

Court File No. CR-22-00000484

SUPERIOR COURT OF JUSTICE

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HIS MAJESTY THE KING

10

v.

JACK DENSMORE

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P R O C E E D I N G S A T T R I A L
I N C A M E R A

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BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on April 12, 2024 at HAMILTON, Ontario

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SECTION 486.4 OF THE *CRIMINAL CODE OF CANADA*, BY
ORDER MADE IN THE SUPERIOR COURT OF JUSTICE**

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APPEARANCES:

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M. Fahmy and A. Jafari

Counsel for Jack Densmore

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25	(ph) indicates preceding word has been spelled phonetically
All spellings of names are transcribed as set out in the reporter's notes unless noted with a	
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30	Transcript Ordered	April 16, 2024
	Transcript Completed	April 17, 2024
	Ordering Party Notified	April 17, 2024

FRIDAY, APRIL 12, 2024

MR. FAHMY: Good morning, Your Honour.

THE COURT: Good morning.

5 MR. FAHMY: Mr. Sosa was here, but he's just stepped up to use the restroom.

THE COURT: All right.

10 MR. SOSA: Good morning, Your Honour. Sorry to keep you waiting.

THE COURT: Good morning.

15 MR. SOSA: Morning.

THE COURT: All right. So let's do the introductions on the record then, please.

15 MR. SOSA: Yes, good morning, Your Honour, it's Sosa, S-O-S-A, first initial B., here for the Provincial Crown.

20 MR. FAHMY: Good morning, Your Honour. Mark Fahmy for you, F-A-H-M-Y, first initial M., counsel Mr. Densmore. And to my left is Ayman Jafari, A-Y-M-U-N, J-A-F-A-R-I, and she will be assisting me with Mr. Densmore's trial. Mr. Densmore is here before the body of the court. It was already anticipated that there would be an application for him to sit at counsel table and the Crown would be consenting, so we'd be asking for that order now, Your Honour.

25 MR. SOSA: That's confirmed, Your Honour, on consent.

THE COURT: Is there room?

30 MR. FAHMY: Yes, we'll pull up a chair for him.

THE COURT: All right. Order granted. Yes?

MR. SOSA: Yes, so thank you, Your Honour. So my

friend and I had an opportunity to discuss some of the outstanding housekeeping matters, especially with respect to the admissibility of the records that were produced. So we have had a discussion, Your Honour. What we anticipate for today is to begin to open the Crown's case, to begin with the complainant as the Crown's first witness. I anticipate I'll be most of the day with her, at least until the early afternoon, at which point I expect we can address Stage One of the admissibility of the records. Mr. Fahmy served those materials on me this morning. I've reviewed them briefly, but I'm not yet in a position to respond, so I'll do that over the lunch break, hopefully, and then be able to address it this afternoon.

Your Honour, from there, what we expect to happen is, depending on the Crown's position at Stage One, ultimately I think this will be conceded, Stage One, and we'll proceed to Stage Two, hopefully Monday morning. That's the discussion that my friend and I had and based on the way things are going this morning, I do expect that will still play out.

MR. FAHMY: Just to add to my friend's point, Your Honour, we've also been — we've also consulted with the complainant's counsel as well, and Ms. Valeri will make herself available; that's Ms., that's Alexandra Valeri, Your Honour, the complainant's counsel. She is available Monday morning and will be here prepared to argue the

Stage Two, or concede it, however they want to move forward on that.

Just also before we begin, I think this might be - my friend and I also had a conversation about a piece of evidence that will be coming out in the defence case. This is something that I wanted to raise at the earliest opportunity in Mr. Densmore's trial. It is going to require some delicate balancing from Your Honour, so I'm in Your Honour's hands. We could address it now or later, however Your Honour sees fit. But that conversation, I believe, would have to happen at least in camera due to the sensitive nature of what we need to discuss. I think my friend would agree with that. And then I'll let him speak at this point.

MR. SOSA: Yes, Your Honour, I don't see the urgency to deal with that at this point, especially considering the Crown's witnesses are here and ready to go. That's a piece of evidence that will come up, from what I understand, in the defence's evidence. It's - I appreciate Mr. Fahmy flagging it for the court because it will likely require us to clear the courtroom, perhaps seal the exhibit if it gets that far, but I don't see the need to address it at the outset, especially if it's not going to come out for a number of days.

THE COURT: All right. I think that I - if we have witnesses here, we're going to proceed. We'll deal with that at the appropriate time. Do

we need an order excluding witnesses to be made?

5 MR. SOSA: So, Your Honour, I will be requesting an order excluding witnesses. I was going to ask that the officer in charge, Michael Buszkowski, be exempt from that order. I understand now, however, that Mr. Fahmy intends on calling Officer Buszkowski as a witness. In my experience, ordinarily the OIC is - it's a professional witness, they're generally able to sit in throughout in any event. I won't push too hard, Your Honour, but that's my position, that the officer should be permitted to remain and assist with note taking throughout the course of the trial, but I understand my friend's opposed that he be exempt from the order.

10 MR. FAHMY: Yes, Your Honour, I mean, I've raised the issue to my friend. I'd actually anticipated previous Crown counsel calling him and then us being able to cross-examine him. I may still try 15 to persuade my friend to do that in terms of the witnesses who were supposed to be subpoenaed for the Crown's case. Again, I don't want to - I mean, the witness is here. I'm not going to say 20 too much about it, but Your Honour will recall we did have him on the stand for a number of days on 25 the application issues. There was a bunch of areas where I couldn't actually get to because they weren't relevant with respect to the application, which will be relevant at trial. The concern is obviously that, you know, if - and it's 30 not even anything - I understand he's a professional witness, I'm not saying he's not.

But as Your Honour knows, the law with respect to collusion is that it could even be unconscious, right? So we don't really want the - Mr.

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Buszkowski's evidence to be tainted in any way, so that's the reason why. And I've told my friend, I'm not here to - there's certain areas that need to be examined with Mr. Buszkowski, so that's the reason why I'm on my feet.

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MADAM REPORTER: Your Honour, can I get the spelling of Mr. Buszkowski, please?

MR. FAHMY: I always butcher it, so I'm not going to....

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MR. SOSA: It's B-U-S-Z-K-O-W-S-K-I.

THE COURT: So I'm going to swing back around to that. I've heard submissions, thank you.

Anything in reply to what your friend said?

MR. SOSA: No, thank you.

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THE COURT: All right. I'm going to come back to that in a second. Sealing of the courtroom. I know this is going to be a trial that's going to go on over a period of time. I'm happy to make the order to seal so that you can leave materials behind and you don't have to gather everything up every night. Is that something you're going to request of the court?

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MR. FAHMY: Yes, Your Honour.

THE COURT: So ordered.

MR. SOSA: Yes, thank you.

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THE COURT: Okay. With respect to the exclusion of witnesses, this is a bit of a different scenario than you would typically see with the officer-in-charge sitting at counsel table. Given

the potential for hearing certain bits of evidence and participating in the trial proper, I will include him in the order of exclusion of witnesses. And depending on when he's called, once that occurs, it depends, again, defence has indicated the Crown may call the officer himself, after that, there'd be no issue. But in the meantime, until we get there, I'm going to include him. Again, it's no disrespect to a professional witness or a police officer, it's just to ensure the integrity of the process, so I'll do that. If the Crown needs to find somebody to sit second chair with them, given that ruling, then, you know, I will give you an opportunity to find somebody to do that if you need that.

MR. SOSA: Thank you, Your Honour. Perhaps, then, if I could just have a moment just to explain that to the officer, and then we can proceed at that point.

THE COURT: Okay. So do you need maybe five minutes to find somebody to sit second chair for you if you need that, and then we'll start the trial?

MR. SOSA: If I could, please.

THE COURT: Okay.

MR. SOSA: Five minutes would be helpful.

THE COURT: So, five minutes. And do we have enough witnesses to fill the day?

MR. SOSA: We do.

THE COURT: Okay, good. So we'll come back in five minutes.

... MATTER STOOD DOWN.

... MATTER RECALLED.

THE COURT: Thank you. With respect to my order for the sealing, I just want to make sure so it's crystal clear, it's with the exception of cleaning staff and IT staff. They will be allowed in to do their work, okay?

MR. SOSA: Thank you.

THE COURT: Are we ready to start?

MR. SOSA: Thank you, Your Honour. Can I just confirm, before we proceed with arraignment, that the 486.4 publication ban order is in place?

CLERK REGISTRAR: Already there is a 486.4 and 278.

MR. SOSA: Thank you.

THE COURT: Thank you.

MR. SOSA: We need to arraign the accused, Your Honour.

THE COURT: Yes.

MR. SOSA: Yes.

CLERK REGISTRAR: And has a re-election been done? I know it was judge and jury at the start.

THE COURT: Yes, the re-election was done on a previous occasion.

CLERK REGISTRAR: Okay. Thank you very much.

Mr. Fahmy, is this - is that the accused, Jake Densmore before the court?

MR. FAHMY: Jack Densmore.

CLERK REGISTRAR: Sorry, Jack Densmore before the court?

MR. FAHMY: Yes.

CLERK REGISTRAR: Is that correct, Jack Densmore?

JACK DENSMORE: Yeah, that's me.

CLERK REGISTRAR: You stand indicted by the name of Jack Densmore that on or about the 5th day of August in the year 2020, at the City of Hamilton, in the said region, did sexually assault [REDACTED]

[REDACTED], contrary to section 271 of the Criminal Code of Canada. On this indictment, how do you plead, guilty or not guilty?

JACK DENSMORE: Not guilty.

CLERK REGISTRAR: Hearken to your plea, as the court hath recorded, you plead not guilty as charged. Are you ready for your trial?

JACK DENSMORE: Yeah.

CLERK REGISTRAR: That completes the arraignment, Your Honour.

THE COURT: Thank you.

MR. FAHMY: Thank you, Your Honour.

MR. SOSA: Yes. So, Your Honour, I do intend on providing the court with a brief opening address just to outline what I anticipate the evidence will be. However, I think first what I'll do is I'll address what is admitted at the trial for Mr. Densmore. So, the....

THE COURT: Is there going to be - is there going to be a written form of those admissions submitted to me?

MR. SOSA: Yes, I think that's probably the best practice. I'll reduce these to writing and file it as a formal ASF.

THE COURT: Thank you.

MR. SOSA: An agreed statement of fact, but if I could also read them into the record...

THE COURT: Certainly.

MR. SOSA: ...at this point, Your Honour. And so, after consulting with Mr. Fahmy, the following is admitted, Your Honour:

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The ID of Mr. Densmore; the jurisdiction of this court to try Mr. Densmore; the date of the allegation; the continuity of all samples taken from the complainant, [REDACTED] by the sexual assault examination nurse and submitted to the Centre for Forensic Sciences. As well, the continuity of the DNA extracted from Mr. Densmore and submitted to the Center for Forensic Sciences for examination. And the sample taken of - sorry - the DNA sample taken from the male party as a sample to exclude him from a mixture found in the biology report. Your Honour, I anticipate there will be at least one expert from the Centre for Forensic Sciences. And I understand that the expertise is not contested and the *Mohan* requirements would be conceded once we get to that point. So that covers the admissions, Your Honour. And I will provide those as an agreed statement of fact, and we can file that as an exhibit once that's ready. So, if I may then provide the court with an overview.

MR. FAHMY: And that's substantially correct, Your Honour. And again, I'll - we'll go over it in detail before we present the ASF report.

THE COURT: Thank you.

OPENING STATEMENT BY MR. SOSA:

The main witness for the Crown, Your Honour, will be [REDACTED] She's currently 22 years of age. What I anticipate she'll share with this court, Your Honour, is that when she was about 19 years of age, she was attending school at McMaster University. She was approached by members of Mr. Densmore's, let's say, YouTube program where he recorded students and interviewed them on campus. And on this occasion, it was at McMaster University. That was her first interaction with anyone related to Mr. Densmore.

Ultimately, some time goes by, she's contacted through social media by Mr. Densmore. They agree to meet, and that meeting takes place on August 5th, 2020. At that meeting, the plan was to meet at his home in Hamilton and then go on a hike. They attempted to find somewhere to hike, they couldn't, it got dark, the trails were busy, and so they returned to his home. And it was then, Your Honour, that the allegations commence of a sexual assault.

From what you'll hear, Your Honour, I anticipate Ms. [REDACTED] will share that she was invited up to his bedroom. That what initially was underway was consensual, and that was in the form of kissing. But then it escalated, and that she was not consenting to what ultimately became aggressive biting, that there was digital

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penetration, that there was forced oral sex, and then ultimately forced vaginal penetration, resulting in Mr. Densmore's semen on Ms. [REDACTED]
[REDACTED]'s back.

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She will share with the court that she left the home shortly after that assault, got in her car, and started to cry. She then contacted two of her best friends, C [REDACTED] and N [REDACTED]. She shared with them something had happened. They met up together in Oakville. They suggested to her that she get an emergency contraceptive. They did go get that contraceptive, and then she went home.

What I anticipate you'll hear next is that the following day, she shared these news, this, of this assault with her stepmother, and that's G [REDACTED]. Her stepmother assisted her with whichever way she could, provided her with general advice, and ultimately they went to the hospital where a sexual assault examination kit was completed on the complainant, and that was conducted by Laura Smith. The kit, Your Honour, confirmed that when the - and I'll just get to the page, just a moment - that the bottom right back of Ms. [REDACTED] was examined with a poly light, and the area illuminated, and that is corroborative of semen being located on the area described by Ms. [REDACTED] where Mr. Densmore ejaculated.

Your Honour, that is, in a nutshell, the nature of

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the allegations. I have provided the court with a list of potential witnesses for the Crown, and that, of course, though, Your Honour, is subject to change, but those will be the main witnesses that I expect to call over the course of the next days.

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So, Your Honour, the first witness for the Crown, then, is the complainant, [REDACTED], and she is with the victim witness worker, so I'll just ensure that they get - Ms. Ferrier's(ph) is there, she'll be getting [REDACTED]

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THE COURT: Am I going to require my screen at all today?

MR. SOSA: Not in-chief, Your Honour, and I don't expect any Zoom witnesses today either.

THE COURT: Thank you.

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[REDACTED] AFFIRMED

THE COURT: Before you start, was it [REDACTED] or [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

25

THE COURT: Got it. Thank you.

MR. SOSA: Thank you, Your Honour.

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EXAMINATION IN-CHIEF BY MR. SOSA:

Q. And good morning, [REDACTED]

A. Good morning.

the other?

Q. There's two last names. Do you go by one over

A. No, I use both.

Q. Okay. So, should I call you Ms. [REDACTED] -
[REDACTED] or Ms....

A. Yeah, that's good, yeah.

Q. Okay, thank you. So, I just want to start off
5 by understanding a little bit about your current life, okay. So
I'm just going to ask you some general background questions
about - about you for today, okay?

A. Sure.

Q. Can you please start by sharing with us how
10 old you are today?

A. I'm 22.

Q. And I don't want to know the address, but
where is it that you live right now?

A. Currently, I live in Waterloo.

15 Q. All right. And why is that you're in
Waterloo?

A. I'm finishing up my undergrad.

Q. And I understand that it's currently
examination period. Is this your last year?

20 A. It is, yes.

Q. Okay. And when you're not in Waterloo, where
is it that you live?

A. I'm from Oakville.

Q. And who do....

25 THE COURT: Sorry, I didn't catch that.

MR. SOSA: She said Oakville.

THE COURT: Oakville. Sorry. Thank you.

MR. SOSA: Q. And who is it that you live with
there?

30 A. I primarily live with my dad and my stepmom.

Q. What is your father's name?

A. O [REDACTED].

Q. And how about your stepmother?

A. G [REDACTED].

Q. So, I just want to talk a little bit about your stepmother G [REDACTED], okay? How long have you known G [REDACTED]?

5 A. Probably - I think I was two, so for about 20 years.

Q. Okay. And how would you describe your relationship with your stepmother G [REDACTED]?

10 A. We have a good relationship, yeah, I think we've been in each other's lives for a long time.

Q. Okay. And if I could take your mind back to August of 2020, where were you living then?

A. I was living in Oakville with my dad and stepmom.

15 Q. All right. There's a couple other people I want to ask you about, okay?

A. Okay.

Q. So, who is C [REDACTED] to you?

A. She is one of my close friends.

20 Q. And how long have you known her?

A. Probably over a decade. Probably 12 years.

Q. And at - at present, so today, do you still have a relationship with her?

A. Yes.

25 Q. And is she still a close friend?

A. Yes.

Q. And again, taking you back to August of 2020, what was your relationship like with her then?

30 A. It was good. It was definitely a bit closer, just 'cause we were living in the same town, but it was still a really good relationship.

Q. Okay. So, I'll ask you similar questions, but

what I want to know about now is - or who I want to know about now is N ██████████ So, who is she to you?

A. She's also one of my close friends.

Q. And how long have you known her?

5 A. Probably about the same time as C ██████████ , probably 12 years.

Q. And I forgot to ask for C ██████████ , but how old is N ██████████ ?

A. She's 23.

10 Q. And what about Ch ██████████ ?

A. She's 22.

Q. All right. And same question again, back in August of 2020, what was your relationship like with N ██████████ ?

A. It was the same as - a good relationship.

15 Q. And how regularly did you see or speak to N ██████████ ?

A. Probably we would text at that time about like every day, every other day. Pretty frequently.

20 Q. And I apologize I didn't ask this, but how about with C ██████████ , how regularly did you speak or see her?

A. The same, probably every day, every other day.

Q. With - that's for texting?

A. Yeah, texting.

Q. And what about seeing each other in person?

25 A. Maybe - I mean, it was during COVID at that time, so we weren't seeing each other in person a lot, but usually it would be, like, every other week, maybe.

Q. And was that for both C ██████████ and N ██████████ ?

A. Yes.

30 Q. And back in August of 2020, do you remember if C ██████████ and N ██████████ were friends?

A. Yes.

Q. All right. So, we're going to switch things up a bit now. What I want to ask you next is, how did you first hear about Jack Densmore?

A. I first heard about him when I was in my first year at McMaster. So, the beginning of – or sorry, the fall of 2019. I heard about him through my friends at the time who also went to McMaster and knew about his online presence.

Q. And what did you understand about his online presence?

A. That he posted a lot of videos kind of aimed at college students or university students. There was a lot about partying, drinking, girls.

Q. And in that first year as you shared fall of 2019, had you personally watched any of those videos?

A. I had friends who'd shown them to me, yes.

Q. Okay. And in that fall of 2019, were you involved in any of those videos?

A. I think I appeared in one video during the McMaster Homecoming.

Q. All right. What can you tell us about that? How did that happen and – and really, what was the subject matter that was – that was going on in the video?

A. Yeah, it was – kind of a lot of the universities do, kind of like, it's I guess an unsanctioned kind of street party that will happen. So I had gone to that street where a lot of students were with some of my friends and my boyfriend at the time and were – had kind of gotten around that – they were filming there a YouTube video.

Q. Sorry, who was?

A. Jack Densmore. And so, there was – I think it was a friend of his had a microphone and a camera and was going up and interviewing people on the street, and he came up to

interview me, and he asked if I would kiss him for the camera, and I said no and that I have my boyfriend with me. And he kind of asked again and was like, oh, let me know if your - your boyfriend breaks up with you.

5 Q. And who was it that was asking you those questions?

A. I - I don't recall his name...

Q. Okay.

10 A. ...but he appeared alongside Jack in the videos.

Q. Okay. Do you recall if Jack was present while you were being interviewed?

A. I couldn't see him, but I knew he was present.

15 Q. Okay. And do you know what ended up happening with that interview of yours?

A. They ended up cutting it or editing it and putting it in the video, their video.

Q. Do you know where that video ended up?

A. It ended up on YouTube.

20 Q. And how did you learn that?

A. Because I had a friend who had watched the whole video and sent it to me and had said, [REDACTED] I think this is you in the video.

25 Q. And back in the fall of 2019, were there any other interactions with Jack Densmore or any of his friends?

A. No.

Q. And on that occasion, in the fall of 2019, did you interact at all with Jack Densmore?

A. No.

30 Q. When did you first talk to Jack Densmore?

A. July of 2020.

Q. And how did that happen?

A. It happened online. I believe that we saw each other on a dating app, and then he reached out to me over Instagram.

Q. Okay. And....

5 THE COURT: Could you just slow down, sir? And he reached out?

MR. SOSA: On Instagram, I believe I heard.

MR. SOSA: Q. Now, why do you believe that you first connected through this dating app?

10 A. I'm assuming attraction, or attraction and he was a person I recognized.

Q. I guess my – let me clarify. Were there any messages or was there any affirmative contact through the dating app?

15 A. Sorry, what do you mean by affirmative contact?

Q. How about let's start with this, which dating app was it?

A. Tinder.

20 Q. And on Tinder, from what I understand, you can match with a potential partner...

A. Mm-hmm.

Q. ...right? Was there a match on Tinder?

A. Yes.

25 Q. Were any messages exchanged through Tinder?

A. No.

Q. How much time passed between when you matched on Tinder and when he reached out on Instagram?

A. It wasn't very long, maybe a day.

30 Q. Okay. And how is it that he makes contact with you on Instagram?

A. He sent me a direct message.

Q. Do you remember what the direct message said?

A. I don't.

Q. And what were your initial thoughts when you received that message from Mr. Densmore?

5 A. I was curious and kind of open-minded to talking to him, but I didn't have any strong feelings one way or another towards him.

Q. And when he messages you on Instagram, are you familiar with him?

10 A. I know who he is, yes.

Q. Okay. And can you generally tell us what the conversation is like?

A. It was just some light conversation, kind of going back and forth, some flirting. That was about it.

15 Nothing too deep or personal.

Q. And what was your impression of what he was like?

A. He seemed very confident and self-assured.

20 Q. How long did you continue to communicate through Instagram from that point onwards?

A. We exchanges messages on and off for about two weeks before we actually met in person.

THE COURT: Sorry, was that two weeks?

A. Yes.

25 THE COURT: Two.

MR. SOSA: Two weeks.

MR. SOSA: Q. And I know you said on and off, but can you give us a little more detail about how frequent the messaging was, either frequent or infrequent, however you can describe it?

30 A. Yes, it wasn't very frequent. It was maybe a couple messages every day or every other day. Mostly just

planning if we were gonna go on a date.

Q. Okay. And based on what you remember of all those messages, was that generally the intention of the messaging, to set up a date?

5 A. Yes.

Q. Did you ever provide Mr. Densmore with your phone number?

A. No.

Q. Did you get his phone number?

10 A. No.

Q. And in your conversations with him on Instagram, what did you learn about him?

A. I learned that he seemed more – very – quite personable, more relaxed than I expected, maybe a bit more shy.

15 Q. Did he share with you what he did for work?

A. I did tell him that I knew what – what he did for work.

Q. Did he share with you what his age was?

A. No.

20 Q. Did you learn anything about his personal life?

A. Not really, no.

Q. All right. So, you've shared with us that this continued for about two weeks with the intention to meet.

25 Were plans eventually made to meet?

A. Yes.

Q. All right. How does that happen?

A. We had initially made plans to meet probably a week after we had started talking, but I cancelled on that plan 30 because I wanted to see my grandmother, so we had rescheduled to the following week.

Q. Okay. And on that initial meeting, what was

the plan?

A. The plan was to go for dinner and to go for a hike.

Q. Okay. How did you communicate to him that you
5 were cancelling?

A. I sent him a message on Instagram.

Q. And what was the response?

A. I think he was – he understood and was kind of persistent about making another date.

10 Q. And is another date made?

A. Yes.

Q. And how does that happen?

A. It was just through Instagram messages again.
He – one of us suggested the week after.

15 Q. And what was to happen on that occasion?

A. The same plan, to go for a hike and dinner.

Q. And did you discuss where the hike and dinner would be?

A. No.

20 Q. Was that eventually discussed at some point?

A. When I got there, the day of, yes.

Q. Okay. So, tell us then, when you say, when I got there, what are you referring to?

A. When I got to his house, the day of the date.

25 Q. I'll just pause you there, take us a few steps back. How did you know where to go?

A. I had asked him for his address.

Q. And was there anything else discussed prior to you attending his address?

30 A. No. He had just said that we would meet at his house before going out.

Q. Do you remember where he – where he – where he

[REDACTED] lived?

A. I remember it was in Hamilton. I believe that it was on [REDACTED].

Q. Okay. So, what's the first thing you do when 5 you arrive at his address on [REDACTED]?

A. We went inside as his roommate was leaving the house.

Q. How did you know it was a roommate?

A. He introduced him as his roommate.

10 Q. Did you get a name?

A. I did. His name was Chris.

Q. So, you meet Chris, you say he's leaving.

A. Mm-hmm.

Q. What happens next?

15 A. We had a short introduction. I think we just shook hands, and then he left. And then Jack offered me a tour of the house.

Q. Can you describe the house to us then?

20 A. Yeah, it was a bungalow. It kind of had – you walked in, there was a living room to the right, the kitchen to the left, directly in front there was stairs to go to the basement and stairs to go upstairs. He led me into the basement and showed me where his filming equipment was for his YouTube channel, and we didn't go upstairs, but he just showed me – or 25 told me that there was bedrooms up there and a washroom.

Q. Do you know how long approximately that tour went on for?

A. Not long, maybe 15 minutes.

30 Q. And as that tour is going on, can you tell what it is that you're thinking, how are you feeling throughout all this?

A. I was shy and nervous. I was quite, I think,

reserved.

Q. Did anything stand out to you as being unusual?

A. No.

5 Q. Did you tell anyone that you were going to Jack's house?

A. I did.

Q. Who did you tell?

A. I told my stepmom and my dad that I was going 10 on a date, and I believe I told C [REDACTED] and N [REDACTED] as well.

Q. And why did you do that?

A. Just for safety reasons 'cause this was our first time meeting, and also I just naturally kind of tell them about what's going on in my life.

15 Q. Okay. So, I'll - we'll continue then. You've said the tour was approximately 15 minutes, nothing unusual.

What happens after that?

A. Then he suggests that we go for the hike.

Q. And how did you then end up going for a hike?

20 What happens after that?

A. He suggested that we drive to a trail that was close by to his house. So I agreed to that, and we started driving there.

Q. Who drove?

25 A. He drove.

Q. Okay. So, you start driving there.

A. Mm-hmm.

Q. What - what's it like on the drive over between the two of you?

30 A. We're not talking much really. Be some questions about my school and my life, but nothing really personal. He's quite quiet.

Q. And where did you drive to?

A. I - I don't know what it's called specifically, but kind of on the Hamilton, like escarpment, the trails around there.

5 Q. And do you remember what time it was?

A. I got there at around eight-thirty, so....

Q. Where's there?

A. To his house, sorry, at around eight-thirty and we left probably between eight forty-five and nine.

10 Q. Do you remember whether there was still any daylight?

A. There was, but the sun was setting.

Q. Okay. So, you described driving towards the escarpment.

15 A. Mm-hmm.

Q. Do you eventually stop somewhere?

A. No. He says that it's busy and that we shouldn't bother with going on a hike because it's getting dark out.

20 Q. Did you make any observations of your own that it was busy?

A. It looked like there was people around. I didn't know - I mean, I didn't know the area, so I don't know what it would usually look like, if there was no people compared to busy, so I just kind of took his word.

25 Q. Okay. So, the two of you, I guess, agree it's busy, and then - then what happens?

A. So, then he suggests going back to his house.

30 Q. And what did you understand would be happening then if you did go back to his house?

A. I assumed that we would go back to his house and then we would be going out for dinner.

Q. Are you able to give us an estimate about how long you were trying to, I guess, locate a hiking trail?

A. Again, not long, maybe 15, 20 minutes.

Q. Okay. And so, did you agree with his
5 suggestion to go back to his house?

A. I did.

MR. SOSA: So, Your Honour, I'm looking at the time, and I'm about to get into a different area, so I think this might be a good time to break.

10

R E C E S S

U P O N R E S U M I N G:

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MR. SOSA: Your Honour, I've notified the victim services worker, but I'm not sure - if I could have your permission, Your Honour, just to step out and see if there's any issue.

THE COURT: Okay.

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MR. SOSA: Your Honour, I don't have access to the room they're in. If I could try through this door?

THE COURT: With a building like page assist?

25

MR. SOSA: Yes, please, but I don't know if it'll reach the rooms they're in but....

THE COURT: Let's try a building wide page, please, for the witness.

... WITNESS PAGED TO COURTROOM 608.

MR. SOSA: Thank, Your Honour.

30

MR. SOSA: Q. Okay. Good morning again, [REDACTED]
So, I'm just going to take you back to where we left off, where the decision had now been made to return to Mr. Densmore's

house, okay? So, I'll take you back there and then we'll continue, okay?

A. Okay.

Q. Do you remember what time it was when you
5 returned to Mr. Densmore's house?

A. I don't remember the exact time, but it was probably a little after nine.

Q. Okay. And what's the first thing that the two of you do upon arrival at his house?

10 A. We got in the house, and we were just kind of making some small chat. I remember he offered me a beer, and I said no.

Q. And do you know if he had anything to drink?

A. He did have one, yes.

15 Q. One...

A. A beer.

Q. ...beer? One beer?

A. Yeah.

Q. Was anyone else in the house?

20 A. No.

Q. And how did you know that?

A. I think he had mentioned that we were alone, his roommates weren't there?

25 Q. Did you learn how many roommates lived at that house?

A. I believe he said there were two others.

Q. Okay. Where were you in the house when he offered you the beer?

A. We were in the kitchen.

30 Q. And once that offer is made and declined, what happens next?

A. He said that we could go upstairs.

Q. And what did you think at that point?

A. I thought okay, we can do that. I was under the impression that we were going to go for dinner, but I think I was quite nervous or just shy and was just kind of taking his lead.

5 Q. Did you, at any point, ask whether you would still be going to dinner?

A. No.

10 Q. So, how did you make your - actually, I'll rephrase. He asked you to go upstairs. What happens next?

A. I agreed, and he led the way to his room, and I followed.

15 Q. Was anything - were there any exchanges, were you discussing anything as you walked to his room, or upstairs I should say?

A. I don't believe so, nothing I remember.

Q. And where do you go when you're upstairs?

A. To his room, his bedroom.

Q. And how did you know it was his bedroom?

20 A. I - I just assumed, I guess, that it was his bedroom because he led me there and I think he pointed out, these are my other roommates' rooms.

Q. And when you get into his bedroom, again, how are you feeling?

25 A. I'm feeling a little apprehensive because the date isn't turning out the way that I thought it was.

Q. Anything that you recall that struck out to you as unusual about the - now being in his room?

A. Nothing unusual, no.

30 Q. Okay. All right. So, now that you're in his room, what's the next thing that happens?

A. He suggests that we watch a TV show.

Q. And did that happen?

A. Yes.

Q. Do you remember what you watched?

A. Yes, we watched Brooklyn Nine-Nine.

5 Q. And so, if you can help us just to understand where things are in the room.

A. Mm-hmm.

Q. So, if we're facing inwards to the bedroom...

A. Mm-hmm.

10 Q. ...right, so you walk in the bedroom, where is the TV?

A. So, kind of when you walked through the door, the TV was on that same wall to the left and the bed was in front of it to the left.

15 Q. Okay. So, just to confirm, you - if we're facing the bedroom from the doorway...

A. Mm-hmm.

Q. ...immediately to the left would be the TV on the wall?

20 A. Mm-hmm.

Q. And then immediately in front of that TV is a bed?

A. Yeah.

25 Q. Thank you. And where did you watch Brooklyn Nine-Nine from?

A. We sat on the bed.

Q. Do you remember which part of the bed you sat on?

30 A. He was closer to the wall, kind of on the right side, and like sitting on the bed, he was on the right side, and I was on the left closer to the door.

Q. And would that be at the foot of the bed?

A. Probably more near the - the head of the bed.

Q. Okay. And does anything happen during the course of watching this show together?

A. Yes.

5 Q. Tell us, what is that first happens?

A. First he starts kissing me. He had his arm around me, started kissing me, and then it progressed.

Q. Okay. So, how long had you been watching the show before the kissing began?

10 A. Maybe five or ten minutes.

Q. And what was your response?

THE COURT: Slow it...

MR. SOSA: Sorry.

THE COURT: ...down, please.

15 MR. SOSA: Q. Thank you. What was your response to the kissing?

A. I was taken off guard, but I was okay with it at the time.

20 Q. And what about - what were your feelings about him placing an arm around you?

A. Again, I was still apprehensive, not fully sure what to make of the situation.

Q. Would you - were you consenting to the kissing?

25 A. At first, yes.

Q. So, you say, "At first". Did that change at some point?

A. Yes.

Q. At what point did it change?

30 A. When the kissing progressed to more heavy touching, and it became painful.

Q. Please tell us in what way it progressed and

what was painful?

A. He started by removing my shirt and pulling down my dress so that my breasts were exposed, and he started kissing them and then biting them, and that was quite painful, 5 so I kind of pushed away from him. Then he'd kind of gotten over top of me, so I was laying on the bed, and he started putting his fingers inside of me, which was also painful. I did not feel comfortable, so I started to push his hand away.

Q. All right. From the point that you describe 10 the kissing and biting starts, did you say anything to Mr. Densmore?

A. I didn't say anything.

Q. Did he say anything to you?

A. No.

15 Q. And you describe pushing away. Can you just kind of share, what were you using and what were you pushing? Using your hands to push what, or....

20 A. I was using my hand to push his hand out from inside of me and from touching me, when he was kissing my breasts, I was pushing away on his shoulders.

Q. Okay.

MR. SOSA: So, Your Honour, for the record, Ms.

[REDACTED] has extended both hands outwards, palms facing out and pushing forward.

25 MR. SOSA: Q. And that was at what point?

A. That was — I was pushing on his shoulders, and he was biting my breasts, and pushing on his hand when he was inserting it in me.

30 Q. Did he say anything in response to those actions?

A. No, he just continued.

Q. And what is it that he continued doing?

A. He continued to kiss me and put his fingers inside of me.

Q. Are you still in a seated - or I should ask you, what position are you in at this point?

5 A. I was on my back, and he was on top of me.

Q. How is that the two of you ended up in that position?

A. Through him kind of pushing me onto my back.

Q. Did you say anything at all during this?

10 A. No.

Q. All right. So, you mentioned it continued with his hands - or sorry, was it - did you say hands or fingers penetrating you?

A. His fingers.

15 Q. Fingers. Did anything further happen?

A. Yes. Then he told me to get on the floor.

Q. What did you understand that to mean?

A. That he wanted me to sit on the floor by his bed.

20 Q. All right. And did you do that?

A. Yes.

Q. Why did you do that?

A. I was scared at that point. I knew that I didn't want it to progress as far as it did or any farther, and 25 I felt like my attempts to stop what was happening from continuing had not been met.

Q. Okay. So, once you do sit on the floor...

A. Mm-hmm.

Q. ...does he say anything further at that point?

30 A. He stands in front of me, kind of with his feet at both sides, so my back is against the bed and he's sitting in front of me, and he then pulled down his pants and

took out his penis and put it in my mouth.

Q. Were any words exchanged between the two of you?

A. No. I believe when he was fingering me, I did say, oh. He would kind of call me names throughout it, like a slut.

Q. Any other names?

A. That's the main one I remember.

Q. When that happens, that he now has pulled out his penis, what is going on in your mind?

A. I'm thinking I don't want to do this anymore. This is not a situation I want to be in, and I'm trying to think about how to get out of it.

Q. Okay. Does he keep his penis in your mouth?

A. Yes.

Q. Is there anything more that you can describe about that time, where this is going on? Specifically, with - when you're seated?

A. Yes. I remember like gagging because I was not comfortable and it was unexpected, and then I remember him grabbing his phone and holding it above me and that's when I, kind of, I pulled away, and I was - asked what - what are you doing? And he said, I'm filming you. And I said, I didn't say you could do that. I don't want you to do that. And he's like, okay, no worries, fine, and put his phone away.

Q. How was it that you noticed that he had his phone out?

A. I had just briefly looked up. My eyes were closed for most of it.

Q. Was there anything about the phone that caught your attention?

A. No.

Q. Okay. So, you shared with us that you told him not to do it. He said, okay, puts it away. Where are you during that interaction?

A. I'm still sitting down, but when he went to go 5 put his phone down, he had kind of removed or stopped standing directly in front of me with his feet on both my sides. So I kind of had a way to stand up and create distance between us. So I did that. And then I started putting my shirt back on and getting - looking for my purse because I had decided that I - 10 this had already gone farther than I would like or wanted it to, and I was ready to leave.

Q. Did you - did you indeed put your clothes back on?

A. I did.

15 Q. Did you say anything to Mr. Densmore?

A. I didn't say anything. I was just kind of silently looking for my things.

Q. Did you end up locating your things, what you were looking for?

20 A. I got dressed and I don't think I had my purse with me, but I'd found it.

Q. How was Mr. Densmore dressed at that particular point?

A. I believe he was still partially undressed.

25 Q. And what was - what was undressed?

A. He did not have pants on.

Q. Was he wearing underwear?

A. No.

30 Q. Okay. All right. So you're at the point where you say your clothes is back on. Where are you now positioned in the room?

A. I'm standing up, kind of my back is to the

[REDACTED] door, and I'm kind of facing his bed.

Q. And at that point, what are you thinking, what's going through your mind?

A. I'm ready to leave. I am feeling very
5 uncomfortable. I feel like I've done something I didn't want to do, and I don't want to be in that environment anymore.

Q. And did you leave the bedroom?

A. No. He came up to me, Jack, again, started
kissing me, put his fingers inside of me again, and then kind of
10 quickly pushed me onto the bed, so my stomach was on the bed.
And then he lifted my dress up and put his penis in me from
behind.

Q. Were any words exchanged between either of
you?

15 A. No.

Q. What kind of force was used, if you can, if
you can describe the force that was used to put you onto the
bed?

A. It was enough that I went from comfortably
20 standing to lying on the bed and he had his arms kind of between
either my lower back or on my upper arms, kind of keeping me
down.

Q. What happened after he entered you with his
penis? And I should backtrack; what did he enter?

25 A. He entered my vagina.

Q. So once he did that, what happened next?

A. He continued to have sex with me for a few
minutes before he pulled out and ejaculated on my back.

Q. Were you able to notice or observe whether a
30 condom was used?

A. It was not.

Q. Was anything said at the point that you said

he's now ejaculated on your back?

A. No.

Q. How were you feeling while he's penetrating your vagina?

5 A. I kind of - kind of felt like I had kind of left my body a little bit and was kind of just - I knew it was happening to me, but it felt like it - it wasn't. I think I was so overwhelmed, like this - this can't be happening. It just sort of didn't really feel real. I was - it was taking me a
10 second to kind of process what was happening.

Q. Are you able to describe what Mr. Densmore's demeanour was while he was doing what you just described?

15 A. He was very aggressive and it was quite intimidating. I felt like I wasn't really a person, I was just something he wanted to use.

Q. When the - when he ejaculates, was anything done? What did you do next?

A. He gave me a piece of paper towel.

Q. Okay. Do you know where that came from?

20 A. I think he had a roll in the room.

Q. Anything said at that point between either of you?

A. No.

Q. Okay. So what did you do next?

25 A. I went to the bathroom 'cause something started to not feel right. I started crying on the way to the bathroom and once I got there I used the washroom and was in there for a few minutes because I couldn't stop crying and I tried to compose myself to go back into the room to grab my
30 things.

Q. Where was Mr. Densmore when you exited the washroom?

A. He was still in his bedroom.

Q. And what was he like, what was his demeanour?

A. He was very relaxed, as if, yeah, nothing had happened.

5 Q. Did he say anything to you?

A. He said that he has a long day tomorrow and I should be going.

Q. And how soon after you had returned to the bedroom did he say that?

10 A. Within two minutes.

Q. Did you talk about anything else within those two minutes?

A. No.

Q. Okay. And did you agree to leave then?

15 A. Yes.

Q. And how did the two of you then, I guess, say bye?

20 A. I grabbed my stuff from his room and he walked me to the front door. I think he tried to kind of like give me a side hug and then I left.

THE COURT: I didn't understand the last part.

MR. SOSA: I think I heard, and he gave me a side hug and I left.

25 MR. SOSA: Q. Is that right, [REDACTED] ?

A. Yes, yeah.

Q. Thank you. Would there have been anything to indicate you had been crying between the time you exited the bathroom and walked out the front door?

30 A. I probably did, yes, have red eyes and a puffy face and my skin tends to get quite blotchy, like red spots, after I finish crying.

Q. Do you remember if that was the case though?

A. I remember looking in the mirror and I was like, it looks like I just cried.

Q. Okay. And after the side hug and you leaving, what do you do?

5 A. I got in my car and I turned it on and started to drive, but I was crying so profusely at that point I couldn't see when I was driving. So I pulled into a parking lot at the end of his street and that is right when I texted my friends C [REDACTED] and N [REDACTED], telling them about what had just happened and 10 how I was feeling.

Q. So before we talk about C [REDACTED] and N [REDACTED], why were you crying so much?

15 A. I felt like something had, I felt violated, like something had happened to me that I didn't consent to and that I did not want to happen, and I just felt like I – I wasn't respected as – as a person.

Q. Okay. So then you shared that you contact C [REDACTED] and N [REDACTED]?

A. Mm-hmm.

20 Q. And you are now pulled over. Do you remember where you're pulled over?

25 A. I believe it was a Walmart. It was kind of a big plaza. There was like a Walmart to the right where I was parked and a gas station on the left and it was kind of just a big lot.

Q. How is it that you made contact with C [REDACTED] and N [REDACTED]?

A. I texted them on a group iMessage that we had with the three of us.

30 Q. What did you tell them?

A. I told them what had happens[sic], the sexual encounter that I had with Jack, and that I'm pulled over and

[REDACTED] crying.

Q. Did they suggest anything to you?

A. They suggested that - or they offered that they could meet up with me and that we should probably go maybe 5 to the, to Shoppers and possibly get a Plan B or emergency contraceptive, just because he did not use a condom.

Q. And did that - did that happen, did you meet with them?

A. Yes, I drove back from Hamilton to Oakville 10 and picked them up and we went to the Shoppers.

Q. Did you take or purchase the Plan B?

A. I did, both, purchased and took it.

Q. When did you do that?

A. Probably 30 to 45 minutes after I left. So 15 probably between 10 and 11.

Q. Okay. Did you then drop off your friends?

A. Yes.

Q. And then what did you do?

A. Then I returned back home.

Q. Did you speak to anyone else that night? 20

A. No.

Q. So then let's turn to the following day, did you tell any members of your family that next day?

A. Yes, I did. I told my stepmother G [REDACTED] in 25 the morning.

Q. And once you shared that with G [REDACTED], what happened?

A. She consoled me because I was very distraught and she suggested that I do a sexual assault test kit.

Q. And did you take any steps to get that sexual 30 assault kit done?

A. Yes, she was contacting places in Oakville to

figure out where I would be able to get one, and they had suggested I would need to go to Joseph Brant in Hamilton [sic], Joseph Brant Hospital.

Q. And did you go to Joseph Brant Hospital?

5 A. Later that day we did go to Joseph Brant, but their sexual assault nurse was not in at the time. So they sent us to Hamilton.

Q. Where did they send you in Hamilton?

10 A. I'm not actually sure of the hospital that we were sent to.

MR. SOSA: And I don't think this is contentious,

Your Honour.

MR. SOSA: Q. But, [REDACTED] does Hamilton General sound right?

15 A. Yes, yeah.

Q. Thank you. All right. And were you examined once there?

A. I was.

20 Q. And can you describe for us what it is that happened during that examination?

A. The nurse asked me about what had happened. She inspected my breasts for bruising. She did a internal swab of my vagina, and she used a black light to take photos on - of the semen on my back.

25 Q. And do you know whether the nurse confirmed there was any semen on your back?

A. She did.

Q. Were you prescribed anything, based on your visit to the hospital?

30 A. I was. They also did a sexual assault test kit and a pregnancy test, which came back negative for both. But they did put me on an antibiotic as a preventative measure

against HIV, because there was no condom.

Q. Did you share with anyone else what had occurred between you and Jack Densmore?

A. By that time, my stepmom [REDACTED] had told my dad 5 and I had also phoned my mom and her wife to tell them.

Q. Anybody else that you may have told?

A. No.

Q. Do you - do you recall being, or having a relationship with a therapist by the name of M [REDACTED] ...

10 MR. FAHMY: Objection, Your Honour. Well....

THE COURT: Thank you. We'll....

MR. FAHMY: If the witness can just....

THE COURT: Just a sec. We'll ask the witness to step out, please. Just so you know...

15 A. Yep.

THE COURT: ...this happens during trials and I don't want you to walk away thinking that you're doing anything wrong or anything of that nature.

A. Mm-mm.

20 THE COURT: It's the nature of the trial process when objections are raised, sometimes it's best to do it in the absence of the witness and we'll call you back in and then continue, okay?

A. Okay, of course.

25 THE COURT: Thank you.

... WITNESS EXITS THE COURTROOM.

THE COURT: Thank you. Your objection?

30 MR. FAHMY: Yes, Your Honour, it's not a Perry Mason moment or anything like that, but first, I hear my friend asking about anybody else, anybody else. We all know that, and well, that there was a therapist, she did disclose all of that

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beautiful stuff. And I usually don't object until I hear the full question but the way my friend was phrasing it was, do you recall speaking with a therapist named, and then giving the name. So, my objection is just that that's a leading question. I'm sure it would be. If my friend could perhaps rephrase it in a way that could elicit that evidence, but I guess we have her evidence with respect to the disclosure, in any event.

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THE COURT: Right. Response to the objection?

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MR. SOSA: Your Honour, I can rephrase, that's no – that's no issue. I didn't anticipate that her conversation with a therapist was contentious at all, I mean, it's in the waived records. I thought this would be simply a question to focus her. It wasn't intended to lead anything that is in issue.

THE COURT: And brief reply.

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MR. FAHMY: I've got – now I've got a new objection. We can't use those records at this point. So, now I'm kind of following the trial, we can't go there. You haven't made a ruling on that yet, Your Honour.

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THE COURT: This is – I'm not going to have surrebuttal so the – this is what I had from my notes. The sequence of events is that elicited through examination in-chief is that upon leaving she's distraught and crying, pulls over to a lot and contacts her two friends that have been named as potential witnesses, and that's done by text on a group chat. The communications between the three of them which results in a return to

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Oakville, a picking up of these said friends to go to buy or purchase and then consume Plan B Emergency Contraceptives. These people then are returned home, and that was it for that night. There was nothing else. Didn't speak to anyone else that night, full stop. That was the evidence.

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The following day, as my notes reveal, she told her stepmom in the morning. Her stepmom consoles her and suggests a sex assault kit and then, on her behalf, starts making inquiries of where to go and they're led to Joe Brant. Joe Brant does not have a sex assault nurse there and then referred to Hamilton, and quite properly because it wasn't contentious, we nailed down what hospital it was. I don't think anything really rested on that; Hamilton General. She's examined there. The kit is done. Certain observations made by this nurse are recounted to her and she expresses that, including the black light examination. She is prescribed an antibiotic in the event of, you know, sexually transmitted diseases. I think she said HIV because of unprotected sex.

By that time, so in around that time frame from the morning disclosure to the stepmother, to this period of time, by that time, and these are my notes, the stepmother told her dad and he told the complainant's mom and her wife about this. And then told no one else. That was where it was, at which point, I think this is clearly where the

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Crown was faced with the conundrum of refreshing of memory or whether it's a contentious thing or what it was, and I think that led to, I think a proper objection, there's another way of doing it. So I think the objection is proper. Nothing major has occurred as a result of that procedurally but you'll have to pick up from there because that is her evidence that at that moment in time, that was it. That's my notes. I'll allow for brief submission based on what I've said, so we can resolve this objection.

MR. SOSA: Your Honour, I think I would prefer to just leave it alone. I don't need to explore that area with her. So I'll leave that alone for now. We have her answer and I'll just continue with my remaining questions.

THE COURT: Okay, fair enough.

MR. SOSA: Thank you.

THE COURT: All right, so we'll bring back our witness.

MR. FAHMY: Thanks, Your Honour.

THE COURT: All right.

... WITNESS RETURNS TO THE WITNESS STAND.

THE COURT: Thank you, and again, I just wanted to reiterate that you're not to make anything out of that.

A. Okay.

THE COURT: This is just the way these things work...

A. Yeah.

THE COURT: ...and so you're back and we're going to proceed from there, okay?

A. All right. Thanks.

MR. SOSA: Thank you. Thank you, Your Honour.

5 MR. SOSA: Q. So, [REDACTED] I was just going through your experience at the hospital, and then we were talking about how you had shared with some family members. So we've covered that, so I'm going to move away into a different area now. You eventually contact police; that's why we're here.

A. Mm-hmm.

10 Q. Can you take us through how it was that you eventually reported this incident to police?

15 A. Yeah. We'd - I kind of talked about the idea with my family right when it first - when it first happened after the - the incident, and also with the nurse during the sexual assault kit. She had asked me if I thought I was going to go to police, and I thought, yes, I probably will. So then two days after the assault, I filled out an online - I don't know the proper - I guess I filed an online report with the Hamilton police about what had happened.

20 Q. And you shared that, in speaking to the nurse and your family, you said you probably will. What was it that caused you to file that report two days later?

25 A. I was at work and I couldn't stop thinking about it and I felt like I needed to do something, or at least attempt to have this heard by police because I felt like it was something I needed to do for my own healing and - and for justice.

Q. Okay. And once you submit the online report, do you eventually meet with police?

30 A. Yes, they responded about my report pretty soon after, probably the following week and then we - they'd scheduled an interview for me in, I think, September or October of that year.

Q. Do you remember who it was that reached out to you from the police?

A. I believe it was Detective Buszkowski.

5 MR. SOSA: And the spelling again, Your Honour, for Buszkowski is B-U-S-Z-K-O-W-S-K-I.

MR. SOSA: Q. Okay. And so an interview is scheduled, you said, for September or October?

10 A. Yes, I think it had been delayed a few times just because they were renovating the police building in Hamilton. So they didn't have a - a room to meet.

Q. Okay. And do you eventually go in for an interview?

A. I did.

15 Q. As a result of all this, can you just help us understand what impact it's had on your life?

20 A. It has - I - I'm trying to properly, I think, put it into words. It's had an incredible impact on my life. I have thought about it, obviously, ever since it happened. I think it made me view the world and myself a lot differently. My relationships with other people, I view differently. My relationships with men were definitely impacted. With my own body, it was - yeah, it was, it's something that I think I'll always remember.

25 Q. Thank you very much, █████ those are all the questions that I have for you.

A. Okay. Thanks.

Q. Those are all the questions that I have for you.

MR. SOSA: Thank, Your Honour.

30 THE COURT: So typically, we go until 1 o'clock. But I'm just wondering, maybe this would be the appropriate time for a break, and then we'll come

back earlier, or - as opposed to breaking up...

MR. SOSA: That makes sense.

THE COURT: ...the cross-examination, I think it just makes more sense.

5 MR. FAHMY: Yes. Yeah, Your Honour, I think the issue is that, first, I want to agree with Your Honour, I think we should definitely break for lunch early. My suggestion is that we still come back at 2:15 in order to give my friend some extra time to look at that 278.92 application.

10 THE COURT: Sure.

MR. FAHMY: At this point, I'd like to continue submissions in the absence of the witness.

15 THE COURT: Okay. So we're going to take a lunch break and we're going to come back at 2:15.

A. Okay.

20 THE COURT: So just make yourself available at 2:15. And so you're free to go right now.

A. Okay.

25 THE COURT: We'll see you back at 2:15.

A. Okay. Thank you.

THE COURT: We'll - you're free to go.

A. Okay. Thank you.

25 THE COURT: Thank you. So dealing with the lunch break and the additional time, I think that that makes plenty of sense because I don't - you'll need some work time in addition to your lunch hour to do...

30 MR. SOSA: Right.

THE COURT: ...what you need to do. Okay, so that lunch break until 2:15. Next?

MR. FAHMY: Next is, and no fault to my friend,

but I guess when we spoke yesterday, when he said
this morning, it was anticipated that he would be
with the witness until after lunch, until late
afternoon, which, you know, would have kind of
made our timing with everything a bit more, make
more common, make more sense in terms of how to
kind of proceed. So I obviously don't want to
start my cross-examination without getting that
ruling from Your Honour first. I think that was
kind of agreed to in the first place. The issue
with that is that I'd have, there's lots of issues
with that, Your Honour. But besides that, it's
that also procedurally speaking, I'd have to bring
the application before the start of cross-
examination as per the law, as even per your
order, that I'd have to serve and file it as soon
as, just before she starts her cross-examination.
And that's all well and good. I'm apologizing on
my friend's behalf, but not really because, you
know, like I said, I don't fault him for his pace
or anything like that. So I'm in Your Honour's
hands.

What I suggest is that at 2:50, we come back and
hear from my friend with respect to the Stage One
application. If it needs to be argued, I'd
respectfully ask if he can kind of let me know by
one o'clock so I get some time to prepare any
further submissions on that. And then, but if
it's - two possible outcomes are we'll be about
another hour with Your Honour after lunch, or we
might not be. So that's my [indiscernible].

THE COURT: Okay, so if I'm hearing you correctly, if there's a concession, then we're going to go to Stage Two on Monday, well, after I make a ruling based upon that concession.

5 MR. FAHMY: Correct.

THE COURT: And we would go to Stage Two on Monday where we would have the counsel for the complainant here as per our discussion at the beginning.

10 MR. FAHMY: Yes.

THE COURT: If it's not conceded, then it would be about an hour's worth of argument to deal with it, at which point, I have to make a ruling probably by end of day so that we can then tee people up for Monday, or not. Yes?

15 MR. FAHMY: Correct.

THE COURT: Okay.

20 MR. FAHMY: So a lot of moving parts, and also I don't want to fault my friend, I'm not, first of all, but in fairness to him as well, complainant's counsel didn't indicate that she was available today and that she would be available Monday morning in any event.

25 THE COURT: Okay, so let's....

MR. FAHMY: So I'm not....

THE COURT: Let's do that. We'll take our break now, we'll come back at 2:15. You'll let me know whether or not there's a concession on I. If it is, then we'll do the decent thing and release this witness until Monday.

30 MR. FAHMY: Correct.

THE COURT: And then we'll go on from there. If

not, then we'll continue, yes?

MR. SOSA: Yes, that's agreed. Thank you.

THE COURT: So 2:15.

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R E C E S S

U P O N R E S U M I N G:

THE COURT: Good afternoon.

10 MR. SOSA: Thank you, Your Honour. So I can confirm that I did use the afternoon recess or the lunch recess, I should say, to review the materials for Mr. Fahmy. So I am in a position to address those, to address that application, I should say, Your Honour. So I think before we can do so, we'd need to clear the courtroom and go in camera.

15 THE COURT: All right. Thank you. So ordered. So we're going to proceed, unless, of course, I guess it depended on whether or not there was, were you going to, was it a concession moving it over or not, or are we - we're going to be?

20 MR. FAHMY: I'm in the same boat as Your Honour. All my friend said is he wanted to make some comments. So if we're going on to the record with respect to the application, we'd have to do it [indiscernible].

25 THE COURT: All right, then. Yeah, so it'll be in camera in the absence of the public. So if you all want to just wait until we've finished that, then we can call you back in. Thank you.

30 CLERK REGISTRAR: Just to inform you, Your Honour,

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there has been a couple people on Zoom. I put them back into the waiting room.

THE COURT: Thank you.

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I N C A M E R A

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MR. FAHMY: I guess what I should also mention is that I've served my friend, but I haven't actually filed it with Your Honour. I'm happy to send it to Mr. Register. He emailed me the Zoom coordinates this morning, or I can send it through the regular SCJ channels. I'm in Your Honour's....

15

THE COURT: It should come - it should come through him. Do you have a hard copy of the materials?

20

MR. FAHMY: I don't. It's just a PDF...

THE COURT: Okay.

25

MR. FAHMY: ...copy, Your Honour.

THE COURT: Send it through then electronically. I can - I didn't bring my computer in, so....

MR. FAHMY: I can have that printed relatively quickly, Your Honour at the....

30

THE COURT: That's fine. Well, if you send the electronic form, it'll come and I'll see it on my device.

MR. FAHMY: All right. I've just done that now, Your Honour, and I've also cc'd my friend, as well.

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CLERK REGISTRAR: Sending it to you now, Your Honour.

THE COURT: Thank you.

CLERK REGISTRAR: You're welcome. It's been sent to you, Your Honour.

THE COURT: Thank you.

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CLERK REGISTRAR: You're welcome.

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THE COURT: I've received it, but it's taking a long time to open.

CLERK REGISTRAR: Do you want, I could put it up on the [indiscernible]....

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THE COURT: Yes, sure. Yes, let's do that. All right. All right. Okay, records and positions. Yes. Can you move on to the next page?

CLERK REGISTRAR: Yes, sorry.

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THE COURT: Oh, hold on. I've got it now, so we're good.

CLERK REGISTRAR: You've got it?

THE COURT: Yes.

CLERK REGISTRAR: Okay.

25

THE COURT: So none of this is, none of it is material. It's relevance outweighs prejudicial effect necessary under the criteria set out under the section, essentially.

MR. FAHMY: Exactly.

30

THE COURT: Okay.

MR. FAHMY: Yes, Your Honour.

THE COURT: All right, so I guess we'll get to the first part, is without conceding the point of admissibility, what is the Crown's position at Stage One?

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MR. SOSA: Thank you, and so I can notify the court that I will concede Stage One, and I just want to include some qualifiers to that

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concession.

SUBMISSIONS BY MR. SOSA:

5 So I'm prepared, Your Honour, to concede Stage One wholesale, let's say, without getting into the particulars of which exact letters or which exact series of text messages, but I do want to flag it at the outset because it will be the focus of
10 Stage Two.

So where I draw the court's attention is at page 6 of Mr. Fahmy's application record, and....

15 THE COURT: Can we bring that up? Let's - we may as well use technology, right?

CLERK REGISTRAR: You said page 6?

20 MR. SOSA: Yes, so where the subheading "1" there is. So at paragraph 15, Mr. Fahmy indicates that these become relevant and probative because they include the feelings and opinions of the complainant towards the applicant. So that will be ultimately what I hope to parse out with the court because the text messages as a whole, do not only focus on the feelings and opinions of the complainant towards the applicant. So that's why
25 I'm saying, I don't want to engage in going through each message today. So I'm conceding Stage One, but that will be the focus.

30 Likewise, at subheading "2", with respect to the records of Dr. [REDACTED] ...

THE COURT: What paragraph is that?

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MR. SOSA: ...at paragraph 17, only where these potential defences or defence theories are present in the materials will I say, or I should say, that's where the basis for my concession. So there's motive to fabricate collusion. So only where that's borne out in the materials and the same applies for prescription records at paragraph 19. I think that one, I can concede as a whole. We've already sent off the samples to be examined by a toxicologist. So that, Your Honour, will be evidence that the Crown leads in any event that those samples were taken. And I'll be calling the CFS expert just to provide the court with an understanding of how those drugs interacted.

So with those comments on the record, Your Honour, for the purposes of the Stage One, I acknowledge that the statutory requirements are made out and that there is a basis to say there's some probative value. The way it's laid out specifically with her views on the accused, on the text messages, and then any motive, if any, for her to be induced and whatnot with Dr. [REDACTED].

MR. FAHMY: Just a very brief reply and if I could ask Mr. Registrar to go back to paragraph 15.

SUBMISSIONS BY MR. FAHMY:

I think my friend, and perhaps it's just my writing style, it doesn't just relate only to the feelings and opinions of the complainant, but I think that should be read as, the messages that

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were order produced by Your Honour relate to the applicant, relate to the alleged sexual assault and include the feelings and opinions of the complainant towards the applicant - so it's actually three things - which then bear on the credibility and reliability, so....

THE COURT: So that's A and B and C...

MR. FAHMY: Yes.

THE COURT: ...equals D?

MR. FAHMY: Yes. I was just trying to be brief, but I do anticipate if - and I just want to remind my friend and the court that, you know, we just produced everything that was order produced to us by Your Honour. We certainly had no obligation to do so. We could have just tried to give a summary of it, whatever, but, you know, I know what we're talking about, Your Honour knows what we're talking about, the Crown knows what we're talking about and the reason why we did it this way is to kind of get the process moving quicker because we were at a time crunch and so I wanted the matter to proceed and so on. And we're going to be forwarding the entirety of this application.

Your Honour knows in *J.J.*, there's even provision in that decision, I believe, it's at paragraph 94, I can pull it up for Your Honour, if you want. You can - Your Honour can even make an order that the complainant not be present during the Stage Two hearing application at that point. But because it's kind of, it's coming at mid trial, it doesn't matter. But if my friend is seriously

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going to argue each and every message and certain messages and the caveat that I'm hearing, we may be asking for that order because then we're now forced to try to respond to things that I don't think we really need to in the first place. I'm happy to, in the second place, if Your Honour decides to do that, but if I'm doing that, I'm going to respectfully ask Your Honour to apply J.J. and ask for the complainant to leave at that point because that'd be revealing a little too much in terms of trial strategy.

But what I can say overall, with respect to the, just with respect to the messages, the messages with the, I'm not going to say anything about that. I will wait, Your Honour.

THE COURT: Okay.

MR. FAHMY: I think that that's, I don't want to jump the gun and I don't want to be unfair in the process, but my friend's conceded Stage One, we're ready to move forward.

THE COURT: Okay, so I don't really hear - need to hear anything in reply to that. I appreciate the concession. I do have a question that I'll ask as a result of that, but that's next. So regarding our process and procedure, we will proceed, obviously, in the absence of the public on Monday and it'll take whatever it takes. I'm just suggesting that this discussion should maybe continue after we finish court today and over the weekend so that we can, you know, get rid of things that don't need to be argued and then we

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can just, you know, focus on what needs to be done. I'll leave that with you.

Now, again, I don't know the answer to this, because I know there's public and there's people here, whether or not I bring public back and make the finding public that Stage One is conceded and we're going to proceed on. And that on Monday morning, it's going to be a Stage Two in the absence of public so that people don't end up showing up and being frustrated, or whether or not you take the position that my determination on this ruling, albeit conceded, ought to also be in camera?

MR. FAHMY: Good question.

MR. SOSA: It is a good question. My inclination is that this is all part of the hearing and should remain in camera, Your Honour. And I don't see there being any issue with Your Honour advising the public that there's been - that we're dealing with an evidentiary issue.

THE COURT: Mm-hmm.

MR. SOSA: I think that would be sufficient...

THE COURT: Okay.

MR. SOSA: ...for the public.

MR. FAHMY: I agree with my friend. I mean, if you want to call everybody back, let them know that there's an in camera hearing that is going to be continuing on Monday...

THE COURT: Right.

MR. FAHMY: ...and that, you know, they're not to come Monday morning or they may have to be

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excluded for a certain amount of time, I'm happy with that too.

THE COURT: Okay, so that was my inclination too.

MR. FAHMY: Yes.

5 THE COURT: So with respect to this, subsection 278.92(1) of the *Criminal Code* states:

10 Except in accordance with this section, no record relating to a complainant that is in 15 the possession or control of the accused – and which the accused intends to adduce – shall be admitted in evidence in any proceedings in respect of....

15 And then there are notes, a number of enumerated offences, including this:

20 The purpose of the record screening regime is for the protection and dignity, equality, and privacy interests of the complainant;

25 (2) recognizing the prevalence of sexual violence in order to promote society's interests, encouraging victims of sexual offences to come forward and seek treatment; and

(3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes.

30 The exclusionary rule in 278.92(1) applies only to records in controlled possession of the accused and that the defence seeks to adduce in proceedings in respect to the offence it

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5 enumerates and when the defence counsel intends to refer to information they learned from private record pertaining to the complainant in their submissions or in the examination of witnesses, even if the record itself is not entered in as an exhibit.

10 Subsection 278.92(3) sets out a series of factors that a judge must consider in determining whether a record falling within the ambit of 278.92(1) but does not concern evidence of the complainant's other sexual activity is admissible. And in 15 determining whether evidence is admissible under (2), the judge must take into account, shall take into account the interest of justice, including the rights of the accused to make full answer in defence, society's interest in encouraging and reporting of sexual assault offences, society's interest in encouraging the obtaining of treatment by complainants of sexual offences, whether 20 there's a reasonable prospect that the evidence will assist in arriving at a just determination of the case, the need to remove from the fact-finding process any discriminatory belief or bias, the risk that the evidence may unduly arouse 25 sentiments or prejudice or sympathy or hostility, specifically in a jury setting - not really applicable here - the potential prejudice to the complainant's personal dignity and right of privacy, the right of the complainant and every 30 other individual to personal security and to full protection and benefit of the law, and any other

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factor the judge may consider relevant.

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Now, subsection 278.93(1) one provides that an accused may make an application to the court for a hearing to determine whether the evidence is admissible under 278.92(2). This is referred to as Stage One. In order to move on to Stage Two analysis, the presiding judge must determine whether the evidence is capable of being admissible. If so found, the judge then holds a Stage Two hearing to determine whether the evidence is admissible.

Now, the Crown has conceded the point that, in its view, the evidence is capable of being admissible. I independently concur with that view and so find. So that means that we shall proceed to a Stage Two hearing this coming Monday in the absence of the public as well. So that is the formal ruling on this mid-trial application, Stage One.

We can bring the public back in and I will simply tell them that we are continuing on with our in camera hearing on Monday morning at least, and then that's it.

MR. FAHMY: Your Honour, I just, and I'm rising to my feet because if - I was more thinking about the Stage One because I didn't know what my friend was doing, but, and I apologize that I haven't given it a lot of thought before rising on my feet right now. But the issue, as I see it now, is that given what the complainant has said in her

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evidence with respect to who she talked to about this, and Dr. [REDACTED] is not on the list of people that she spoke to. And I know at paragraph 96 that you as a - of J.J., you as the presiding judge retain the discretion to direct that the application not be disclosed to the complainant or that portions of it be redacted. This may arise based on a party's or the judge's own concerns about the impact of disclosure and trial fairness.

10 And then at paragraph 97, that's where it says that the - that if, again, if there's any concerns, even though the complainant has the right to meaningful participation, if there are any concerns at the Stage Two hearing, a complainant's attendance - if the complainant's attendance would compromise trial - the judge may, in their discretion, exclude the complainant as required. My only issue is that....

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20 THE COURT: Is it because she's - her evidence thus far was, these are the only people I talked to, but in fact, there was somebody else.

MR. FAHMY: Yeah.

25 THE COURT: Okay. I don't know how far we - I'm just, again, maybe can address this because I think your friend left it at, you know, who are these people that you talked to? And - no, I'll remain silent. It's just, I - it's....

30 MR. FAHMY: Her answer was - yes - her answer was no one else...

THE COURT: Yes.

MR. FAHMY: ...a couple of times, right?

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THE COURT: Yes.

MR. FAHMY: Even though the records clearly show that...

THE COURT: Right.

5 MR. FAHMY: ...they had spoken the night of, the next day, two days later, all of that in and around the same time that she's making these disclosures to the other people.

10 So I have a concern with that because we're disclosing all the records that you've already redacted and given to us in the materials. I'm happy to - I guess there's one of two ways, either we can ask for just the application portion of it, like the notice of application be served on the complainant's counsel. I think the complainant's - because we've gotten these records through the 278.3 regime. And again, I think that when the Crown was raising this issue about whether we 15 needed to do a 92 in any event was because all the records of the doctor are so large.

20
25 I don't think there's really any issue with respect to the texts and so on as much as there is with these records. But then given what was said, it now becomes more of an issue, I think. And the reason why I'm saying that is this, at least with the notice of application, it gives the complainant meaningful, I mean, meaningful participation....

30 THE COURT: It alerts her to the fact that there's Dr. [REDACTED], right?

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MR. FAHMY: Yes. And I've mentioned that there's emails and that there's session reports...

THE COURT: Right.

MR. FAHMY: ...in the notice of application, but not the details of them, which were produced.

There is no requirement on the defence to produce the actual records itself. But given what J.J. is saying is that the safety mechanism for doing so would be to redact or ask for an order or receive an order. And this is actually something that the Supreme Court is saying that the judge of his own volition can do as well. My concern is obviously trial fairness, in terms of being able to meaningfully cross-examine the complainant with respect to these records.

My submission is that either we can - we can - I mean, Your Honour, obviously you can say, no, serve it as it is, and that's fine. Your Honour could also say that no, you know, the notice of application is meaningful enough or sufficient enough for the complainant to participate. And you'll notice, too, in the notice of application that right at the very beginning, we're basically at paragraph four, the applicant repeats and replies[sic] on all the previous materials filed and arguments made in his previous application for the production of third-party records under 278.3. So with that in mind, it still allows for meaningful participation by the complainant in terms of admissibility.

THE COURT: Right. But in it, it already

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identifies Dr. [REDACTED].

MR. FAHMY: It does.

THE COURT: And I'm just trying to think through the prejudice to the - to the accused that I think you're trying to say is, well, listen, her evidence was finite. She said, I didn't talk to anybody else. And now if I - if she knows, then that's my question, dot, dot, dot [indiscernible]. You already - it already ended there to say I didn't talk with anybody. I'm trying to draw - or I think I'm drawing a distinction in my mind as opposed to like the strategic value of an omission, perhaps, or a denial at worst. I didn't talk to anybody as opposed to, I didn't think about like, yeah, that was different. That was like my loved ones I talked to. This is like therapeutic where that belongs. And the admissibility part about it, about what actually was uttered or communicated.

Like, to me, there's a distinction between those two things. And from the prejudicial point of view for the accused, I've kind of got a big question mark saying, what - I mean, it's already happened. I mean, she's - examination in-chief of her is done. She said what she said, what she said, now we're talking about how you're going to use that. So that's why I'm not so concerned about the disclosure because I don't think it really prejudices you at all. I mean, it - you got what you got, it is what it is right now, right? I'll just let you comment and I'll let the

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Crown. I see you want to get in there, but I just want to finish this off because in fairness to him, I'm challenging him on some of the concepts here.

5 MR. FAHMY: Yes. I don't - well, first, we don't even need to hear from her in order for me to make these requests in the first place.

THE COURT: Mm-hmm.

10 MR. FAHMY: But in terms of how the evidence came out, now it's that moment where she might realize - and it could be that the omission was, I mean, I guess that'll be up for submissions later about whether that omission was just an omission or was it a denial or whatever. I mean, I certainly, I can see how that could be argued. I don't know, I think it's more of a denial, obviously. But if it were, right, and then the application comes without the notes, then it's like, oh, yeah, okay, maybe I talked to my therapist because clearly they have records that they want to use.

20

25 But then it's like the - what the - I'm basically helping the Crown's case because what they could have done is tried to refresh her memory with the actual records. So I'm curing the Crown's case for them and then she can then say what Your Honour suggested, which is, all I meant loved ones, whatever. It opens up that door wide open for her, whereas I think right now it's maybe a creak or maybe it's a door closed that's maybe not unlocked. I think that's where it is right now, at the most, I think. And that's why, like, the

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reason why I'm thinking about it now is because I realized that what the Crown was trying to do, I'm essentially going to be doing it for them, once I serve her the actual records.

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So that's why when I went back to J.J., I believe that this is kind of what it's meant to cure. And all of those paragraphs are about that because it's all about the impact on trial. So I'll read 10 96 in its entirety:

15

Importantly, the presiding judge retains the discretion to direct that the application not be disclosed to the complainant or that portions of it be redacted. This may arise based on a party's or the judge's own concerns about the impact of disclosure on trial fairness.

20

So that's why I'm saying it - that that door seems to be closed, in my respectful submission. I certainly don't want to be refreshing her memory, giving her the, you know, what exactly she said because all that stuff pertains to the events, what's happening, her thoughts and feelings, her - her desire to not come forward to the police or press charge and all that. And it goes on for a 25 number of sessions.

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I mean, it's not a huge record, but it's important, especially because those emails are going back and forth and she's getting direction

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from her therapist and so on. So it really opens up that - that door wide open.

THE COURT: So your suggestion then is that only the application itself, not the supporting evidence be....

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MR. FAHMY: I'm actually willing to even throw in the Exhibit A, which is the text message. I don't - there's nothing there that, you know, there isn't. I don't want to say that because we're not at Stage Two. There is relevant stuff there that's good that I'm going to be using, absolutely, but....

THE COURT: So it's only the [REDACTED] ...

MR. FAHMY: Yes.

15

THE COURT: ...materials?

MR. FAHMY: Yes. I think those should be excluded from the application record when it's been given to the complainant as well.

20

THE COURT: But not the reference to it in the notice of...

MR. FAHMY: No...

THE COURT: ...application.

MR. FAHMY: ...absolutely not. Because....

THE COURT: Okay.

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MR. FAHMY: But that's already there. That's already there, Your Honour.

THE COURT: All right. Thank you. I'll hear submissions from the Crown.

MR. SOSA: Thank you, Your Honour.

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SUBMISSIONS BY MR. SOSA:

Well, firstly, this is now admissibility. Ms.

[REDACTED] would have obviously been aware that her records, her discussion with Ms.

[REDACTED] has already been litigated and she's likely already aware it's going to come up at some point. Your Honour has already outlined a number of innocuous ways in which she may have been mistaken. She may have just said, oh, sorry, I thought you were talking about family only. So there's any number of ways in which this could turn out. To now suggest that it would be improper for her to have to vet anything out, Your Honour, I submit is just not supported, not on this record.

The decision of *J.J.*, Your Honour, was to assess its constitutionality and they found that it was constitutional as a whole. And I just reviewed it, starting at paragraph 181, they specifically address what Mr. Fahmy is dealing with, that these are applications that are brought usually well in advance of trial. That these potential dangers that Mr. Fahmy is raising were already rejected by the Supreme Court. And that these applications are to be shared and that it would be – it would be an exceptional circumstance that Your Honour would then therefore either exclude them from Stage Two, or vet it. The – the case also suggests, sorry, I shouldn't even say suggests, supports that mid-trial applications are not to be

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the norm.

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So I don't - I don't see how we are in any danger of providing her with anything that she wouldn't otherwise already know because these applications are generally brought in advance. And as Your Honour has already noted, I also don't see the prejudice to Mr. Densmore. The - whether or not she spoke to her therapist, Mr. Fahmy can still suggest to this court whatever it is he wants you to infer from that. Her being aware that they're being - those records are being requested, I don't see how that then there, she's now going to somehow be better prepared to answer Mr. Fahmy's questions.

20

The defence is still, they're not prejudiced in any way. The constitutionality of the right to cross-examine has already been determined by the Supreme Court. And again, Your Honour, that's starting at paragraph 181 of *J.J.*

25

MR. FAHMY: Just a very brief reply, Your Honour...

THE COURT: Yes, certainly.

MR. FAHMY: ...if I may?

REPLY SUBMISSIONS BY MR. FAHMY:

30

So yes, my friend is right. The paragraphs he's citing, because the way the decision is structured is that there's this whole section about the constitutionality of it. And that's fine, but

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5

that's not what we're - I'm not saying that J.J. is not constitutional, but the entirety of what we're talking about right now is a subheading A Complainant's receipt of application that begins at paragraph 91 of the decision. And that goes from paragraphs 91 up until 96. And then the next portion is B, complainants attendance and submissions, and that's at paragraph - starts at 97, which is what I also cited to you.

10

So I'm talking just about - this is the portion of the decision about Stage Two and how the complainant participates and what she should be getting.

15

THE COURT: Okay. So let's talk about, let's spit it out a little bit further.

MR. FAHMY: Sure.

20

THE COURT: Was it additionally then that at the moment that, because she's entitled to be here, right?

MR. FAHMY: Not at Stage One.

THE COURT: No, at Stage Two, at Stage Two.

MR. FAHMY: She's entitled to, yes.

25

THE COURT: Right, so at that point, was it your submission then that she has to be excluded, so she's not hearing what's going on?

30

MR. FAHMY: No, Your Honour. What I'm, first I - what I'm suggesting is that, that could have been a way to mitigate the issue. But as I - as I kept making submissions, cause I'm just thinking on my feet, this issue is that it makes infinitely way more sense to exclude the Exhibit B from the

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notice of application, send that to complainant's counsel, and then she can participate.

5 But if my friend is going to then try to get into the nitty gritties, or try to expose some of these records, that, like specific records, then I would be asking for that, I believe. So I'm not - and according to paragraph 97, Your Honour has that discretion anyway. I'm not - this isn't like a, 10 you know, hey, I want a better field to, you know, take my at bat. You know, this is within the confines of what *J.J.*, and the reason for that is trial fairness. And I - and fundamentally that is what my client is entitled to, Your Honour.

15 THE COURT: All right, thank you very much.

I have heard the submissions. I mean, it is a 20 very interesting point, but I am not going to order any redaction of the record. The application record will go as is. We are going to proceed on Monday morning in the usual course, and we will see. Like I'm - there may be, again, like all of these applications, sometimes we have to time out, and because of the lay of the land, we 25 have to rejig it or rethink things. I mean, that does happen, we know that. But what we have right now, we're going to proceed in the normal course. The application will go as is. That's that.

30 So we'll bring the public back in because they may still be waiting around, and I'll just tell them that we're continuing with this in camera hearing

on Monday morning, and then they can keep track of when it starts, when it's open to the public again. Is that all right?

5

MR. FAHMY: Yes, Your Honour. And just, I guess, technically now the complaint is in cross-examination, I'd ask Your Honour to give the customary warning to the witness, subject to, obviously, any discussions with her counsel with respect to the Stage Two application.

10

THE COURT: Correct. Yes, okay. So we can bring her back in as well, obviously, because we have to bind her over to Monday. Okay?

15

MR. SOSA: Thank you. I did send a message, but if we can also page, since that seems to be more effective for [REDACTED]

THE COURT: Just our witness. Just use witness as you've been doing, that's fine. Thank you.

MR. SOSA: And will that be at 10:00 a.m. start, Monday? Is that....

20

THE COURT: Yes. At 10:00 a.m., yes.

MR. SOSA: We've - that's what we've told complainant's counsel, and she's expecting my materials that morning at 8, so....

THE COURT: Thank you.

25

... WITNESS PAGED TO COURTROOM 608.

30

THE COURT: Hi, oh. You were very stealthy, I didn't see that happening. So, ladies and gentlemen, we are continuing the in camera portion of this proceeding on Monday morning, and as a courtesy to the public that I know has attended today, I wanted to let you know, in advance. So Monday morning, it will again be in the absence of

the public until we've completed that portion of the trial process.

5 So now to you, to our witness, you're bound over to Monday, and I would like to advise you that you are not to discuss your evidence with anybody until you have finished your cross-examination and re-examination. And the best way I could help you conceptualize that is imagine that until that 10 happens, until the cross-examination, re-examination is done, that you're still sitting in this box. So it wouldn't be open for people to approach you and say, well, listen, what about this? Are you stepping out and talking to people 15 about what's going on here? So that's the best way to understand that concept is until it's done, you're not to discuss this particular matter, your evidence with them. Okay?

A. It's okay. Yeah.

20 THE COURT: All right, so for those that are going to be here for the in camera, I will see you on Monday morning at 10:00 a.m., and for the public, again, you'll have to just keep track of when the 25 in camera session is over. And I think, Mr. Registrar, you can do the endorsement to that effect for me, yes?

CLERK REGISTRAR: Yes, I can.

THE COURT: Thank you very much.

30 ... WHEREUPON THE MATTER IS ADJOURNED.

73.
Certificate

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

5

10

I, Janet Smith, certify that this document is a true and accurate transcript to the best of my skill and ability (and the quality of the copy of the recording and annotations therein) of the recording of Rex v. Jack Densmore in the Superior Court of Justice at Hamilton, ON, taken from Recording No: 4799 608 20240412 094227 10 KRAWCHJ.dcr which has been certified in Form 1.

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September 3, 2024

Date

Signature of Authorized Person
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Signed in Ontario, Canada

25

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Court File No. CR-22-00000484

SUPERIOR COURT OF JUSTICE

5

HIS MAJESTY THE KING

10

v.

15

JACK DENSMORE

P R O C E E D I N G S A T T R I A L
I N T R I A L
IN CAMERA

20

BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on April 15, 2024 at HAMILTON, Ontario

25

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ORDER MADE IN THE SUPERIOR COURT OF JUSTICE**

APPEARANCES:

30

B. Sosa

Counsel for the Crown

M. Fahmy

Counsel for Jack Densmore

(i)
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25	[sic] indicates preceding word has been reproduced verbatim and is not a transcription error.
	(ph) indicates preceding word has been spelled phonetically
	All spellings of names are transcribed as set out in the reporter's notes unless noted with a (ph)

30	Transcript Ordered August 7, 2024
	Transcript Completed September 3, 2024
	Ordering Party Notified September 16, 2024

MONDAY, APRIL 15, 2024

I N C A M E R A

5 THE COURT: All right.

MR. SOSA: Good morning, Your Honour. So, I can confirm that Mr. Fahmy served both myself and counsel for the complainant this morning with the Stage Two of the 278.92 application. So, we're in
10 a position to address that if the court is, Your Honour.

THE COURT: Sure. Do we have a hardcopy for me by any chance?

15 MR. FAHMY: No, Your Honour, and I could – I understand that my friend, complainant's counsel is going to ask for a quick adjournment anyways, so I can have that printed for you, not a problem. We also will be using the screens today, so....

20 THE COURT: Mm-hmm, okay, great.

MS. VALERI: Your Honour, sorry, yes, good morning. It's Valeri, initial A. I'm certainly not asking for an adjournment of any – of any time, but I was potentially going to ask for a few moments. I just received Mr. Fahmy's application
25 this morning. I was able to speak to my client, Ms. [REDACTED] on Friday before receiving the application about the general application and get instructions. But now that I have the more specific application, I haven't spoken to her and I was hesitant to do so without the court's permission as well as counsel's, given that she is
30 in the middle of providing testimony.

5

10

As I mentioned, I do have instructions. I feel, based on my conversations with Ms. [REDACTED] that we could – that I have, that I am instructed to make submissions on her behalf, but I obviously was not able to review the specifics of the application with her. And so, I would just ask for a moment to do that in the circumstances, but I wanted to make sure that the court was aware of that request.

15

THE COURT: Okay. I think that that's reasonable to have an opportunity to look it over and to get some further instructions, clarifying instructions before we start, yes.

MR. FAHMY: I'm in Your Honour's hands...

THE COURT: I mean...

MR. FAHMY: ...you know, obviously, I asked....

20

THE COURT: ...the application, we – we dealt with the issues that you had on Friday, so the application is in her hands and clearly, she should be able to...

MR. FAHMY: Again...

THE COURT: ...review it.

25

30

MR. FAHMY: ...Your Honour, just for the purposes of the record, our position was that not to give the complainant access to the actual exhibits. I'd earlier said to actually – I think that was the same argument that was made on Friday that you already ruled on, so I can't just – I can't change my position at this point, but I leave it in Your Honour's hands.

THE COURT: Okay. So, we're going to do that.

How long do you need to do that?

MS. VALERI: I don't think lengthy, Your Honour.

5

I wonder if maybe my friend can advise, is she here in the building? Okay. Then I could go down and see her. I would probably need, Your Honour, maybe 20 minutes to half-an-hour, but not...

THE COURT: Okay.

MS. VALERIA: ...much longer than that.

10

THE COURT: Let's say half-an-hour, in that half-hour as well we can maybe produce a hardcopy as well as sending me an electronic copy so I have the two.

MR. FAHMY: Absolutely, Your Honour.

THE COURT: Thank you. Half-an-hour.

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R E C E S S

U P O N R E S U M I N G:

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THE COURT: Thank you.

MS. VALERI: Thank you, Your Honour for that opportunity.

THE COURT: All right.

25

MR. SOSA: So, in - in which order would Your Honour ask - my position, as the complainant is represented by counsel, would be that the complainant's counsel share their position and then it may be a situation whether I either adopt or augment some of the submissions, Your Honour.

30

So, it might be more streamlined if the complainant counsel would proceed first.

THE COURT: Sure.

MS. VALERI: I'm okay with it, Your Honour.

THE COURT: Well, I mean, you're - you're the - you're the moving party, you're the applicant. So I mean, typically, I would think that the applicant should make their case for something followed by submissions by the respondent, and I agree that the first place respondent would be the complainant because these are records that relate to her with the augmentation by the Crown. Now, having said that, like I mean, if you had all chatted outside and there was some kind of common ground that you're going to just say, oh, we're saving a little bit of time, we're really not too concerned about A, B, but we're super concerned about C, D, then that's a different story. If that's not the case, then let's just proceed with - yes.

MS. VALERI: Your Honour, in that case, then maybe it would make sense for me to go first and Mr. Fahmy's okay with that. There are some things that I can tell you I have less concern about and would likely concede after Mr. Fahmy's submissions, but there are some points that I can at least raise what my concerns would be and then maybe that might help Mr. Fahmy in responding to that, if that makes sense.

THE COURT: Yeah, I mean, this is as by way of introductory remarks, we're still going to follow the same...

MS. VALERI: Right.

THE COURT: ...procedure that you'll make your application because you're the applicant, you'll

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respond in first place and you will augment if you so desire, but this may help us streamline things, so...

MS. VALERI: That's my thought.

5 THE COURT: ...let's do that, okay?

MR. FAHMY: Yes, Your Honour. Thank you.

MS. VALERI: Thank you, Your Honour.

SUBMISSIONS BY MS. VALERI

10 So, first of all, I can indicate that the complainant on - on her behalf, I'm prepared to concede exhibit - I'll refer to it as Exhibit C of Ms. Krzecko's affidavit in regards to the prescription medication. There's no issue with counsel adducing her - the details of her prescription, as well as the dosage.

15 THE COURT: Okay, hold on. No issue with prescription or dosage, content that Exhibit C be allowed if required by defence. Yes?

20 MS. VALERI: Yes, Your Honour, and the only - the only comment I would make on that is obviously what would be relevant is the use that defence is - is making of that in the sense of, I think questions such as, you know, what were you initially prescribed this for, go through your whole medical history, would be straying outside of what's relevant for this. But I think, the medication she was on, on the day of the offence, you know, what - how she may have interacted with that medication on the day of the offence or leading up to, is within the realm of relevance.

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But, I think, in terms of this medication, a too far history back into that might stray into the realm of - of what becomes no longer relevant.

THE COURT: So, I understand though, would it be -
5 would it be the complainant's position that it would be fair game to say, oh, this is a Tylenol, this was prescribed for what? You're saying that would be impermissible in your view?

MS. VALERI: I think the - the basis for the
10 prescription is okay. I think the sort of underlying details of that. For instance, if she were to say, you know, I was prescribed this for anxiety, right, I think the underlying basis of, when did you first...

15 THE COURT: Okay, but the first part would....

MS. VALERI: ...experience anxiety....

THE COURT: Sorry to interrupt.

MS. VALERI: No, that's okay.

THE COURT: But the first part would be okay...

20 MS. VALERI: Right.

THE COURT: ...to say - because I think then the distinction would be, are these recreational...

MS. VALERI: Right...

THE COURT: ...are - were they...

25 MS. VALERI: ...Exactly.

THE COURT: ...were they medically prescribed?

So, you would say that it would be in the complainant's estimation to say, you have this prescription...

30 MS. VALERI: Right.

THE COURT: ...and that is conceded.

MS. VALERI: Right.

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THE COURT: Why were you prescribed this, and the answer could be specifically - I'll use anxiety...

MS. VALERI: Right.

THE COURT: ...I don't, you know, that's...

5 MS. VALERI: Right.

THE COURT: ...just - for anxiety.

MS. VALERI: Right.

THE COURT: That would be all.

MS. VALERI: Right.

10 THE COURT: To go in to say, well, when did you first have anxiety and...

MS. VALERI: Exactly.

15 THE COURT: ...and so on and so forth, you're saying that would go too far. You'll have your chance. You'll have your chance.

MR. FAHMY: It's not that, Your Honour. I apologize, and I wouldn't do this because I just - in the interest of trying to streamline things...

THE COURT: Mm-hmm.

20 MR. FAHMY: ...I think this part of my friend's submissions is straying way too far from what we're trying to do here. What the application for is, is this evidence admissible?

THE COURT: Right.

25 MR. FAHMY: That's it. Is it relevant to an issue at trial? Yes, no. Is the - the test, is the probative value versus the - whether it would bring the administration of justice into disrepute. What my friend is now doing is getting into, well, once it's admissible, what can we do with it, what can we not do? That's all part of 30 the regular trial process.

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THE COURT: Well, not really.

MR. FAHMY: Whether it's....

THE COURT: I mean, I'll just interrupt you for a second, because Section 278.94(4) of the Code says, "At the conclusion of this hearing", so I mean, this is a Stage Two, not a Stage Two-A, Stage Two-B, Stage Two-C sort of scenario, and what she's - I think what your friend is sort of getting to is the next part, it says, if the court - I have to give reasons, right? So, if, "shall provide reasons for the determination, and, if not all the evidence is to be admitted", because that's the admissibility chunk to say, admissible, not admissible. Admissible, how much is admissible, then if it's to be admitted the reasons must state the part of the evidence that is to be admitted. The reason must state the factors referred to. And if any part of the evidence is to be admitted, the reason must state the manner in which the evidence is expected to be relevant of the issue.

So, I think this is kind of just, like, on - on the periphery, I think it's helpful because it'll - it'll help you get to that Stage Two. So I hear you...

MR. FAHMY: Okay.

THE COURT: ...but it's - it's the nature of the beast.

MR. FAHMY: I understand, Your Honour. Thank you.

THE COURT: Okay?

MR. FAHMY: Yes.

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THE COURT: So, you're saying as long - first of all, big point, the Exhibit C, prescriptions, no problem.

MS. VALERI: Right.

5 THE COURT: The use of it, gentle approach as to how far back you're going...

MS. VALERI: Right.

10 THE COURT: ...so as not to get into this - the whole relevance then, because that's really sort of like what tags along with, is like the - well, admissibility, but then the other components that are going go through the factors. So, that's what you're saying, I got it. Okay, so we're going to go from there, okay?

15 MS. VALERI: Thank you, Your Honour. And I mean, certainly, my friend Mr. Sosa will be here as well to object if there's questions that get into that area, but I just want to flag what I think the parameters would be of - of the - of that around it being admissible. In terms - and I apologize to jump around, but in terms of Exhibit A, so we're referring specifically to the text messages.

20 THE COURT: Yes.

25 MS. VALERI: There is one specific portion I can advise Your Honour that I would be opposed to counsel adducing, and I'm going to try and find the page. I think I made a note of it. I think it's page 101 of my PDF. If I can just have a brief moment. Oh no, I'm sorry, that's not the page.

30 THE COURT: There should be page numbers on the bottom of the texts.

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MS. VALERI: That's right. It is page - sorry,
Your Honour. Here we go. It's page 1110.

THE COURT: Page 1110. Let me just try to find
that.

5 MS. VALERI: Yes. The title is, "Issues I am
Having".

THE COURT: Okay, yes, I see that.

10 MS. VALERI: Okay, thank you. Your Honour, this
seems to be a - appears to be a note that the
complainant made subsequent to her longer - or on
the same date it seems of the note, "My Story".
The note, "My Story", is where she describes the
incident. That's something, in my view, Your
Honour, that the complainant can concede to being
15 admissible. But this, note, "Issues I am Having",
she's - she's writing about emotions, feelings,
private reactions to - to what she's experienced.
I - in my submission, Your Honour, this is -
provides no probative value to the court. It's
20 private thoughts. It's potentially, you know,
it's prejudicial to the complainant in the sense
that it's exposing her privacy. She made this
note to document her feelings and her thoughts and
her reactions. This is a specific note that I
25 would object to its - to its admissibility in the
trial. And I'll give Your Honour perhaps a moment
to look that over.

THE COURT: Okay.

30 MS. VALERI: Okay. So, that's a note, Your
Honour, where I feel we're - we're getting into
the area of - of private thoughts and feelings
that are - that are certainly significantly

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impactful on the complainant's privacy and that provide no probative value to – to the issues at trial. I would also indicate, Your Honour, in regards to those factors that Your Honour has to consider under 278(5), these are the type – type of information that would dissuade complainants from coming forward, would dissuade them from seeking potential therapy, and would certainly sort of send the – essentially, sort of deter complainants from potentially coming forward because – or trying to work through feelings and trauma that they may be experiencing as a result of the incident, subsequent if this were to be admitted as part of the trial.

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20

The next – I think it's just the next page and a little bit on that bottom page where there's the description of "My Story", and that was something that the complainant had disclosed, I believe originally. This is something, again, for the purpose of defence looking at inconsistencies or the nature of that, this is something that is much more likely to have a probative value to the trial.

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THE COURT: So, I just – so, I understand what you're saying, you're saying, my note is in – in your submission, something that would not meet muster, that there's no relevance or its prejudicial effect completely outweighs it for the factors set out. However, the note that follows afterwards completely fair game because it sets out her version of what occurred...

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MS. VALERI: Right.

THE COURT: ...and that would be fruitful, although there may be personal notes in there that the probative value outweighs any prejudicial effect. Did I get it right?

5

MS. VALERI: Right, Your Honour...

THE COURT: Okay.

10

MS. VALERI: ...and – and given the way that this – that she wrote out the story, the purpose for which she wrote out the story of what specifically happened, given that the – the privacy interest is – is less than for issues – issues I'm having...

THE COURT: Right.

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MS. VALERI: ...which is clearly sort of a note that she wrote to herself, potentially to bring up to her therapist with, these are specific issues that I'm struggling with as a result of something – of something that happened. It's – that – that in my view, is neither here nor there for the purpose of this trial, but the specific description of the incident, that is something that obviously would be more relevant...

20

THE COURT: Got it.

25

MS. VALERI: ...and would have more probative value. In terms of some of the other text messages, Your Honour, I think maybe I'll ask for the opportunity to respond to Mr. Fahmy's submissions on those. A number of them are almost – seem to be timeline oriented. Okay, today I went to the – to the doctors and we had – this happened. Today, I filed my police report. Things in that nature. In terms of the

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complainant's position on those, in terms of the factual basis they're providing, there's no real issue with that. I - I don't see, necessarily, how these are overly relevant, but perhaps I'll leave that to my - to my friend to explain. But the factual basis of, today, I did this, today, I did that, you know, we filed a police report. Those kind of things are - are not necessarily something that we have an overriding concern as to the potential for prejudice to her privacy. But I'm - I'm not sure I necessarily see the relevance, although obviously something may come up at trial if there's an inconsistency as to when something happened or if someone needs to be reminded as to the date of something, then obviously I can't foresee that, but that is not something I should say I'm strongly opposed to.

Where - where I'm most strongly opposed, Your Honour, is some of the notes made by Dr.

[REDACTED], and I'm just going to take a moment because I - when I took a note, I noted the page number written on - or the number that was written on the top of the page in handwriting, which may not correspond with the number on the document. So, for instance, Your Honour, at the top of one of Dr. [REDACTED]'s first notes from Friday, August 2020, it - there's an "18-14" written in handwriting on the top.

THE COURT: Yes.

MS. VALERI: And it's page 107 of the PDF.

THE COURT: Yes.

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MS. VALERI: And then subsequent to that, there's continuing notes of the same tone. They're just from different dates of sessions, "18-27" written at the top. This is the information where I am more strongly opposed, Your Honour. This is information that she's discussing with her therapist. She's talking about her reactions, her feelings in response to the assault. And in my view, there's nothing in - in these notes that is of significant probative value. That is the language used [indiscernible] significant probative value that the applicant has to - has to prove. These are - these are examples of a complainant speaking to her therapist about something that happened to her and their responses.

So, for instance, something on page - at the top as noted "18-40", there's a note, "Her first item related to finding it frightening in the shower and change her clothing. We talked about the power of our brain to make associations with dangerous events". That does not provide any probative value to this court, and what it does is potentially, if the complainant were asked about it, that would serve only to potentially embarrass the complainant, sort of make public her private feelings and reactions. And there's a - there's a real significant risk of prejudice to her. But we're also running, in my view, Your Honour, with some of these - these notes, we also could be running into real potential for the reliance on

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rightness or the reliance on how a victim should act or should react to an assault when it happens. If she were asked about some of these private feelings, for instance, lower on that page, "We talked about her feelings about men generally and then looked at whether all men fit that description". Things of that nature, in my view, are not relevant, they're not probative, and they're only – essentially serve to infringe on the complainant's privacy interests and potentially, you know, reveal private things she discussed. But also potentially embarrass or try to shame her for any reaction that she may have had to the assault.

So, I don't see – and – and this is where perhaps my friend can respond, I don't see the probative value in – in these types of things being admitted into the trial. If there's something specific about the interaction between Dr. [REDACTED] and the complainant that my friend wants to point to, to assist with a theory that the therapist had influenced her into believing that this was an assault, then that may be that specific line or that specific conversation could be highlighted or put to this court and – and the complainant. But just these full pages have a lot of information on them, that – that, in my view, would not be appropriate and should not be admitted.

And I mean, there's another example on page 18-64 about, "She's been having difficulty sleeping and

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we reviewed sleep hygiene". That's not relevant to this proceeding. It's private information. It's information discussed between a complainant and a therapist under the assumption that these things are private and it has to do with reactions to trauma as well as ways to - to deal with that. I don't see what probative value that type of information could have for any of us in this courtroom.

Then before those notes, Your Honour, there's the email exchange with Dr. [REDACTED], particularly the very first email, "something happened". Your Honour may remember that we made submissions about this at the production stage.

THE COURT: Yes.

MS. VALERI: And that's the initial email, "Um, something happened", and then we see Dr.

[REDACTED]'s response, which is, you know, "Can you go to the hospital, are you willing to report this immediately?" So, again, that email exchange, the initial email, "Um, something happened" sent on August 5th at 11:44 p.m., that is an email exchange that if my friend wanted to use in order to question on inconsistencies or - or the nature of that exchange between herself and Dr. [REDACTED] for the suggestion that Dr. [REDACTED] influenced her in some way, that is specific to the - to the details of the assault. It's an account of what happened, information which she would have shared with this court already. And there's a specific use that my friend's making of it to suggest that

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this back and forth may have influenced her into believing that this was an assault.

5 So, this is more the type of information, Your Honour, that I think the complainant would be in a position to concede would be admissible for that – for those purposes as compared to some of the therapy notes where there's more discussion about feelings, thoughts, how to manage trauma and that 10 type of thing. So, I hope that I have explained – explained in a way that makes sense. I haven't touched on every page, but that's sort of where the – my position is as complainant's counsel.

15 THE COURT: So, just so I understood what you said, we start off with the proposition that depending on what the applicant says regarding the clinical notes, there may or may not be something in there, depending on what they say that may have probative value that outweighs prejudicial effect, 20 but not in its entirety because...

MS. VALERI: Right.

THE COURT: ...a lot of it is really private and – and really doesn't assist in the fact-finding or truth-finding function of the court...

25 MS. VALERI: Exactly.

THE COURT: ...one. However, with respect to this initial flurry of emails going back and forth, you don't take such a strong position because that's sort of a free flow of information going back and forth, which may be fruitful in cross-examination, 30 or at least assist in this court having a better understanding of what went on?

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MS. VALERI: Right. For instance, there's update one and update two where she talks about disclosing to her parents. I think that's probably of less relevance to the court in terms of what that — what theory, defence theory or what use that could be made of. But it's something that also doesn't have the same potential for prejudice that her private feelings and thoughts might have that she's disclosing to Dr. [REDACTED].

So again, if — if my friend can point to — I understand the theory is, Dr. [REDACTED] may have influenced the complainant into believing that this was an assault and — and that's relevant to defence's theory, which — which I think is a theory he can pursue, but there has to be specific information from these exchanges pointed to. It can't just be, let's review your session from August 14th and discuss how you disclose this and disclose that. What is — what use can be made of what's in here, has to be pointed to that theory and not just, we're putting every — every conversation that you have with Dr. [REDACTED] to you and we want you to comment on, you know, your feelings at the time, whether you were sleeping, feelings of shame that you might have had or feelings of guilt that you might have had. It's — it's got to be related to the defence theory...

THE COURT: Got it.

MS. VALERI: ...in my position, Your Honour.

THE COURT: Okay.

MS. VALERI: So, perhaps that helps give a view of

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what I'm concerned about and then I would ask for the chance to respond if there is something further that comes up. But at least that sort of gives the lay of the land as to - I'm not opposed to everything completely, but it has to be what's relevant and what is, has significant probative value, not just might be of use.

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THE COURT: All right. Very helpful...

MS. VALERI: Thank you.

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THE COURT: ...introduction. On the basis of what we said, we're now going to get into the application proper and hopefully this will help sort of streamline the arguments that are advanced because now you - now you know what - what the fight is, okay?

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MS. VALERI: Thank you.

THE COURT: Thank you.

MR. FAHMY: So, can I go ahead...

THE COURT: Yes, please.

MR. FAHMY: ...then, Your Honour? Thank you, Your Honour, okay.

SUBMISSIONS BY MR. FAHMY

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I think just by way of like a formal kind of start to this application, Your Honour, is that this all goes in, and I'll just kind of first get to a bit about 290 - 278(92) and that....

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THE COURT: Is this - is this from your materials, you're bringing it up?

MR. FAHMY: It's not, but what I will do, Your Honour, is I'll - I'll PDF it and - and print it

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and send it...

THE COURT: Okay.

MR. FAHMY: ...Your Honour. It's only a couple of cases, but the first - actually, one of the cases is *R.M.R* and the other case is *Burtch*, and I've included the hyperlinks to the relevant paragraphs, Your Honour.

And just a - just a reminder, so, the test is, the evidence is admitted if it is relevant and significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. So, the issue now is the word significant probative value, what does that mean? Significant doesn't mean what we might think it means because as this decision cites *Darrach*, a Supreme Court - a Supreme Court of Canada decision is that - and because it's the same language as - as 276 that's used, "The requirement of 'significant probative value' serves to exclude evidence of trifling relevance". Trifling relevance is the key word to significant probative value. And this has to be, of course, weighed in with the fundamental right of every defendant to cross-examination.

Again, the - and this is from *Burtch*, Your Honour, paragraph 11 that was citing *J.J.*, which is that, The ability to impeach a witness is a fundamental tool in any barrister's toolbox. It has been effectively removed by a strict application of this legislation, particularly

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in cases where the parties are known to each other....

And so on. But – but it's been effectively removed by strict application of this legislation.
5 So, that's the danger that Your Honour has to weigh because the – the test is that it doesn't significantly – that it doesn't outweigh – I'll get the correct terminology for Your Honour
10 because I put it in my materials,
"....substantially outweighed by the danger of prejudice to the proper administration of justice?" But with respect to the prejudice to the proper administration of justice, it doesn't just go towards the complainant's issues.
15

But the very first part that the court – that you are to consider, Your Honour, at 278.92(3) is the interest of justice, including the right of the accused to make a full answer and defence. And the same reasoning applies that even in the case of, should you admit, should you not, with 278(3) where it was, should you produce, should you not produce, but if it's tilting towards the accused, then you have to produce. It's the same thing here. If it's tilting towards the applicant for admissibility, the same test applies.
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Now, I also want to just give a brief comment about collusion and collaboration. Again, collusion doesn't – and collaboration doesn't mean what we would understand the normal sense of those
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words to mean. This is from the case of *Wilkinson*, Your Honour. It's a Court of Appeal decision, paragraph 32.

THE COURT: What's the cite?

5 MR. FAHMY: It's 2017 ONCA 756 (CanLII).

THE COURT: Yes.

10 MR. FAHMY: So, — and I'm just going to read the underlying portions that the court itself underlined citing the Court of Appeal — Supreme Court of Canada decision in *Shearing*, which is 15 that there is some:

Here, there is some evidence of opportunity for collusion or collaboration and motive, but nothing sufficiently persuasive to trigger the trial judge's gatekeeper function.

But then just before the next part:

20 He instructed the jury to consider "all of the circumstances which affect the reliability of that evidence including the possibility of collusion or collaboration between the complainants". He defined collusion as the 25 possibility that the complainants, in sharing their stories with one another, intentionally or accidentally allowed themselves to change or modify their stories in order that their testimony would seem more similar or more convincing.

30 And that has to do with the fact that it's a — a

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similar fact evidence application.

THE COURT: But that's collusion where you're talking about two people coming and telling the same story. That's not really what we're looking at here. This is more tainting, right?

5 MR. FAHMY: It – but it's still under the collusion umbrella, Your Honour, yes, absolutely. It's not, let's come up with a story to frame my guy or say something about my guy, for example.

10 THE COURT: Because there was only two people in that room.

MR. FAHMY: Exactly. That's not...

THE COURT: Okay, all right.

15 MR. FAHMY: ...what we're talking about. There's no other complainant, there's no similar fact application. But why this is important is because what I want to bring out from this is that collusion, it could be intentional or accidental to change or modify. And how we know that is that at the following paragraphs at 38 and 39, because 20 here now the court is saying that actually, collusion doesn't have to be conscious, doesn't have to be on purpose. The court is saying that it could even be unconscious collusion. And what 25 is that?

The court – I'm going to read the underlying portion:

30 The reliability of a witness' account [in this case [REDACTED] can be undermined not only by deliberate collusion for the purposes of concocting evidence, but also by the influence

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of hearing other people's stories, which can tend to colour one's interpretation of personal events or reinforce a perception about which one had doubts or concerns.

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And that is replete, replete throughout. All the records that were ordered produced, Your Honour.

Does she have doubts about what happened?

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Absolutely. She continues to have doubts, even after session one, session two, session three, session four, session five, session six, the very last session, she's still expressing doubts. And I'm just going to give you a brief overview, Your Honour. I'm going to wait to hear from my friends to give pointed rebuttals, and I'm – and I'm happy to give examples, but like the – and it's not just with the sessions. It's not just with the emails.

15

Where the – where the therapist and – and now, in my respectful submission, the – the – the records that were produced, Your Honour, the records that were produced, this – it's – it's not about getting treatment for sexual assault. This is about influencing the complainant to convince her that something happened. The very first email that the therapist sends back is, this is an assault. You didn't have to do anything. He didn't ask for your consent. Complete ignorance of the law. Complete untethered factual basis for any of that. She has no idea what happened except what she's told her, [REDACTED] in that email. And I'll get into that a little bit more.

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But in the sessions, she calls my client a predator. Oh, he was very conniving and he was – he – he used – he knew that you were a people – he used your people pleasing tendencies in order to take advantage of you, and just more and more and more painting my client as a predator, as somebody that did this to her on purpose, knowing who she was and how she had all of these issues that – that – personality issues or maybe psychological issues, I don't know. But that makes it ripe for cross-examination, Your Honour.

And then telling the complainant, he's done this before, without any evidence, and he will do it again. When the complainant herself is expressing doubts about whether or not to press charges, and when you link it to the messages and the emails to her mom, her – her mom's wife about, you know, this didn't go well, you expect me to do this and you wanted me to press charges. Even before she tells her mother, when she tells the therapist in the email, she says, I don't want to tell my mom because she's going to force me to press charges.

THE COURT: Okay. Just – just a quick note.

MR. FAHMY: Yes.

THE COURT: Like just on that particular point.

MR. FAHMY: Mm-hmm.

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THE COURT: Whether somebody forces you to go to the police or not, that has nothing to do with the elements of the offence that you're dealing with, right? What's – what's the bridge is to say that

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this force is so overwhelming that in order to go to the police, I have to concoct a story that is police worthy. Is that the theory? Like, to say - because it - it's - like, all - all the stuff that you're saying, I get.

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MR. FAHMY: Mm-hmm.

THE COURT: She goes, the therapist is aggressively saying, you need to report, you do this, for whatever reasons.

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MR. FAHMY: Mm-hmm.

THE COURT: Parent, she reports, well, you know, I'm afraid they're going to make me go to the police. I mean, that goes to the fact, as we talk about is people don't want to go to the police, but for other reasons other than the key one is, was it a criminal offence, right? That's - that's what we're dealing with here. Like, the - the consent issue, the - the issues regarding the subjective analysis that the court is going to have to go through, right? So, how does this advance it, right, that - I get it. There's a lot of pressure to say, go to the authorities, go to the authorities. So, what?

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MR. FAHMY: Well....

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THE COURT: Unless you could show me like, why...

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MR. FAHMY: Yeah.

THE COURT: ...why is that important?

MR. FAHMY: It's crucial, Your Honour...

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THE COURT: Okay.

MR. FAHMY: ...because she, throughout this time, she's - she's having a real struggle of whether something criminal even happened in the first

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place.

THE COURT: So, the link is to say that this pressure to go to the police is what I said, is then she - your theory is then she has to somehow get all the - all the pins in a row so that it meets the definition of a sexual assault. So, she's got - she's got to somehow align her recollections and stories so that she can go and please everybody and go to the police?

MR. FAHMY: It's not just that - it is that, but it's not just that by itself, because from the very beginning, as soon as she's - moments after their interaction, she's telling her friends, she's telling her therapist, I don't think anything happened. I don't know. He didn't force me. I didn't say no, you know. And then - then the therapist jumps in, then the friends jump in, he should have said yes, he should have done this, he should have - and then it's starting to build. But even with that, she's still doubting, she's still saying, maybe I'm making this all up in my head. Your Honour, that is crucial.

THE COURT: Okay. I see where you're going.
Thank you.

MR. FAHMY: Okay. Right? And then it keeps compounding with, well, there's - it's so terrible. Like, you know, and I feel for her that she's - she had to, you know, deal with these kinds of - of issues, right? But like, there is a point where she's telling her therapist that, like, you know, basically, my mom said that if I didn't press charges, it's on me. I'll pull it up

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for Your Honour here. This is right after she spoke with her mom. It's update number two and I can - it's page....

THE COURT: I see it.

5 MR. FAHMY: Okay. And this is, again, Your Honour, this is like the next day. We're not talking about - I don't know where my mouse went, sorry, Your Honour. There it is, okay. So, even before she says anything to her mother, she's 10 telling her therapist that she's already worried that her mother's going to be judgmental and telling me I need to press charges immediately. And then in that same email, I still feel really guilty and like I'm at fault, that I inflict - I 15 feel guilty that I inflicted this anger and hurt onto my parents, and I feel - and I feel like I'm just being dramatic. I am just seeking attention, that I'm making a big deal out of nothing, and that she's wasting everyone's time and energy.

20 Those are all motives for her to say that something happened, because right here - right there, Your Honour, "I feel stupid and like a bad person, because if I really wanted him to stop, I could have just done that, but I didn't". That - 25 that's a key piece of evidence right there, Your Honour, that she knew that what she did, what she said, how she reacted to whatever my client was doing was consensual. That's a reasonable doubt. Your Honour, when - when you're - when you're - 30 when we're assessing this case, the Crown has to prove that the *actus reus*, which is that, you

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know, that there was a — there was a — an assault, physical touch that wasn't — but that there was — that was sexual in nature, there was no consent. We're — and — and that's subjective in terms of how she thought about it at the time.

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She can, as she did on the stand, saying, you know — I mean, I don't exactly recall what she said exactly at this moment in time, but essentially, I did not give — in my head, I didn't give him consent. She doesn't verbalize anything and then there's consent could be verbalized or through...

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THE COURT: Well, I think what she was saying...

MR. FAHMY: ...action.

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THE COURT: ...is, I pushed — I pushed his shoulder...

MR. FAHMY: Right.

THE COURT: ...and pushed his hand, I said, ouch, and in my mind, I think it was like...

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MR. FAHMY: Yeah.

THE COURT: ...sort of a — a constellation of things.

MR. FAHMY: Correct.

THE COURT: Okay.

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MR. FAHMY: Correct. Right? But on that point, whether she gave consent, we can raise a reasonable doubt. We can bring this up and say, look, Your Honour, there's a reasonable doubt here about what she told us because she knows right immediately after this encounter with my client that she didn't do anything to alert my client that this was not consensual, because she's saying

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right then and there that she feels stupid about it, that she feels like she's a bad person, because if I really wanted him to stop, I could have just done that, but I didn't. So, she's admitting that she had the power, or that she had the wherewithal to do it, but she didn't do it, and now she's regretting it after the fact, just by what she's saying. But all of these are her own doubt about the truth of her allegations.

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That affects her credibility.

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And if I go up to here where she's worried about — after she's — after she tells Dr. [REDACTED] she's worried about telling her mother, she updates her and says, "It went terribly. They asked me, why would I put myself in the situation to begin with?" They call her dumb to go to his house. "He is an asshole". They don't know my client, Your Honour. There's going to be no evidence that these people know who my client is. But all of this, again, Your Honour, is collusion in the very real sense of it being, influencing how the complainant is seeing the transaction between them.

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And then they're putting it on to her that you need to figure out why you would do something like that in the first place and that you should know better by now. What does that mean? And I need to press charges. I need to. That you're required to do this because otherwise, if I don't, I'm letting him do that to other girls. What kind

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of responsibility is being put on her to then, oh man, I really got to do this. I really got to go through with pressing charges because if I don't, they're putting on her that she's going to be responsible for this predator going around and doing this to other girls? That – that's motive to fabricate, Your Honour, and not in a, I'm lying sense, but it doesn't have to be nefarious. It doesn't have to have an element of this is something that I am doing on purpose. It's unconscious even. And that's pressure Your Honour, that's real pressure. They're reinforcing her own belief.

So, remember, she already has this belief by itself, but then her – her mother is then basically saying, this isn't his fault, it's your fault. You did something wrong. You're responsible to make sure that this doesn't happen to other girls. And let's connect it to the – to the text that she's sending to her mother's wife.

THE COURT: What page are we on? The text should have page numbers at the bottom.

MR. FAHMY: I'm going to get that to you right now, Your – oh, if you – that's all you need, I have it right here; 238, Your Honour.

THE COURT: Yes.

MR. FAHMY: So, at this point – and – and again, this is the same timeline that we're talking about. This is August 6th, the very next day, and the UTC, you've got to deduct four hours, Your Honour, so this is like at six o'clock, six-thirty

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in the evening. So, this is right after she's emailed her therapist, and she's saying, like basically, she's talking to her mother's wife, that her mother had talked to C [REDACTED]'s mother about how [REDACTED] was making bad decisions, and then:

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Is that what you guys think that I made a bad decision? Because I don't. It's not that boys will be boys or anything like that. He should have known better. He should have asked for consent. She should have forced me.

[as read]

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I'm going to suggest to Your Honour and to her, eventually, when I can, that what she really means is he shouldn't have forced me. It's not my fault. So, she's going back and forth, back, and forth between whether or not that this is an assault or not. I'm already....

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THE COURT: Just a second, hold on. No, it's in camera. Thank you.

MR. FAHMY: Thank, Your Honour.

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You're upsetting me, you're making me feel a lot worse about everything. I'm already blaming myself. I'm already thinking I am stupid. I'm already replaying everything I could have done differently. I already feel like absolute shit and you two are not helping. You're making me feel like I'm at fault. Like, I was asking for your support and talk openly about it and, but if not, then

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you know, if you're not helping me, then I'm not going to talk to you about it. [as read]

Right? So, more importantly, is that this shows –
5 and again, this connects back to the therapists records where she is talking about how that conversation went down, how it had affected her. Right here, mother was quite accusatory:

10 She should know better than to go to a guy's house. She should press charges so it doesn't happen to another girl. But [REDACTED] was helpful getting a sexual assault program. She got the rape kit done... [as read].

15 And – and so on. "But we spent the session going over her experience and looking at potential stuck points." Stuck points for what? Stuck points where she is stuck with the fact that she doesn't believe that my client committed a sexual assault against her. How? Because in reviewing the evening, it is clear that [REDACTED] attempted to make good decisions. But she's saying she's making bad decisions. This is all ripe for cross-examination, Your Honour. And that he was clearly 20 a predator, skilled in having her make small changes to their plans until she was in his apartment. Let's talk about that.

25 She sends the email to her therapist saying, when I showed up to his house, he said, oh, it's too late, we can't go for a hike anymore, just let's

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go to my - let's come inside, and then he raped me. And in case there was any inconsistency with that story that she tells her therapist, she repeats it again. But in actuality, they did try 5 to go for a hike. They left the house. This wasn't - this is - this - these are all things that there's inconsistencies with what she's telling her therapist, right, keeping in mind that she's saying, I don't know if I'm making this all 10 up in order to get sympathy, in order to, like, feel like I'm - like something's actually happened, or if I'm trying - she says that, Your Honour. I know you're giving me a scowling face 15 but....

THE COURT: I'm not.

MR. FAHMY: Oh, oh.

THE COURT: That's my face.

MR. FAHMY: Oh.

THE COURT: No, there's no scowling. That's 20 just....

MR. FAHMY: I can show you where everything is. I 25 don't mind.

THE COURT: I want it clear, there was no scowling. I'm listening with great attention to everything everybody's saying.

MR. FAHMY: Yeah. But - but she says that. I 30 don't know if - and I can - I'll bring it up for Your Honour, right here, she's still struggling with whether she was being dramatic but recognized that she would not think that if it were another person.

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Working through the stuck points had been helpful. I encouraged her to write down the things that had impacted her thinking as it was very easy to have your thoughts to go back to where they were from the beginning. [as read]

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And again, ripe for cross-examination because, you know, there's all these messages between her and her – again, her mom's wife, oh, you know, she told me to write things down. Jack will never think to do something like that. Then the mom says, oh, maybe, like, are you going to tell him that he should too? It's, like, no, no, no, don't do that. Like, you know, all of that stuff is relevant, Your Honour, it's relevant. It's absolutely relevant.

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And – and again, in the following week, August the 14th, but again, you're – like, in the messages, she's texting her mother, "I'm mad at all men. Jack should fucking rot in jail. He deserves to go to jail for the rest of his life. I hate A █████. I hate all men", all coming up, all relevant, because here she is, she's now saying, no, I'm having a – a difficult week. Here she is talking about being a bad person and discussed the validity of her evidence. The validity of it. That means █████ is having real issues with the reliability and the credibility of her own evidence, and she's sharing that with the therapist who's then saying to her, hey, your

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evidence is valid, here you go.

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And that's - there's - there's nothing here to say, hey, well, let's actually explore, like, why are you feeling this way? Do you think like maybe you are making this up? Like, you know, maybe you felt that you've been taken advantage of, you know, this was the straw that broke the - none of that, none of that. It's reinforcing, and your evidence is valid. That is collusion. That is influence.

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We also reviewed what we discussed about how going to the guy's place was bad judgment on her part. I emphasized the - and my friend mentioned something about sleep and having to take med - that's important because that's one of the medications that - that is found in the tox report. And the, my issues document that my - the complainant's counsel had mentioned at the outset, I mean, I don't know if I'm going to use it. I don't know. But at the end of the day, that was part of the Crown disclosure. It's not even - it wasn't even part of the 278 application. This is Crown disclosure. That and the "My Story". So, you know, unfortunately, that - the cat's out of the bag on that one because the complainant already waived her privacy interest to that a long time ago.

THE COURT: Let's just - I - I want to just confirm that. So, "My Notes" and "My Story" were all part of the initial disclosure package?

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MR. FAHMY: That's correct.

THE COURT: So, the fact that it ends up here is just sort of coincidental because it formed part of what was in the entirety of the record.

5 MR. FAHMY: That's correct, Your Honour. As you'll notice that....

THE COURT: I just - I just wanted confirmation from you.

10 MS. VALERI: Sorry, Your Honour, I - I don't - I believe My Story was, I don't know what that section, "Issues I am Having" was. My recollection was it wasn't, but if I'm incorrect then I stand to be corrected. But "My Story" was, "Issues I am Having" was not, to my recollection.

15 MR. SOSA: And if I could have a moment as well to confirm.

20 THE COURT: Yes, let's - let's deal with that. I think it's kind of critical. So, "My Story" was in initial Crown disclosure. my issues, we're waiting on that. While everybody's looking for that, I think we'll just take our morning break right now. We'll come back and pick up from there, yes.

25 MR. FAHMY: Can we have a little extra longer break so we can have a moment to look through that, Your Honour...

THE COURT: Yes, yes.

MR. FAHMY: ...because I don't want to....

30 THE COURT: So, we'll give you - we'll give you 20 minutes. You'll get 10 minutes to work...

MR. FAHMY: Yes.

THE COURT: ...and 10 minutes to break, how's

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that? Twenty minutes, we'll come back at ten to.
Thank you.

R E C E S S

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U P O N R E S U M I N G:

THE COURT: All right.

10 MR. SOSA: Good morning, Your Honour. So, I've taken steps - I've also consulted with the Crown that was previously assigned. It's the Crown's position that the notes that states, "Issues I am Having", was not part of the waived records from the complainant.

15 THE COURT: It was not. So, that is one - My Issues was not part of initial disclosure. Okay.

20 MR. FAHMY: Apologize for that, Your Honour. I thought I'd seen it before. If I find it, I'll let you know, but I'm - I'm happy with that, in any event. And like I said, Your Honour, we're not, you know, in terms of probative value, I could get into it, but I got all this. I'm not really, you know, too harped up about that at this point in - point in time.

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30 But - but I will say this though, is that, you know, my friend was saying, oh, well these are about her feelings and - and like, you know, her thoughts, her innermost - the Crown opened that door, Your Honour, in terms of, how are you feeling, how are you feeling afterwards, right? That is ripe for cross-examination. So, it's not

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just how she was feeling at the time, her thoughts going on I her head, but also how she was feeling afterwards and the words that she described in relation to what she actually felt in terms of what she's saying to other people, what she's telling her therapist, what she's even writing in her own notes and her "My Story" and so on.

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And – and my friend was – was saying about like, oh, this goes into, you know, like, you know, the imperceptible reasoning of – of how a victim should respond and so on. Again, Your Honour, I would ask that you give no weight to that – that argument at all. That's – that's not what here, first, to discuss, and second, there's lots of case law, like *Holland* that says, yeah, we know that there's no commonality in terms of how a victim is supposed to – and I'm using air quotes – supposed to respond, but you can definitely look at what she did, what she said in order to make reasonable inferences from that, from that evidence. It's not saying, well, you would have done this, or you should have done that. That's not what we're saying. I haven't made that argument. I'm saying, here's what it is, this is what we're going to use it for. That's an inference. That's logic. That's reasoning. That is not what my friend is saying about any kind of stereotypical submissions on what she should have done, what she should have said, how she should have felt. That's not what this is.

THE COURT: I mean, that – I'm just thinking that

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one through. I mean, part of the inference drawing from what somebody said or did, that - I think that's where it becomes a fine, fine point on it, because you could say, well, you did this and you did that.

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MR. FAHMY: Mm-hmm.

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THE COURT: If you just left it at, that's one thing, like either is part of the *actus* or the - the *mens* or whatever in very simple cases. In more complex cases, it's what comes from that, is to say, well, you did this and you did that and therefore the inference is, well, that's weird because most people would do it this way and this way, which gets you back into that jam, right?

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MR. FAHMY: I respectfully disagree, Your Honour. I'm not - I'm not suggesting that that's the issue. The issue is her own real struggle. She has her own real - the first thing I'm going to tell you, Your Honour in my closing submissions is the very first person - I didn't want to do this, but I'm going to do this right now - the very first....

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THE COURT: I don't want to force you to do anything you don't want to do.

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MR. FAHMY: No, no, no, I'm going to do it.

THE COURT: Okay.

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MR. FAHMY: I'm going to do it. The very first person to have a reasonable doubt is her, is her, Your Honour. It's right there. It's all there. It's all there. I don't actually - I don't know if this is real. Maybe I'm making it all up. Making it all up? That's reasonable doubt. She's

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the first person to have a reasonable doubt. And then I'm going to ask you to find the same because I need all of this to show you and weave it through in the cross - cross-examination of her to show you that this reasonable doubt is reasonable. And Your Honour, you have that function while I'm crossing her to impose, and my friend can object if there's something that's improper, right? You know, besides the wide latitude given on cross-examination.

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If there's something that goes beyond relevance, relevance, right, there's - is it - it trifling relevance? Right now is the test, but then is it actually relevant to the - what we're doing, what we're talking about in cross-examination. That's a different relevance, right? So, there is a further gatekeeping function for Your Honour to - to - to take.

And I think - and I'm - and I'm, you know, maybe jumping ahead here, but like if my friends are going to suggest to you, well, you know, you need to redact, like, you know, like that girl and - and whatever, and like words here and there, whatever, that's not - that's not helpful. It's not necessary, and all of this is relevant, all of it. The sessions that she had with her therapist go beyond anything to do with therapy and more to do with, this is a bad guy, you shouldn't feel like this, here's the validity for your evidence. This is to the heart, Your Honour, of reasonable

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doubt. I'm not here to say - I don't have to say, my client didn't do it. If we did that, there - the law would be upside-down. I'm not here to say that. I mean, I am going to say that obviously, but all I - all I need is to say reasonable doubt, not just on her end in the *actus reus* with consent, right, but then also with respect to my client having a reason - a mistaken - an honest but mistaken belief in her consent. That ties

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into that.

If she's saying that she could have - if she's acknowledging that she didn't do something to give my client the - and keep in mind, I know you were saying, like, she said she pushed, she said she pushed her shoulder, whatever, maybe that happened. Let's just - let's - I don't think it did, but let's just say that it did, there are other events right after that reengage her in the sexual encounter. This - this isn't about, like a - a dichotomy of, well, you know, she - she, one, push - maybe she pushed his hand to get a better position. I mean, we're certainly going to be putting that to her, right? But that doesn't end the analysis of, did this become a sexual assault? You know, right after, she - her evidence is, he told me to get on the floor and I did. No objections, no qualms, nothing about that, right?

There's - there's the part of kissing after the oral sex. She never - the Crown - there's no evidence before that that kissing wasn't

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consensual. There's no evidence before you — like, so, the — the — when she says he put his fingers inside me before he had intercourse with me, there's no evidence that that wasn't consensual, that that was not consensual, am I saying that right?

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THE COURT: I get what you're saying.
MR. FAHMY: Yeah. But — but that's what I'm trying to say, Your Honour, is that this isn't just a, you know, it's a — it's a lot of moving parts but the most important thing is this is days after what happened, all of these sessions, and I'll — I'll show you something, Your Honour because I think it's just key. So, I've labelled them as, like, you know, there's — there's basically six sessions that Your Honour — and — and these have already been redacted by the court.

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So again, yes, fine, let's say that we don't have an appeal case yet. I think maybe one day it'll come, soon, I hope, but I think an appeal court's going to vindicate Justice Stribopoulos in *McFarlane*, that once you do the 278 and you get the records — and I get it, like his — his reasoning makes sense, is that it's — it's not just about the duplicity but in terms of how to look at the legislation, right? But part of that is that these redactions are by the court. They're by the court. They've already been redacted for things that are not relevant and that's why they were ordered produced, in order for my client to use it to make full answer and

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defence.

Look at this last session that – that Your Honour produced. They're talk – she's talking to her about the court, how did you feel about finding him guilty, not guilty, but more importantly, look what she's saying about how her experience being interviewed by the police, this is a couple of days after. She was interviewed on the 29th of September. This would – is – is three days after. But she's telling her therapist she had to endure a number of insensitive remarks. There's no insensitive remarks. Example, to – just to clarify, were you in a relationship with this guy or was it, what would be called now a one-time hookup? That question was never posed to her, not even in a remote way in that entire interview. So again, it's not just about her sessions about what the therapist is writing, but it shows what she is telling. There's – there's an inconsistency with what is happening in reality. It's on video. It's in reality, and what's she's telling her therapist.

She had her written account but was not allowed to read it quote "because it would not look good for the camera". That's not what happens. The officer asked her, oh, you have – okay. Well, you can use your notes, right? Was it – was it you that wrote it, did you make any additions or – he's just trying verify the – that this note is something that she did, like, to verify its

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authenticity, and then he asks her to - to give it to him, never tells her not to read it, but she - that - that's a perception with a - with a totally neutral - actually, a person is trying to help her and she has that impression of him, of the officer. Well, how does that impact the reliability of how she's perceiving my client? It impacts it.

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And just before September the 25th, so just days before the interview with the police, third line down, [REDACTED] struggles with the feeling she is, "making this all up". This is almost two months later. She still has a reasonable doubt. She's still struggling with motive to fabricate. I'm not talking about a bad motive, just making it all up, literally a fabrication, Your Honour. She's still struggling with that.

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We talked about her reaction at the time, wanted to escape, feeling scared, sobbing after she left. I asked, what would account for this reaction? She was able to acknowledge, it could only be accounted for by her feeling she was being assaulted. [as read]

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No. She said that he told her to leave right after, that she felt like he treated her and disrespected her. Those are other possible reasons why she felt the way she felt.

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She said that while she initially not been sure she wanted to pursue charging him, she is now angry that he gets to go on with his life as if nothing happened while she has to deal with the impact on her. [as read]

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Motive to fabricate, animosity, she's now angry at him.

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The rest of it is all about the therapist trying to alleviate that, to fix what she's actually feeling and experiencing by saying no, no, no, you're this, you're that, don't minimize your experience. That means embellish it. That means expand it. That means make it bigger than it is. If minimizing her experience means that she's trying to minimize it because she knows that this was not a sex assault. I can't get that unless I have this, Your Honour. That's - that's what I'm using it for. It's all permissible. It's all - that's cross-examination.

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I want to go back one more. Sorry, just a brief [indiscernible].

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In this session, she's already practicing how she's going to talk to the detective on September the 11th. She's been having difficulty sleeping, talked her meds as a sleep medication, has her sleeping well into the day. [as read]

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The relevance of that, Your Honour, is with respect to the drugs that she was taking — taking on the day of the offence, that we have the tox. report showing that these drugs were in her system, which we're going to argue affect her reliability with respect to her perception of the events.

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Going back, this is August the 21st. She's writing a list. The therapist is normalizing her list. We don't know what that list is. But again, the therapist is influencing, helping along, and I think that has to do with the issues because it's frightening to take a shower, change her clothing, all that kind of stuff, can't trust herself for others. This is important because the last two are — are very important because this talks about the incident itself, what she was thinking at the time of the incident, and then how the therapist is trying to come in after the fact and saying, no, no, no, this is why, and this is why, and you were feeling this.

Like, the freeze option, sure, we know through therapy, there's the flight or fight response, right, and then there's the freeze option. It's — it's replete in therapy. I understand that. But again, that is not indicative of what actually happened. That's her offering her, the complainant, a way out to try to counter her own feelings of making it all up. But keep in mind, Your Honour that I'm going backwards. So, at the

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very last session, she's still struggling with this, making it all up. But I just want to get to the last sentence here, or the last one:

5 We talked about her feelings about men generally and then looked at whether all men fit that description. She couldn't name others who did not. We talked about how she might be able to detect this. She feels her —
10 her instincts are good, but she does not always attend to them. [as read]

15 So, maybe what's happened is that her instincts, she's describing her instincts, but not any in terms of how she thought, about this is not consensual, about — maybe that's her instinct.
20 There's a — a part in her — in her evidence, where she says well, I don't think the date was going the way that it was because we were supposed to go out for dinner, as she going up to his room, even though objectively, after what she's been describing, she's the one that is agreeing that, yeah, it's getting dark and it's — let's go back to — to your house, yeah, let's go upstairs, all 25 of that, right?

30 But the last part is the therapist telling her early on, August the 21st, "We also talked about the difficulty in using instincts when someone is a predator". It's not your fault. Even if you had good instincts, even if you didn't know how to respond to your own instincts, it's not your

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fault. He's a predator. He's above your instincts. "We agreed that her assailant appeared to be a predator". That means prior to this, she did not think he was a predator. And now the therapist is – on August the 21st, stamped him predator. Okay, he's a predator. That has – this is before she gives her statement to the police.

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I think we went into the August the 14th, and we did the August the 7th. So – and again, I'm more focused on the records of Dr. [REDACTED], mostly because I think they're crucial to the cross-examination. I think – and my – my friend is kind of saying, well, the emails, look, I can see his point with respect to probative value, I think we've outlined some of that as well. I'll wait to hear her response to that because I think she said, I want to hear kind of what I had to say about that, so fine.

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But the sessions, that's gold. That is gold, Your Honour. The way that she's influencing her, the way that she is pointing him out to be a – a predator, the way that she is normalizing her own doubts to bring it into an objective, yeah, no, he did do this. And keep in mind, even after she gives her statement to the police, she's still struggling with making it all up.

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I'll just say one thing about Exhibit A, the text messages, because I think my friend had mentioned that, oh well, you know, a lot of this stuff is

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timeline and filed my police report and all that stuff. Well, if that's the case, then the reasonable expectation of privacy goes down even further, and the – it shouldn't have even, for example, if I had – which I do actually, we have some messages from the Instagram, but because they were disclosed, I have, like, two or three pages of a couple of days before. I don't need to bring a 278.92 application. I'm going to introduce it because the Crown had already disclosed it. It's part of meeting up, there's nothing private about it, right. So, technically, I can do the same thing with whatever messages my friend is saying are innocuous. They're just timelines. They don't – they don't have any probative value. It doesn't matter.

That – then there's nowhere – then there's no reasonable expectation of privacy on that because they're so mundane, like J.J. says, you know, about things of scheduling and – and just, you know, day-to-day kind of matters or whatever, nothing that would attract a reasonable expectation of privacy, I can bring it in. I'm interested to hear which ones she thinks are – she wants to have you excise, but we don't need to do that. Whatever she – whatever my friend is saying are the messages about, like, oh, I filed my police report. Great, good. I have in my possession, there's no reasonable expectation of privacy for that, I can use it because it's innocuous. It's not bearing on anything that has

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to do with something that's of a - of a - of a private nature that attracts 278.1. But again, you know, my friend's position is that she doesn't really take a strong position with - with respect to that.

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Is there something that Your Honour wants me to just kind of touch upon and - okay. So, those are the submissions, subject to any questions and a reply, of course.

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THE COURT: Thank you. Yes.

SUBMISSIONS IN REPLY BY MS. VALERI

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Your Honour, I'm going to focus again on - on the therapeutic records. Specifically, I want to firstly take Your Honour to page 108 of the brief, but it's the note 18-27 from the session of Friday, August 14th, 2020.

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THE COURT: Let me get there. Eighteen-two-seven, yes.

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MS. VALERI: Your Honour, this, my friend pointed to the phrase, the validity of her evidence. If we read this whole sentence, it's the second sort of bullet point down:

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We looked at her evidence that she is a bad person and then discussed the validity of her evidence. We agreed that she has made mistakes. [as read]

But Your Honour, my friend is mischaracterizing,

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in my submission, some of what's actually being discussed in these therapeutic records. She's not discussing the validity of her evidence in court or the validity of her evidence about the assault. She's discussing the validity of her evidence that she's a bad person based on her feelings.

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And if Your Honour looks at a number of these – of these notes that Dr. [REDACTED] has taken, that's what they're discussing, [REDACTED]'s feelings, [REDACTED]'s emotions. They're not discussing evidence in court. They're not discussing the details of the assault and – and that she's doubting – they're going through and discussing the validity of her statement or what she told the police. They're discussing her evidence in her own mind of why she might be a bad person, so....

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THE COURT: So, your point on this one is, 18-27, holus-bolus has no relevance, and in fact it's more prejudicial because it talks about, like, her subjective feelings of herself being a bad person in the situation she's seeking assistance with.

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MS. VALERI: Exactly.

THE COURT: 18-27 as a whole.

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MS. VALERI: And I'm using 18-27 too, Your Honour to demonstrate that there are – that there are points, and I'll go through a few more of them in my friend's submissions where he's misunderstanding or misinterpreting what's being discussed between the complainant and her therapist, because that's the nature of therapeutic records, is they're discussing her

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reaction, her feelings. And, in fact, Your Honour may recall at the production stage, we - we cited case law that said therapeutic records are notoriously unreliable for this reason because they're more abstract, they're more feelings based, reactions based, they use psychiatric terms. They're not discussions like we would have in court where we rely on evidence.

THE COURT: I think that the point - to be fair to your - to your friend and maybe just to get to the nub of this, I think the big point that he's trying to make is - I'll paraphrase - was number one, the court had already gone through an exercise of redacting certain stuff for the production stage, so the argument goes, therefore admissibility should follow, and let's not spend too much time and effort sort of redoing what was done before. That's part one.

MS. VALERI: Right.

THE COURT: Part two is that the big points that I heard your friend trying to make is inside of these notes. I think he probably acknowledges what you're saying that, yes, they are therapeutic in nature, and you're talking about stuff. But where he deviates from your - your argument is to say, well, okay, there comes a point where these records or the way they've been written down may very well point to nudging somebody off a particular storyline, and I use that with all respect - I'm saying it's a made-up story - but with a - with a narrative, maybe is a better term, nudging them from that narrative on the basis of

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fairly vigorous suggestions by the deliverer of the therapeutic services.

That's, I think, where he's going with that to say, well, for instance - again, I'm going to paraphrase - I'm not sure of my story. I don't know what happened. Oh no, you do know. He is this and that and your feelings are justified because these things can happen to people in certain circumstances. Like, I think that that was kind of like the - the nub of what he was doing.

MS. VALERI: Right. And I understand that point, Your Honour, and I think again, the email exchange, that's something that he can use. Her initial response is that's an assault. But I think if Your Honour looks at those session notes, is that really what Dr. [REDACTED] is doing? And I think that it does bear scrutiny at this stage of admissibility, is what my friend is indicating, is that really what's happening here? If - certainly, if we rely on some mischaracterizations, like, oh, they're discussing the validity of her evidence, then it certainly seems that way. But I think if we actually look at these notes, is that really what's happening in these sessions?

THE COURT: Can I just stop you for another second? It's - because these - this can go in two directions, right? Like, I mean, one, the argument about - and - and from the pretrial application stage about, like, listen, when

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somebody's making notes about, you know, whether it's solicitor-client or - or you know, patient-doctor notes or the therapist notes, that's the notetaker's sort of...

5 MS. VALERI: Right.

THE COURT: ...subjective view of what's going on.

MS. VALERI: Right.

10 THE COURT: Okay. And that's fine. So, to pose to the complainant, well, a doctor here says this, I'm sure there could be an objection to say, well, listen, yeah, that's what the doctor wrote, that's not necessarily - either going to accept it or reject it. So, it may have very limited view, very limited focus.

15 What could be said is, the doctor said that we had - you had a discussion about, yeah, don't worry about this part because you're right. What you're saying to me, I've - I've synthesized that and I think what you're telling me is this and this is correct. And - and then to put that to the - to the complainant and say, well, is that how you perceive this, at which point they could say, like, no, that's not what I got at all. More so, I think it's more effective when you're talking to the notetaker to say, well, I suggest to you that you had a particular agenda. I think that's what he's - I don't think I'm telling tales out of school, I think that's what he's saying, that this therapist had a particular mindset and was trying to say, well, I - I think I'm helping you this way by telling you this, so I'm nudging you off.

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MS. VALERI: Right. And....

THE COURT: So, there's two purposes of that - of these notes, right, [REDACTED] and the complainant.

MS. VALERI: Right.

5 THE COURT: The complainant less so.

MS. VALERI: Right, and that was one of my concerns as well I was going to raise, so thank you, Your Honour, for bringing that up. But obviously, these are Dr. [REDACTED]'s notes, and they're notes of their conversation. They're not the entire conversation recorded, and they're her impressions of what she's writing down. So, I think that perhaps goes to the weight that would be afforded to this rather than admissibility, but that is certainly something that the court needs - needs to recall.

20 But I think in terms of using these session notes, certainly, my friend has the right to cross-examination, but this type of application, Your Honour, does limit how defence can cross-examine and what areas defence can cross-examine in. That was reaffirmed by the Supreme Court of Canada in *J.J.* that there can be limitations based on cross-examination. So, it's not just widespread cross-examination. One of those limitations is, as my friend pointed out, issues that are of trifling relevance, and that's what doesn't have significant probative value. And some of these - a lot of these points of these nights - of these notes, sorry, excuse me - the notes by Dr. Libertate are of trifling relevance. They're of

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them trying to work out feelings that – that the complainant is having in response to the assault.

5 My friend made a big point about the complainant having a reasonable doubt herself and saying, I'm not sure if I'm making all this up. But if you actually look at what's in those notes, Your Honour, she doesn't ever waiver on what actually happened. She waivers on her responses to it and how far she should take her response to it. And that is a key distinction, and she's not – the question is what happened on the day of the offence, you know, in that room between those two people, was their consent or was there not, did this incident happen. The issue is not, did she think twice about reporting it to police because that's actually very common for – and we're getting into then issues around delays and disclosure and the law that surrounds that is to...

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THE COURT: I think we touched on that.

MS. VALERI: ...whether that can be used.

25 THE COURT: Like, I mean that's not – the issue about, should I, shouldn't I, that's not the big point here...

MS. VALERI: Right.

THE COURT: ...that I think that your friend was addressing. He was talking...

MS. VALERI: Right.

30 THE COURT: ...about being – again, with the greatest of respect, counsel, because it was a counselling session, but sort of counselled to –

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to perceive or to accept a particular way of looking at something as part of this therapeutic effort.

MS. VALERI: Right.

5 THE COURT: I mean, the person's there to help, right, so, but did it - did it cross a line, is I think what Mr. Fahmy is saying is it crossed the line to sort of nudging you, sort of in a - in a different trajectory.

10 MS. VALERI: Yes. And I think Mr. Fahmy can pursue the theory, the - the therapists, Dr.

15 [REDACTED], again [indiscernible] view, there was some suggestion of - of tainting. I think he can pursue that. But where I think the concern is, is the admissibility of these specific notes that don't really forward that theory in the way that my friend is suggesting that it does, if you look specifically at these notes. These notes are not actually - except for maybe a specific point, you know, for instance, and that's why I know my friend says, we shouldn't go through and redact, but I do think that's an appropriate thing to do, in my submission, Your Honour, is to redact what might be appropriate versus what might not.

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25 So, if he wanted to ask, for instance, about viewing him as a predator, that may be something where the probative value is stronger as compared to some other points that I pointed out earlier, such as fears of taking a shower and - and removing clothes. There is some value in taking away and we did that in the production stage,

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taking away what's not appropriate to be admitted and – and only including things that could – that could provide some value. So, I mean for – even for instance, something that I would point out is that the – the complainant's contact information is unredacted on these session notes. That's something...

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THE COURT: Could we...

MS. VALERI: ...in my view....

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THE COURT: ...what would be very helpful for me, I mean, since we're going through this exercise, I have a highlighter, I'd just like to hear what your submissions are, and in fairness to your friend so he knows what you're talking about too, because it may end up not being an issue.

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MS. VALERI: Right.

THE COURT: So, those notes, the session notes, we had the updates and things like that, and I heard your submissions on that.

MS. VALERI: Yeah.

25

THE COURT: So, the session notes start really at numbered eight – 18-14.

MS. VALERI: Yes.

THE COURT: Is there something in particular – that one was not redacted by the court at all.

30

MS. VALERI: Right.

THE COURT: Specifically, in that one that I'm going to use my red highlighter or orange highlighter...

MS. VALERI: Right.

THE COURT: ...to highlight...

MS. VALERI: Right.

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THE COURT: ...if there's something in there, and then we'll just go through them because there's not a ton of them, but I think it will be very helpful.

5 MS. VALERI: Right. And so, Your Honour, the highlight would be what's not relevant or the highlight...

THE COURT: Yes, what...

MS. VALERI: ...would be what....

10 THE COURT: ...what to take - what you think should be taken out.

15 MS. VALERI: Okay. Well, I mean, this first one is a bit of a recap of sort of some of what we know from the - from the messages above. So, in terms of the first bullet point about mom's reaction and some of the - the messages up there. But I think - I think what would take - what I would take issue is that she felt that working through the stuck points had been helpful. My friend made a point about the stuck points. We don't know what those are. We only know that there's points where she blamed herself. The therapist writes:

25 In reviewing the evening, it is clear that [REDACTED] attempted to make good decisions and that he was clearly a predator, skilled and having her make small changes to their plans until she was in his apartment.

30 It's - it's difficult to even put that to the complainant, Your Honour because that could be the

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therapist's conclusion based on what she heard. I mean, I - that's where I think it's difficult.

THE COURT: Well, I mean, we're kind of stuck - we're kind of stuck with the fact that the - the therapist is making notes from a meeting...

5

MS. VALERI: Right.

THE COURT: ...right, and I think that - like those notes, the - the weight given to what a therapist...

10

MS. VALERI: Right.

THE COURT: ...writes down...

MS. VALERI: Right.

15

THE COURT: ...that could be measured, but you know, I think - isn't it fair to say, did you, you know, did you say something along the lines of something like this to your therapist, that she would have - if the answer is no, then okay, great.

MS. VALERI: Right.

20

THE COURT: So, what - what part - we're still at 18-14.

MS. VALERI: Right.

25

THE COURT: The first - the first bullet is, "████████ has been in touch with me over the week after being sexually assaulted when she went on a date". Do you find that to be a problem?

MS. VALERI: No.

THE COURT: No.

MS. VALERI: No, Your Honour. I mean, again....

30

THE COURT: "I've encouraged her to talk to her parents. Her mother was quite accusatory."

That's seen in the texts.

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MS. VALERI: Right.

THE COURT: And:

She should know better than to go to a guy's
5 house. She should press charges so it doesn't
happen to another girl. [REDACTED] was much more
directly helpful getting her to a sexual
assault program. She had a rape kit done and
10 [REDACTED] had arranged for her to see a sexual
assault counsellor.

Anything sort of wrong there? No.

MS. VALERI: No.

15 THE COURT: "We spent the session going over her
experiences and looking at potential stuck points
where she blamed herself". Are you saying that
that was an issue...

MS. VALERI: Well, I think that...

THE COURT: ...because it's...

20 MS. VALERI: getting....

THE COURT: ...kind of therapeutic in nature?

MS. VALERI: Yeah, I think that's getting into the
issue there...

THE COURT: Okay.

25 MS. VALERI: ...Your Honour.

THE COURT: So, okay, I'm - I'm just putting the
highlighting on that, "blamed herself".

In reviewing the evening, it is clear that
30 [REDACTED] attempted to make good decisions and that
he was clearly a predator, skilled in having
her make small changes to their plans until

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she was in his apartment.

5 Do you think - like, I mean, that's - that's not really therapeutic. This is now somebody is sort of laying out the foundation of sort of certain analyses, right, to say - because there's....

10 MS. VALERI: I - I think what's difficult, Your Honour, is that - that he was a predator, skilled in having her make small changes. Again, this is - seems to be language that the - Dr. [REDACTED] 15 herself is using. So, while I - I see what you're saying in terms of it might not be directly therapeutic, it could be a way for her to put what the complainant is describing sort of into words, and so, I mean, I think....

20 THE COURT: Well again, wouldn't - wouldn't the - like again, I'm just hypothesizing because nobody's here, but - so, I'm - I'm the therapist and I'm writing this. It - it would seem to me that wouldn't that be that, oh yeah, we did this, but then he said this, and then he did this and then this, and then I as the therapist go, oh, well, it sounds like there's some manipulation going on here and that's why I've come up with this conclusion, which is the subject matter of cross-examination on both parties, right? So, that - that to me doesn't seem to be therapeutic really in nature. That's kind of, like, 25 [indiscernible], I know you want to jump up, Mr. Fahmy. You'll have a chance. Just make a note, make a note for yourself. You'll get to it in your reply. Okay, so, let's move on to the next

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paragraph.

5

"She felt that working through the stuck points had been helpful." Okay, that's kind of therapeutic and I think that that was what you're saying is that is not helpful:

10

I encouraged her to write down things that have impacted her thinking and is very easy to have thoughts, go back to where they were at the beginning.

15

Okay. Well, I don't know whether that's necessarily a bad thing, is it?

20

MS. VALERI: I mean, I think - I think all of this is sort of action plans as part of their therapy, which I think is private and I - I fail to see the - the relevance of - of that. It just seems to be something that she suggests as a way to...

25

THE COURT: Okay.

MS. VALERI: ...to move through the session

THE COURT: So, "I encouraged her to write things down", so that's really therapeutic advice from a - from a - okay, you're up.

30

MR. FAHMY: So sorry, Your Honour. It's just, we're throwing around that word therapeutic as if that there's some kind of dichotomy where if something is therapeutic, that means it - it gets tossed out.

THE COURT: Well, no, I...

MR. FAHMY: Maybe she was....

THE COURT: ...I'm - I'm completely in tune with

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the concept of relevance. I am simply talking about the factors because it's not one overshadows the other, it's A through I.

MR. FAHMY: Yes.

5

THE COURT: So...

MR. FAHMY: Yes.

10

THE COURT: ...there's - there's a lot to consider and I think I touched upon that earlier. So, I'm trying to get a holistic view of what these objections are. And, again, I don't want to oversimplify, but you're saying like at this particular point, that's almost like an action plan, so there's - it's really - the - the relevance...

15

MS. VALERI: Right.

THE COURT: ...is *de minimis*.

MS. VALERI: Right. And....

MR. FAHMY: But she's not saying - okay.

MS. VALERI: Sorry, Your Honour, I think...

20

THE COURT: Okay.

25

MS. VALERI: ...what we're doing, we're referring to some things as more therapeutic, but what we're really saying is, what's actually relevant to the - my friend's theory that this - that - that the doctor may have influenced or there might be some sort of painting that's going on, and what's just completely irrelevant and just part of a therapy session that - that's going through.

30

THE COURT: Well, the last part though is, "I offered to meet with her family members". Again, this part of, like, Mr. Fahmy's narrative to say, like, this is sort of stepping beyond to, "I

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wanted to support her in helping them understand".
So, that means, I have an understanding and I'm
going to transfer that understanding to the
receiver of this information that you had not been
5 reckless. And again, the recklessness is really
sort of a - a loaded term, but it's like
essentially you are - you are a victim or because
- that sort of idea.

MS. VALERI: Right. I mean, I think - I think the
10 family is a little bit of troubled waters, Your
Honour, because they seem to engage in some
stereotyping that this court would obviously have
to be careful of. And so, in terms of the
therapist speaking to the family member, offering
15 to speak to the family members and - and help to
understand the situation, I mean, I - I don't see
how even in the text that we see with the family
members, how that's necessarily borne out.

THE COURT: So, you're saying this particular
20 statement really is more that the disclosure has
been made, I talked to my parents and they were
engaging in myths and stereotypes and essentially
saying you're to blame, you're reckless, you're a
bad girl, and I'm going to go and help - tell them
25 that that is not the case, so really there's
no....

MS. VALERI: Exactly, yeah.

THE COURT: Okay. I understand your point. Let's
- let's move on to the 18-27. Okay.

30 She's had a difficult week. She thought she
was handling what happened well, but her

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feelings caught up with her. She says she's in cycle of guilt, shame, anger at him.

Again, this is key to what Mr. Fahmy is saying,
5 you know, sort of motivation and so on, anger at
him and society, sadness, repeat.

MS. VALERI: Your Honour, looking at this whole –
not to jump ahead, but looking at this whole
thing, I – I think all of this should be redacted.
10 I don't see – I don't see any significant
probative value in this. The fact that she's in a
cycle of guilt and shame and anger at him and
society/sadness, repeat, again, I think the
question is that of more than trifling relevance
15 to the point, or is that her expressing her
feelings after an assault? I – I just don't see
how this evidence is assisting in providing
significant probative value.

THE COURT: Okay. So, you're saying the entirety
20 of that particular....

MS. VALERI: Right.

THE COURT: Okay. Just a second.

MS. VALERI: And – and a lot of this notation,
Your Honour, is also self-reflection, reflection
25 on her.

THE COURT: Okay. So, let's move on to the next
one, 18-40 wasn't redacted by the court at all, so
let's look at 18-40.

MR. FAHMY: Sorry, Your Honour, just a moment.

30 THE COURT: I'll leave this one for you.

MS. VALERI: Okay. The first line, Your Honour,
obviously is again, it seems to be more an update

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as to what's been happening at this time in terms of, "She put in a police report waiting to meet with the inspector. She has not been able to yet to meet with the sexual assault counsellor". It seems to be more information based. I don't necessarily take huge issue with it, but it doesn't seem to add anything to our information that we don't already have. And then...

THE COURT: Okay.

MS. VALERI: ...we went through the list together. I initially normalized her list. We don't know what that list is, so that piece of information is of - of real no assistance.

THE COURT: Well, other than what Mr. Fahmy said was, what does normalized...

MS. VALERI: Right.

THE COURT: ...mean? Is that, like, I was skeptical that I had doubt about what actually happened, but I'm - I'm going to go through that list and I - and I'm going to help you to feel better about, yeah, that's - that's, yeah, that's okay. So, I mean that was the point he was trying to make.

MS. VALERI: Right. And it says, "I initially normalized [indiscernible] saying that what she had written were really common experiences after experiencing trauma". So, what it sounds like is - is she's talking about experiences that she had again personally. So, she's saying, yes, these are common experiences after experiencing trauma. I don't know if it's a list of these are the things that I was doing to help my court case. It

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sounds more like a list of - of personal actions or personal things that she might have experienced in terms of feelings and - and things such as that. But again, we don't know what the list is, so the weight to be afforded to that is - is probably very minimal.

10

15

There's a little bit, I guess, a mention of it in the next bullet point, which might help us. It says, "Her first item related to finding it frightening to shower and change her clothing". So, it does seem like it's her reactions similar to those issues that I'm having section. So, in my view this is not relevant to the case, this is what we've been calling therapeutic, but what we really mean is not relevant, more relevant to the - to the therapeutic session that she's having and not about the actual facts or details of the case.

THE COURT: Okay.

20

25

30

MS. VALERI: So, I think the first three bullet points are not of - of assistance. And I think that's the same for the fourth bullet point as well as the fifth bullet point. Your Honour, I know my friend mentioned these bullet points specifically, but you know, it says, "She feels her instincts are good, but she does not always attend to them". I don't think that makes out what my friend was suggesting that it did, and - and certainly talking about the freeze option and reviewing her responses to what might have been happening in the situation. It sounds like they're looking at that from a - again, a

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psychological anger as to how she specifically reacted in the moment.

5

THE COURT: So, you're saying in your submission, the entirety of 18-40 is just not relevant and should be taken out.

10

MS. VALERI: In my view, Your Honour, yes.

15

THE COURT: Okay.

MS. VALERI: That's right.

20

THE COURT: We can move on to 18-64.

25

MS. VALERI: Okay. And then, so, 18-64, it looks like it starts at the second bullet point. Again, this seems to be a bit of a recap what's been happening. She has to provide a report to the detective at the end of September. She was grateful that she write down events and she plans to read it to the detective. And then, again, the - the therapist suggests at the next session that she can start writing this down so she can get used to talking about it. I mean, if that's - if that's a point that my friend wants to ask her about suggestions the therapist made, did your therapist make the suggestion, I think that could be something that - that's specifically related to his theory.

30

THE COURT: Yeah.

MS. VALERI: And so....

35

THE COURT: So again, this one here is, like, all right, I - we're going to - I'm suggesting here you make a list, next time you come we're going to go over it so you can habituate yourself to this list.

MS. VALERI: Right.

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THE COURT: So, that's fair.

MS. VALERI: Right.

THE COURT: But I think in your — when you made your introductory remarks, you said that other unredacted part was completely irrelevant...

5

MS. VALERI: Right.

THE COURT: ...about, like, sleep, hygiene, and everything.

10

MS. VALERI: Exactly, Your Honour.

THE COURT: Okay, got it.

15

MR. FAHMY: So, that's still being — so, Your Honour, so, the — the — I got that the — the first part is okay, but then the second part is, my friend is still having an issue with, even — yeah?

20

THE COURT: As — as far as relevance, because...

MR. FAHMY: Okay.

THE COURT: ...she's saying, look, this — this has to do with, you know what, if you want a good night's sleep, don't look at your screen, wear some earplugs, get some — like — like again, relevance *de minimis*. That's what she's saying.

25

MR. FAHMY: I — okay.

THE COURT: Okay? So, we're going to move on then to 18-95.

30

MS. VALERI: If I can just have a brief moment to review this one, Your Honour. Again, the first bullet point seems to just be recaps of sort of what they generally discuss. In terms of the — the second bullet point, I mean, that doesn't seem harmful either way. It sounds like she's giving her information about what aid she might be able to have when she — or they're talking through what

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aid she might be able to have when she goes in to speak to police. The third bullet point, I think my friend had pointed this one out as there's feelings that she's making this all up, which when questioned, she clarified that it wasn't a big deal, that she's making something out of nothing, and we talked about her reaction at the time, and I asked what would account for this reaction.

10

15

20

25

So, it sounds like, again, in my view, this is the therapist trying to respond not to — not to encourage her to go to police, but to respond to the feelings that she has that — that what she went — that you know, her making this report is not valid. I think that this is something that, again, perhaps my friend might be able to explore what the suggestions were, and specifically that comment, making this all up. I think that does — well, I'm not saying I agree with my friend's theory. I can see how that is more connected to my friend's theory than some of the other points here.

THE COURT: And then there's also the last bit. I think the two points he made on that one was that about making up and the acknowledgement it could only be account, like there's — there's only one answer...

MS. VALERI: Right.

30

THE COURT: ...to this question, right? So, I think that — okay, fair enough. Anything else in there that....

MS. VALERI: I think — again, Your Honour, some of

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the bottom stuff about fears about being perceived as a victim is more personal, more getting into their therapeutic information and of less just generally relevance.

5 THE COURT: Okay, thank you. Anything else on 18-95?

10 MR. FAHMY: Sorry, Your Honour, I didn't understand, is it the entirety of that bullet point that - that we're discussing or is it just a specific part of it?

15 MS. VALERI: I think the point my friend had mentioned that [indiscernible] mentioned, is she's now angry that he gets to go on with his life. I think Mr. Fahmy could ask her about feelings of anger, but I think she said she is reluctant to tell anyone about her experience. I think everything from below that sentence should be excised.

20 THE COURT: Okay. Disclosing, but then you have that last paragraph where again, now you're having sort of like a positive influence:

25 I discouraged her however from trying to minimize her experience to make it seem like it was nothing, which she says she feels compelled to do to make guys...

MS. VALERI: Right.

30 THE COURT: Maybe that part of the compelled, but again, this is like, I - were you encouraged by Dr. [REDACTED] to, you know....

MS. VALERI: Respectfully, Your Honour, I think

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this should be excluded. Dr. [REDACTED] is clearly saying to try and minimize her experience. Again, she's not talking about this in terms of a court of law factually what happened. She's saying don't minimize your experience of what might have happened.

10

THE COURT: I see, okay. I get what you're saying there.

15

MS. VALERI: And I think that's why we do have to read these carefully, is it's easy for us to think of them as, she's talking to her in the sense of a — a criminal court, what evidence is, but I think a lot of the focus in these sessions is her experience of what happened. And then the next one is 19-09, and that's the last one.

20

THE COURT: Yes.

MS. VALERI: Again, there seems to be sort of a factual recap. I know my friend had pointed out that some of these things seem to be not accurate when you look at the police statement. However, she never says it's the police who said that she's not allowed to read her statement because it would not look good for the camera, and she never even says it's the police who ask, "Were you in a relationship with this guy or was it what was called now a one-time hookup?" She doesn't specifically say who says those things.

25

30

I think even if my friend were to want to cross-examine on her it's sort of a collateral fact that doesn't really go to her credibility or not. She just talks about how she was interviewed by the police, that the experience was validating because

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the detective said there's enough to press charges, but there were a number of insensitive remarks. She doesn't say when they are, if they're on camera or when she was going or when she was there in the waiting room or when that might have happened. So, I mean, the fact that some of that's not on the video is not necessarily surprising or in my view of much - much relevance.

10

15

And then she just talked - seems they talk about what might happen as a result of her laying the charges, so what some of her feelings might be if - if he was not found guilty, she [indiscernible], how would she feel, so they talk through - talk through some of that. Doesn't seem the therapist makes any suggestions on that point at all here. So, in my view, Your Honour, this - this is another one where the bulk of it can be - can be redacted.

20

THE COURT: Okay.

25

30

MS. VALERI: And, Your Honour, I know we went - we went through that specifically, so I think that's pretty much my views on - my views on those specific notes. But what I do encourage Your Honour to do is - is to look at what actually is disclosed in those messages and whether the complainant is actually doing what my friend is saying that she's doing. Now, obviously, that's going to be a question for the trial proper and this is just a question of admissibility, but it - it is relevant as to whether these particular messages are - are actually - should be admissible

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and actually relevant to the issues that my friend is raising.

For instance, some of the comments she made, like,
5 "Well, I didn't say no", or "I guess I could have tried to push him harder", the legal definition of consent, as Your Honour knows, is affirmative, it's ongoing, it's not – it's a mistake in the defence is a mistaken belief in communicated consent. So, consent has to be communicated. So, 10 the fact that she's saying, well, I didn't say no, if anything shows that she doesn't understand the legal definition of consent because we know, you don't have to have said no for there to not be 15 consent in the legal forum.

So, those comments, are they actually her doubting herself and the therapist telling her that what she's saying is right, or is this just her trying 20 to work through what happened to her in the context of a – of conversations with – with her therapist? And when we actually apply the – the – the legal definition of consent, those arguments are – are not as relevant as I think my friend may 25 be submitting they are because whether she said no or not is not the final answer on whether she gave consent, and the fact that she didn't say no might be – is not – does not go into the fact of honest but mistaken belief and communicated consent, because even for that defence to work, there has 30 to be some communication of consent. It's not just, well, she didn't say no or she didn't not do

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– she didn't fight me off, so I thought she was consenting. There has to still be communicated consent.

THE COURT: Through words or actions.

5 MS. VALERI: Right, through words or actions. It doesn't have to be words...

THE COURT: Yeah.

10 MS. VALERI: ...explicitly, but through words or action. And so, we have to keep in mind the actual definition of consent in determining whether some of these things are actually assisting that theory or not, and the reason why I'm saying that is because if these points don't actually assist defence's theory or aren't evidence a defence can actually point to, then they don't become relevant. They become of trifling relevance and – and shouldn't be admitted.

15 THE COURT: But I think the point that your friend was trying to make was, and he said he – that she's questioning her own reliability...

20 MS. VALERI: Right.

25 THE COURT: ...and – and veracity in the events, and it's – this is – this is not a simple sort of binary yes or no...

MS. VALERI: Right.

THE COURT: ...there's a lot of stuff going on.

30 MS. VALERI: Right. And I think this is ultimately – probably a submission to go to the weight of that at the end of the day, but what we have to recall is too, is this is all in the context of a potential therapeutic or trusting

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5

relationship with someone she knows where she may be saying, you know, I'm questioning what happened and so – and not in the – in the context of being in court or the actual specific facts of it. So, some of those questioning and things that she's working through, are things that you would work through in a psychiatric session that you may not talk about in the same sense in a court of law.

10

15

So, that I think goes more to the weight of some of those suggestions, but it is relevant in terms of determining what pieces of this evidence from therapy can we use, what evidence is relevant? It has to be evidence that's directly related to defence's theory that the therapist influenced, and there may be some tainting by the therapist. Whether Your Honour ultimately accepts that theory is a different question entirely, I appreciate that, but the – the pieces he uses have to be pieces that support that theory, not just the therapy sessions at large, in my submission.

20

THE COURT: Thank you. I'll let the Crown do their supplemental.

25

30

MR. SOSA: Thank you. I think there's very little that I'll need to provide the court. There's been wholesome submissions. I think Your Honour raised one concern or one question that was not answered by Ms. Valeri with respect to Mr. Fahmy's position about admissibility, or sorry, whether admissibility is still required considering it was already produced by the court. Was that addressed?

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MS. VALERI: No, I did not address that.

MR. SOSA: So, just - I can deal with it quite quickly, Your Honour.

THE COURT: This was the "My Notes" bit?

5 MR. SOSA: No, I think Mr. Fahmy made the submission that the court has already produced them and already redacted the records and therefore that should in some way support his position.

10 THE COURT: I don't need to hear submissions on that.

MR. SOSA: Okay.

15 THE COURT: I - I got what he was - I got what he was saying was, listen, I mean, we had argued that at the - a the first go around where I said, no, it's going to be a two-step process, where we're going to now talk about, one was the disclosure component and now it was the admissibility...

MR. SOSA: Right.

20 THE COURT: ...following the rubric set out here. And I - I understood what he said to be, well, listen, that - the heavy lifting was already done, you've already redacted for purposes of disclosure that really your thought process then should really transfer now to the admissibility component and it should just stay the way it is.

25 MR. SOSA: Right.

30 THE COURT: So, I don't - I don't really need to hear submissions about that because I think I've already made the distinction that they're - they're two different exercises, so one is disclosure...

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MR. SOSA: Right.

THE COURT: ...and one is going to be admissibility.

MR. SOSA: Right.

5

SUBMISSIONS BY MR. SOSA:

10

So, then I guess, Your Honour, the only point I wish to emphasize is what was discussed at the very outset, which is when Your Honour, in my view, correctly stated the law that in order for Your Honour to rule on admissibility it has to go to a specific issue at trial, and that's identified in the *Code* where if some or all or whatever is identified, Your Honour is to explain why, what makes it relevant. So, that is just in support of our position, which Your Honour is required to go through each piece of evidence and identify if it's admissible and why.

20

25

30

And then just to close, Your Honour, the only other concern is that the – some of the submissions by Mr. Fahmy, such as animus are towing on the line of myth-based reasoning, Your Honour, that a woman scorned is therefore going to be vindictive. There's nothing to support animus. She's describing what happened to her. It's very – it's a very appropriate response to be angry at someone who would have committed something like this. So, I just want to ask the court to please also not inject itself with any myth-based or stereotypical reasoning because it's – even though

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276 is not alive here, the same considerations apply for the - the record screening regime. So, those are my only comments, Your Honour.

THE COURT: All right. Brief reply.

5 MR. FAHMY: Okay.

SUBMISSIONS IN REPLY BY MR. FAHMY

10 I'm just going to firstly respond to the Crown and - and I - well, absolutely, you can look at animus. That has nothing to do with the twin - twin myths at all. The idea that I am suggesting that, you know, a woman scorned or anything, those words never came out of my mouth. Animus is a 15 legitimate motive to fabricate. It's replete in the case law. There is nothing to suggest that that somehow does not apply to cases where there is a sexual assault complainant.

20 Just responding generally to complainant's counsel. Every time she says the word "weight", Your Honour, that means it's admissible. You can't have weight without admissibility. You have to admit the evidence first before you can weigh 25 it. And my friend did a remarkable job about saying, well, you know, we should interpret it this way and not the way that my - the fact that we're even having a debate about how something can be interpreted means that it's going to weight, which means that it's relevant, which means that 30 it's admissible. All of it.

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The last thing that she touched upon was, oh, you know, she's questioning what happened and she's trying to work that out in a — in a therapeutic session. There is *Mills, Mills*. There is no bright line rule that a therapeutic relationship is out of bounds for evidence to be used in cross-examination. That's a Supreme Court Canada decision. That's untouched. There — there's nothing to say that just because she said it in a therapeutic session that that means it automatically can't be used. That's not what the law is.

And when she says that, oh, she's just working it out in — in questioning what happened because it's in a therapeutic setting, respectfully, Your Honour, she says that in her texts to other people, she says it in the emails that my friend didn't object, right? So, this whole like working it out, it — and again, I — I caution the court, Your Honour, it does not matter that some — this — all of these are done for the purposes of therapeutic sessions. All of it. They are notes from the therapeutic sessions themselves. I'm not — this isn't, hey, we met for a coffee and we talked about things and we said, hey, let's hook up for a therapy session in like a week and — we know that it's in a therapy session. That's — that's not disputed here, but that also shouldn't make it untouchable.

And again, my friend is going into the — the legal Publication Ban

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test for consent, communicated consent, all of that kind of stuff. I'm not going to get too much into it, but she says he didn't force me. She says that the therapist says to her, he needed to ask you. He doesn't need to do that.

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I just want to get into the October, the second session. I believe that's number - so, that's 18, sorry, 19-09, Your Honour.

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THE COURT: Yes.

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MR. FAHMY: Again, that - everything that my friend said about this has everything to do with weight. We don't know what her answer is going to be, right, in terms of when I've been able - but if I put this to her. And I just - I really need to make this very clear at the very outset. What to do with these actual records is going to be an issue at this trial because, one, do they go in as - as ordinary business records, which means that the *Canada Evidence Act* applies, Section 31 that they just go in, so that's an issue for this trial.

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And just in case, we've already subpoenaed Dr.

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[REDACTED] anticipating whatever ruling that Your Honour gives on this application, anticipating what the witness herself says, right, because if she's denying all of this stuff, then we call the - the doctor, get her to clarify what her actual notes meant and said and what she - what the complainant told her. She's a compellable witness because of these records.

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Now – but again, that always will depend on what you allow and what she says on the box. If she's agreeing with all of this stuff, we don't need to call the doctor, right? But so that – and in fairness, we didn't need to disclose that, but I just want that out there because there was some talk about when Your Honour was talking about, like, you know, when – when we're going through cross-examination, she denies it or whatever, like, we would have to do that, right? But that's why when I saw that Your Honour was live to that issue I wanted to – to bring that up. Specifically, with that – the quotes, because it would not look good for the camera, my friend is saying, I don't know who said that. Exactly. We need to ask her, right? Again, more to the weight.

September the 25th, my friend wants to redact this entirety of this, or at least from the part where she says, "I discouraged her from trying to minimize her experience to make it seem like it was nothing". Again, Your Honour, that's weight. That's – what is – what does she actually mean by that? I could certainly make that suggestion to her because it's relevant, but my friend is again going past that and saying, well, it could be interpreted this way as well. The fact that she's saying that means that it's relevant because it can go either way, that's what you do, Your Honour, that's – I don't mean to be so colloquial,

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but that's - that's your job, Your Honour, to - you're there to decide, well, does it go this way or does it go that way? But the fact that there's even a contest means that it's irrelevant.

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Again, the sleep hygiene, I think the only thing I want to mention about that second bullet is that she will speak to her psychiatrist about her meds and sleep medication has her sleeping well into the day. I'm not going to say too much about that except for one thing, which is that we do know that she got her psychiatrist records, which have been already conceded. We don't actually have a prescription for the - the sleep meds, but we do know from the tox. report, from the sample that was taken from her on August 6th that that was present in her urine on the day in question, which means, again, that if there's any issues with her sleep cycle, with her ability to recall events, with her ability to - to, you know, that whole out of body experience, the interaction of all of these drugs, I know my friend has already indicated that they're going to call the toxicologist with respect to the interaction of those drugs. So that's how that could be relevant or is relevant, but I mean could have some weight at the trial.

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When she says that she's - sorry, I - I missed a point here on the 18-95 when she says she's reluctant to tell anyone, she does tell people, making it all up. My friend is saying - actually,

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I think she conceded that one. But with respect to the – the disclosure and all of that stuff, that's all there. As Your Honour heard her evidence that she didn't tell anybody else, but we know that she in fact did talk to her therapist and even messaged A [REDACTED] about it. With respect to the August the 21st, my friend is saying, 18-40, I believe, my friend is saying the whole thing gets tossed out. Again, I'm not going to repeat what I – what I said about the normalize, but my friend did again, keep mentioning the word "weight", which again, means that it needs to be ad – admit – admitted first.

And then my friend made a submission that I haven't made out that the instincts that she's talking about have anything to do with the – the night in question. Your Honour, I don't have to. I don't have to make out anything. It's not – first, it's not my case to prove, number one. Number two is that that's not the issue. The issue is, is there a chance, is there a reasonable chance that the – the relevancy that I'm speaking about with respect to her instincts, with respect to the way that she couldn't trust herself and all those submissions that I made before, that has it – I don't have to – I don't – my burden on this application isn't, do I make it out? My burden is, is it relevance beyond trifling, beyond trifling.

August the 14th, my friend had mentioned something

Publication Ban

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about, you know, oh, you know, again, anger, shame, and anger at him. That's animosity. The evidence that she is a bad person and discussed the validity of her evidence, again, that can go both ways. If my friend is saying, well, that only applies to the – to the bad person part and not the validity of her evidence of – of what she says happened, that's an issue for Your Honour to decide in terms of weight, in terms of who to believe, credibility.

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But again, what we have here is we [indiscernible]:

We had discussed about how going to the guy's place was bad judgment on her part, which means that this isn't about her being a bad person, but there's a bad person versus bad judgment, and going to his house was bad judgment.

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That is something that the therapist is telling her was bad from the very beginning, from even going, before anything happened.

And then, finally, with respect to something that my friend said about the – again, the stuck points where she blamed herself, that can go either way with respect to how she was trying to make something more than what it was. With respect to the family members, the only note that I have is that number one, they're witnesses, and number

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two, like Your Honour said, is that the therapist is trying to go beyond and try to help out in terms of what these other people are saying with respect to her.

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But then – and the – the last thing I want to say about this, Your Honour, is that *Mills* and the case law says that these records go in if there can be shown that the records precipitated going to the police or somehow influenced her to go to the police. Throughout these sessions, from the very beginning to the very end, even at the very end, we're – we're even at trial stage with respect to the – what they're talking about. So, that's why it's relevant and that's why it needs to go in.

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Those are my submissions, subject to any questions, Your Honour.

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THE COURT: All right. We're now at ten after two, so just have a seat. Let's talk about some planning.

MR. FAHMY: Yeah.

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THE COURT: Okay, so I now have to produce – to go through now because we've – we've gone through sort of a – a informal suggested redaction, non-redaction process. I have to take a look at that. I have the documents here. And I'll probably take the balance of the afternoon to come up with the decision. I think we'll just come back tomorrow. I – I – I at one point thought, well, maybe I'll have you guys hang around, but I don't know

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whether that's really an efficient use of time because even if I did do it or was able to get - get it written for you, we're not going to start cross-examination with like half-an-hour left of the day. I don't think that that's really a very good idea. So, I'm thinking maybe we reconvene tomorrow at quarter to 10, 9:45 for me to deliver the decision.

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Again, just thinking it through, we know - this - it's like a finite set of information. We know what we're talking about. It's either going to be admitted or not, and if it's not, the methodology would be by way of redaction. So, if I was to simply reproduce the materials to correspond to whatever decision I ultimately make then I would make them available to you all, and then you just work from that. So, let's say I agreed that a line should be taken out, the document you get would have that line taken out. If there was nothing taken out, then you'd get the document with nothing taken out, and then you'd have my decision to correspond. Is that - would that be all right as far as like throwing you off your game because you're not going to see it until you start your cross-examination or....

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MR. FAHMY: Yes, that's what I wanted to - to address, Your Honour. So, I think my friend and I had anticipated that, you know, we probably wouldn't start cross-examination until tomorrow in any event, and - and that's fine. I don't think that it'll impact our trial schedule in terms of

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trying to complete at the end of this week. My only issue is, as you've - well, there's two things. I think Your Honour mentioned - when you said you're going to release the decision to us all, I'm assuming you just meant to just my - Mr. Sosa and myself.

10

THE COURT: Yes.

MR. FAHMY: Okay.

THE COURT: Yes.

MR. FAHMY: And then with respect to the coming in at 9:45....

THE COURT: Well, I think, doesn't - doesn't she get to hear what the decision is ultimately...

MR. FAHMY: No, Your Honour.

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THE COURT: ...or not? I forgot.

MR. FAHMY: No, no.

MR. SOSA: I've never....

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MR. FAHMY: That's not how it - that's not how it's been. They're only entitled to make submissions.

MR. SOSA: I - I've had to litigate it, but it's never been an issue....

THE COURT: Right.

MR. SOSA: ...Your Honour, so....

25

THE COURT: I don't - again, I - I have to take a look at these because it's a very complicated sort of process. So, I - I'll take a look at it. I was just asking whether or not she had to be present to - to hear the decision.

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MS. VALERI: Your Honour, I don't - I don't see in my experience of doing these, and again I haven't - I'm in the same boat, I've never had to litigate

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it, so I may be wrong, but I have usually been here when there's been a decision given. What – whether I can go and share that decision with my client is – is another question, right, which we can – we can address given that she's mid-evidence.

10

THE COURT: Mm-hmm.

MS. VALERI: But I mean....

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THE COURT: It would seem to me to be odd that...

MS. VALERI: Yes.

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THE COURT: ...you can make a submission but not hear the result. What you do with it is a different story. It just seems odd. It's, you know, again, we'll – we can cross that, you can tell me because I don't know the answer to that.

You'll tell me tomorrow.

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MR. FAHMY: Sure.

THE COURT: Okay.

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MR. FAHMY: So, assuming that – I guess we'll cross that bridge when we get there. Coming at 9:45 is not an issue. Again, it just kind of – the issue is in terms of reviewing that decision, going over my extensive prep and trying to make sure that I'm not running afoul of anything that you've...

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THE COURT: How long would you need?

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MR. FAHMY: ...that the court has decided.

THE COURT: How long would you need after that?

So, I do it at 9:45. We wrap that up at 10 o'clock. Like, if we then started at 11, is an hour sufficient time to sort of review that?

MR. FAHMY: I don't think that's – that's not

unreasonable, Your Honour. I'm going to just put a little asterisk, just kind of depending on what Your Honour eventually decides. I mean, if it's just like a couple of lines that I think were maybe a little bit less contentious or whatever, I don't think that'll be an issue, but if it's something more substantive than, you know, I may have to request a little bit more time. I just - I'd hate to box myself into...

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THE COURT: We won't box.

10

MR. FAHMY: ...a particular....

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THE COURT: I'm just...

MR. FAHMY: But that's....

THE COURT: This is generally speaking, we're going to 9:45 to 10 so that it's done. I will allow you an hour. Again, flexibility will prevail if more time is needed, and conversely less time if you said, look, I've looked - I'm ready to go.

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MR. FAHMY: Yes.

25

THE COURT: So, I think what we should do is make sure that all witnesses are ready to go for the start of court because it may be 11, it may be 10, it may be 10:15, so we at least have them, as opposed to saying, oh, don't show until 11, they're late, they come at 11:30, he was ready at 10:30 and we've lost an hour. How does that sound?

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MR. FAHMY: Perfect, Your Honour.

THE COURT: So....

MS. VALERI: And - oh, sorry, Your Honour. And would that include - I imagine Mr. Sosa might come

with me, but for today, if we were to let the complainant know that she can head home, is it okay if we share that we finished our submissions and we're awaiting a decision?

5 MR. FAHMY: Yes, of course.

THE COURT: I think that that's fine.

MS. VALERI: I just wanted to make sure because I know she's in that weird realm of halfway through evidence.

10 THE COURT: Yes. No, I think that it is absolutely appropriate to tell somebody that you can go home and that this procedural thing is concluded and we're getting a decision tomorrow, so please be here at 10 o'clock. That's completely okay. All right?

15 MR. SOSA: Thank you, Your Honour.

MS. VALERI: Thank you, Your Honour.

THE COURT: All right. Just let me gather up my things and then I'll see you all tomorrow morning.

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... WHEREUPON THE MATTER IS ADJOURNED.

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94.
Certificate

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

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10

I, Janet Smith, certify that this document is a true and accurate transcript to the best of my skill and ability (and the quality of the copy of the recording and annotations therein) of the recording of Rex v. Jack Densmore in the Superior Court of Justice at HAMILTON, ON, taken from Recording No: 4799 608 20240415 095256 10 KRAWCHJ.dcr, which has been certified in Form 1.

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20

September 3, 2024

Date



Signature of Authorized Person
Janet Smith
ACT # 2474492821
Signed in Ontario, Canada

25

A certificate in Form 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate.

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Court File No. CR-22-00000484

SUPERIOR COURT OF JUSTICE

5

HIS MAJESTY THE KING

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v.

JACK DENSMORE

15

P R O C E E D I N G S A T T R I A L
I N C A M E R A

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BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on April 16, 2024 at HAMILTON, Ontario

25

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PUBLISHED, BROADCAST OR TRANSMITTED, PURSUANT TO
SECTION 486.4 OF THE CRIMINAL CODE OF CANADA, BY
ORDER MADE IN THE SUPERIOR COURT OF JUSTICE**

30

APPEARANCES:

B. Sosa

Counsel for the Crown

M. Fahmy

Counsel for Jack Densmore

(i)
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30 Transcript Ordered April 7, 2024
Transcript Completed September 10, 2024
Ordering Party Notified September 16, 2024

1.
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TUESDAY, APRIL 16, 2024

R U L I N G

5 KRAWCHENKO J. (Orally):

This is a Stage Two ruling being delivered orally. Today's date is the 16th of April 2024. A Stage Two hearing was held in camera on 15 April 2024.

10 In addition to Crown and defence counsel, the complainant was represented by her counsel, Ms. Valeri. The records in issue do not reference the complainant's other sexual activity. Accordingly, they are inadmissible unless the content of said records are relevant to an issue at trial and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This is determined by taking into account the factors set out in 278.92(3).

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As was stated in *R. v. R.M.R.*, 2019 BCSC 1093 CanLII, the requirement of significant probative value serves to exclude evidence of trifling relevance. Subsection 278.92(3) sets out a series of factors that a judge must consider in determining whether a record, falling within the ambit of 278.92(1), but that does not concern evidence of the complainant's other sexual activity is admissible.

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In determining whether evidence is admissible

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under subsection (2), the judge shall take
into account:

(a) the interests of justice, including
the right of the accused to make a full
answer and defence;

(b) society's interest in encouraging the
reporting of sexual assault offences;

(c) society's interest in encouraging the
obtaining of treatment by complainants of
sexual offences;

(d) whether there is a reasonable prospect
that the evidence will assist in arriving
at a just determination in the case;

(e) the need to remove from the fact-
finding process any discriminatory belief
or bias;

(f) the risk that the evidence may unduly
arouse sentiments of prejudice, sympathy
or hostility in the jury;

(g) the potential prejudice to the
complainant's personal dignity and right
of privacy;

(h) the right of the complainant and of
every individual to personal security and

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to the full protection and benefit of the law; and

(i) any other factor that the judge considers relevant.

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Section 278.94(4) of the *Criminal Code* further provides that:

10 At the conclusion of the hearing, the judge, shall determine whether the evidence, or any part of it, is admissible and shall provide reasons for that determination, and

15 (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

20 (b) the reasons must state the factors referred to that affected the determination; and

25 (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

There were three groupings of records referenced in this application, those being:

30 (1) portions of the complainant's cell phone extraction records, cell phone records.

- (2) Dr. [REDACTED]'s records; and
(3) prescription records.

I will deal with each grouping in turn. Before starting with my analysis, I would like to address the argument raised by defence, which in summary was, that given the fact that this court had previously ruled on the production of the subject records of the defence pursuant to Section 278.7, and further that in ordering production, the subject records had already been vetted and in certain cases redacted, that this previous exercise would have been sufficient and need not be repeated on this admissibility application.

That argument is very attractive on its face. The factors in both production and admissibility regimes warrant closer scrutiny. I have divided it up. It is not really clear in oral reasons, but I have a bit of a chart for myself. So I have production requirements, admissibility requirements.

Production requirements, produced if likely relevance to issue a trial. Admissibility requirements, inadmissible unless relevant to an issue at trial as per procedure. Under production requirements, production necessary in interest of justice and complainant witness right to privacy and personal security and equality are referenced. On the admissibility requirements section, significant probative value, not substantially

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outweighed by the danger of prejudice to the proper administration of justice.

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Now we get into the factors in each one of those sections. Under production factors, necessity of record for full answer and defence. On the admissibility factors, interest of justice, including right to make full answer and defence.

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Under the production factors, probative value. Under the admissibility factors, not necessarily stated, but it is found in the admissibility requirements above.

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Under production factors, the nature, extent of reasonable expectation of privacy, potential prejudice to personal dignity and rights to privacy. On the admissibility factors, potential prejudice to complainant's personal dignity and rights of privacy.

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Going back to production factors, discriminatory belief or bias based. Same on the other side on admissibility factors.

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Societal interest in reporting sex assault under production factors, same under admissibility factors. Societal interest in encouraging seeking treatment, same in both production factors and admissibility factors.

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Effect on integrity to trial process on the

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production factors. Under admissibility factors, reasonable prospect that the evidence will assist in the just determination of a case.

5 Under admissibility factors, I am going to switch to that side right now, the right of complainants, et cetera, to personal security and full protection of benefit of the law, that is in the factors. Under production factors, it is not 10 found there, it is found in the requirements.

15 In summary, as can be seen in this comparison, the factors to be considered are very similar. The distinction is that in the admissibility regime, likely relevance is not enough. Here the evidence must be relevant to an issue. It must be significantly probative and not outweighed by danger, prejudice to proper administration of justice.

20 On the basis of this analysis, I do not agree with the proposition that the determination made at the production stage, that is the extent of the information provided in redacted or non-redacted 25 form, necessarily dictates the outcome at the admissibility stage.

Moving on, I now turn to the groupings of records. First, cell phone records. The cell phone records 30 as produced, with the exception of the personal notes found at 1110 as item 1, are all relevant. The messages that are admissible all relate to the

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accused, the alleged sexual assault, details of the events leading up to and after the alleged offence and provide potential insight into the feelings and opinions the complainant had with regard to the accused in certain circumstances where same arose.

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With regards to the personal note mentioned, here the court finds there is minimal probative value to these personal notes and the admission of them into evidence would cause prejudice to the complainant's personal dignity and right to privacy, and that would be outweighed. The factors engaged under the grouping are the interest of justice, including the right of the accused to make full answer and defence, there being a real prospect that the evidence will assist in arriving at a just determination of this case. The relevance of the evidence to be admitted is that it touches directly upon the events that are subject matter of this trial and has limited impact on the complainant's personal dignity and right of privacy or personal security.

Turning now to the records of Dr. [REDACTED]. With regard to these records, neither the complainant nor Crown take real issue with the admissibility of the email exchanges between the complainant and Dr. [REDACTED]. The email messages are admissible. They all relate to the accused, the alleged sexual assault, details of the events leading up to and after the alleged offence and provide potential

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insight into the feelings and opinions that the complainant had with regard to the accused in certain circumstances where same arose.

5 Additionally, the email responses relate to advice and opinions given by Dr. [REDACTED] to the complainant with regards to the events as described. The evidence contained therein does have the potential of assisting the court in arriving at a just determination in this case, 10 allowing the accused to make full answer and defence with its probative value outweighing any prejudicial effects.

15 In addition to the aforesaid email exchange, there are six notes created by Dr. [REDACTED] I'll reference them by the numbers assigned to them in disclosure:

20 Note 1814 - 7 August 2020:

25 With the exception of the complainant's address, I do not agree with the submission made by complainant's counsel in support of a full or partial redactions of point 3, 4, and 5. I find the entire note, other than her address, is admissible in the interest of justice, including the right of the accused to make full answer and defence.

30 Note 1827 - 14 August 2020:

I agree with the submissions made by complainant's counsel in support of the full redaction of this note, other than the date of the appointment.

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Here, the notes do not assist in arriving at a just determination of the case, but rather simply affect the personal dignity and privacy of the complainant.

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Note 1840 - 21 August 2020. With the exception of the complainant's address, the entire note is admissible in the interest of justice, including the right of the accused to make full answer and defence. The note addresses issues raised by defence of motivation to fabricate the conscious or unconscious collaboration between the complainant and her therapist in the early days after the alleged occurrence that may have coloured or tailored the ultimate description of the impugned events.

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Note 1864 - 11 September 2020:

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The second paragraph of the note, commencing with, and I quote, "█████ feels that she is doing...", shall be admitted with the fifth bullet, as previously disclosed, redacted, along with the complainant's address. The applicant's argument regarding the reference to sleep medication and psychiatrists in the redacted text are not probative of anything in the context of this note and impact on the personal dignity and privacy of the complainant. Issues relating to medication,

10.
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drugs, will be addressed in other toxicological evidence.

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Note 1895 - 25 September 2020 and note 1909 - 02 October 2020:

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With the exception of the complainant's address on both notes, the balance in the disclosed redacted form shall be admissible in evidence. The information found therein is probative as it touches upon the central elements of this offence.

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Prescription records:

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Neither complainant nor Crown raised any issues with regard to the post prescription record information. The evidence found therein is probative and does not prejudice the complainant's personal dignity or rights of privacy to such a degree that would suggest that it not be admitted into evidence if needed.

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In conclusion, for reasons noted earlier pursuant to Section 278.94(4) of the *Criminal Code*, I have now determined whether the evidence in issue in this application or any part of it is admissible. I have provided reasons for that determination and in cases of redaction have advised what part of the evidence is to be admitted. I have referenced the factors that affected the determination made and have indicated which way the evidence is expected to be relevant to an issue at trial.

THE COURT: I am going to provide Crown and defence with the reference material, the redactions that I made. It'll make sense once you have it in your hands...

5 MR. SOSA: Thank you.

10 THE COURT: ...it'll just - I took the liberty of redacting the things that I said I was going to redact. And with this ruling we will then take a brief adjournment and return to continue with cross examinations of the complainant. Again, as we've discussed yesterday, I'll leave it in your hands Mr. Fahmy to let everybody know. I think you said you needed about an hour but if it's going to be shorter, that's fine, okay? So you 15 will let the court know through the CSO and then I will be summoned and come back in to continue the trial.

MR. SOSA: Your Honour.

20 THE COURT: Yes?

25 MR. SOSA: ...just to be entirely clear because the issue was kind of left untouched this morning with respect to the complainant counsel and what, if anything, can be shared as a result of your ruling. Since that's not been addressed, counsel and I both agreed, based on Mr. Fahmy's comments that she would share the results of the ruling with the complainant. So do we just leave it at that then or is there any further comments that Mr. Fahmy would like to make? I just want to ensure that there's no allegations of any 30 impropriety once [REDACTED] takes a stand.

MR. FAHMY: Yes, that was my understanding, Your

Honour, is that complainant's counsel would be here to hear the decision but ultimately, it's the Crown who's got to make sure that defence abides by that decision in any event so there's no purpose in kind of disposing the records or what's been redacted or not. That was kind of Ms. Valeri's position and we all kind of had an agreement about that before we all left the building yesterday. So my friend has quite accurately portrayed that.

MS. VALERI: Yes.

THE COURT: So just so I understand, what is the plan?

MS. VALERI: Your Honour, because of the situation that Ms. [REDACTED] has given her direct evidence and given her cross, I think if she weren't in that position, I think I would be able to share with her Your Honour's decision, but given the situation that she's in, I don't want to just to avoid any suggestion that she may be prepared or anything of that nature. What I would like to be able to do, so she knows that I was here is go back with Mr. Sosa, tell her we received Your Honour's decision, that we are not sharing with her what that decision was but that she can expect that later today she'll be cross-examined and just leave it at that, that we received the decision. And, you know, after she gives her evidence, if she wants to talk about why that ruling was made, I can help explain that but while she's giving evidence we don't, we can't discuss that.

THE COURT: Fair?

MR. FAHMY: Yes.

THE COURT: Fair enough. That's the plan.

MS. VALERI: Thank you.

MR. SOSA: Great, thank you, Your Honour.

5 THE COURT: I'll see you when you let me know you need to.

MR. FAHMY: I think 11 will be sufficient, Your Honour.

THE COURT: Okay, 11 o'clock.

10 MR. FAHMY: Yes.

THE COURT: So we'll plan on 11.

MR. FAHMY: Thank you.

THE COURT: If earlier, that's fine.

15 MR. FAHMY: Actually, just, if I may, Your Honour, I've like already produced a very voluminous exhibits document for the court to use. I'm certainly going to put it on the screen to the witness. It would take some, it would take a long time to try to like get redactions and either reprint it or even do it on the page itself perhaps, I don't know, but I'm, you know, obviously I'm mindful of what is been redacted. I'm not going to rely on it or use it but if I could still use that. It's not going to be entered as an exhibit obviously, it's just, first, because I wanted to make sure that you had a judge's copy to kind of make your own notes as we kind of went along through the testing of her evidence and so on for my friend as well. So, but that will not have the redactions. Is that - is that - it's not meant for an exhibit or anything like that.

20
25
30

THE COURT: If it's not an exhibit and everybody has the corresponding ruled upon redactions.

MR. FAHMY: So....

5 MR. SOSA: If I understand correctly, it's essentially just as an aid for our own purposes to follow along.

THE COURT: Right.

10 MR. SOSA: It's not going to be part of the record. I don't see an issue.

THE COURT: Nor do I.

MR. SOSA: Right, okay.

MR. FAHMY: Thank you.

R E C E S S

15 U P O N R E S U M I N G:

THE COURT: I'm not going to need my computer for any of this, we'll be able to use the screens, yes?

20 MR. FAHMY: Yes.

THE COURT: Thank you.

MR. FAHMY: And so, Your Honour, I also provided a paper copy of that exhibits, just that so, it's a judge's work copy basically.

25 MR. SOSA: Your Honour, I just rise just because I'm not sure if Mr. Fahmy will address this; I might as well raise it. He had mentioned, Your Honour, that there may be some observers on Zoom. That's fine. My submission to the court on that, Your Honour, would be that before we call in Ms.

30 [REDACTED], that anyone who is joining us by Zoom be advised of the publication ban and I'd ask

that the court disable any ability for the observers to turn on your video or access the microphone to ensure there are no interruptions.

THE COURT: The standard warning as well.

5 MR. FAHMY: Yes, no issues with that, Your Honour.

THE COURT: All right.

MR. SOSA: Thank you.

10 CLERK REGISTRAR: You're not permitted to make any recording of the proceedings or take photos or screen captures of the proceedings. It is an offence under Section 136 of the *Courts of Justice Act* that may constitute contempt of court for anyone who copy, record, screenshot, photograph, publish or broadcast court hearing or any portion of it or otherwise disseminate such a record including on social media and or other internet sites without express permission of the court.

15 THE COURT: Could you repeat also the publication?

20 CLERK REGISTRAR: Yes, I'm just getting it right now. Pursuant to Section 486.4 of the *Criminal Code*, an order that no information that could identify the complainant or witness shall be published in any document or broadcast or transmitted in any way.

25 THE COURT: Thank you.

CLERK REGISTRAR: You're welcome.

30 MR. SOSA: And Your Honour, whenever Mr. Fahmy is prepared to proceed, Ms. [REDACTED] will be paged.

THE COURT: Ready to proceed?

MR. FAHMY: Yes, Your Honour.

THE COURT: I think the - oh, I thought the

complainant was being paged already.

MR. FAHMY: I apologize, Your Honour, I had no idea - I was ready.

5

[REDACTED] REMINDED OF AFFIRMATION

CROSS-EXAMINATION BY MR. FAHMY:

Q. Good morning.

A. Morning.

10 Q. So, my name is Mark. I'm Jack's lawyer. We're just going to go over some of your evidence and, you know, just generally about the things that happened on the day in question, August the 5th, 2020, all right. And, you know, well, first of all, my friend had asked you and you said that you'd moved universities, you're at Waterloo now, correct?

15 A. Laurier.

Q. Laurier, sorry. And what it is- what is it that you're doing there?

20 A. I'm doing a Bachelor of Science in Psychology with a minor in Biology and Criminology.

Q. Okay. Wow. Interesting. All right. And this is your last year, you were saying?

A. It is, yeah.

25 Q. Okay. Any interest in going to law school later?

A. No.

Q. Okay. All right. So and I just wanted to kind of go over- I just want to get to one thing. That moment when you came back from the bathroom and you're back in his room 30 and he tells you that he's got an early morning. And while you say he said that, you know, he has an early morning and that you should go. Do you remember saying that?

A. Yeah.

Q. Okay. And you remember how it felt?

A. Yes.

Q. Didn't feel good?

5 A. No.

Q. Okay. And there's a lot of reasons in your own mind, right, that you had gone through, even at that moment or immediately about why he would do or say something like that after you just had sex, right?

10 A. Umm, yes.

Q. Okay. And you'd agree with me that, you know, some of those reasons are because he's an asshole, right?

A. No.

15 Q. No? Okay, any- you kind of hesitated there, is there a reason why?

A. I wouldn't say those few - I wouldn't say I had those thoughts in my head.

Q. Not during?

A. At that time, no.

20 Q. And not immediately after or a few days after?

A. Maybe a few days after.

Q. Yeah.

A. But in that moment, I wasn't thinking....

25 Q. Okay. I want to talk about that moment and all your kind of reactions to that because I'm assuming, something like this you've thought about several times, right? You've thought about it for, maybe till now, I don't know, right? You got to- sorry. I understand what you're saying when you're nodding your head, yes, and madam reporter is saying thank you to me because what's happening is that she can't record you nodding your head.

30 A. Oh, my apologies. I didn't know if that was a

direct question or not.

Q. No need to apologize to me. Madam reporter is all good with that now.

A. Okay.

5 Q. All right. So you've definitely had occasion to think about that moment and all the reasons why he would do something like that, right?

A. Yes.

10 Q. And eventually, you came up to the fact or one of the things is that he was an asshole, right?

A. Yes.

Q. And that he had used and abused you basically, right?

A. In your words, yes.

15 Q. Well, what about in your words?

A. I wouldn't say he used and abused me but, yes.

Q. What would you say?

A. I guess, yeah, he- well, yes, he did it. He did assault me in my words, yeah.

20 Q. Okay. But before using that word "assault", I believe that your evidence at trial was that you had felt that he had made you feel that you were worthless?

A. Yes.

25 Q. Right? That - and - and I think you'd agree with me that, at some point, when you had an opportunity to write down your thoughts and feelings, you've mentioned that he had basically just used you for his own pleasure and entertainment?

A. Yes.

30 Q. Right? Okay. Anything else that I'm missing?

A. I don't think so.

Q. Okay. Now, can you think of and those are all

like- you'd agree that all of the reasons that I just stated to you, those are all reasons, bad reasons why he would do something like that?

A. Yes.

5 Q. Okay. Do you have, in your mind, any other reason why he would do something like that?

A. No.

Q. Not at all?

A. No.

10 Q. Okay. You- I'm going to suggest the reason.

I've spoken to my client, I have his side of the story. I'm sure he's going to sit where you are and tell the court. So I'm going to - I'm going to suggest something to you, okay?

A. Okay.

15 Q. You agree that throughout the time you were together that day, you'd mentioned he was a bit shy?

A. Yes.

Q. You'd mentioned, I believe you told your friends, hey, things are a little awkward between us?

20 A. Yes.

Q. Even told your friends he was shy?

A. Yeah.

Q. Like not like after, like, while you're at his house...

25 A. Mm-hmm.

Q. ...right? You've got to say "yes".

A. I don't recall.

Q. You don't recall?

A. Yeah.

30 Q. Okay. All right. I'll bring you back to that, all right? But is it possible that that's what you did that you....

A. Possible.

Q. Yeah. Okay. Now, back to the reason I'm going to suggest to you, ma'am,- don't worry about her, just focus with me. Don't worry about the reporter. This is 5 important. My client's life is on the line here, okay?

A. I'm focused.

Q. All right. I'm going to suggest to you that when you guys were having sex, he came a little quicker than you thought he would, then he thought he would, and that when you 10 kind of turned around, you gave him that look like, is that it? And that he- would you agree that you gave him that look first of all?

A. No.

Q. You don't agree with that? You don't think 15 that that's possible that that's what happened here, that he got embarrassed that the sex didn't last as long as you'd hoped for, you gave him a look like that's it?

A. No.

Q. Not at all?

20 A. No.

Q. Okay. And when you came back to the room, you didn't give him that look at all?

A. Could I please get clarification what you mean by a look, like a look...

25 Q. Like...

A. by conveying - conveying what, sorry?

Q. Conveying that that's it?

A. Then, no.

Q. Okay. All right. Okay. And even without 30 that look, even without you acknowledging it on your part, do you think that it's possible that that's what was going on for him at that moment?

A. It's possible that could have been going on for him.

Q. And you'd agree that, you know, he's kind of - actually, he's- after he comes, he's the one that takes the 5 paper towel and wipes your back first and then gives you some more paper towel, in case you needed it?

A. No.

Q. He didn't wipe your back?

A. No.

10 Q. Okay. All right. I'm going to ask you now about what it is that you were wearing...

A. Okay.

Q. ...that day, okay? And I mean, start off with something easy. Obviously, were - you were wearing shoes?

15 A. Yes.

Q. All right. And what kind of shoes were you wearing? Do you remember?

A. I believe there were sneakers.

20 Q. Sneakers, okay. And you'd mentioned that - and when you get to his house the first time, he gives you a tour of the house and I'm going to suggest you take your shoes off?

A. I believe so, yes.

25 Q. Yeah. He doesn't want you to- it's a clean house, as much as you can recall, right?

A. Yeah.

Q. Okay. And - and then when you leave to go to attempt to go for that hike, you put your shoes back on?

A. Yes.

30 Q. Okay. Hike doesn't work out. You go back to the house. You take your shoes off again?

A. Yes.

Q. Okay. And then when you leave, you put your shoes back on?

A. Yes.

Q. Okay. And is it those sneakers where you just kind of like kick them off or you got to like untie them, take them off. Do you remember?

A. I don't remember.

Q. Okay. And what about, if you recall, whether you had to like, sit down, take them off, when you were going in and out of the house?

A. No, I didn't have to sit down.

Q. Okay. Did you maybe bend down to like, unlace the tie in the knot, I guess. I'm assuming that, sorry, they're not Velcro?

A. Yeah, yeah.

Q. Okay.

A. They had — they had laces.

Q. All right, they got laces. But it's going to take you a second or two or whatever to, you know, take them off, put them back on, right?

A. Yes.

Q. Okay. And I believe you also mentioned that you were wearing- oh, sorry- and the shoes, I'm assuming, you would agree, actually, that you left them by the front door?

A. Yes.

Q. Okay. Jean jacket. You first come in, right, and it's August, so it's already, it's kind of hot, right?

A. Mm-hmm.

Q. Okay. But jean jacket, you said you were wearing?

A. Yes.

Q. Okay. When you first get to the house, I'm

going to suggest you, you take off your jacket and you hang it up, because there's like a little coat rack thing right by the door, right?

A. I don't believe I hung it up. I think I kept
5 it on me.

Q. You believe you kept it on?

A. Yes.

Q. Okay. All right. And then the- when you get back to the house, after not being able to go for a hike, at
10 that point, you put the jacket on the coat rack on the front entrance, right?

A. No, I believe I kept it with me the whole time.

Q. The whole time you were in his house?

15 A. Yes.

Q. Okay, like that means even going up to his room.

A. I don't believe I was wearing it, but I was carrying it.

20 Q. You were carrying it. Okay, so you took it off at some point...

A. Yes.

Q. ...the second time to come to his house?

A. At some point I took it off, yes.

25 Q. Okay. Well, where were you when you took it off?

A. I'm assuming at the house or in the car during the hike, or when we attempted to go on the hike.

30 Q. Okay. So you may have left your jacket in his car after, that's your evidence, and you may have left it somewhere in the house, right? So if it's in the house where do you recall perhaps you may have left it?

A. I would have taken it to the bedroom.

Q. You've taken it- so you could have taken it to the bedroom, or you could have left it in his car?

A. I didn't leave it in the car.

5 Q. But you just said that you might have left it in his car.

A. I might have taken it off in the car but I would have kept holding on to it.

10 Q. Oh, okay. So you might have taken it off in the car and then you were holding it, brought it into the house and then kept continuing to hold it all the way up to his bedroom?

A. Yes.

15 Q. When you're in his bedroom, what do you do with the jacket?

A. I put it on, I believe it was the chair with my purse.

Q. Okay. With your purse?

A. Mm-hmm.

20 Q. Okay. About your purse, what kind of a purse was it?

A. It was just a small like over the shoulder purse.

25 Q. Okay. Over the shoulder means that it had like a little strap, thin strap, I guess?

A. Yes.

Q. Okay. Small being like - like just bigger than a wallet, maybe. Something like that?

A. Yes.

30 Q. Okay. All right. And then you were wearing a t-shirt you'd said, right?

A. Yes.

Q. Okay. Do you remember- sorry, the - the- what kind of a t-shirt was it?

A. It was grey, a grey t-shirt...

Q. Okay.

5 A. ...and it had a wave on it?

Q. A wave?

A. Yes.

Q. Like a surf wave? Like what kind of a wave?

A. It was like a famous painting. I....

10 Q. By?

A. I can't remember the name.

Q. Okay. All right.

A. Cool waves.

15 Q. Okay. And is this a woman's t-shirt or men's t-shirt or....

A. A woman's t-shirt?

Q. Okay. All right. And like what size was that t-shirt?

A. Probably a smaller medium.

20 Q. Okay. And in terms of like, was it like a baggy t-shirt, or was it like a tight fitting t-shirt?

A. It wasn't form fitting.

Q. Okay.

A. It was a bit looser.

25 Q. A bit loose, okay. So it, you kind of had room, when you lifted up your arm, there'd be room underneath where the sleeve is?

A. Yes.

30 Q. Okay. And did it come all the way to your elbow, that t-shirt?

A. Yes, a little just over my shoulder.

Q. A little over....

A. Yeah.

Q. So it's like a little oversized...

A. Yes.

Q. ...t-shirt.

5 A. Yeah.

Q. Like it goes over your elbow- sorry. It goes over your elbow, right, a little bit?

A. I don't know that when all the way to my elbow, probably like mid....

10 Q. All right. I'm sorry, there's a screen in front of you.

A. Yeah. Mid-bicep.

Q. Do you mind standing - sorry?

A. Mid-bicep

15 Q. Oh, okay.

A. Yeah.

Q. So now it's up here?

A. Yeah.

Q. Okay. All right.

20 MR. FAHMY: So, just for the purposes of the record, the witness is motioning to half her- between her arm, or her shoulder and her elbow. Okay?

A. Yes.

25 Q. Fair enough? All right. And in terms of its length, I'm going to suggest to you that- and I guess you said you're also wearing a skirt underneath?

A. A dress, yeah.

30 Q. Or a dress underneath - sorry. And you would agree that the t-shirt and the dress were kind of at the same level or just a little bit, one was a little bit shorter than the other?

A. The shirt fell to probably my belly button

area....

Q. Oh.

A. ...and the dress went to about my knees.

Q. Okay. So the dress- I mean, the t-shirt is
5 only going to your belly button?

A. Yes.

Q. Okay. And then you're wearing a dress that
goes past that?

A. Yes.

10 Q. Okay, like the length of that dress goes past
that?

A. Yes.

15 Q. Okay. And – and, in terms of that dress, in
terms of its- you would agree that it was, you know, a tight
fitting, form-fitting dress, correct?

A. Yes.

20 Q. Okay, and it's a, like a tube dress, and
forgive me, I'm like, I'm such a guy/guy, like, I don't know how
to, like, so like, I'm not trying to like, you know, say
something or trying to trick you, I just don't know. But it's
like a tube dress. Am I saying that right?

A. It had thin straps around the shoulders
and....

Q. Yeah, and....

25 A. It was made out of like cotton.

Q. Okay.

A. Yeah.

30 Q. So it's made out of cotton, it's black, I
believe you said, right, and it had the straps on, you're
pointing, I guess, to your shoulder?

A. My shoulders, yes.

Q. So, it goes over your shoulder, connected to

the back?

A. Yes.

Q. Okay. And it's tight fitting, you said, or form-fitting, right?

5 A. Yes.

Q. Okay, and how do, like, you'd agree that in order to put that dress on, you'd put the whole dress kind of down on the floor, and you'd put your legs through and pull it up and put the straps over in order to put it on, right?

10 A. Yes, yeah, or over my head.

Q. Or over your head?

A. Yes.

Q. Okay, all right. And you agree that there wasn't like a zipper or anything at the back, right?

15 A. No.

Q. Okay, all right. And in terms of the length of that dress, you would agree with me that it was above the knee?

A. Yes.

20 Q. And I'm just suggesting to you that it was about like midway between like your hip and knee, like it was like kind of on your thigh area, right?

A. Yes.

25 Q. Okay, all right. And you would agree with me that you also were not wearing a bra that day?

A. Yes.

Q. Okay. Now, so just like I kind of took you to the after, let's take you back to the kind of before, okay? And, you know, there is generally some, I guess, excitement on 30 your part, you know, meeting up with Jack. Would you agree with that?

A. Yes.

Q. All right. And, I guess you'd also mentioned that you had both matched on Tinder?

A. Yes.

Q. Yeah. And, you know, in order to match on 5 Tinder, he would have to see your profile and swipe right. You got to say, "yes".

A. Yes.

Q. Okay.

A. Sorry. I didn't know if you were done with 10 the question.

Q. And then you'd have to see his profile and swipe right?

A. Yes.

Q. And then Tinder says, hey, match, and sends 15 you a notification, right?

A. Yes.

Q. And sends him a notification?

A. Yeah.

Q. All right. So, your evidence was that a 20 couple of days after that or a day after or something like that, he messages you on Instagram?

A. Yeah.

Q. All right. And, I'm going to suggest to you that the first message is- so I have some messages. I'll show 25 them to you. I'm not trying to, like, you know, hide anything from you. But before I do, like, just so, I mean, I don't really, I don't have Instagram, I don't really know how it like works exactly, but there is like you follow people on Instagram, right?

A. Yes.

Q. And then people can follow you back?

A. Yes.

Q. And by following somebody or them following you, they get access to certain content that you've uploaded yourself?

A. Yes.

5 Q. All right. And I mean, obviously, before you had met up, in August the 5th of 2020, you had followed him on Instagram?

A. No.

10 Q. He had - no?

A. Oh, sorry, before we met up, yes, yes. Sorry.

15 Q. Yeah. Okay. No, no, no worries. Did he follow you back?

A. Yes.

15 Q. Okay. And I guess when you're following somebody or they're following you, you can kind of like comment or "like" their kind of posts, correct?

A. Yes.

20 Q. All right. And you would agree with me that you had done that?

A. Liked and commented on his posts?

25 Q. Yeah?

A. I don't remember if I liked or commented on anything.

Q. No?

25 A. No.

Q. Okay. What about him? Do you remember if he liked or commented on anything?

A. No.

30 Q. He didn't, right?

A. I don't remember.

Q. Oh, okay. I mean, it was four years ago, so that's understandable. But again, you don't remember, but it

[REDACTED] could have happened, right, like....

A. It could have.

Q. Like usually when you add somebody on Instagram or you follow somebody, you kind of want to look at [REDACTED] their profile, look at stuff that they're doing and saying, right?

A. Yes.

Q. Okay. And- but earlier, when you were giving your evidence at trial, you said that Jack didn't share his age, [REDACTED] right?

A. Yes, he did.

Q. Okay. But you would agree with me, right, that on Tinder, your age is kind of a prominent feature on the profile, right?

A. Yes.

Q. Yeah. So I guess when you say he didn't share his age, you would agree with me that he actually did on Tinder, right?

A. Yes. He didn't explicitly tell me.

Q. Yeah.

A. Yeah.

Q. But the Instagram messages follow the fact that you both matched on Tinder?

A. Yes.

Q. So he knew how old you were and you knew how old he was?

A. Yes.

Q. And on Tinder, you can kind of set parameters like, you know, only show me people of a certain age, for [REDACTED] example, right?

A. Yes.

Q. Okay. And because the app matched you to

Jack, that means that that was an age range where you were kind of interested...

A. Yes.

Q. ...in meeting people, right?

5 A. Yes.

Q. Okay. And in terms of the messages, right, I mean, I think it starts off really funny. I'll post it up for you here, see if you can kind of recognize it.

10 MR. FAHMY: So this is going to be page two, Your Honour, of that exhibit book. All right, all right, so no, no just go back up there, okay.

MR. FAHMY: Q. So you see here that, it says at the top, you don't follow each other on Instagram, right?

A. Yes.

15 Q. But that's because you no longer follow each other on Instagram, right?

A. Yes.

20 Q. Okay. And actually, if we can just kind of scroll down a little bit, you recognize kind of the – the way that these messages kind of work?

A. Yes.

Q. All right. So on July the 24th, it says you replied to their story, right?

A. Yes.

25 Q. So you would now agree with me that you actually did reply to his story or something about him on that day?

A. I believe that's actually him messaging me.

30 Q. Oh, okay. All right. And then the – the blue is his messages, right, the ones on the right?

A. Yes.

Q. And the ones on the left are yours, obviously,

right?

A. Yeah.

Q. Okay, and he starts off by saying, "Totally just saw your cute mug on Tinder".

5 A. Yes.

Q. And then you respond, "Did you swipe right though is the real question", right? I mean you already knew but because he's, his response is "Allegedly", right?

A. Yes.

10 Q. And you're kind of being lighthearted, like you mentioned in your evidence about the back and forth between you on Instagram, right?

A. Yes.

15 Q. Okay. But then he says, "I'm making my slide on here though", right?

A. Yes.

Q. And then, you kind of laugh, "Hahaha, is that so?" What's it and then he says, "What's it look like", right, laughing, right? Okay. Now, moving on, he's kind of saying, what's it look like, and you're saying laugh out loud, right, "lol". "Okay, okay, I see you", right?

A. Yes.

20 Q. Now, I mean, at this point, what's going on through your mind?

25 A. I was just excited to talk to someone new.

Q. Right. Well, he's not just new. You mean, you kind of knew about him, right?

A. Yes.

30 Q. And you knew about him at least a year before this?

A. Yes.

Q. And I think elsewhere you mentioned somewhere

when you wrote it down that you know, he's a- he might take a little offence to this, that he's a semi-famous Youtuber guy, right?

A. Yes.

Q. And he has like hundreds of thousands of followers or whatever, right?

A. Yes.

Q. And just, in and around that time, I believe you told your friends, in a text message, O [REDACTED] and N [REDACTED], 10 that it was your dream to be on SNL, which is Saturday Night Live, right?

A. I don't recall.

Q. Okay. All right. But if I showed you that message, you would agree that that's something that you'd said, 15 right? Here, why don't I show you that? The computer's froze, sorry that.

MR. FAHMY: Page 47.

CLERK REGISTRAR: Forty-seven?

MR. FAHMY: Yeah, just zoom in maybe so she 20 can....

MR. FAHMY: Q. You can see that on your screen too, right?

A. I can, yes.

Q. All right. So, what I'm showing you are some 25 group messages between you, O [REDACTED] and N [REDACTED]. And this is actually sent by you on August the 5th of 2020...

A. Yes.

Q. ...which is the day of the date?

A. Yes.

Q. 30 And it says, "1905 UTC". But that, for your purposes, and there's not going to be any issues with this is that, it's really four hours behind in order to get Toronto time

or sorry, Eastern time.

A. Okay.

Q. So it's about 14:05, which would make it 2:05 p.m. in the afternoon.

5 A. Okay.

Q. Just so that you're not confused about how these times work. It's because these were extracted from your phone. I think you recall doing that with the police and whatever, right?

10 A. Yes.

Q. All right. And that's the - the UTC means universal time code or whatever, it's like....

A. Okay.

Q. Okay. So, just so that you understand that. 15 All right, and there it is, "I just realized my biggest dream in life is to intern at SNL, even though that will never happen because I don't have the skills or connections", right?

A. Yes.

Q. All right. So you're telling your friends 20 that this is like your biggest dream is to, you know, be on Saturday Night Live?

A. At the time, yes.

Q. At that time, of course, yes. I'm just saying 25 at that time, yeah, right? Okay. And we'll get back to that, but I want to go back now to the Instagram messages. We were on page three. Okay. Where am I here? Mm-hmm. And he says, you know, "It's been a minute. How you been?" Now, I mean, obviously it hasn't been a minute, but that's- you'd agree, that that's kind of like slang for like, hey, it's been a while?

30 A. Yes.

Q. All right. And you would agree with me that you took that to understand that he remembered you from that

encounter almost a year ago at that homecoming, right?

A. Okay.

Q. And actually, when you mentioned that you had, I mean, he didn't interview you himself, right?

5 A. No.

Q. But you had mentioned that a friend had told you, hey, you made it into his cut, like one of his YouTube videos that were like professionally edited, right?

A. Yes.

10 Q. Okay. And in fact, that homecoming, like the entire video is, whatever it is, an hour, hour and a half, whatever, however, whatever length it is. But when you go on YouTube there's like a cover screen for that video, right, and you're on the cover screen?

15 A. Yes.

Q. So anybody that wants to look at that video, the first thing they're going to- I mean it's not just you, right?

A. Yeah.

20 Q. It's like a whole bunch of people, Jack is kind of in the middle. It's like a bit of a cut and paste job, right?

A. Yeah.

25 Q. But you're there and you're prominent, you're kind of on the left side of him, right?

A. Yes.

Q. Okay. And he remembered you?

A. Yes.

30 Q. Okay. And you'd agree that that kind of made you feel special?

A. I don't know if "special" is the word I'd use, but it made me feel good.

Q. Okay. I'm going to insist on special and I'll tell you why. This guy meets thousands of people, right?

A. Yes.

Q. He- before this, he didn't know your name,
5 right?

A. Yes.

Q. Before this, he had- didn't have your number, didn't know anything about where you work or hadn't seen you anywhere for almost a year, right?

10 A. Yes.

Q. And it's not like he stopped making videos,
right?

A. Yes.

Q. He met probably thousands of people after
15 that, right?

A. Yes.

Q. Okay. But even after all that, and you knew that, obviously, because you knew who he was, right?

A. Yes.

20 Q. But even after all of that, he still remembered who you were?

A. Yes.

Q. I know you're impressive. I think you're impressive. I think he thought you were impressive. And I'm 25 going to suggest to you that you thought the same, that you kind of made a mark on him, right?

A. Yes.

Q. Okay. And that's what made you special.
That's what made you feel special, right?

30 A. That he remembered me, made me feel good, yes.

Q. Okay. But not just that he remembered you,
but because of all those other reasons, right? Like, for

example, and I know you hesitated and I apologize. If you want to say something, you can. Can - or....

A. Please continue.

Q. Okay. It's not like you went to the gas station, you met this- the cashier, then you go back, you know, 5 a week later and the guy's like, oh, hey, I remembered you from last week or from whatever. And that would make you feel good, right?

A. Yeah.

Q. Okay. But you would agree with me that that's 10 not the same feeling that you'd have in that hypothetical scenario that you'd had with Jack, right?

A. I disagree. I wouldn't say it made me feel any more special.

Q. Even though you knew all those things that- 15 about him and how he came to know you, you still don't think that it made you feel just a little bit better than good?

A. No.

Q. Okay. Even though your biggest dream at that 20 time was to go on SNL, not even to be on, just to intern, right? That's what you said in your message?

A. Yes.

Q. That's your biggest dream, right?

A. Yeah.

Q. And here's Jack, who you're now saying- has 25 hundreds of thousands of followers, he's famous, and out of all the people that he'd met before and after, had no way of knowing how to get a hold of you, but he found you, right?

A. Yes.

Q. Okay. And he even showed you, you said, when 30 he gave you the tour of the house, he gave you a tour of the house, right?

A. Yes.

Q. He gave you a tour of the basement where he makes all his YouTube videos, you said, right?

A. Yes.

5 Q. Okay. And you talked about it with him, right?

A. The YouTube videos?

Q. Yes.

A. Yes.

10 Q. And you talked about like the process, editing, right?

A. I don't recall what the specifics were of what we talked about.

15 Q. I'm not saying specifics though, but you'd agree that you talked to him about some of the process of how to make these videos?

A. I believe so.

20 Q. Yeah. That's fine. It's- this isn't, you know, you talked about the process, like, you know, oh, you were - you were interested in him doing that, right, as a profession?

A. Yes.

Q. Right? And the reason is because, at that time, you kind of wanted to get in the biz or whatever?

A. No.

25 Q. But you just said that your biggest dream was to be an intern at SNL.

A. I think I was being hyperbolic when I said that was my biggest dream.

30 Q. But you just told us that at that time it was your biggest dream. Now you're saying something else. Now you're saying it's just hyperbole?

A. It was a big dream of mine, yes. Would it be

my biggest dream? No.

Q. Okay. So then it's fair to say that you just kind of say things you don't mean or text things you don't mean, right?

5 A. No.

Q. Okay. Well, was it your biggest dream or was it not your biggest dream?

A. It was a dream, yes.

Q. But it wasn't the biggest dream anymore?

10 A. When I sent that message, it was something I wanted to do.

Q. On August the 5th?

A. Yes.

Q. 2020?

15 A. Yes.

Q. Okay. How about we just stick to that day, right?

A. Okay.

Q. That was your biggest dream that day?

20 A. Sure, yeah.

Q. Okay. And then you go to the basement, right?

A. Yes.

25 Q. And you're genuinely interested, like, not because you think, well, I'm sure you thought it was cool, right?

A. Yes.

Q. Had you ever been to like a studio before?

A. Yes.

Q. Which one?

30 A. I had visited the Saturday Night Live set before.

Q. Oh, okay. So, but- so you've been to the set?

A. Yes.

Q. How long ago did you - well, I mean, it was COVID then, so I'm assuming before 2020?

A. Yes.

5 Q. When did you go?

A. 2019.

Q. Okay. So you kind of caught the bug. I mean, you go somewhere, you'd agree that you kind of caught the bug back then, right?

10 A. I had been interested in it prior, yes.

Q. Even prior to that?

A. I've been interested in Saturday Night Live, yes.

15 Q. Okay. All right. But it- I mean, I don't mean you're interested, like you were- when you say interested, you don't mean like as a fan, like as just to watch the show, right?

A. No, that is what I mean.

20 Q. Okay. But what I'm asking you, though, is you're interested in being on the show, whether as an intern or maybe one day as a cast member, or something like that, right? That was your biggest dream on August the 5th of 2020, we agreed, right? And how long prior to that, did that dream start to kind of like pick up some steam?

25 A. I'd been a fan of the show as I watched it with my parents for years before that.

Q. Okay. We're not talking about a fan of the show anymore. I'm a - I'm a huge fan of the show. I like it. I love it. I'm sure there's lots of fans of the show. Talking 30 about going from fan to being a member of the show or an intern or working in production or editing or whatever in terms of getting, as an intern, you know, they might make you just get

coffee from the coffee shop down the street, right?

A. Yes.

Q. Okay. But you'd be doing it for Saturday Night Live.

5 A. Yes.

Q. And even your biggest dream to be an intern, lowest rung of the ladder in that business, you understood, right, that that's kind of your way to get your foot in the door. I mean, you'd agree that being an intern wasn't where 10 you'd want to stop at SNL, right?

A. I hadn't thought any farther.

Q. You hadn't thought any farther?

A. No.

15 Q. Okay, all right, sorry. All right, fair enough. So in terms of your interest in that, right, you would agree on August the 5th that it was your biggest dream and you would agree that when Jack was showing you the production and all that stuff in the basement, right, that you were showing a genuine interest because of that dream, right?

20 A. No. I was showing a genuine interest because I was trying to get to know him.

Q. Trying to get to know him.

A. Yes.

25 Q. But in your message you said that even though that'll never happen, because I don't have the talent or the connections, right?

A. Yes.

30 Q. Okay. And I'm going to suggest to you that, you know, when you say the talent, that's because you wanted to go beyond being an intern and actually being on the show, right?

A. Possibly.

Q. Okay. And when you say that you didn't have

the connections, it's because you were- you didn't go to any other - sorry- did you go to any other studio besides the SNL studio?

A. Not that I remember.

5 Q. Okay. Did you do like media marketing or did you try to do any of that kind of stuff at all?

A. No.

10 Q. No? Okay. So Jack is as close as it got to some kind of a way in into doing something online or doing something that like professionally produced, right?

A. I didn't see him in that way, as a connection to get to SNL.

Q. But you just messaged your friends that hours before you were going to meet up with him?

15 A. Yes.

Q. Why would you tell them, just before you're meeting up with Jack, the famous guy, the one who does professional videos, that your biggest dream in life is to be an SNL intern, but you don't think it'll- I don't think it'll ever happen because I don't have the talent or the connections?

A. I was just expressing how I felt at that time, completely unrelated to me seeing him later that day.

25 Q. So now you're saying that that message is unrelated to anything to do with him seeing - anything - anything to do with seeing him that day?

A. Yes.

Q. You sure about that?

A. Yes.

Q. Okay.

30 A. Yes.

Q. Brooklyn Nine-Nine, great show, right?

A. I haven't seen the whole series, but yeah.

Q. You haven't seen the whole series, but you don't need to see the whole series to say that it's a good show?

A. Yes.

Q. It's hilarious, right?

5 A. It's funny, yes.

Q. Okay, not only is it funny but a lot of the actors that are in Brooklyn Nine-Nine are also either on Saturday Night Live or used to be on Saturday Night Live, right?

10 A. I don't know. I'm not familiar with the cast of the show.

Q. Come on. Adam Sandberg?

A. Yes, I know who Adam Sandberg is.

Q. Okay, and he was on Saturday Night Live?

A. I believe so, yes.

15 Q. For years, right?

A. That might have been before my time watching it.

Q. Oh, come on. That wasn't that long ago. But he's the main character on Brooklyn Nine-Nine.

20 A. Yes.

Q. Right? And the reason why - and - and you guys watched Brooklyn Nine-Nine, right?

A. We started, yes.

25 Q. Yeah, and the reason why Jack put Brooklyn Nine-Nine on the TV is because you told him that like one of your favorite shows is Saturday Night Live, right?

A. I don't remember telling him that.

Q. You don't remember telling him that?

A. No.

30 Q. Okay. But do you agree with me that that's probably the reason why out of- I mean, it was on Netflix, right?

A. I believe so.

Q. Yeah. There's like hundreds, maybe thousands of shows, right?

A. Yes.

5 Q. Okay, and you don't- I'm going to suggest to you that the reason why he picked it - sorry- he's the one that picked it. I just want to confirm that, right?

A. Yes.

10 Q. Okay. And do you recall if he asked you what you wanted to watch?

A. I don't recall.

15 Q. No? Okay. And I guess your answer is, you don't remember if he asked you, hey Brooklyn Nine-Nine has a lot of the cast members from Saturday Night Live. You don't remember having that conversation?

A. No.

20 Q. Okay. And you never told them once, throughout the whole time you guys were together that day anything about Saturday Night Live?

A. Not that I remember.

25 Q. Okay. Even though you don't remember it, you could have, right?

A. Possibly.

Q. Okay. It kind of makes sense that, you know, 30 he put on Brooklyn Nine-Nine because you- Saturday Night Live is not on Netflix, right?

A. Yes.

Q. Okay. And so he was trying to get you like the next best thing, right, by putting on Brooklyn Nine-Nine, right?

A. He could have.

Q. Yeah, okay, that's fair enough. All right.

Back to these Instagram messages, okay? He's asking you, "How you been?" You're saying, "I'm not bad. How about you?", right, that's what that means, okay? And I got to say out loud the- what you mean, and if I say it incorrectly, just let me know.

5

A. Okay.

Q. And he says, "Good, what's up?" And you're saying, "Just at work. How about you?" Right?

10

A. Yes.

Q. Okay. Now, this is all on the same day of July the 24th and - 2020?

15

A. Yes.

Q. I - were - where- so where were you working at that time?

20

A. I was working at the Oakville Hospital.

Q. Working at the Oakville Hospital?

A. Yes.

Q. Okay. What were you doing there?

A. I was a COVID screener.

25

Q. A what?

A. COVID screener.

30

Q. Oh, okay. All right. And he responds, "Same. About to run some errands", right? And then you kind of take your conversation outside of the day-to-day by saying, "Okay, nice. Do you have any plans for this summer?" He says, "Yeah, a bunch. HBY"? H-B-Y, but he was probably trying to say H-B-U, which means how about you, right?

A. Yes.

35

Q. Okay. And then you say, "Literally nothing,

"lol". I'm trying to work a lot to save money because I'm planning on backpacking Europe next year. And he responds, "That's dope. I was headed to Italy in April and then COVID

happened". And you say, and then you respond, "Fuck, really? Italy is like the number one place I want to visit". Is that true back then?

A. Probably.

5 Q. How about, was it true that day?

A. Sorry?

Q. Was it true that day?

A. Yes.

10 Q. Okay. And then he responds with like a heart emoji saying that he loves that about – about what you just said, right?

A. Yes.

15 Q. Okay. And then he responds, "Haha. Yeah, so now just making plans locally". And then you say, "Yeah, literally the same". And he asks, "You're in Hamilton"? You say, "Oakville". And then he says, "I was there earlier td", which means today, right?

A. Yes.

20 Q. And he's got the googly eyes, right?

A. Yes.

Q. And that's kind of his way of being kind of funny by saying, oh, I was there today like, you know, I got eyes on you kind of a thing, right?

A. Maybe.

25 Q. Oh. What did you take it to mean?

A. I didn't really take it to mean anything.

Q. Oh, okay. But, I mean, you laughed. You say, "Haha, no way"...

A. Yes.

30 Q. ...right? And I guess that was kind of like your response to him saying what a coincidence, like, you know, we're – we were kind of in the same city at the same time,

right?

A. Yes.

Q. Okay. And there's a voice note. I can't - we've tried, we can't get it to - I don't know how but it, no longer available. But he says something to you and it's about 5 29 seconds - the recording is 29 seconds long, you don't know what he said or whatever but then you say, whatever he said, "Honestly, that sounds great. You definitely gotta let me know when you're free", right?

10 A. Yes.

Q. I'm going to suggest to you, even though I can't play it, but I know what he - I know what my client is going to say he said, but I'm going to suggest to you that he's sending you a voice note along the lines of, hey, there's this 15 place we can go take a hike and then we can go for drinks later. How does that, you know, love for you to join me, kind of a thing. It's an invitation, right?

A. Yes.

Q. Okay.

20 A. Yes.

Q. And you're enthusiastic about it...

A. Yes.

Q. ...right? You're saying, honestly, that's great. And then, you're asking him to let you know whenever 25 he's free?

A. Yes.

Q. And you got to let me know. It's not like - it's not ambivalent, you're - you really want this to happen, right?

30 A. Yes.

Q. Okay. Three days later, on the 27th, he messages you and says, "What days work for you this week?", and

then you respond by saying, "I work 6:00 a.m. to 6:00 p.m., and then it's a little blacked but I believe it says when - you work 6:00 a.m. to 6:00 p.m. Wednesday and Friday, but other than that I'm free. Is that about right?

5 A. Yes.

Q. Okay. And then he responds by saying - oh, there it is, "I work on 6:00 a.m. to 6:00 p.m. on Wednesday and Friday but other than that I'm free". And then the following day, he responds saying, "Hey, I can do Thursday or Friday".

10 A. Yes.

Q. Right? And then you respond by saying, "Thursday's good", right?

A. Yes.

Q. Okay. And then the following day, he responds by saying, "Cool". We'll do a hike and if we don't fall off a cliff and die, we'll get drinks after", right?

A. Yes.

Q. Okay. And - oops. And then you respond the same day saying, "Yeah, sounds good. Do you have a time in mind"? And then he says, "I'll be done work and showered by 7". And then moving on - sorry - it kind of goes into the next set of messages. But then, actually, on July the 30th, which is the following day, right?

A. Yes.

25 Q. You respond by saying, "Hey, I'm really sorry, but I don't think I could make it tonight. I haven't been feeling the best the past few days, and I woke up today, and I feel worse, so I think I need to go to the doctor. I'm sorry", right? And that's at 12:22...

30 A. Yes.

Q. ...on that day, right?

A. Yes.

Q. That's kind of the first time you lie to him, right? Because - right?

A. Yes, that I lied.

Q. Okay. Yeah.

5 A. Yes.

Q. Right? Well, I said the first time. Did you lie to him before that, too, or....

A. No, I just meant that was one time, yeah.

Q. Okay.

10 A. I lied that time.

Q. All right. Because your evidence is, is that you actually wanted to go see your grandmother that day?

A. Yes.

Q. Okay.

15 A. I just didn't want to get into the personal details with him.

Q. How's that a personal detail about other plans, instead of the plans you guys made?

A. Just pertaining to my grandmother.

20 Q. Okay. Visiting your grandmother. You - so your evidence is, is that telling him that I got to visit my grandmother is less personal than telling him I haven't been feeling the best the past few days. I woke up today. I feel worse. I think I need to go to the doctor. Isn't that more 25 personal than just saying, hey, I just got to go see my grandma today?

A. I don't know. I guess at that time, that's what I thought was best to say.

30 Q. Yeah, and that's fine. That's okay. People lie. People make up stuff to get out of things all the time, right?

A. Sure.

Q. It's - but that's what you told them, right?

A. Yes.

Q. Instead of telling him the truth?

A. Yes.

Q. All right. A little bit later, he says, "Hey, if you're sick, don't worry about it. Drinks on you next time though", right?

A. Yes.

Q. Okay. And you responded with a heart and a heart, like you basically liked or loved to that comment, right?

A. Yes.

Q. Okay. So, you know, even though you weren't actually sick, you were just going to go see your grandmother, he was genuinely concerned, right, and said hey, don't worry about it, right?

A. Yes.

Q. Okay. And then to add a little bit of you jest to the situation to kind of keep things, you know a little bit lighter. He says, hey, drinks on you next time though, right?

A. Yes.

Q. Okay. And then you respond with, "Okay, deal". Right?

A. Yes.

Q. So you - you agree. You say, listen buddy, fine, I'll get the drinks next time, right?

A. Yes.

Q. "Just let me know when you're free next and I'll be there", right?

A. Yes.

Q. Okay. And you would agree with me that there's no more cancellations?

A. Yes.

Q. That you actually, when you make a plan to meet with him, you actually go and meet with him?

A. Yes.

5 Q. Okay. And, I mean, you'd agree with me that up until this point, you're the one that's pushing to make this date happen, right?

A. I wouldn't say I was pushing.

Q. Okay. All right. What would you say?

10 A. I would say I was in agreement of going on a date.

Q. In an agreement? Okay. But let's just look at that last message because that's the last message you send before you guys actually pick a date and you commit to that 15 date, right?

A. Yes.

Q. Okay. So you're telling him the last message right there, "Okay, deal. Let me know when you're free next", right?

20 A. Yes.

Q. So you're asking him, whenever your schedule is free, right?

A. Yes.

Q. And that you're going to be there?

25 A. Yes.

Q. Let's go back up a little bit. I'm going to go right up to that page four, honestly. "Honestly, that sounds great. You definitely gotta let me know when you're free", that's what you say to him the first time about meeting up, 30 right?

A. Yes.

Q. So the first time you meet up, this is what

you say and we just heard what you said the last time before you actually met up, right?

A. Yes.

Q. Okay. So, again whatever he's proposed to do,
5 you're saying that sounds great and you definitely gotta let me know when you're free, right?

A. Yes.

Q. So all he's asking is what days work for you.
10 You tell him, you both pick a date, and then you ask - when it goes to the 29th. I'm just kind of scrolling down, page five, you're asking him, "What time?"

A. Yes.

Q. Right? Okay. And, you know, when you gave
15 your evidence at trial, you kind of told us that when we made plans, I didn't go because I had to see my grandmother, right?

A. Yes.

Q. So you didn't tell us about this little lie
that you told him, right?

A. I didn't remember that that's what I said.

20 Q. All right. But then you also said that he was being persistent?

A. Yes.

Q. You did say that, right?

A. Yes.

25 Q. But when you look at these messages, you think he was being persistent?

A. Persistent in wanting to go on a date.

Q. Okay.

A. He did want to go on the date.

30 Q. He did want to go on a date, is one thing.

A. Yes.

Q. But then persistence, you would agree, is

something else, right?

A. Yes.

Q. It's not like you ever told him no, and he persisted?

5 A. Yes.

Q. Okay. So you'd agree with me that when you say that he was persistent in wanting to go on this date, he wasn't persistent, right? And in fact, you were the one who was also saying definitely, we gotta do this. I'd love to do this.

10 Let me know when you're free. What time? Right?

A. Yes, I was looking forward to the date.

Q. Okay. And there was never a time when you were not looking forward to the date, except for the time, when you lied to him about being sick?

15 A. Yes.

Q. Or were you disappointed that you had to see your grandmother instead and made up an excuse?

A. No, I made the decision to see my grandmother.

Q. You made that decision?

20 A. Yes.

Q. Okay. So, you also mentioned that in the messages in your evidence at trial that he seemed confident and self-assured, right? You used...

A. Yes.

25 Q. ...those words, right? But then, like right after, you said, "He was quite personable, more relaxed than I expected, maybe a bit more shy".

A. Yes.

Q. Okay. So, how could he be self-assured and
30 quite confident but then shy?

A. I believe - I believe you can be both. He was just more quiet than I expected.

Q. On the messages? This is in the messages. Here, I'll bring it up for you. Okay, just about the messages, right?

A. Okay.

5 Q. Just the messages.

A. Okay.

Q. How would you describe, because my friend had asked you, how would you describe him in the messages; his tone, his....

10 A. How would I describe him in the messages?

Q. Yeah?

A. Yeah, he seemed, I think, confident and personable. I think I meant more shy as when we met in person.

15 Q. Okay. Okay, page 221. Okay. So, here, you'll see at the third line up, where it says, "Crown, B. Sosa"...

A. Hmm.

Q. ...that's Mr. Sosa here to my right.

A. Yes.

20 Q. He asked you and he said, "And in your conversations with him on Instagram, what did you learn about him?" And you say, "I learned that he seemed more very quite personable, more relaxed than I expected, maybe a bit more shy", right?

25 A. Yes.

Q. So, now you're saying that you didn't think that from the Instagram messages.

A. I - I think I got confused in that question. I was just speaking about...

30 Q. Okay.

A. ...my general opinions that I got on him when we met, not just through the Instagram messages.

Q. Okay. So, generally, your impression of him was that he was self-assured - oh, and the self-assured part here, again, sorry page 220, the bottom of the page right there. So this is about the light conversation, going back and forth, some flirting, nothing too deep or personal. When the Crown asked you, "What was your impression of him?" You say, "He was very confident and self-assured".

A. Yes.

Q. Right?

10 A. Yes.

Q. Okay. So, your overall impression now of Jack, you're telling this court is he is quite personable, more relaxed, a bit more shy, confident and self-assured?

15 A. Yes. I was - I thought he was more shy after we met in person.

Q. Okay. And that kind of surprised you a little bit, right?

A. Yes.

Q. And you even told your friends?

20 A. Yes.

Q. And they were surprised too?

A. I can't recall if they were surprised or not.

Q. Okay. We'll go through that. All right, let's do that.

25 MR. FAHMY: Just before I do that, Your Honour, my friend just whispered over to me about maybe taking a break. I'd assumed that I was good until one, but I didn't know if the staff had taken a break or what. I apologize, I would certainly have stopped a bit quicker than an hour and 15. If everybody needs a break, I'm okay, and I'm good to go until one. I'm in Your Honour's hands.

5

THE COURT: I think what we're going to do is we'll take just a quick break, 10 minutes, and then we'll come back and then we'll continue to one-ish and we'll where we go. So, yes, we're going to take a break. My comments that I had earlier, just again, conceptualize that you're sitting in that box until you're done.

[REDACTED] Yeah.

10

THE COURT: So, you're not to talk to anybody about what's going on. All right, we will come back in 10 minutes time.

R E C E S S

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U P O N R E S U M I N G:

THE COURT: Can you recall the witness, please?

MR. FAHMY: Does Your Honour - is one o'clock okay or one....

20

... WITNESS PAGED TO COURTROOM 608.

25

MR. FAHMY: Sorry, Your Honour, I just realized that, because I put the page numbers at the top right of the page, and I believe some of the, like, there's been some redactions. So where there's black, you won't see the page number at the top.

MR. FAHMY: Q. I'm going to go to page 49 next.

30

Okay, [REDACTED] can you see those messages clearly or do you want them a little bit more zoomed in or....

A. Maybe just slightly zoomed in more.

Q. Okay, sure. How about that?

A. That's great, yeah.

Q. Okay, all right. So kind of where we left off was you said you didn't recall if you told your friends that he was being shy?

A. Yes.

5 Q. Are you okay?

A. Yes. Yes, I'm good.

Q. You look like you've been crying.

A. I'm okay.

Q. Are you sure?

10 A. Yes.

Q. Have you been crying?

A. Yes.

Q. Okay, do you need a minute?

A. No, I'm good.

15 Q. Okay. Anytime you need a minute, you can ask His Honour, okay?

A. Yes.

Q. All right. Is there something I've said or something that's upset you about what's happening?

20 A. It's just an upsetting process.

Q. Okay, all right. I mean, you've never testified before, right?

A. No.

25 Q. Okay. I mean, just, I guess you obviously know like His Honour is here if there's anything that I'm doing wrong or whatever, the - and the Crown can object. I'm just trying to be fair to you.

A. Yes.

Q. Okay? You - you - so far we're okay?

30 A. Yes. Yeah.

Q. All right. Okay. So here you are.

A. Yes.

Q. Okay. This is the group chat with Nicole and
- sorry - N [REDACTED] and C [REDACTED]?

A. Yes.

Q. Do you ever call them Nicole, it's just both
5 of them together?

A. No.

Q. All right. So here you are. And again, the
UTC says, "0035", which is in like our time 8:35 p.m., right?

A. Yes.

10 Q. And you're messaging them saying "I'm here".
And then shortly after, "I went inside", okay?

A. Yes.

Q. So at this point, you'd agree 8:35 and 35
seconds, you're inside of his house?

15 A. Yes.

Q. And then literally, as two seconds later, you
message them again saying, "It's awake are" but I'm going to
suggest to you that you're saying it's awkward?

20 A. I believe - I'm - I'm not sure what I was
trying to say.

Q. Okay, I'm just suggesting to you though...

A. Okay.

Q. ...that, that - when you do auto-correct,
right....

25 A. It's possible.

Q. Yeah.

A. I could have been saying, "awkward" yes.

30 Q. Okay. And right after that you're saying,
"He's kind of shy"?

A. Yes.

Q. Right? So you told your friends he's kind of
shy?

A. Yes.

Q. Okay. And then in caps, in bold, "Also very much 26"?

A. Yes.

5 Q. Okay. even though he hadn't told you his age, you knew he was 26, right?

A. Yes.

Q. And that's because of the Tinder, right? There's no secret, like nobody's - that's how you knew the - he
10 didn't tell you, right?

A. Yes.

Q. But you knew that through the Tinder app,
right?

A. Yes, I...

15 Q. Okay.

A. ...believe so.

Q. And then C [REDACTED] - and - and, hold on, before we go down, you're sending - sorry - this is Amin(ph). She's helping me with this case, to kind of do all this stuff, take
20 notes, and she's doing great, but just so you know what's happening here, okay?

A. Okay.

Q. All right. And you're actually sending these messages while you're with him?

25 A. Yes.

Q. Right? Okay. And that's why it's kind of awkward, maybe. You're supposed to be like at his house, getting a tour, like do you recall where you were on the tour when you were able to send these messages?

30 A. No.

Q. Okay. Do you recall if he was getting something or looking at something or do you recall?

A. I don't remember.

Q. Okay. Do you remember if he was on his phone while he was in the house?

A. I don't remember.

Q. Okay. All right. All right, let's see what 5 your friends say. So, C [REDACTED], "lol, well, yeah". And then, "Wait, he's shy? Huh, didn't expect that", right?

A. Yes.

Q. So now you agree with me that, you know, even 10 your friends didn't expect him to be shy.

A. Yes.

Q. Okay.

A. And you didn't expect him to be shy?

Q. Yes.

A. Okay.

Q. But he was kind of shy?

A. Yes.

Q. Right? Okay. And - okay. Going back to the 20 Instagram messages, I believe - actually, just before, and like, you know, let's just get one thing kind of straightened out between us, okay?

A. Okay.

Q. My friend, when I say, "my friend", I mean Mr. Sosa, okay?

A. Yes.

Q. He kept asking you about a dinner, a dinner, hike and a dinner, dinner in a hike, right?

A. Yes.

Q. But you agree with me that it was always hike 30 and drinks, right?

A. No, we discussed drinks or dinner, yes.

Q. Sorry, drinks or dinner?

A. Or drinks and dinner. It was used kind of dinner/drinks.

Q. Okay. Where does the dinner word - where is dinner used?

5 A. I believe that we had said that to each other in the communication.

Q. Okay. But in your evidence, you said that you hadn't spoken over the phone, right? Because you didn't have each other's phone numbers?

10 A. No.

Q. And you would agree with me that you didn't communicate on any other kind of messaging app, right?

A. Yes.

15 Q. And you would agree with me that the only communication that you had was over Instagram, right?

A. Yes.

Q. Okay. And when we look....

MR. FAHMY: Let's go back to the Instagram.

20 That's page two. Start from there. So okay, keep going down. Keep going down. Keep going down.

Oh, wait. Keep going down. Sorry, sorry. Okay.

MR. FAHMY: Q. Do you know where that word "dinner" is used at all? I'm going to suggest to you, ma'am, that it's not anywhere in the Instagram messages.

25 A. Yes, I'm not seeing it in these messages.

Q. Okay.

A. It may have been in the voice memo.

Q. Oh, it may have been in the voice memo?

A. Yeah.

30 Q. Oh, okay. All right. But even still, that was at the very beginning, right?

A. Yes.

Q. And it's always drinks that keeps coming up in the next few communications, right?

A. I'm seeing drinks here, yes.

Q. Okay. And you would agree with me that it's not just one time about the plan for drinks. It's if we don't fall a cliff[sic], we'll get drinks?

A. Yes.

Q. Okay. And then when you cancel on him, right, he says, drinks on you next time?

10 A. Yes.

Q. Okay. And there's no - even after that voicemail, there's no mention of dinner from him or from you? Yes. Okay. So I'm just going to suggest to you that, you know, maybe you're just like, I guess your evidence is that you kind 15 of used them interchangeably dinner/drinks, right, that's what you tried to say?

A. Yes.

Q. Okay. But it's fair to say that from what we just saw in his own mind, right, or from what's been 20 communicated between the two of you, that it's really drinks and a - or hike and then drinks after, if you don't fall off a cliff, right?

A. Yes.

Q. Okay, all right. Thank you. And then, do you 25 recall at trial - do you recall that my friend asked you, "And did you discuss where the hike and dinner would be?", and then you said "No", and then he asks, "Was that eventually discussed at some point?" And then your response was, "When I got there at the day of, yes". "Okay". And then my friend asks, "Okay, so tell us then, when you say, when I got there, what are you referring to?" And you say, "When I got to his house the day of 30 the date". Do you recall those questions and that answers?

A. Yes.

Q. Okay.

A. And they're accurate?

Q. Yes.

A. Okay.

5 Q. But, actually, if we look at, I'm going to page 11, the very bottom, you'd asked him, "Like, what time?" He says, "8:00 p.m.", and you say, "Sure. Where?" And he says - gives the address, which is his home address, right?

10 A. Yes.

Q. Okay. And then you say, "Sounds good". And then you ask, "Still doing a hike?", right?

A. Yes.

15 Q. Okay. And we got to kind of go a bit down, and he says, "It's more of a glorified walk along the escarpment, but yeah", right?

A. Yes.

Q. And then you respond, "lol, okay, sounds good", right?

20 A. Yes.

Q. Okay. So, you'd agree with me, that actually he told you where you were going to go for the hike on the escarpment, right?

A. Yes.

25 Q. Okay. And, obviously, this was before you got to his house?

A. Yes.

Q. Okay. All right. And, I mean, you would agree with me that we can just scroll a little bit down, okay. 30 That's kind of the last messages between the two of you. That's noted at August the 5th, 6:38, right?

A. Yes.

Q. Okay. And, now that we've looked at all, well, not all of them, because there was some, we can and we will, but I'm going to ask you first; you'd agree with me that you never asked him where you would go for drinks?

5 A. No.

Q. Okay. Or dinner, for that matter, right?

A. No.

Q. Okay. And, even throughout your time together, when you got to his house, till the time you left, you 10 never asked him either of those questions, right?

15 A. No.

Q. Okay. All right. And, I believe, in your evidence, you'd said, the Crown had - like carrying on from that kind of question and answer from the two of you - the Crown had asked you and said:

QUESTION: Okay, take us a few steps back.

How did you know where to go?

ANSWER: I had asked for the address.

20 QUESTION: And was there anything else discussed prior to you attending his address?

ANSWER: No, he had just said that we would meet at his house before going out.

25 And then do you recall those answers and those questions being asked to you at trial?

A. Yes.

Q. Okay. And those are accurate?

A. Yes.

30 Q. Okay. But when you look at the messages, so you - you get the time, right?

A. Yes.

Q. And then you ask them where to meet and he gives you an address.

A. Yes.

Q. And then you ask, "Sounds good. Still doing a hike?", and he says, "It's more of a glorified walk along the escarpment, but yeah", right?

A. Yes.

Q. Okay. So that's how you understood, right? That you'd go to [REDACTED]

10 A. Yes.

Q. And then you'd go out for the hike after?

A. Yes.

Q. Okay. All right. Now he sends you that address and it's kind of like, you can see that it's blue and 15 then he wrote "Hamilton" after, right?

A. Yes.

Q. Now, is that because it was a link that you can just kind of touch on your phone and it'll show you a map like, or like where it is?

20 A. I believe so, yes.

Q. Okay. All right. And you did that, right?

A. Yes.

Q. And then you - so you knew that it was his house? You - or you assumed, 'cause it was, the address popped 25 up, right?

A. Yes.

Q. And you actually send that link to your...

A. Yes.

Q. ...friends you'd said in your - in your 30 evidence, right? But he's the one that provided it for you?

A. Yes.

Q. Okay. All right. Now, well, where we stopped

looking at the Instagram messages was just right after you made
- where he'd said, "Drinks on you." "Okay, deal. Just let me
know [where] when you're free next, I'll be there". And that's
up page seven. And so that was July the 30th. He responds, you
know, the next day says, "Monday, Wednesday" and then you
5 respond the following day, I'm free Wednesday after six. The
following day, he sends you a text saying, "Good girl"...

A. Yes.

Q. ...right? Okay.

10 MR. SOSA: Your Honour?

THE COURT: Yes.

MR. SOSA: If I could please address a concern in
the absence of the witness.

THE COURT: Certainly. If you can just step out.

15 Yes, Mr. Sosa?

MR. SOSA: Thank you, Your Honour. So these
messages, we're all seeing them for the first
time today. I have not raised an issue thus far.
The messages that Mr. Fahmy just took to witness
20 to where it starts at 8:00 p.m. and
[indiscernible] were part of the waived records.
The other ones, Your Honour, I did not take issue
with because I did not want to raise getting into
whether there is a reasonable expectation of
privacy or not. I think they were appropriately
25 led by defence, Your Honour. But the next
section, which begins at, "Good girls see you
Wednesday, dress nice". Your Honour, it's the
Crown's position, these are obviously records and
in addition, do engage other sexual activity and
should, Your Honour, form, should have formed part
30 of Mr. Fahmy's application. The conversations are

records because this is obviously content that would have engaged her privacy rights, Your Honour, and the content of the messages are with respect to, in my view, my characterization, flirting, and therefore do touch on subjects that are properly the application of a 276.

MR. FAHMY: Thank you, Your Honour. So, for the benefit of my friend, obviously he wasn't Crown counsel on this case until very recently. Every single white page of those Instagram messages is from disclosure; 276 is not engaged because it's not other sexual activity, it's with respect to this incident, this allegation. This was never raised before. We've had a Form 17 judicial pretrial conference on these issues already. This was never raised, nor can it be. It's not - there's no legal premise for my friend to say that. And, I mean, I - I'd respectfully ask for Mr. Sosa to take a moment to consult with Ms. Huh to figure this out because this is just going to cause a huge delay to this trial.

There's no absolute reason to bring a 276 application. It has nothing to do with other sexual activity, it only pertains to this interaction. I'm in Your Honour's hands, but this is beyond the pale, Your Honour. If he's just seeing it for the first time, that's even more concerning because this has been in disclosure since 2021.

THE COURT: All right, well, we're going to take a beach [*sic*].

MR. SOSA: All right.

THE COURT: We will come back at quarter after two. That'll give you a lunch break, the standard lunch break, and an opportunity to consult with the Crown. I'll have to look through my notes as well, and then we will reconvene at 2:15 to hear his reply to that.

5 MR. FAHMY: Sure, Your Honour. But I'd like this to, because the last time we did this, I didn't hear from Mr. Sosa about a response to what Your Honour had asked or the question that was outstanding until you got back into the courtroom. I would like to know, in advance, before you come back, so that I could have some meaningful way to make submissions on this very serious issue that 10 my friend is raising in the middle of cross-examination.

15 THE COURT: All right. So again, these are issues that I don't need to give direction on. These are professional courtesies. Again, I can't dictate when he's going to have an opportunity to get an answer that comes to you. We will try to remain flexible. However, again, for trial efficiency, 20 as decent human beings to move people through the witness box so that they're not here forever, I think it behooves everybody to try to get an answer to the question and communicate that to each other so we can be efficient in dealing with 25 this when we come back. So we'll come back at quarter after two, thank you.

30 R E C E S S

U P O N R E S U M I N G:

5 MR. SOSA: Good afternoon, Your Honour. So, Your Honour, I had the opportunity over the lunch break to review the disclosure that was in possession of the Crown. I've also reviewed some correspondence. The Crown has never had these screenshots in their possession. They were not part of disclosure. Your Honour has the exhibit book in front of you, those are clearly screenshots from Mr. Densmore's phone. So the Crown would have never had them.

10

15 So I can confirm, Your Honour, those were not disclosed and they were also not part of the waived records that we provided the defence. And Your Honour did not produce those to either my friend or the Crown at any of the prior pre-trial motions. So my objection is still a live issue, Your Honour. It's my view that it's a record and that it may engage 276 as well. So whether we need to engage further, that would depend on a ruling from Your Honour. But that's the Crown's position.

20

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MR. FAHMY: Well, my friend is not entirely accurate, Your Honour. So actually, the Crown did disclose a bunch of those messages. And I'll pop them on my screen right now so that there's no issues with that. They were part of the cell extraction. And, you know, he's not here and I don't like to talk badly about people that are not

here, but this is all because of Buszkowski, Your Honour. The issue is that they are right here. These are part of the chats from the - can I sit for this part, Your Honour?

5 THE COURT: Certainly.

MR. FAHMY: So you'll see here that these are some of the chats from the Instagram that I was referring to. It's the exact same ones with the correct timestamps, all of that, and even 10 including the portion about "That's another spanking". "Damn, I'll keep that in mind". "Okay, I think I'm here". These were disclosed to the defence. I think the issue is, is that when you 15 look at this portion of the disclosure that we received, again, it's chats, Instagram, previously disclosed, and it makes it look like all of them 20 were disclosed because of the way that these messages were being sent to participants, and then you only get some of those messages because they had been disclosed here, but not all of them. So 25 that's where the confusion lay, Your Honour, but my friend is not correct in saying that none of these messages have been disclosed. They have been disclosed, just weren't disclosed properly. That's my first position.

Second, is that this could very quickly be disposed of by way of a motion for directions. There's - I'd - I'd originally mentioned that 30 there was about two pages missing which were the beginning of the messages that I considered that the Crown did not have, and those I showed here

5 after, that are in the blue. There's about a couple of pages there because there's about two days of messages that have been missing that I, as I alerted the court, they're innocuous. They're about planning. I don't need even to bring a motion for directions. They don't engage any privacy interests and so on.

10 My position, if Your Honour, I don't know if we should be doing this in camera or not because - but....

THE COURT: Well, this was my question.

MR. FAHMY: Yes, I should have....

15 THE COURT: This is like - this is tiptoeing towards a 276, Stage One application potentially which does have to be done in the absence of the public, and I'll just address the public right now.

20 It is uncertain how far this is going to go in these submissions, and out of the abundance of caution, I am going to treat it as the commencement of a Stage One, so I'm going to ask that the public be excluded until we sort that out. Now, if it gets sorted out in short order, then, you know, we'll have somebody signal you that you can return to court, but I think that out of the abundance of caution, that's how we should proceed, so we'll go in camera now for this.

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30 Thank you.

I N C A M E R A

5 THE COURT: Yes, thank you. So it's clear on the record as well. The video observers or the Zoom observers are now in a waiting room as well, so we are completely in camera.

10 MR. FAHMY: All right. So for the benefit of the court, Your Honour, I mean, in terms of how to move forward in trying to salvage what we've done so far, is that perhaps what we can do is do a very short, sharp motion for directions. There is, just on the face of it, there's no 276 engaged. The complainant herself....

15 THE COURT: Well, before - let's just talk about procedure before you go into argument and presuppose that's what we're going to do.

20 So you're suggesting that a workaround right now, because clearly two things happened; one, Mr. Sosa consulted with his office and came to a particular understanding of the state of affairs. Two, having that state of affairs and having discussed that with you, it didn't result in sort of a negotiated resolution of a workaround to say, 25 well, listen, given my concern and given what you're planning to do, perhaps we can do this instead. I take it that that is not on the table, so now I'm faced with either we'll start off with a motion to clarify?

30 MR. FAHMY: In fairness - in fairness, Your Honour, we haven't had a chance to talk. I got

his email. It was sent out 1:45. I hadn't seen it until just minutes before 2. I was hoping to speak with my friend. I'd asked him if he wanted to talk outside. He said, well, His Honour's coming down. So we haven't had that conversation.

5

THE COURT: Okay. So maybe I've just jumped the gun a little bit, because I think what I would like to do is suggest, because you know what you're doing and where you're planning to go. You know what he's doing and what he plans to do. Nothing here is mysterious, one. Two, it's a judge-alone trial. Three, we don't have a lot of time. Four, a 276 will derail this process just by its very nature. We will not finish on Friday. So those are the facts on the ground.

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There are ways around it. Number one, the two of you talk and say, yeah, you know what, we've decided, I'm either going to do this or not do this. I'll concede this, not concede this. We're going to work around this way, and then you'll run it by me, and, as the final decision-maker, I'll say yay or nay, and that can be in the form of this motion for direction. If, after your conversation it's not there, there's no workaround that can then be, you know, sort of touted, then we have to consider, like, what is this motion really about? Is the motion for directions, is this 276 or not 276? You'll define that for me. I don't know at this particular moment. So that's kind of like the next step after that.

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MR. FAHMY: Just while you're summarizing, I'm

even at the point of whether this is a record that the complainant has any privacy rights to at all. So whether it's - what I'm saying is that it's not 276, and it's not 278.92 either. That's my position, just so Your Honour kind of....

THE COURT: Well, anyways, I'm going to give you guys, let's say, five minutes to have a conversation about this.

MR. FAHMY: Okay.

THE COURT: To see whether you can come to some sort of resolution, because, like, what was coming to mind to me was to say, like, when Mr. Sosa rose, it was we're getting close to the, oh, I guess the spanking or something like that. I think that that's what raised his concerns to the point of raising this objection where we are today. Am I right? Like, I mean, it was getting there.

MR. SOSA: It was getting there, yes.

THE COURT: Okay, so maybe, maybe, after your discussion, there will be a determination on the import of that per se. Does it really....

MR. SOSA: Your Honour, may I just ask if you've reviewed the pages that are in issue?

THE COURT: No, because I - that - I don't - I don't know where we're going yet. So like, I saw that because it was, like, on the screen as I was going there, and when you rose, that's what I - that's what it telegraphed to me was we're talking about a spanking.

MR. FAHMY: And if I may, Your Honour, the moment he rose was, as you've seen, is the one that

they've already disclosed, which is why I misunderstood, and I certainly don't mean to, like, mislead the court in any way or anything like that, but you'll see from what was disclosed here is, you know, "That's another spanking".

"Okay, damn, I'll keep that in mind". "Okay, I think I'm here". Like, it was already there, so that's why I was like, hey, wait a - no, he's - he's the one that gave this to me. That's why.

THE COURT: Okay. Well, again, I'm just going to suggest that...

MR. FAHMY: Sure.

THE COURT: ...maybe, maybe it's not worth the candle, just saying, to go through this process. I mean, the process is here, and I'm saying this to the accused because this is his - this is his trial. Like, there's procedures, there's purpose behind the procedures. You've been through this enough times to see that. We have to cut a fine line, and this is a particular type of offence that has a specific type of treatment because of its very nature. But certain things are important and other things are not. So I leave that with you. I'm going to give you five minutes.

MR. SOSA: Your Honour, if I just have...

THE COURT: Sure.

MR. SOSA: ...a short moment more. My concern, Your Honour, is that, generally speaking, I can only agree with a waiver. So even if I was of the view we can concede, I'll need a waiver.

Otherwise, Your Honour, we'll have to rule whether there's a record or not because the Crown's

position is that this is a record and therefore subject to the regime. So even if I were to say yes....

THE COURT: Okay, let me just stop you there.

5 Like, I - I'm now going to have to go pull out my file because this went on, we've had a number of attendances and there were a number of rulings. I'm going to have to go back and read because remember, well, you weren't here for this, but we 10 had charts up on the screen with what was included, what was conceded, what went. We had the - I think we had the assistance of Ms. Valeri at a particular point in time and, you know, what 15 was okay, what wasn't, rulings were made. Like, I'm going to have to really dig deep.

MR. FAHMY: I hope not, Your Honour, and I don't think so. And if - if - I mean, like, this may be the Crown's position right now. Perhaps, you 20 know, we can keep talking and they may be persuaded. I mean, that's our job. And perhaps we can move forward.

THE COURT: Or the - another alternative, if I can suggest, is maybe there, this can be parked...

MR. FAHMY: For now.

25 THE COURT: ...for now...

MR. FAHMY: I understand.

THE COURT: ...and we move on to see whether or not that's important. Again, because until you're finished your cross-examination, you still have 30 the ability to say, okay, well, yeah, we moved past that. I would like to now raise it.

Just like 276s sometimes, when you have a ruling, based on what somebody said, all of a sudden, it's like, you know, people, their hands start flying up and saying, Your Honour, we've got to - we've go to do a redo here because what was good then isn't good now.

5 MR. FAHMY: Correct.

THE COURT: So, again, there's different, I think, routes to get us back on track. I'll give you 10 minutes.

10 MR. FAHMY: Okay.

THE COURT: I'll give you 10 minutes so that you can have like a thoughtful discussion about this and then I'll come back at that time.

15 ... COURT STOOD DOWN.

... COURT RECALLED.

MR. FAHMY: Are you still looking, or no? Are you still looking, or no?

MR. SOSA: Looking for what?

20 MR. FAHMY: At the messages.

MR. SOSA: No.

MR. FAHMY: What time did Ms. Valeri say she's available?

25 MR. SOSA: So, Your Honour, we discussed the potential for a waiver, Your Honour, but I think the concern now really is that counsel and I are just, we're not agreeing whether it's a record or not, and that's really the standstill.

MR. FAHMY: Well, Hang on, Your Honour. Okay, I mean, I think, I don't, I, first, I apologize. I didn't know you were sitting, Your Honour, I apologize. Second of all, is that regardless of

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the fact that I think my friend is being contentious for no reason and there's nothing to it or whatever, I think what he mentioned to me is that, and I had agreed with it earlier, which is that we get hold of Ms. Valeri and the quickest, shortest route to this, which I agree, is just a waiver from the complainant. Although, in my respectful submission, it's the Crown that should be getting the complainant's waiver, not her counsel.

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So I don't know why we need to wait for her counsel. It's always the Crown prerogative to get the waiver of the, of whatever personal or records that they think are of a personal nature. So that's the law. That's what should happen here. And I would suggest that you give my friend an opportunity to give her - to get her consent in an informed way so that she can waive her right to privacy on those records, however way he sees fit, I'm okay with that. He mentioned from a certain date for these messages. I'm happy for him to go and do that. If that's not successful, then unfortunately my position is that we can dispose of it the next quickest way, which is by way of a motion for directions for a ruling on, Your Honour, that these are not records and do it that way. And I'll be ready to do this tomorrow morning. If I - if I have to work all night, I'm getting these records in. I've also considered very carefully trying to move on without these records. Unfortunately, I will not be able to, in

terms of, I mean, the way the cross-examination has been set in the parameters that's been set. So that's what I suggest.

5 We don't need there's not - the complainant has no right to counsel if the Crown is seeking a waiver of her private records. So the corollary is that if there is a record that engages - they're her records too. I mean, they're - and I don't mean records in the sense that you should make a ruling 10 that they are records in quotes, but....

THE COURT: Her stuff.

15 MR. FAHMY: Her stuff, their messages. Yes. Thank you, Your Honour. And again, please excuse the way I kind of barged into court. I just didn't see you.

20 THE COURT: Okay. So let me just understand what the suggested plan is. We are now approaching three o'clock. A call has gone out to Ms. Valeri. Defence says it's the Crown prerogative just to go and approach the witness, which in active cross-examination poses a little bit of a problem, just conceptually, conceptually to be approaching a witness to say, well, listen, this is what we want 25 to be doing and to provide her an opportunity to make an informed decision. I think that's linked to, and maybe of assistance to have Ms. Valeri involved in that just to get rid of a potential problem, where if there was going to be this waiver that it can be simply explained by somebody 30 other than the Crown. I'm just saying potentially.

5 So either way, whether it's the Crown himself or somebody from the Crown's office goes and engages in this or it involves Ms. Valeri, I'm not going to comment which is the better way of doing it.

10 I've just pointed out that one has the benefit of being truly independent because it's that person's lawyer, as opposed to an agent of the Crown. So on to your point about informed consent, either way you slice it, that's going to take up the next 30 to 45 minutes to an hour, which then takes us to four o'clock, at which point, depending on the answer, if it's a waiver, then we start where we left off. If it's not a waiver, then we're doing the motion for directions, at which point, I don't think that there's enough time, unless we do it at 15 four o'clock and have the preliminary motion for directions at that particular time.

20 MR. FAHMY: I would ask to do that first thing tomorrow morning. I - I'd....

25 THE COURT: Okay.

MR. FAHMY: These are so important. I'm going to have to make sure they get in.

30 THE COURT: So, yes, you're - you're - I'm kind of feeling that too. Like, I mean, right now, by the time we try to work out the other thing, and I don't know whether or not that's even possible to get that today, that we would be coming back tomorrow to do a motion for directions and potentially go into...

MR. FAHMY: Cross.

THE COURT: ...a stage one, maybe some kind of

blend. I don't know. I'm sort of caught by surprise. You know that the ush[sic] is mid-trial, 276 applications are not to be normalized. It's - this is the problem. However, I think that all we can do is adjourn then to tomorrow morning.

5 MR. FAHMY: Well, can we - can we maybe just come back and let Your Honour know if - because it's either we're adjourning tomorrow for a motion or adjourning tomorrow to continue.

10 THE COURT: Oh, yes, okay. Well, why don't we, we'll come back at what, four o'clock?

15 MR. SOSA: So, Your Honour, I do agree that it would be best for all parties involved that Ms. Valeri be the one to seek the waiver. So I have connected with her. She's not available at this moment but is available to return to the courtroom - sorry - the courthouse by about 3:30.

THE COURT: Okay.

MR. SOSA: So....

20 THE COURT: Four o'clock? We come back and you guys give me...

MR. SOSA: If...

THE COURT: ...a report.

MR. SOSA: ...I think four should be okay.

25 THE COURT: Sure.

MR. SOSA: I just want to also make sure, on the record, which - which text I'm going to be sharing for the waiver. So I've identified these to Mr. Fahmy as the screenshots beginning August 3rd.

30 MR. FAHMY: Give them all, all the Instagram messages, okay? Make it easy. It's not a problem.

THE COURT: It just makes it easier.

MR. SOSA: I - okay.

MR. FAHMY: It doesn't matter.

5

MR. SOSA: That is easier. I just wanted to be clear for the record.

THE COURT: Okay. All right.

MR. FAHMY: They're not - yes.

10

THE COURT: So we'll convene at four o'clock. That's plenty of time to get that done, get yourself sorted out and make plans, and then at four o'clock we'll determine what's happening, whether or not we're coming back. I mean, if it is at 4 o'clock and the answer is there's a waiver, we can continue, we can use the last half hour.

15

MR. FAHMY: I'm okay with that too.

20

THE COURT: Yes. If it's not, then clearly, we're going to have to reconvene the next day. Okay.

MR. SOSA: Thank you.

THE COURT: So, four o'clock. As I said before, if this happens to be something that you have a resolution before four o'clock, send somebody to get me, don't just wait until four o'clock...

25

MR. FAHMY: Of course.

THE COURT: ...and do nothing.

MR. FAHMY: Yes.

THE COURT: Time is not our friend.

MR. FAHMY: Yes.

30

... COURT STOOD DOWN.

... COURT RECALLED.

THE COURT: Good afternoon.

MR. SOSA: Good afternoon, Your Honour.

MR. FAHMY: Good afternoon.

MS. VALERI: Good afternoon, Your Honour.

THE COURT: Good afternoon. Thank you for coming in. Ms. Valeri?

MS. VALERI: Thank you. Your Honour, sorry for my lack of dress, I just came over in a rush, so I didn't grab my robes. I can advise that I've spoken to the complainant. We are requesting that we adjourn for today, and we pick this up tomorrow morning. We've canvassed a waiver. I think it's very possible, Your Honour, but the complainant would like a little bit of time to think it through. It's been a heavy day, and it's sort of a significant decision to make in 20 or so minutes, so we're asking for tomorrow.

THE COURT: Well, in the circumstances, we are now 25 after almost 4, so even if there was a waiver produced at this very moment, we would have been adjourning to tomorrow morning. So, I mean, it is what it is. We'll come back tomorrow.

I'm going to suggest, again, we do another 9:45 to find out whether or not that happens, because that just gives us a little bit of wiggle room for planning today. Okay? So 9:45, adjourned to 9:45 tomorrow.

... WHEREUPON THE MATTER IS ADJOURNED.

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Certificate

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September 10, 2024

Date



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