA 378; *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638, *Eastman v R* [2000] HCA 29, 203 CLR 1. In other cases, the appeal framework has been the categories for plea vacation in *R v Le Page* [2005] 2 NZLR 845.

¹⁹ *Nonu v R* [2017] NZCA 170; *Tihema v R* [2024] NZSC 112.

²⁰ For example: *CG v Police* (CA) at [2], [11], [26], [75]-[76]; *Leapai v Police*, at [26]; *Epere v Police*, at [25]-[27] and [56]; *Paraba v Police* at [27]-[28]; *Trow v Police* at [25]-[26] (all above n 17).

²¹ For example: *Erskine & Williams v R*; *Walton v R*; *R v AAM*; *ex parte A-G (Qld)*. In New Zealand: *Britz v R* at [113]; *Wheble v R* at [54]; *Tarrant v R* at [47] (all above n 17).

- 4.6. A person can conceptually be fit to plead but unfit to stand trial, and the difference between the capacities can be significant.²² This was discussed in *Marcantonio & Chitolie v R*,²³ where the Court said *obiter*:

8. [...] There will be cases in which the defendant would be unable to follow proceedings at trial or to give evidence but would not lack the decisional capacity necessary for entering a plea of guilty. We would question the desirability of denying such a defendant the option of pleading guilty. Once it is established that a defendant who intends to plead guilty has the capacity to do so and that his plea is a sound basis for a safe conviction, it is difficult to see why he should be considered unfit to plead on the ground that he would be unable to understand a trial which will not take place or to give evidence in his defence when the evidence he would give, if called, is that he is guilty and he would not therefore be cross-examined [...]

- 4.7. The Court did not attempt to define the appellate approach and a bifurcated standard was not applied for the purposes of evaluation, the Court saying on the appeal of Mr Marcantonio (who pleaded guilty):²⁴

50 ... it is necessary to have regard to the particular circumstances of each case. It is necessary to take a realistic view of the nature of the proceedings and their likely course and the nature and complexity of the issues which are likely to arise. Nevertheless, we proceed on the basis that the test does not distinguish between fitness to plead guilty and fitness to stand trial...

- 4.8. *Marcantonio* is consistent with *Orr v R*,²⁵ another decision of the English Court of Appeal delivered in the same year. In that case, the defendant pleaded not guilty but had a break-down after his examination-in-chief, such that he was unable to be cross-examined. The trial proceeded and the Judge directed the jury that he was unfit for the purpose of cross-examination. Despite the advantage to the defendant in having avoided hostile questioning, the Court found that an inability to fully participate

²² *R v Komene* [2013] NZHC 1347 at [17]; *Akabuta v R* [2020] NZCA 19 at [103]; Law Commission *Unfitness to Plead*: Volume 1 (Law Com No 364) 3.145 citing R D Mackay, B Mitchell and L Howe, "A continued upturn in unfitness to plead – more disability in relation to trial under the 1991 Act" [2007] *Criminal Law Review* 530.

²³ *R v Marcantonio* [2016] EWCA Crim 14, [2016] All ER (D) 263 (Feb).

²⁴ Consistent with the final analysis at 58.

²⁵ *R v Orr* [2016] EWCA Crim 889.

in the process of giving evidence meant that the defendant was not fit and appeal was allowed.²⁶

- 4.9. In the 2024 decision in *Ismael v R*,²⁷ the *Marcantonio* distinction was referred to and, again, the English Court did not attempt to refine the appeal standard, finding that it would make no difference on the facts.
- 4.10. In New Zealand, *Marcantonio* has been cited in support of the narrower *fitness to plead* standard in the decisions of the New Zealand Court of Appeal in *Wheble v R* and recently in *Tarrant v R*,²⁸ but without any recognition of the structural tension in the judgment or the fact it does not reflect English law.²⁹ Nor has there been an attempt to justify why it should affect the appeal standard or any examination of its underlying premises. There is good reason to think *Marcantonio* represents a solution in search of a problem (below).

What should the appeal question be?

- 4.11. Despite a line of authority that has emerged in the Court of Appeal, it is wrong to uphold a guilty plea where a defendant may have been fit to plead,³⁰ but was unfit to stand trial. Where an unrecognised fitness issue has resulted in a guilty plea, the question on appeal should be whether the appellant was fit to stand trial. Counsel make six points.
- 4.12. First, s 4 of the CPMIP Act recognises a unitary standard of *fitness to stand trial*. *Fitness to plead* is necessary but not sufficient to establish fitness. To apply the unitary standard on appeal is simply to respect the language and the purpose of the Act. The fact that a plea was entered is not a reason to depart from the s 4 test.
- 4.13. Second, the purpose of the fitness regime requires the statutory standard. The system is underpinned by three key principles: fairness

²⁶ This conclusion may not have been reached applying *Tibema*, above n 19 at [105].

²⁷ *Ismael v R* [2024] EWCA Crim 301.

²⁸ *Wheble v R*, above n 17 at [55]. *Tarrant v R*, above n 21, at [47].

²⁹ *Marcantonio* was cited also with approval in *Hanara (CA63/2019) v R* [2022] NZCA 608 at [145]-[146], albeit to make a different point than the one raised on this application. The issue in this case did not arise in *Hanara* because the appellant stood trial and because that appeal was allowed on other grounds.

³⁰ This is not accepted in Ethan's case.

to defendants; promoting the integrity and legitimacy of the criminal justice system; and securing reliable outcomes by facilitating trials where those charged can advance a defence.³¹ There is also an imperative to address the over-criminalisation of people with mental health difficulties.³² All of these purposes are compromised by applying a lower standard on appeal.

- 4.14. Third, the lower standard can operate to ratify guilty pleas that are based on a false-choice equation. For a plea to be *free*, the defendant must be just as able to plead *not guilty* as *guilty*. A *not guilty* plea implies the ability to fully participate in a trial. If the defendant cannot fully participate, the choice is forced and therefore false. Pleas of this nature cannot be said to be *free* or *voluntary* in the necessary sense.
- 4.15. Fourth, the lower standard is inconsistent with the modern approach to fitness. There is a contradiction in raising the bar to fitness in the pre-trial context – *Nonu* and *Tibema* – and lowering it to below the statutory level in the appellate context. As this case demonstrates, whether a defendant is in one position or the other is often accidental. The resulting difference in outcomes is unprincipled.
- 4.16. Fifth, the lower standard can operate to ratify guilty pleas based on arbitrary factors, such as lack of previous contact with mental health services or insufficient curiosity on the part of counsel. In this case, a psychologist who was unable to obtain collateral history and administered no formal testing, did not identify a condition that is now recognised to be beyond dispute.
- 4.17. Sixth, the lower standard operates to deprive the accused of the ability to make the two fundamental trial decisions (free and informed decisions as to plea and election to give evidence) which, in the ordinary appellate context, will occasion a miscarriage of justice.³³

³¹ *Nonu v R*, above n 19 at [26].

³² Miranda Bevan and David Ormerod “Reforming the Law of Unfitness to Plead in England and Wales” in Ronnie MacKay and Warren Brookbanks (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, 2018) at 80.

³³ *Tibema*, above n 19; *Hemopo v R* [2016] NZCA 398 at [75].

- 4.18. Fitness is fundamental to requiring a person to answer criminal charges. A rigorous, statute-driven approach should apply on appeals where an unrecognised fitness issue has resulted in a guilty plea.

Marcantonio and a bifurcated test

- 4.19. *Marcantonio* touches on a familiar tension – in some cases it will be preferable for an impaired defendant to plead guilty and be sentenced in the usual way, rather than engaging fitness process, which may reveal that they are unfit to stand trial.
- 4.20. Nothing about acknowledging that tension implies that a bifurcated fitness test should apply on a conviction appeal where an unrecognised fitness issue has resulted in a guilty plea. There are different categories of defendant, which need to be clearly delineated:
- i. The first defendant pleads guilty, despite having been given careful and proper advice, because a fitness issue has gone undetected.
 - ii. The second defendant pleads guilty because, having been given careful and proper advice, they compromise and forego fitness inquiries to secure the benefits of the guilty plea and/or avoid more coercive disposition under the CPMIP Act.
- 4.21. Ethan is in the first category and it is submitted these defendants must be restored to the position they would have been in had nothing gone wrong – that is, if the impairment implicating fitness had been detected as it should have been. For this defendant, there is no reason not to apply the full s 4 test that would have applied had the issue been identified pre-trial. This will be especially important in cases where unfitness persists and CPMIP disposition is appropriate – it will control the actual pathway for properly dealing with the defendant.
- 4.22. In relation to the second defendant, counsel makes six points.
- 4.23. First, the position of this defendant is entirely counter-factual for the purposes of this appeal. It only requires consideration because the Crown may say that the appellant’s argument would frustrate criminal

procedure or set up an illegitimate appeal pathway for people who enter pragmatic but informed guilty pleas.

- 4.24. Second, the dicta in *Marcantonio* is not obviously correct. For a plea to be truly *free*, the defendant must be just as able to plead *not guilty* as *guilty*. It is also questionable whether a plea should be accepted not as an acceptance of responsibility but as a mere aversion to CPMIP Act processes. Again, there is a risk of a forced, false-choice equation.
- 4.25. Third, where the CPMIP Act is engaged, its provisions mean that a person who is unfit at one time may later become fit, allowing them to resolve, plead guilty or proceed to trial – meaning that it is often a question of when, not whether, a person is able to enter a guilty plea.
- 4.26. Fourth, it is unlikely that affirming the statutory standard as applying on appeal would set up a wave of conviction appeals. Those who may have been unable to fulfill all trial competencies but were able to enter pragmatic guilty pleas are unlikely to bring appeals, when that will usually bring about the disadvantages the plea sought to avoid. The second-defendant-as-appellant scenario is largely hypothetical, whereas the problem of undetected fitness issues is very real.
- 4.27. Fifth, to the extent that the second defendant does appeal, the ordinary principles of guilty plea appeals stated in *Merrilees v R* apply:³⁴

If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

- 4.28. Sixth, if *Marcantonio* responds to a real problem, the solution is legislative. While the courts have affirmed a robust approach to the interpretation of the CPMIP Act *to make the legislation work*,³⁵ the source

³⁴ *Merrilees*, above n 30, at [35].

³⁵ *Komene v R*, above n 22, at [20], citing *R v McKay* [2009] NZCA 378 [2010] 1 NZLR 441 (CA) at [91].

of that language, in *Northland Milk Vendors Association Inc v Northern Milk Ltd*, registers an important qualification:³⁶

Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended ...

- 4.29. For whatever problems it aspires to solve, the approach in *Marcantonio* leads to injustice if applied as a general rule controlling the appeal standard. The bifurcated fitness test is inherently flawed. If it responds to a real problem, the solution is legislative – not to effectively amend the CPMIP Act by proxy, via the appellate standard.

5. Fitness contingent on assistance that was not provided

- 5.1. Trial counsel said he *certainly* would have sought a communications assistant had he known about Ethan’s FASD.³⁷ The Court of Appeal accepted that it was likely a communications assistant would have been appointed had Ethan’s issues been identified pre-trial,³⁸ and the evidence was that, even today, Ethan would require adapted trial and communications procedures. Appeal counsel, with respect, agree.
- 5.2. The entitlement to communications assistance is analogous to the right to interpretation.³⁹ While the latter is expressly guaranteed by s 24(g) of the NZBORA, s 80 of the Evidence Act 2006 provides that a defendant is “entitled” to assistance, to “understand the proceeding” and to “give evidence”, when they are not otherwise sufficiently able to understand and play an active role in the proceedings. The objective is “full participation” in the trial process.⁴⁰

³⁶ *Northland Milk Vendors Association Incorporated v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.

³⁷ First affidavit of Nathan Bourke at 39.

³⁸ *Webster v R*, above n 16 at [37], [45], [54] and [57].

³⁹ *Abdula v R* [2011] NZSC 130; [2012] 1 NZLR 534; *Tihema v R*, above n **Error! Bookmark not defined.**, at [42].

⁴⁰ *Poibipi v R* [2022] NZCA 421 at [42].

- 5.3. The threshold for entitlement to interpretation is not onerous.⁴¹ A trial conducted without interpretation or effective interpretation is regarded as having been conducted in the absence of the defendant, occasioning unfairness.⁴² Prejudice to the defence is not required, although it may establish a breach of the right. In *R v Tran*, the Canadian Supreme Court said:⁴³

In assessing whether there has been a sufficient departure from the standard ... under s 14, the principle which informs the right – namely, that of linguistic understanding – should be kept in mind. In other words, the question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court.

- 5.4. The source of the defendant's inability to fully participate in a case where communications assistance is required is cognitive rather than purely linguistic. But the rationale for assistance applies in full:⁴⁴

...The requirement that an accused be present at trial was not concerned merely with corporeal presence. The defendant should be able to understand the proceedings and decide both what witnesses to call (or not), and whether personally to give evidence (and, if so, on what matters)...

- 5.5. In New Zealand, an unmet need for communication assistance has been treated as occasioning a miscarriage in itself, where the effect was that the defendant was required to make a fundamental trial decision without assistance.⁴⁵ In *Hemi v R*, Toogood J found that the absence of assistance for a vulnerable defendant meant the decision whether to give evidence was not fully informed.⁴⁶

⁴¹ *Abdula v R*, above n **Error! Bookmark not defined.** at [45].

⁴² At [25]-[26] citing *Kunnath v The State* [1993] 1 WLR 1315 (PC) and *Dietrich v The Queen* (1992) 177 CLR 292.

⁴³ *R v Tran* [1994] 2 SCR 951 per Lamer CJ at 974.

⁴⁴ *Abdula v R*, above n **Error! Bookmark not defined.** at [24]

⁴⁵ *Hemi v R* [2017] NZHC 714. Other cases have not involved fundamental decisions: *Bradley v the King* [2024] NZCA 115 and *Riminie v the King* [2024] NZCA 676.

⁴⁶ At [24].

- 5.6. In *Tibema*, this Court said that where there is an inherent barrier to full engagement with counsel, steps *must* be taken to overcome it. If they are not, the right to legal assistance may itself be compromised.⁴⁷
- 5.7. There is no doubt that communications assistance would have been sought and provided in this case, had Ethan's deficits been identified.
- 5.8. The defining feature of the relationship with trial counsel was an inability to establish a meaningful dialogue on the issue of intent. Mr Bourke did not interpret Ethan as being uncooperative and found him to be a pleasant client.⁴⁸ Ethan was able to give relevant instructions about the assault. However, as Mr Bourke said:⁴⁹

Mr Webster was never able to articulate answers that I thought mitigated the risks he faced. If I put to him a question that I said the Crown might ask, he would often simply draw a blank and be unable to respond. Reflecting on this, it is possible that Mr Webster had not comprehended the point I was making or understood what I was trying to get across to him, or was simply unable to articulate his thoughts, rather than it being a situation where he didn't have an answer to the question.

- 5.9. At the time he was dealing with counsel, it is clear that Ethan was only able to understand the intentional form of murder (s 167(a)), to the exclusion of the reckless form he was charged with.⁵⁰ Meaning no criticism, this led to a situation where counsel did not ask Ethan to formally accept the elements of recklessness, but instead asked the simpler question of whether he wished to plead guilty.⁵¹
- 5.10. Recklessness is complex, even for an unimpaired defendant. Clients almost never appreciate that proof of a reckless mind will establish a murder. They need to be educated. The convoluted expression of the elements in law creates further challenges for counsel in giving advice.

⁴⁷ *Tibema v R*, above n **Error! Bookmark not defined.**, at [49].

⁴⁸ Cross-examination of Nathan Bourke, p 2.

⁴⁹ First affidavit of Nathan Bourke at 28.

⁵⁰ Second affidavit of Nathan Bourke at 8, 11, 32 and 42.

⁵¹ Cross-examination of Nathan Bourke, p 3

- 5.11. It is also difficult to drive home to defendants that the question is not what they appreciate at the time that they are speaking to counsel, but what they appreciated at the moment they committed the guilty act.⁵² Untangling the two is fraught. This question was difficult in Ethan's case because the Crown case was not well particularised, and it was not clear when the Crown would say that the actus reus and mens rea were co-incident, such that Ethan was guilty of murder.
- 5.12. As to other factors that might have influenced the intent question, Ethan could not give counsel instructions about a condition he did not know he had, and was not sophisticated enough to suggest that he had difficulties that might have interacted with the recklessness test.
- 5.13. It is also unclear how, in the absence of assistance, Ethan could ever have adequately understood the law and the evidence comprising the case against him. Ethan cannot read. This meant an illiterate 18-year-old with FASD and Specific Learning Disability⁵³ was reduced to assimilating and remembering verbal information from Mr Bourke. Confounding matters, it is clear that Ethan was emotional and crying when the plea decision was made.⁵⁴
- 5.14. In the end, Ethan was deprived of necessary assistance when called upon to decide whether to exercise the right to silence with police and when making the fundamental decision as to plea.
- 5.15. The finding that Ethan was fit to plead amounts to a contingent finding that assumes assistance. Applying the principles in *Tihema*,⁵⁵ contingent fitness cannot be regarded as fitness in law. This conclusion is only reinforced if the correct question was fitness to stand trial, because there was no prospect of Ethan effectively participating without assistance. Any trial carried out under the conditions as they prevailed would have been condemned as unfair.⁵⁶

⁵² *R v Piri* [1987] 1 NZLR 66 (CA) at 79. See also *Adams* at [CA167.06].

⁵³ CA Add Mats, p 14.

⁵⁴ Second affidavit of Nathan Bourke at 32.

⁵⁵ *Tihema*, above n 19 at [39]-[51].

⁵⁶ *Tihema* at [41].

5.16. The absence of assistance can further be found to have caused a miscarriage of justice in itself, because it foreclosed the possibility of obtaining a properly informed plea.⁵⁷

5.17. It is no answer to say that the lack of communication with Mr Bourke implies that Ethan had nothing of value to say about recklessness. Indeed, one of the categories of evidence that has been relied upon to suggest that a defence is unsustainable – the repeated statements made to Ethan that death was possible – suggests the exact opposite. Multiple people, Ethan’s co-accused, trial counsel, a psychologist, have all found it necessary to tell him what would be obvious to anyone else: there was a risk that Mr Ramsay could die.

6. Ethan was not fit to plead or stand trial in late-2022

6.1. FASD is a positive menace to fair trials, requiring careful consideration of whether and, if so, how effective participation can be achieved such that the accused retains their autonomy and can contribute to the trial.⁵⁸

Fitness to plead

6.2. The argument that Ethan was unfit to plead is essentially that made above – he was deprived of the assistance that was required for the plea to have been informed and he was not fit to plead *not guilty* and proceed to trial. This was a significant factor informing the plea advice. It is telling that the plea decision was essentially entrusted to counsel.

Fitness to stand trial

6.3. In *Tihema*, this Court affirmed the *effective participation* standard adopted in *Nonu*,⁵⁹ which requires that the defendant is able to:

⁵⁷ *Hemi v R*, above n 45.

⁵⁸ Dr Warren Brookbanks, Valerie McGinn and Joanna Chu “Unfitness to stand trial and fetal alcohol spectrum disorder: Understanding and responding to FASD within the criminal justice system in New Zealand” (2021) 1 Behavioural Sciences and the Law 159-169; Jerrod Brown and Others “Fetal Alcohol Spectrum Disorder (FASD) and Competency to Stand Trial (CST): A Call on Forensic Evaluators to Become Informed” (2019) 19(4) Journal of Forensic Psychology Research and Practice 315-340.

⁵⁹ *Nonu*, above n 19, at [45]-[46].

- (a) understand the nature and implications of the trial process;
 - (b) evaluate the impact of relevant information on the conduct of the defence;
 - (c) make the fundamental decisions referred to in *Hall v R*; and
 - (d) communicate instructions to counsel and give evidence, if that election is made.
- 6.4. These capacities need to be capable of being exercised “in real time”.⁶⁰
- 6.5. Ethan’s fitness to stand trial when the plea was entered is a matter of expert evidence and evidence from Mr Bourke, which is entrusted to the Court. Counsel make nine points about the fitness issues.
- 6.6. First, *Mental impairment*, defined in s 4 of the CPMIP Act is deliberately open textured – it encompasses intellectual disability (**ID**) but also includes any form of impairment capable of impacting the capacities necessary for a fair trial. FASD falls within the definition and there is no dispute that Ethan meets the FASD criteria.
- 6.7. Second, there is a division in the evidence about whether Ethan’s impairments rise to the level of ID. Dr Fon suggests that they do, while Dr Nuth considers that Dr Fon’s testing lacked symptom validity, without attributing invalidity to any particular cause. Dr McFadden and Dr Pankhurst agree that Ethan has a low range of functioning, but not to the extent of ID. The symptoms testing is clearly a difficult issue and Dr Pankhurst has pointed the Court to literature suggesting that special care is required in finding invalidity where the subject also has FASD.⁶¹ Whether or not Dr Fon’s findings are accepted, the consensus in the evidence is that Ethan is very close to the line of ID, a condition Dr McFadden and Dr Pankhurst described as *Borderline Intellectual Functioning* (respectively finding sub-average general intelligence scores of “at least 75” and 78, where the score required for ID is below 70).⁶²

⁶⁰ At [30].

⁶¹ CA Add Mats, p 85 at 22.

⁶² Section 7(1)(a) and (3) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

- 6.8. Third, the consensus that Ethan would require trial accommodations is significant and directly impacts requirements (a) – (d) of *Tihema*. The evidence is that fitness, even today, would require adapted trial and communications procedures, the implication being that a trial process in 2023 could not have been manageable, except on the counterfactual of appropriate scaffolds. As Ethan’s mother said to Dr McFadden:⁶³ *...people will run rings around him, the lawyers will eat him alive, he won’t understand what the other lawyers (crown) are saying*. Dr McFadden says that it was unlikely that Ethan would have been able to effectively participate in the trial without special measures.⁶⁴ The witnesses agree that Ethan would be fit now, with the benefit of these measures.⁶⁵
- 6.9. Fourth, there is consistency between the independent witnesses on the fitness indicia. Dr McFadden and Dr Pankhurst both found that Ethan suffers mental impairment under s 4.⁶⁶ Dr McFadden found that Ethan substantially met the foundational requirements of fitness,⁶⁷ but that it was not clear whether Ethan understood the mental element (recklessness) most relevant to his case, the evidence that the prosecution would rely on to prove the charge, or his counsel’s advice.⁶⁸ Dr Pankhurst was more sceptical about the foundational requirements, and echoed Dr McFadden’s findings about active engagement,⁶⁹ and specific comprehension of the recklessness issues.⁷⁰
- 6.10. Fifth, Mr Bourke’s evidence is that it was difficult for him to drive home the pathways under s 167(a) and (b) of the Crimes Act, which was critical to the development of any defence. Trial counsel notes that there was little feedback from Ethan when discussing the intent issues, and he was left to assume that his advice was comprehended.⁷¹

⁶³ CA Add Mats, p 74 at 130.

⁶⁴ CA Add Mats, p 77 at 150.

⁶⁵ CA Add Mats, p 77 at 152 and p 111 at 118-119.

⁶⁶ CA Add Mats p 75 at 137 and p 109 at 110.

⁶⁷ CA Add Mats, p 76 at 143 and p 99 at 88(i).

⁶⁸ CA Add Mats, p 77 at 146-149.

⁶⁹ CA Add Mats p 110 at 112.

⁷⁰ CA Add Mats, p 88 at 88(i).

⁷¹ At 39-41.

- 6.11. Sixth, the trial was not simple.⁷² It raised a network of issues, both in the pre-trial and trial phases. There are serious questions about whether the ERI was unfairly obtained and, if it was, whether an application for exclusion would have been in Ethan's interests. Several statements would have required challenging and the defence would have needed to consider issues around the effect of Ms Hughes' evidence as a co-defendant.⁷³ Further, while it was likely that the Crown would have prosecuted Ethan as a joint principal, there was a risk that the charge could have been amended to alternatively allege party liability. In any case, the defence would have turned on intent and knowledge, requiring Ethan to fully participate in trial preparation. It is noted that the limitations to Ethan's understanding of recklessness appear to endure⁷⁴ and would require careful exploration, with assistance.
- 6.12. Seventh, given the available defences, Mr Bourke notes there was a "likely need for [Ethan] to give evidence", which prompted consideration of whether he would be able to withstand the process.⁷⁵ Counsel formed the view he would not, which significantly informed the plea advice. It is submitted counsel's assessment was correct and it is likely Ethan would need to give evidence to explain his version of events, what he understood of the risks and to respond to or contextualise aspects of the Crown case (including what Mr Candy may have said to him in the vehicle, if the ERI is admitted).⁷⁶ The Court of Appeal erred in failing to reach a conclusion on this issue, although this likely reflects the bifurcated fitness test applied.
- 6.13. Eighth, it was in error for the Court of Appeal to have put weight on the assessments of Ethan's abilities at a time when neither Mr Bourke nor Mr Carlyon were aware of his underlying condition.⁷⁷ Mr Bourke has clear reservations about whether Ethan understood his advice.

⁷² *Nonu v R*, n 19 at [31].

⁷³ Although these issues would fall away if the Court overturned the conviction because Ms Hughes has now been convicted in a separate trial process. Trial counsel would still need to consider the challenges that would be required if she was summonsed as a witness.

⁷⁴ CA Add Mats, p 110.

⁷⁵ Affidavit of Nathan Bourke dated 2 May 2024 at 47.

⁷⁶ Although Mr Candy could not specifically recall making these comments; ERI dated 3 August 2022, p 8.

⁷⁷ *Webster v R*, above n 16 at [67]-[70].

With the benefit of hindsight, he recognises Ethan's presentation as being consistent with a lack of understanding.⁷⁸ Ethan was unable to respond to questions Mr Bourke asked when interrogating possible defences,⁷⁹ and counsel formed the view that he would struggle giving evidence. Mr Bourke notes that lack of comprehension may run as deep as Ethan not understanding what the summary of facts **was** and that he never gained command over its contents. There is an obvious contradiction in the efforts counsel made to convey the summary and Ethan's repeated comments to the report writers that he did not know the contents of the document, which may be suggestive of severe difficulties with understanding and/or recall.⁸⁰

- 6.14. Ninth, the phrasing of the ultimate conclusions in the fitness reports – that Ethan *may have been unfit* (Dr Pankhurst) and that it was *not clear* that he would have been regarded as fit (Dr McFadden) – does not determine the issue. The reports are measured in view of the fact that the witnesses were conducting retrospective assessments – circumspect underscored by the fact that both found that he would be fit today. But fitness is a legal question. In *Hanara*, the Court considered whether ultimate issue evidence about fitness was helpful or necessary, concluding that there is nothing wrong with an assessor expressing an opinion but that fitness is ultimately a question for the court.⁸¹
- 6.15. For those essential reasons, it is submitted that Ethan was unfit to effectively participate in his trial at the time the plea was entered. Nor is he fit to effectively participate now, unless and until communications assistance and other trial accommodations are put in place. If they are, trial can safely proceed. But if a person was unfit when a plea was entered, then the trial will have been unfair.⁸²

7. A fundamentally uninformed plea to murder

⁷⁸ First affidavit of Nathan Bourke at 10.

⁷⁹ At 28.

⁸⁰ Second affidavit of Nathan Bourke at 45.

⁸¹ *Hanara v R*, above n 29 at [121] and [126].

⁸² CPA, s 232(4)(b). See *J, A Compulsory Care Recipient, by his Welfare Guardian T (CA412/2019) v Attorney General* [2023] NZCA 660 at [140]; *Nonu v R*, above n 19 at [24]; *Lawler v R* [2013] NZCA 308 at [29].

- 7.1. Ethan may be guilty of manslaughter but not murder. The facts do not admit of one conclusion and the reports cast doubt on whether Ethan foresaw a risk of death and consciously ran that risk; he is specifically impaired in the domains of rationality, foresight and decision making.
- 7.2. Ethan's guilty plea was not informed in the required sense because evidence of his FASD only became available post-conviction. It was impossible to advise Ethan that his personal characteristics could be marshalled as a source of doubt that he had the necessary intent.
- 7.3. Viewed another way, it was impossible for counsel to discharge his duties to fully inform the plea and to protect Ethan from conviction.⁸³
- 7.4. Trial counsel said – without contradiction – that his advice around the issue of foreseeability and recklessness **would** have been different, as would his assessment of trial prospects and ability to defend the charge.⁸⁴ Counsel further said the admissibility and reliability of the ERI would have required *serious consideration* and that the reports opened up an *entirely different pathway* for answering the Crown case.⁸⁵
- 7.5. In these circumstances it is submitted the Court should have concluded that the trial was unfair and, alternatively, there was a real risk that the outcome of the trial was affected.

Jurisdiction engaged by a fundamentally uninformed plea

- 7.6. Where a plea is uninformed in some fundamental respect, it is submitted the jurisdiction engaged is s 232(4)(b) and no inquiry as to the merits of the defence arises.⁸⁶
- 7.7. Traditionally, guilty plea appeals fall into one of four categories – (1) where the plea resulted from a wrong understanding of the charge, (2) where it occurred in circumstances where the alleged facts did not

⁸³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.13

⁸⁴ First affidavit of Nathan Bourke at 40.

⁸⁵ CA142/2023 Cross-examination of Nathan Philip Bourke.

⁸⁶ In submissions, counsel had argued this issue on a 232(4)(a) basis but, before hearing, advised the Crown that the issue would be argued under s 232(4)(b), which it was. This is obliquely referred to in the judgment at [76].

constitute the offence, (3) where it was induced by a wrong legal ruling, or (4) where it arose from incorrect legal advice – usually relating to the availability of a particular defence.⁸⁷

- 7.8. While, by convention, guilty plea appeals are usually framed in terms of these categories, each is simply a species of the argument that the plea has resulted in a *miscarriage of justice*, which is defined in s 232(4) of the CPA as some kind of error or irregularity that has resulted in either an unfair trial, or a real risk that the outcome was affected.
- 7.9. These provisions apply to guilty pleas due to s 232(5) which provides that “**trial** includes a proceeding in which the appellant pleaded guilty”. However, the section does not specify whether a plea entered as the result of an error creates an unfair trial, or whether an appellant must show that the outcome of a trial-proper could have been affected, had it occurred. Nor do the leading authorities (most of which pre-date the CPA) take a position on this point, although in a number of cases it is apparent that the logic of the proviso is being applied.⁸⁸
- 7.10. In Ethan’s case, the Court of Appeal was bound to accept that an error had occurred, but concluded that the outcome would not have been affected. While the Court stressed that the focus here was on whether the decision to plead was affected, its reasoning rested on its view that an acquittal was not a *realistic possibility* given the evidence.⁸⁹ That is, the Court appears to have formed the view that Ethan had failed to establish that his defence might succeed.
- 7.11. The relevance of this factor is controversial. As the Court noted, if the advice was wrong, then the correct standard must be whether a different plea would have been entered. It is neither practical, nor appropriate, to assess the strength of a defence in any detail on appeal.
- 7.12. The existence of an arguable defence is, to an extent, inherent in the conclusion that the advice was defective. However, it has become

⁸⁷ Summarising the law as found in *R v Le Page* [2005] NZLR 845 (CA) and *Merrilees v R* [2009] NZCA 59.

⁸⁸ For example: *Maa v R* [2025] NZCA 645; *R v Le Page*, above n 87.

⁸⁹ *Webster v R*, above n 16 at [79].

common to treat s 232(4)(a) as inviting the appellate court to determine whether a different verdict (rather than a different plea) was possible.

- 7.13. This can be seen in *Whichman v R* where the Court identified three elements that were required on a guilty plea appeal based on inadequate advice: erroneous advice, a genuine prospect of acquittal and credible evidence that the plea would not have been entered but for the advice.⁹⁰
- 7.14. However, even where this approach is adopted, cases differ on the precise boundaries of the second limb.⁹¹
- 7.15. In *Whichman*, the Court emphasised that an appellate court should not *overanalyse the merits of available defences*.⁹² Rather, the Court suggested it was a *matter of impression* as to whether justice had been done, with an emphasis on the final limb. In *Cooper v R*, the Court required a defence of *some* substance, but would not apply a requirement that it have *good prospects of success*.⁹³ By contrast, in *Nixon v R* the Court held that *a real case for the defence must be established*.⁹⁴ Against that, in *Whichman* the Court identified *T (CA662/2012) v R* as an example of a successful appeal where the availability of any defence was *unclear*.⁹⁵
- 7.16. An analysis of the strength of a defence is not inherent in s 232(4)(a). Either of the second two elements in *Whichman* could be viewed as constituting the *real risk that the outcome was affected* in terms of s 232(4)(a). In counsel's submission, it is only the final element – whether the plea may have been different – that should be considered.
- 7.17. The alternative is uncertain and – to the extent that the proviso is being applied – wrong. Counsel make four points.
- 7.18. First, where a defendant is mistaken about the nature of the charge, or the grounds of defence that are available, they have been deprived of

⁹⁰ *Whichman v R* [2018] NZCA 519 at [41]: related to incorrect advice about sentence, not a defence.

⁹¹ This conflict in the authorities was expressly recognised by the Court of Appeal in *Gleason-Beard v R* [2018] NZCA 349, [2018] 3 NZLR 699 at [26].

⁹² At [41].

⁹³ *Cooper v R* [2013] NZCA 551 at [19] – [21].

⁹⁴ *Nixon v R* [2016] NZCA 589.

⁹⁵ *Whichman* At [40], citing *T (CA662/2012) v R* [2013] NZCA 550.

specific fair trial rights guaranteed by NZBORA, including the right to be informed “in detail of the nature and cause of the charge”, the right to a jury trial and the right to present a defence. A defendant in this situation has not received what the law requires for a fair trial, and is therefore entitled to succeed on proof of this fact alone.

7.19. Second, placing an onus on an appellant to establish the strength of a defence undermines the guarantees of s 25 of the NZBORA. An appellant who is required to prove a real prospect of innocence:

- i. Is not presumed innocent, contrary to s 25(c);
- ii. May be required to give evidence to establish that reasonable prospect, meaning having to forego the right to silence guaranteed by s 25(d) in order to qualify to examine prosecution witnesses at trial under s 25(f);
- iii. Must win the opportunity to advance a defence at trial, without having had that opportunity guaranteed by s 25(e), and to have that decision made by a Judge or Judges rather than the jury guaranteed by s 24(e) in category 3 and 4 offences.

7.20. On appeal, an appellant has usually either had the advantage of these rights at first instance, or has waived them by pleading guilty. However, in cases where that plea was based on a mistaken understanding, especially an understanding that no defence could be advanced,⁹⁶ that waiver should not be treated as binding.⁹⁷

7.21. Third, the temptation to ratify advice that appears to be sound, but is wrong in some material particular, leads directly to a situation where – paraphrasing Erskine’s complaint⁹⁸ – the advocate assumes the role of

⁹⁶ Directly engaging the s 25(e) right.

⁹⁷ To similar effect, the waiver of the right to silence or the right to a lawyer is ineffective if it was not sufficiently well informed: *R v Shaheed* [2002] 2 NZLR 377 at [146] (fully informed waiver is effective); *R v Siminai* [2011] NZCA 326 and *R v Robinson* CA16/97, 12 May 1997 (both that waiver of the right to silence requires knowledge of the seriousness of the allegation); *Police v Kohler* [1993] 3 NZLR 129 (CA) (lack of advice a lawyer could be consulted *in private* meant waiver was not fully informed); *R v Schriek* [1997] 2 NZLR 139 (CA) at 155 and *R v Liu* [2015] NZHC 746 at [85] – [86] (both that waiver will not be effective if the defendant does not understand that he or she can obtain a lawyer).

⁹⁸ Lord Erskine’s Speech in behalf of Thomas Paine, Court of Kings Bench, 18 December 1792.

the judge. A defendant is entitled to good advice on which to make his own decision about a plea. Where he receives bad advice, that decision should not then be made on his behalf by an appellate court.

- 7.22. Fourth, following a guilty plea, an appellate court does not have a trial record on which to determine whether a defence may succeed.⁹⁹ What evidence does exist, such as formal witness statements and video interviews, has not been tested or subjected to the usual processes to determine admissibility. Even absent these issues, it is also incomplete – an appellate court cannot predict how the evidence may turn out at trial. Accordingly, the determination of whether a defence could succeed is made on a very narrow and unreliable basis in such cases.¹⁰⁰
- 7.23. This is analogous to the difficulties that arise when fundamental trial counsel error has occurred, such as preventing the defendant from giving evidence, where the issue will almost invariably go to whether a fair trial occurred.¹⁰¹ In those cases, it is not possible to assess what the evidence may have been without that fundamental failure.
- 7.24. Returning to s 232, an appellant is entitled to have a conviction quashed if the outcome would have been different or if it has resulted in an unfair trial. As submitted, a different plea is a different outcome. But more importantly, where the consequence has been to deprive the appellant of the rights guaranteed in s 25 of the NZBORA, the effect is an unfair trial. Applying the language of s 232, this means that the conviction should be overturned.
- 7.25. This submission does not invite any defendant who regrets his plea to revisit it at will. It will remain the case that retraction of a plea entered following careful and proper advice will rarely be permitted.¹⁰² But if a defendant can establish a material error in the advice – whatever the

⁹⁹ *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 (per Elias CJ and Glazebrook J) at [33]: “... The assessments of miscarriage and application of the proviso are undertaken by the appellate court in the context of all the evidence and conduct of the trial....”.

¹⁰⁰ This is analogous to the difficulties that arise when fundamental trial counsel error has occurred, where the issue will almost invariably go to whether a fair trial occurred: *Tibema v R*, above n 19 at [122].

¹⁰¹ *Tibema v R*, above n 19 at [122].

¹⁰² *Merrilees*, above n 87, at [35].

cause of that error – this alone should suffice to overturn a conviction that results from the advice actually given.

- 7.26. The Court of Appeal concluded, on the basis of a précis of the Crown case, including evidence that has never been tested for admissibility or reliability, that Ethan could not have advanced a defence based on a lack of mens rea.¹⁰³ This approach was unsafe and is unsafe in almost every appeal where conviction follows a guilty plea and the court does not have access to a trial record. It encroaches the constitutional role of the jury and risks the court removing arguable defences, depriving defendants of autonomy. As Lord Bingham said in *Bain*:¹⁰⁴

Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts.

The s 232(4)(a) analysis was in error

- 7.27. If the Court was correct to proceed under s 232(4)(a), it is submitted that the evaluation was wrong because the evidence about whether **the plea** was affected led to a single conclusion and, far from being an unrealistic possibility, an intent defence is inherently arguable.
- 7.28. As noted, the Court appeared to have focused narrowly on whether the plea was affected, but resolved this issue by assessing the viability of the defence. However, on this analysis, the only realistic conclusion is that the plea **was** affected, because counsel **would** have given different advice with complete information. This can be sure to have affected the plea because Ethan would have accepted *whatever course of action [counsel] suggested and presented to him as his best option*.¹⁰⁵ To find otherwise was to reject unchallenged evidence and to substitute the Court's own view of what advice would have been given.

- 7.29. The Court's own view was also wrong.

¹⁰³ *Webster v R*, above n 16 at [79]-[80].

¹⁰⁴ *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [119]. See too the famous comment of Megarry J in *John v Rees* cited approvingly in *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC) at 22; *Re Erebus Royal Commission (No.2)*; *Bradley v Attorney-General* [1981] 1 NZLR 618 (CA).

¹⁰⁵ First affidavit of Nathan Bourke at 33.

- 7.30. The intractable weakness of the Court’s analysis is that, in the absence of a trial record, it necessarily proceeded on the basis of disputed, untested and possibly inadmissible evidence. There is simply no safe way to conduct this type of evaluation.
- 7.31. Nowhere is this more problematic than on the issue of the admissibility of the ERI. Counsel said an application for exclusion would now require *serious consideration* and it is submitted Ethan is entitled to make a first-instance application to have the interview excluded.¹⁰⁶ The interview may be influenced by oppression or otherwise improperly obtained,¹⁰⁷ on the grounds that Ethan’s FASD – and the absence of assistance – foreclosed an informed decision about whether to exercise the rights to silence and counsel. A Judge determining admissibility would need to consider the impact of Ethan’s age and deficits,¹⁰⁸ the encouragement evident throughout during the interview, the improbable lies, the inability to respond to open questions and the risks of confabulation and false admission in those with FASD.¹⁰⁹
- 7.32. Another weakness of the Court’s analysis is that it relied on deductions about what was objectively *obvious*. Recklessness is subjective.¹¹⁰ As noted, many who have interacted with Ethan have found it necessary to bring home to him what would be obvious to others.
- 7.33. Mr Bourke’s assessment in light of the post-conviction is the correct one: an intent defence is inherently arguable. In his second report, Dr Barry-Walsh noted:¹¹¹

The finding of intellectual disability, the difficulties for Mr Webster in dealing with a conflicted and difficult situation and in foreseeing consequences appear to be relevant to the issue of

¹⁰⁶ CA Cross-examination of Nathan Bourke, p 3 and CA Add Mats, p 98 at 86.

¹⁰⁷ Evidence Act, ss 29-30.

¹⁰⁸ CA Add Mats, p 69-70 at 90-91 and p 107 at 102.

¹⁰⁹ *Pora, Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, [2007] NZSC 7; *R v Wichman* [2015] NZSC 198; *R v Kumar* (2015) 27 CRNZ 739 (SC); *R v Fawcett* [2021] NZHC 2406. See also Jerrod Brown and Others “Fetal Alcohol Spectrum Disorders (FASD) and competency to stand trial (CST): Suggestions for ‘best practices’ approach to forensic evaluation” (2017) 52 International Journal of Law and Psychiatry 19-27. See also: Royal Canadian Mounted Police *Fetal Alcohol Spectrum Disorder FASD Guidebook for Police Officers* (2005).

¹¹⁰ For example: *Maa v R*, above n 88, at [69] and [73].

¹¹¹ CA Add Mats, p 38.

culpability, mindful of the way the offending unfolded. It increases the plausibility of the suggestion Mr Webster was vulnerable, was led by the others during the offending and may also be relevant to consideration of his capacity to form the relevant intent.

- 7.34. Even for a young defendant without mental impairment, a different approach is required when considering intent, particularly reckless intent, than when dealing with an adult. A defining characteristic of young people is that the areas of the brain related to higher-order executive functioning - including risk assessment and planning ability - are not developed. In that context, they are less able to comprehend consequences (particularly young people with low or borderline IQ).¹¹²
- 7.35. It is regularly open – especially when a manual assault is the actus reus – to argue that the young person may not have fully comprehended the potential consequences of their actions, and did not form murderous intent, meaning a manslaughter verdict is appropriate.
- 7.36. These issues take an even greater significance in view of the evidence of acquired brain injury in the form of FASD. At trial, it is likely an expert would be briefed to elaborate on the relevance of FASD and Borderline Intellectual Function to the ability to form intent.
- 7.37. But even if a trial were convened today, there is ample foundation in the existing evidence for a complete defence. All of the experts who have interviewed Ethan would be summoned as would Ethan’s mother. The defence would involve putting before the jury:
- i. Evidence about the deficits of 18-year-olds generally, as they relate to the ability to form reckless intent.
 - ii. Evidence about Ethan’s deficits as they relate to his ability to form intent. Specifically, his deficits in the domains of forecasting consequences, rationally processing information,¹¹³ and solving

¹¹² *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [78], [83] and [86](a).

¹¹³ CA Add Mats, p 24 at 47, p 31 at 87-88, p 38, p 107 at 101, p 108 at 106.

problems,¹¹⁴ as well as his immaturity,¹¹⁵ and tendency to magical thinking.¹¹⁶

- iii. A challenge to the reliability of the Crown evidence regarding the nature and extent of the assault.
- iv. In all likelihood, evidence from Ethan about (*inter alia*) the extent of the assault and what he understood of the risks at the various points in time, where he has the aid of a communications assistant and the jury has the benefit of expert evidence to contextualise his performance in the witness box if necessary.¹¹⁷
- v. Submissions to the effect there is doubt about whether Ethan ever subjectively formed reckless intent in the heat of an evolving situation and, if he may have, whether that intent was ever coincident with a guilty act, such that he is guilty of murder.

7.38. If any assessment of the prospective defence is required, the correct test is whether there is a real risk that the outcome of a trial was affected: what could a jury have made of the evidence?

7.39. Recognition that the evidence implicated intent meant that the Court could not have been *sure of guilt* and required the appeal to be allowed, applying *Haunui v R*.¹¹⁸ The Court's *realistic possibility* analysis was a short comment on the merits of the defence. Whether evidence raises a reasonable doubt is the constitutional domain of a jury.

8. Outcome

8.1. It is submitted that the appeal ought to be allowed and a retrial ordered.

Dated this 18th of June 2026

¹¹⁴ CA Add Mats, p 29 at 80, p 107-108 at 104.

¹¹⁵ CA Add Mats, p 3, p 10, p 61 at 13, p 67 at 73 (reporting the impressions of a tutor) and p 75 at 138.

¹¹⁶ CA Add Mats, p 76 at 135 (similarly p 93 at 56).

¹¹⁷ *Hanara v R*, above n 29 at [87].

¹¹⁸ *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189.

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