IN THE MOOT COURT OF THE GALE CUP

(ON APPEAL FROM THE SUPREME COURT OF CANADA)

BETWEEN:

CATHIE GAUTHIER

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM

[Last Name, First Name]
[Last Name, First Name]

Counsel for the Appellant

[Last Name, First Name]
[Last Name, First Name]

Counsel for the Respondent

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PART I: STATEMENT OF FACTS

1. The Respondent generally agrees with the Appellant's statement of facts, but would set out the following additional facts.

2. The Appellant gave the pharmacist false reasons for the early renewal of the couple's Oxazepam prescriptions on December 27th. The couple already had enough medication for 10 days.

R v Gauthier, 2013 SCC 32 at para 9 [*Gauthier SCC*].
R v Gauthier, 2011 QCCA 1395 at para 24 [*Gauthier CA*].

3. The Appellant said that, after having "realized" what was going on, she tore up the documents relating to the murder-suicide pact. However, only two documents were torn up: a handwritten will and Mr. Laliberté's life story, prepared by him. The four documents that remained intact included a typed joint will, signed by both spouses, and three letters written by Ms. Gauthier which mention the plan.

4. The letter to Kathie Ouellet said "Our act has been planned for several weeks. No one will suffer, we're just going to go to sleep and never wake up." The letter to her mother contained the phrase "We have chosen not to start the New Year."

Gauthier CA, supra para 2 at paras 56-57.

5. After Mr. Laliberté served the family poisoned drinks as planned, one of the children fell asleep on the couch and another complained of a tingling sensation in his legs. Upon waking up the first time on January 1st while it was still light out, with her wrists slit, the Appellant took a bath. She called 9-1-1 hours later. During the call, she stated that "we told ourselves we wouldn't start 2009, but…"

Gauthier CA, supra para 2 at para 8.

PART II: ARGUMENT

Issues On Appeal And Overview Of The Respondent's Position

6. This appeal asks whether the defence of abandonment should be available to a woman who had knowledge of the planned and deliberate murder of her three young children, who provided the drugs that were used in the killings, and who failed to take any steps to cancel out the effects of her participation or to prevent the offence. The Respondent's position is that the defence *is not* and *should not* be available on these facts. For that reason, the Respondent asks this Court to uphold the conviction for first-degree murder.

7. The Respondent has two submissions. First, the Supreme Court was correct to reformulate the elements of the defence of abandonment. This reformulation is consistent with the underlying policy bases for assigning and withdrawing from party liability, and is not a substantive modification of the defence. Second, there is no reason to order a new trial, because there is no air of reality to the defence, however it is formulated.

A. The Supreme Court Was Correct To Reformulate The Elements Of The Defence Of Abandonment And Did Not Modify The Defence In Substance

(I) The Test Set Out By The Supreme Court Is Consistent With The Policy Basis For Assigning Party Liability And With The Purpose Of The Defence Of Abandonment

8. The Supreme Court was correct to conclude that, in order to raise the defence of abandonment, there must be evidence that the accused took "in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence." This formulation of the

defence is consistent with the legal and policy basis for assigning party liability and with the role that the defence of abandonment plays in the criminal law.

Gauthier SCC, supra para 2 at para 50.

(a) The legal and policy basis for assigning party liability

9. Under s. 21 of the *Criminal Code*, there is no distinction between those who aid or abet an offence and the principal offender. As Charron J. held in *Briscoe*, "the person who provides the gun . . . may be found guilty of the same offence as the one who pulls the trigger." The *actus reus* of aiding or abetting is doing something to assist or to encourage the commission of the offence. The *mens rea* has two components: (1) knowledge of the principal's intentions and (2) intent to assist the principal in the commission of the offence.

Criminal Code, RSC 1985, c C-46, s 21 [*Criminal Code*].
R v Briscoe, 2010 SCC 13 at paras 13, 16 [*Briscoe*].

10. There are two key policy reasons for holding parties equally responsible for the criminal acts of the principal. The first is deterrence: by criminalizing all acts of assistance or encouragement, Parliament has sent a clear message that even the smallest involvement in a crime, so long as intentional and with knowledge of the planned offence, will result in full criminal liability for all parties. The second reason is ensuring that all those who purposefully assist in crimes are punished for their actions, even if they did not "pull the trigger."

11. The Appellant's liability as a party is not in dispute in this appeal. The jury's verdict demonstrates that she knew of the planned murders and that she acted with an intention to assist her spouse in committing those murders. The only issue that remains is whether this legal status changed before the offence was committed – whether she was

able to "undo" her exposure to criminal liability for the murders. To answer this question, this Court must determine what the defence of abandonment requires.

(b) The purpose of the defence of abandonment and its role in the criminal law

12. The defence of abandonment exists for three reasons: 1) it helps ensure that "only morally culpable persons are punished"; 2) it encourages parties to withdraw from criminal activity and to notify the authorities; and 3) it motivates parties to dissuade principal offenders from completing the offence.

Gauthier SCC, supra para 2 at para 40.

13. In the Respondent's submission, the defence of abandonment represents the point along the spectrum of potential party liability at which the common law has decided that aiders, abettors and common intenders should no longer be held criminally responsible for the acts of the principal. This is what the Court below meant when it said that the defence is about ensuring that only the morally culpable are punished. Once this point on the spectrum is crossed, it would be unjust to hold the lesser participant responsible for the acts of the principal.

14. The selection of where on the spectrum this point should fall is ultimately a policy determination; however, it is a determination that is guided by s. 21 of the *Criminal Code*, by the policy bases for assigning party liability, and by previous judicial treatment of the defence.

15. The Supreme Court struck the proper balance by concluding that the defence requires a change of intention, timely and unequivocal communication of withdrawal, and reasonable steps taken to cancel out the effects of participation or to prevent the offence.

16. The requirement to take reasonable steps to cancel out the effects of participation is justified for one key reason: those who contribute to an offence and create danger with a criminal intent should have an obligation to take steps to undo that danger.

17. What will qualify as "reasonable steps in the circumstances" will primarily depend on the effects of the party's prior involvement in the crime and the amount of danger that she has set in motion. Those who have done more will generally have more to undo. A majority of the Alberta Court of Appeal has approved of this approach in *Bird*, concluding that the "depth of the prior involvement" of an accused person may alter the standard by which abandonment is assessed: someone deeply entrenched in the offence will have to do more to demonstrate withdrawal than someone whose involvement was minor or peripheral.

R v Bird, 2009 ABCA 45 at para 19, rev'd on other grounds 2009 SCC 60.

18. Where the party has positively aided in the commission of an offence, verbal communication of abandonment will not suffice to undo the danger that her actions have put in motion.

(c) The "reasonableness" requirement allows the defence to remain context-dependent and does not create uncertainty in the law

19. When applying the defence, what constitutes "reasonable" neutralizing steps in the circumstances should be defined by asking the following question: What would an objective observer consider necessary to cancel out the effects of participation, given the circumstances of withdrawal and the depth of prior involvement in the offence?

20. While the determination of what is "reasonable in the circumstances" will primarily depend on the party's prior involvement in the offence, this element also allows the defence to adapt to situations in which it was not necessary or possible for the

accused to take positive steps to cancel out the effect of previous assistance. The Supreme Court of Canada acknowledged this when it said that there could be circumstances in which timely and unequivocal communication alone would suffice to raise the defence. For example, if an attempt to take neutralizing steps would place a party in grave danger, then the trial judge is free to conclude that, in the circumstances, it would have been *unreasonable* to attempt to cancel out the effects of prior participation.

Gauthier SCC, *supra* para 2 at para 51.

21. The context-dependent nature of the "reasonable neutralizing steps" element does not lead to uncertainty in the law. Trial judges are experienced with assessing objective elements of criminal defences at both the air of reality stage and when considering whether a defence will ultimately succeed. When assessing this defence at the air of reality stage (as will be discussed in more detail below), the trial judge will ask whether any jury, properly instructed and acting reasonably, could form a reasonable doubt that the accused took reasonable steps in the circumstances to cancel out the effects of her participation or to prevent the offence.

R v Cinous, 2002 SCC 29 [*Cinous*].

(II) The Four-Part Test Set Out By The Supreme Court Is Not A Substantive Modification Of The Defence Of Abandonment

22. The Respondent submits that the four-part test for abandonment, as articulated by the Court below, is consistent with the "original" defence that was set out in *Whitehouse* and endorsed by a majority of the Supreme Court of Canada in *Miller*. The elements of the defence were "reformulated," as the Court below said, to better reflect the context-dependent nature of the defence and the manner in which Canadian courts apply the defence in practice. The Respondent respectfully disagrees with the Appellant's position

that the Supreme Court departed from seventy years of precedent and that this departure prejudiced the accused.

> *R v Whitehouse* (1940), 55 BCLR 420 (CA) at 425 [*Whitehouse*].
> *R v Miller*, [1977] 2 SCR 680 [*Miller*].
> *Gauthier SCC, supra* para 2 at para 49.

23. From the beginning, the defence of abandonment in Canada has been context-dependent and focused on exculpating only those who are not morally blameworthy for the principal offence. In *Whitehouse*, Sloan J.A. said the following when describing the elements of the defence:

> **I would not attempt to define too closely** what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. **That must depend upon the circumstances of each case** but it seems to me that **one essential element** ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue it. (emphasis added)

Contrary to the Appellant's position, *Whitehouse* demonstrates that the defence of abandonment was not conceived of as a rigid three-part test focused only on timely and unequivocal notice of a changed intent. Rather, the defence in *Whitehouse* revolved around a single principle: it would only be available in circumstances in which the "chain of causation and responsibility" connecting the party to the principal had been broken. Mr. Justice Sloan was careful not to "define too closely" what would be required to break this chain, but it suggested that *one* essential element should be timely and unequivocal notice of abandonment, where practicable and reasonable.

> *Whitehouse, supra* para 21 at 425.

24. In *Miller*, a majority of the Court held that timely and unequivocal communication of abandonment, where practical and reasonable, was "an essential

element of the defence." The Court did not say that this was the *only* essential element, or that nothing more is ever required.

Miller, supra para 21 at 708.

25. Despite often characterizing the essential elements of the defence as a change of intention plus timely and unequivocal communication, when positive acts of assistance have been provided, Canadian courts have often concluded that "unequivocal communication" *requires* steps to counteract the prior assistance. The majority below correctly picked up on this when they said the following:

> Where participation in a crime is more than a simple promise to carry out a common unlawful purpose – where, for example, the person is a party to the offence within the meaning of s. 21(1) of the *Criminal Code* – requiring an unequivocal communication of the intention to cease participating in the commission of the offence (the *Whitehouse* test) **means that the accused must show that he or she took reasonable steps to neutralize the effects of his or her participation.**
>
> *Gauthier SCC, supra* para 2 at para 47 (emphasis added).

26. For example, when murder weapons have been provided in other cases, courts expect the accused persons to take positive steps in order to demonstrate the unequivocal nature of their withdrawal. In *Leslie,* the accused was convicted of first degree murder, despite walking away from the scene after having said to the principal "No, don't. Just leave him, don't kill him." The Court found that the accused said these words immediately after handing the murder weapon to the principal, with knowledge of the impending murder. The communication was found to be "not unequivocal" and "not timely", but the analysis clearly shows that the accused was expected to do more than provide unequivocal verbal communication; he was expected to take steps to prevent the

offence that he had facilitated, and to undo the fact that he had just handed the murderer the hatchet that delivered the lethal blow.

R v Leslie, 2012 BCSC 683 at paras 508, 542 [*Leslie*].

27. Where the accused has taken steps to prevent an offence, the defence of abandonment is more likely to succeed. In *Edwards*, three assailants attacked a man on a bicycle path. When two of the assailants realized that the victim's life was in danger, they actively intervened and attempted to pull the third attacker off the victim. The Court held that "their actions to end the mêlée indicate that there was timely communication of the intention to abandon the common purpose." As with *Leslie*, while the Court used the language of "timely communication," the analysis really turned on the *actions* taken by the accused persons to cancel out the effects of their participation or to prevent the offence. In the Respondent's submission, had the two assailants, halfway through the brutal beating, simply told the third attacker that they wanted nothing more to do with it, the defence would not have been available.

R v Edwards, 2001 BCSC 275 at para 186 [*Edwards*].
Leslie, *supra* para 25.

28. British authority also supports the proposition that reasonable neutralizing steps may be an essential part of timely and unequivocal communication. In *Becerra and Cooper*, the two accused entered a house with an intent to steal. Mr. Cooper killed a tenant with a knife provided by Mr. Becerra, despite Mr. Becerra having communicated his withdrawal by saying "Come on, let's go" and darting out the window. The Court, applying *Whitehouse*, concluded that Becerra had to do more: "If Becerra wanted to withdraw at that stage, he would have to 'countermand' . . . in some manner vastly

different and vastly more effective than merely to say 'Come on, let's go' and go out through the window."

> *R v Becerra and Cooper* (1975), 62 Cr App R 212 (Eng CA) at paras 10, 28. *Whitehouse, supra* para 21.

29. Likewise, in *Graham*, abandonment was withheld because the accused's verbal pleas were not enough to counteract his earlier deeds. In that case, a man delivered an unsuspecting victim to a group of terrorists. He later begged them not to kill the victim, but the pleas fell on deaf ears.

> *R v Graham*, [1996] NI 157 (CA).

30. Therefore, the Respondent submits that the majority of the Supreme Court of Canada did not make a substantive change to the *Whitehouse* defence. Rather, the Court reformulated the elements of the defence to better reflect the context-dependent nature of the *Whitehouse* test and to acknowledge that courts, when considering "timely and unequivocal notice," have often focused the abandonment analysis on the steps taken (or not taken) by the accused to cancel out the effects of his or her earlier participation or to prevent the offence.

B. A New Trial Should Not Be Ordered Because No Reversible Error Was Made

30. The conviction should be affirmed and a new trial should not be ordered for two reasons. First, there is no air of reality to the four-part defence of abandonment that was re-formulated and applied by the Court below, and it is not prejudicial to the accused to assess the air of reality based on the evidentiary record developed at trial. Second, even if the Court erred in its formulation of the defence, the error is not reversible because there is no air of reality to the defence of abandonment as it existed at the time of trial.

31. For a defence to be put to a jury, it must have an air of reality, such that there is evidence upon which a properly instructed jury acting reasonably could acquit if the evidence is assumed to be true. The air of reality test must be applied to each element of the defence. If an air of reality is lacking on any one element, the defence fails.

Cinous, *supra* para 20 at paras 82-83.

32. Canadian courts have acknowledged the importance of the air of reality test when it comes to easily feigned defences such as the defence of abandonment:

> [A] defence which in a true and proper case may be the only one open to an honest man ... may just as readily be the last refuge of a scoundrel. It is for these reasons that a Judge presiding at a trial has the responsibility cast upon him of separating the wheat from the chaff.

It is therefore important to remember that there are two prongs to this test – there must be some evidence on every element of the defence, *and* that the evidence must be capable of supporting the reasonable inferences required for the defence to succeed. This threshold ensures that juries, in exercising their traditional function as triers of fact, only consider the legally permissible avenues to acquittal, rather than fanciful defences.

> *R v Stone*, [1999] 2 SCR 290 at para 29, quoting *R v Szymusiak*, [1972] 3 OR 602 (CA).
> *Cinous*, *supra* para 20 at para 48.

(I) There Is No Air Of Reality To The Test As It Was Reformulated By The Court Below

(a) The Appellant did not take reasonable steps to cancel out the effects of her participation

33. If taking reasonable steps to neutralize the effects of one's participation in the offence is a stand-alone element of the defence, as articulated by the majority in the Court below, there is no evidence in the record of the Appellant taking any such steps. For this element to have an air of reality, a properly instructed jury acting reasonably should be

able to form a reasonable doubt based on the evidence that she took steps to undo the effects of her participation in the planned murders. Since the Appellant's criminal responsibility is founded on the fact that she put the lives of her children in danger by providing the medication to her spouse and by committing to the murder-suicide pact, she had an obligation to take steps to cancel out the danger that she set in motion.

Gauthier SCC, *supra* para 2 at para 63.

34. The Appellant should not be permitted to reargue the issue of the nature of her participation in the offence. This issue was definitively decided by the jury, which found that the Appellant "contributed in aiding, encouraging, or omitting to do something with the purpose of causing the children to ingest medications." Only actions that attempted to counter these contributions could give the element of reasonable neutralizing steps an air of reality.

Gauthier CA, *supra* para 2 at para 44.
Factum of the Appellant, at paras 48-52.

35. There were several neutralizing steps readily and safely open to the Appellant. Most obviously, the Appellant could have thrown away or hidden the medication she had provided. The fact that the medication may have had a legitimate use was no excuse to allow its availability for the murder plot. If the Appellant had truly been worried about its worth, she also could have hidden it from her spouse or removed it from the premises without destroying it.

36. The Appellant could also have removed the children from the house reasonably easily. Doing so for even one evening might have sufficed, as New Year's Eve had symbolic meaning for the couple, as evidenced by the words used by the Appellant in the letter to her mother ("We have chosen not to start the new year") and during the 9-1-1

call ("We told ourselves we wouldn't start 2009"). At the very least, the Appellant could have alerted the authorities if she was unable to move the children to safety.

Gauthier SCC, supra para 2 at para 15.
Gauthier CA, supra para 2 at para 57.

37. This was not one of the rare situations contemplated by the Court below "in which timely and unequivocal communication … will be considered sufficient to neutralize the effects of her participation in the crime." By any standard of reasonableness, communication would not have satisfied the obligation to undo the danger that she had set in motion.

Gauthier SCC, supra para 2 at para 51.

38. The Appellant's belief that her spouse also withdrew from the pact because of what she said to him does not transform the communication into a reasonable neutralizing step, because the belief itself was unreasonable. The only support for it in the record is the Appellant's testimony that, after telling her spouse that "we couldn't… he couldn't do that… I didn't want to be part of it," she "gathered from his face that he was getting the message, too, and that it was alright." Her spouse's facial expression is ambiguous, however, since the reassuring look could have equally have meant that he wanted the Appellant to get past her temporary unease and continue with the plan. It was not reasonable for the Appellant to expect that this single one-sided exchange would bring to an end, hours before it was to be executed, a complex plot to murder their children that "[had] been planned for several weeks."

Gauthier SCC, supra para 2 at para 58.
Gauthier CA, supra para 2 at para 56.

39. Tearing up two documents does not constitute evidence of taking reasonable steps to cancel out the effects of participation. The Appellant asserts that "[t]he destruction of them left her spouse with having to formulate a new plan without her written acknowledgement." This is untenable for two reasons. First, the torn-up documents found in the trash – a handwritten copy of a will and a copy of the spouse's life story – were not as relevant to the pact as those that remained. A typed will signed by both spouses and three letters written by the Appellant explaining the reasons for the murder-suicide were left intact. Second, none of the documents were necessary for the plan's continued existence. At most they were physical evidence of the Appellant commitment to the pact, rather than something the Appellant contributed to the plan and had to cancel out. The destruction of the documents could do nothing to alter the course of events, or to undo the danger that she had already set in motion.

> *Factum of the Appellant,* at para 46.
> *Gauthier SCC*, *supra* para 2 at para 14.
> *Gauthier CA*, *supra* para 2 at para 56.

40. No reasonable jury, even accepting the Appellant's evidence, could form a reasonable doubt based on the evidence that the Appellant took steps, reasonable or otherwise, to cancel out the effects of her contribution or to prevent the offence. The defence as formulated by the majority in the Court below is unavailable to the Appellant.

(b) A new trial is not required to adduce evidence of reasonable neutralizing steps taken by the Appellant

41. A new trial is not required to assess whether the newly-formulated element has an air of reality for two reasons. First, the Appellant would have presented evidence of taking any neutralizing steps, because that has always been a relevant exculpatory factor in the defence of abandonment. Second, questions of law may be decided on appeal even

when the law is reformulated, because courts have the discretion to apply modifications to the common law to the parties before them.

42. As explained above, the defence of abandonment was merely reformulated by the Court below, as the presence of reasonable neutralizing steps was always an exculpatory evidentiary factor. *Leslie* and *Edwards* are two examples where the viability of the defence turned on whether there were positive actions taken to neutralize prior assistance or encouragement. The practical and legal significance of such actions has not changed, so the air of reality analysis using the original evidentiary record does not prejudice the Appellant.

Leslie, *supra* para 25.
Edwards, *supra* para 26.

43. Had the Appellant taken reasonable steps to neutralize the effects of her participation in the murder-suicide pact or to prevent it on the night of December 31st, 2008, she would have presented evidence of this, because it would have been highly relevant to the analysis of unequivocal communication. The fact that there was not enough evidence presented at trial to give the defence an air of reality is not an invitation to order a new trial. Rather, it is a reason to affirm the finding of guilt.

44. Further, appellate courts consistently apply their judgments to the parties before them. For example, in *R v McCraw*, the Supreme Court expanded the definition of "serious bodily harm" to include psychological harm, thus expanding the scope of the offence of threatening to cause serious bodily harm. The Court went on to apply the new definition to the accused on appeal based on the original evidentiary record, and denied the accused a new trial.

R v McCraw, [1991] 3 SCR 72.

45. Finally, the case of *R v Ryan* does not support the Appellant's argument that the interests of justice prevent retrospective application of "a new test to facts at trial." Rather, it stands for the proposition that the remedy of a stay of proceedings may be available to an accused in exceptional circumstances. The Supreme Court did not modify the defence of duress in *Ryan* and its granting of a stay of proceedings was unconnected to the issue of retrospectivity.

R v Ryan, 2013 SCC 3.
Factum of the Appellant, at para 58.

(II) There Is No Air Of Reality To The Test As It Existed At Trial

46. If this Court finds that the Court below erred in reformulating the defence of abandonment to include a stand-alone element of reasonable neutralizing steps, the error of law is not reversible because there is "no realistic possibility that a new trial would produce a different verdict." This is because the defence as it was formulated at the time of her trial still lacks an air of reality. Specifically, the Respondent submits that there is no air of reality to the element of unequivocal communication.

Criminal Code, *supra* para 9, s 686(b)(iii).
R v Sarrazin, 2011 SCC 54 at para 24.

47. The requirement that the notice of change of intention be timely and unequivocal has an objective aspect: rather than relying on the party's subjective belief as to whether the notice was unequivocal, the *effect of the notice on the principal* should be considered. The wording in *Whitehouse* supports this objective approach: communication must "serve unequivocal notice upon the other party." As one commentator put it, "[a]s *Whitehouse* made clear, the principal must be made to understand that he or she now acts alone." This interpretation of unequivocal notice is consistent with policy considerations, because to

judge the elements of timeliness and unequivocal notice from the perspective of the accused would open the door to claims of abandonment in every case of party liability.

> *Whitehouse*, *supra* para 21 at 425.
> Mark Campbell, "Turning Back the Clock: Aiders and the Defence of Abandonment" (2010) 14:1 Can Crim LR 1 at 9.

48. The ultimate question that must be resolved for unequivocal communication is this: would a reasonable and objective observer, viewing the communication as a whole, including the words and actions of the party and the principal, conclude that the principal should have understood, at the time of the offence, that he was acting alone? Because of its objective quality, this element cannot be established by direct evidence and it becomes necessary to make inferences based on all the available evidence.

49. Sometimes even the most unambiguous words will not support the inference that the withdrawal was unequivocal, as was the case in *Leslie*. Other evidence that should be considered is the depth of one's involvement in the plan, the circumstances of withdrawal, post-withdrawal conduct, and the principal's reaction to the communication. Especially in cases in which positive acts of assistance have been provided, the courts have also taken neutralizing steps into account when analysing this element, because evidence of neutralizing steps strengthens the communication to the principal of unequivocal withdrawal and prevents sending mixed messages.

> *Leslie*, *supra* para 25.

50. In deciding if there is an air of reality to this element, the judge is permitted to engage in some limited weighing to determine if unequivocal communication is *a* reasonable inference. In the case at bar, the evidence presented at trial cannot support a reasonable inference that the Appellant "served unequivocal notice upon" her spouse.

The Appellant's words may have been clear, but her actions and the circumstances surrounding the communication make it clear that the withdrawal was equivocal.

R v Arcuri, 2011 SCC 54 at para 23.

51. As the majority of the Court below notes, the Appellant's assertion of withdrawal "stands alone in the appellant's principal narrative to the effect that she never agreed to the murder-suicide pact, that she wrote the incriminating letters while in a dissociative state and that she told her spouse she disagreed with what he was planning to do as soon as she realized what it was."

Gauthier SCC, supra para 2 at para 61.

52. After receiving a reassuring look, the Appellant did not press the issue or ask for a verbal acknowledgement of her withdrawal. She did not try to destroy any documents that might have actually held significance for her spouse, like the signed final version of their will. She did not try to cancel out the effects of her previous participation, which left her spouse with the opportunity to carry on with the plot to poison the children with the medication that she provided. Most significantly, when her spouse served the drinks to the family later that night, *as per the plan*, she did not react negatively or ask for any assurance that they were not poisoned.

53. The evidentiary burden to establish abandonment after aiding an offence has consistently been interpreted stringently, and there are no reported Canadian cases where the defence was successfully used in the context of s. 21(1)(b) of the *Criminal Code*. This burden is not met in the case at bar, where the only evidence that would support the inference of unequivocal communication is the Appellant's testimony of what she told her spouse, which stands in stark contrast to her subsequent behaviour and the

circumstances surrounding the communication. No reasonable jury, properly instructed, could form a reasonable doubt based on the evidence that the communication was unequivocal, so the defence as it existed before the new element was added lacks an air of reality.

C. Conclusion

54. The defence of abandonment should not be available to this Appellant – a mother who knowingly and purposely assisted in the murder of her three young children, and who failed to take *any steps* to cancel out the effects of her participation or to prevent the offence from occurring. There is no air of reality to the defence, however it is formulated.

55. The defence of abandonment should only be available when a party has communicated a genuine change of heart and demonstrated her withdrawal by taking steps to counteract the harm that she has previously set in motion. The reformulation of the elements of the defence by the Court below is consistent with the rigorous manner in which the *Whitehouse* test has been applied to those who have provided positive acts of assistance, and is also consistent with the underlying purposes of the defence.

PART III: NATURE OF THE ORDER SOUGHT

56. The Respondent respectfully requests that the appeal be dismissed, and the conviction affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____	_____
[LAST NAME, FIRST NAME]	[LAST NAME, FIRST NAME]
Counsel for the Respondent	Counsel for the Respondent

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