

Appendix H
Defence Closing
Address



#22732

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE
SUPREME COURT ACT, R.S.C. 1985, C. S-
26;

IN THE MATTER OF A REFERENCE BY THE
GOVERNOR IN COUNCIL CONCERNING WHETHER
THE CONVICTION OF DAVID MILGAARD IN
SASKATOON, SASKATCHEWAN ON JANUARY 31,
1970 FOR THE MURDER OF GAIL MILLER ON
JANUARY 31, 1969 CONSTITUTES A
MISCARRIAGE OF JUSTICE, AND WHAT
REMEDIAL ACTION, IF ANY, IS ADVISABLE,
AS SET OUT IN ORDER IN COUNCIL PC 1991-
2376, DATED THE 28TH DAY OF NOVEMBER,
1991.

A F F I D A V I T

I, LORAIN SMITH, of the City of Saskatoon, in
the Province of Saskatchewan, MAKE OATH AND SAY AS
FOLLOWS:

1. I am a Certified Official Court Reporter
employed by C.V.S. Reporting Services in the City of
Saskatoon, and as such have knowledge of the matters
hereinafter deposed to which I believe to be true.

2. I am informed and verily believe that during the
week of January 13, 1992, my colleague Merle Chovin was
asked by Mr. Robert Frater of the Department of Justice
if it would be possible to transcribe certain notes of
Edna Lockrey, the court reporter present at the trial of

031255

R. v. David Milgaard. Edna Lockrey is a former colleague of ours who has passed away.

3. After discussing the matter with Merle Chovin and examining the notes, we agreed that it would be possible to transcribe the notes, although a perfect transcription would be impossible due to the unique form of shorthand employed by Edna Lockrey.

4. I have been primarily responsible for the transcription of the jury address of Calvin Tallis although part of the transcript was done by Merle Chovin. I have done so to the best of my ability. Where I have been unable to transcribe something, I have used three dots (...). In some cases, the dots indicate a single word is missing; in others, several words. In no case are there more than several words missing.

SWORN BEFORE ME at the City)
of Saskatoon, in the Province)
of Saskatchewan, this 11th)
of February, A.D. 1992.)



A COMMISSIONER FOR OATHS in and
for the Province of Saskatchewan.
Being a Solicitor.

031256

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF
THE SUPREME COURT ACT, R.S.C.
1985, C. S-26;

IN THE MATTER OF A REFERENCE BY
THE GOVERNOR IN COUNCIL
CONCERNING WHETHER THE
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SASKATOON, SASKATCHEWAN ON
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OF GAIL MILLER ON JANUARY 31, 1969
CONSTITUTES A MISCARRIAGE OF
JUSTICE AND WHAT REMEDIAL
ACTION, IF ANY, IS ADVISABLE, AS SET
OUT IN ORDER IN COUNCIL PC 1991-
2376, DATED THE 28TH DAY OF
NOVEMBER, 1991

AFFIDAVIT

031257

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
CRIMINAL SIDE
JUDICIAL CENTRE OF SASKATOON

C A N A D A)
)
PROVINCE OF SASKATCHEWAN)

HER MAJESTY THE QUEEN

- against -

DAVID EDGAR MILGAARD

ADDRESS TO THE JURY

BY MR. TALLIS

C. V. REPORTING SERVICES LTD.
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031258

1 Address to Jury
Mr. Tallis

MR. TALLIS: May it please Your Lordship, lady
and gentlemen of the jury. First of all I want to
join with my learned friend Mr. Caldwell in
commending all of you for the careful -- and I
mean this sincerely -- attention which you have
given to the evidence in this case.

I realize, I think as well as
anyone, that in many instances you have been taken
away from your work and find this really in some
respects is an inconvenience to you and that -- I 1
sincerely hope that -- you have sat here for now,
I guess 9 or 10 days, the 9th day -- that you will
have a better appreciation of the system under
which we operate. A system which has been
developed through the experience of generations 1
and which culminates in certain rules of proce-
dure, certain practices that ... a criminal trial
of this nature . . .

Now, having joined my learned
friend in commending you for the attention which 2
you have given to this matter, I must, of neces-
sity, turn to a few other things which I suggest
are of importance.

031259

My learned friend, in his very
able way, referred to the oath that you took; a 2
very important part of this proceeding, and of

some consequence to all of us not just the parties in this case. Because, when you took that oath, you, in effect, agreed to follow the rules which will be laid down for you in determining the guilt or innocence of a fellow citizen in court and you agreed to extend to him that same presumption of innocence until proven guilty beyond a reasonable doubt which you or I would have a right to expect in any court of law.

Now, My Lord, the Chief Justice, will be addressing you on matters of law. I am not going to worry you with . . . in this connection and if by chance I do say anything about it, because that would transgress the rule -- that is, the law is for the judge, the facts are for the jury, and counsel ought to restrict his submission to the facts -- then you must disregard anything that I may say on the law and take it solely from His Lordship, who will direct you in this connection.

Now in connection with this, it has been mentioned that a person must be proven guilty beyond a reasonable doubt. That is not something that I propose to explain to you because it is a matter that lies within the jurisdiction or province of His Lordship, and when

031260

you are getting into the area where we will be discussing certain matters of fact, you are judges here for the duration of the trial, and it is a very important matter, because the consequences of it are very, very far-reaching to say the least.

Now, in this particular case, my learned friend, in his very able way, has developed what he called the theory of the prosecution, the theory of the Crown, and I want to just pause a moment and . . . you that . . . theories is a very dangerous suggestion and we aren't, I suggest, interested in theories. But more particularly we are interested in the guilt or innocence of a person on a charge that was read in court when you were here as jurors sworn to do your duty. And I want you to reflect on that because this question of theory -- the theory of the defence, the theory of the crown -- could lead us astray and involve very dangerous considerations.

Now, I told you I was not going to worry you with . . . and I do hope I keep that promise, but, members of the jury, in assessing the facts here in this particular case I submit most sincerely to you that you cannot just propound a theory as has been propounded here and

031261

then say that it was supported by evidence. After all, juries decide cases on evidence, and the request of my learned friend in propounding the theory he did -- and if all these things do not come right at your feet -- you will . . . on a theory, on a notion which has been propounded.

Now, my learned friend has said to you that certain things should be disregarded. He has anticipated that I will raise certain things with you and I know that time . . . or either counsel to go through nine days, nine and a half days . . if we tried to do it we would be doing a disservice to all concerned. We can only touch the highlights and if through my . . . to you, I fail to mention particular points which you feel are of significance to David, I am sure that you will take them into account and bear in mind that it is impossible to touch upon them all.

Now, this case in my . . . has to be scrutinized very carefully, and first of all I would ask you to consider what you would call the physical circumstances.

Now, let us consider the question of the weather. Now, I know that in many cases . . . about the weather but really it is of no consequence. But may I suggest to you all that

031262

when you are considering the facts of this case
and considering the theory of the prosecutor, that
you bear in mind that the weather on this particu-
lar morning is not without significance. The
temperature is pretty clear from the evidence,
somewhere in the 40 below region. Then there is
the location of the body and of course you will
have the photographs with you and, frankly, I do
not intend to go over them photograph by photo-
graph or anything like that because, members of 10
the jury, I should mention to you that counsel are
aware of the fact that when you go into the jury
room you are permitted to have the exhibits with
you. Consequently, it will not be necessary for
me to go through the photographs, the garments and 15
so forth and draw to your attention matters which
you can easily see in the room and which would
just be a waste of time for me to ... over them
with you.

031263

But then we have the location of 20
the body. And members of the jury, when you are
examining these photographs I would . . . to you and
appeal to you most seriously to consider very
carefully the circumstances, which I know you
will, ... to disregard anything you may have heard 25
on the radio, T.V., in the paper by way of ...

gossip and so forth. I am sure that some of you may have heard as many theories as there are jurors long before you got involved in this case. If your experience is similar to mine, I think that that is not an over-statement by any means, perhaps it is a under-statement.

When we talk about theories, and I mention that because I suggest to you that the various theories that likely have been propounded throughout this thing, and believe me there are many and they illustrate to you the inherent danger of taking any ... of theories. 1

Now, we know the body was there, and I agree that it is a tragic thing -- and I mean this most sincerely -- for a young person to be struck down in the prime of her life. But we are dealing here now with a situation that ought not to ...any of us to be swayed in our thinking by that .. fact, when you are considering this theory of the prosecution. 2

My learned friend made reference to tracks, the question of tracks. Now, this, I suggest, poses a real problem and it is suggested on the one hand that any vehicle could have driven there. Some evidence would point to this. Some points in the other direction, and I would suggest 2

031264

to you that the ~~concrete~~ evidence is really quite
~~questionable one way or the other~~, and I say this
with the utmost respect to the witnesses for the
Police Department, because you can look at it one
way and then you can look at it the other. It is
just a see-saw effect, in my respectful submission
to you and it is in my submission conceivable that
~~an automobile did go along there and . . . it is~~
~~conceivable that there was no automobile and . . .~~
would suggest if a person was running down the ... 1
whilst you wouldn't see any tracks, yet in the
police officer's mind they were there later on ...
made tracks in ...if you are being pursued may I
suggest you wouldn't ...as to whether or not your
feet were ... This is a matter I invite your very 1
careful consideration of... that we have a whole
series of other matters, and my suggestion is that
these physical circumstances are important for not
just the fact of what was found here and there but
also from the time element. 2

This is something which my
learned friend did not make reference to, and I
submit to you that this is very important ~~because~~
~~we are dealing with a time element and the time~~
element here is so very specific . . . in my 2
respectful submission.

Handwritten notes:
 10/11/01
 10/11/01

031265

8 Address to Jury
Mr. Tallis

First of all you have the
deceased located in one site and you have a key
and comb located . . you have purse and contents.
. . you have a sweater and boot. You have a
cosmetic bag, or you could call them contents of a
purse.

Now, I want to refer to that
because if my learned friend is correct in the
theory that he has propounded as to how these
things got in these various places. You have, in 1:
my submission, a . . time element and of course
you have this business of allegedly taking the
boot, taking the sweater and burying them in a
particular spot, a somewhat pointless thing in my
own opinion. 1:

If the motive is . . . why worry
about a boot being buried where it was, why worry
about a sweater being buried where it was, but
these things, in my submission, involve a great
deal of time, much more time than my learned 2:
friend suggested to you.

031266

And there is nothing to indicate
here that this . . . was . . . or buried or
anything like that to the site. There is no
zigzag pattern of foot marks or anything like that 2:
leading up to the places, and this is something

that we ask you to analyze very carefully in dealing with the photographs, which I think are with P-3 and P-4 and . . . suggest on P-4.

Now, my learned friend, in his very able way, said I anticipate counsel for the . . . will say something about the bag. Now, members of the jury, I think you would be surprised if I did not. And in that connection, I am not going to bother opening the exhibits, you can do this. But I do suggest to you that you take this little cosmetic bag or container and examine what is in there. You won't find just one lipstick or two lipsticks, the duplication which my learned friend suggested. You will find several. As I say, I am not going to open it all up and wave them in front of you. And then in addition to that you will find another little container, plastic with a sort of ... on the back of it and there is a form of the cosmetic here and in this area, and perhaps my friend was out of order in suggesting that you defer to the female member of your jury on matters of this kind. I gather throughout the course of the trial that some of the male participants here were as not as informed as they might have been on matters of this kind. But ... I invite you to consider that

031267

very carefully, and also consider the question of the purse, the contents of the purse, and then ask yourselves, when you examine that, bearing in mind the alleged dimensions of this other so-called compact is it reasonable, ~~is it probable that there was in fact another compact or cosmetic bag as is alleged in this particular case?~~

Now, members of the jury, these are matters that I invite you to consider and I advance them to you just as an illustration of the heavy task that will soon pass to you. It doesn't matter what my learned friend thinks, it doesn't matter what I think, in the final analysis it is what you think that counts and I take that as an illustrative because if you find, having examined those exhibits, the ones that we have, if you find that you are not satisfied beyond a reasonable doubt that there either was this other compact that was allegedly tossed out of the window, the one that allegedly came from this purse, then that is something that you will have to consider very carefully in assessing credibility and weight of evidence in this particular case.

031268

Now, I don't like to have to belabour some of these things but in passing I must mention some. My learned friend has men-

tioned what is an inconsistency in the situation
as far as the theory of the prosecution is
concerned, and that involves, in my submission,
the clothes on the body of this unfortunate young
lady. A most unique situation, and I never recall
...in a situation where anything like this was
found. But once again I invite you to look at
those photographs, consider the position of the
clothes, consider the clothes themselves, and may
I suggest to you, and I think my learned friend 10
would agree that with this, that it points
unalterably to the fact that someone got the coat
off that girl, there or in a ... got the coat off,
got the dress down off the arms and after this...
then the stabbing must have taken place and the 15
... the stabbing in the back must have been, in my
submission, have taken place after the coat had
been put back on, and this is why I suggest to you
it is such a unique situation. And just the
question of the slash marks, I suggest to you that 20
it is quite clear that the nurse's uniform must
have been down because there is nothing to
indicate, if my examination of the garment is
accurate, and you will have a chance to see it,
there is nothing to indicate any knife slash marks 25
either on the outside of the coat, across the neck

031269

area or on the outside of the uniform.

Now you may say, well, these things were ...larger, and you may well say that to yourself and you may be saying that to me now, silently, but I say this to you, because once again we must go back to the time element ... among other things, and I ask you to bear them in mind because these are matters which you, as men and women of the world can consider and apply your common sense to. They are things that are there. 10
And there are other factors which I suggest are important in connection with the time element. The position of the . . .the . . . one boot off, quite some distance from the body and so forth. Now these are things which I don't think counsel 15
needs to draw a picture for you. I merely mention them in passing because I suggest that they are of possible significance.

Now, in addition to that, reference has been made by my learned friend to 20
the wounds. And he anticipated, as he quite frankly told you, that I may make reference to this, and I think he made reference to Dr. Emson's evidence in this connection. Now, may I say this 25
to you, that Dr. Emson gave evidence with respect to the nature of these wounds and I don't much

031270

think anyone pressed him unfairly, I hope I didn't
with any questions, but I do suggest to you that
his observation with respect to the nature of the
~~wounds~~, the angle of them, certainly lend support,
and strong support, to my submission to you that
they are certainly consistent, ~~and consistent~~
~~with having been inflicted by a right-handed~~
~~person~~. Now I don't want to quibble over words.
At one point in the proceedings it was said, while
one witness said that I intended to say with the 1
right hand, rather than right-handed. Now as I
say, I don't want to nitpick over it or quibble
over it, but I do say to you when he looked at the
wound, if you recall Dr. Emson's evidence is that
is not an unreasonable suggestion. I don't think 1
he thought it was. One can never say with
certainty, but he did, I think it is fair to say,
take into account the position of the wounds, the
angle of them and so forth, and when I ... him,
and I was glad to see a doctor of Dr. Emson's age 2
would recognize that there are certain things
which you can judge by common sense, you do not
have to be a professional person, and in that
connection I think he was very frank about it.

031271

Now, I would suggest to you that 2
these physical circumstances, these physical

factors that you can follow there add up to a very substantial amount of time after ... I suggest to you that it is unreasonable and I don't think my learned friend really verified this, I don't think he could, on the evidence, ~~It is~~ unreasonable to suggest that such a dreadful thing could happen in such a short period of time. I suggest to you that this is something that must be carefully considered in your deliberations.

Now, in the question of -- on the ~~question of a sexual attack,~~ 1 I am not going to be so naive as to argue that there wasn't ...but what I do say to you is that in this area you may once again have to consider very carefully certain ... it is suggested that the attack supposedly started 1 and presumably was completed right there. This is the theory. But in this, ~~you would examine the physical evidence, bear in mind the weather.~~ I am not going to dwell on that at any great length. The fact that seminal fluids were found on the 2 panties that were down around her ..., this may cause you a great deal of concern in deciding whether or not you can find beyond a reasonable doubt that this sexual attack started and was finished there. It is one of these things which 2 in my submission must be weighed very carefully as

031272

one ... and we must be frank about this, for it to happen there ... from start to finish around the trampled area would indicate a fair amount of time for a . . . there. ~~If the struggle lasted as long as my learned friend urged you to hold, then you are back to a time factor which is of the utmost importance.~~

Now I have dealt for the moment with these physical circumstances at the scene and now I want to turn to what you might call a 1' different ... but you can't put these things in pigeon holes, members of the jury, I think, but to some extent refer to them separately, but I am not suggesting to you that you can just pigeon hole them. This is not the purpose of referring to it 1' in this way, but it will, first of all, I think, this was accepted, it is common ground between my learned friend Mr. Caldwell and myself that there was no use of liquor or drugs by the accused that morning in question. No suggestion that he was 20 under the influence of them and this, I suggest to you, is a very ... point ... which is common ground between us and as well all sorts of submissions have been made to you with a view to advancing the theory of the prosecution. I want 2' you to consider something that my learned friend,

031273

I think it is fair to say, did not urge upon you,
and I can understand it.

First of all, let's deal with the
conduct of David on the morning in question. The
conduct of a boy as observed by average -- and I
don't say this disrespectfully -- average,
everyday citizens who go about their daily work
and, I suggest, pay their taxes and pay their
bills. And what do we find? Well my learned
friend expends much ... very early in his theory. 1
Well, these are not the people who really looked
for things therefore they don't see them. Now,
just ask yourself, is that reasonable? I invite
you to consider the observations of Mr. Rasmussen,
and if I may say so, you may well find that he is 1
the type of man who would be there. The door was
~~open at 7:00 in the morning, he would have it~~
~~opened at 7:00 in the morning, and his evidence is~~
~~that shortly after 7:00 a.m. -- as I say, I invite~~
you to find that he is the type of a chap that if 2
the door was to be open at 7:00, he would have it
open, he would not be ...half an hour late, but
this is something where you should consider very
carefully the situation. And he notices nothing
unusual about this Now it is all very well 2
to say he perhaps didn't look very carefully, but

031274

he remembers him after daylight, he remembers that he didn't have shoes or snow boots and it was then that he was behind the counter he must have had some powers of observation. He spent a few minutes with him, showing him certain things on a map, an act of courtesy on his part, and I am sure he would treat any other person the same way. Now, can you ignore testimony of that nature? I suggest to you that it is not reasonable to disregard it in the way in which you have been invited to do so. 1

Now, what else do we find on the morning in question? The group end up near Walter Danchuk's and his wife. Now, of course, my learned friend ... how he took this sketch ... was he invited you to find that it would not take very long to get to the Traveleer Motel, and frankly it is only a few minutes' drive if you know your way there. But he is asking you to assume that, and I suggest that the evidence does not warrant that assumption. And if they knew their way as well around as it is urged upon you then ... why would they end up behind -- why would Wilson end up behind Walter Danchuk's place over on Avenue T? These are matters for you to consider and I certainly suggest they merit your careful con- 2

031275

sideration.

And then what do we find then at Danchuks? Walter takes his car out, only gets part way out. He and his wife are ... to go to work and ... that really suggests that they offered a hand, I think this is common ground that David did the ... Once again, we run into the question of the stalled car. Walter and his wife were ...

Now, first of all I invite you to consider this pretty carefully because I suggest when a stranger comes to your door, comes to your place at 7:30 in the morning, 8:00 o'clock in the morning with a group and you have never seen them before, you take a pretty careful look. And if they say they're from out of the city, you perhaps then scrutinize a little more carefully.

Now, these are matters, I suggest, where you can apply your common sense, and you might not agree with what I am suggesting to you, but I submit to you that if you test it by ordinary standards, that it is not unreasonable. It is not unreasonable. And what do we find? Well I suggest to you that their appearance at the Danchuks leads to this conclusion, that there is no suggestion that David appears unusual; nothing

031276

unusual about his demeanour or about his speech,
nothing -- and this is quite important -- nothing
unusual about the other two. And Mrs. Danchuk, as
I understand it, said that they were dressed like
school kids.

Now, I may say here that where I
refer to the evidence, that is only my recollec-
tion of the evidence, my recollection, and if it
is at variance with yours, you follow your own
recollection of it. But as I understand it David 10
was very polite, talked in a normal tone, ~~nothing~~
~~unusual about his clothes, and time-wise~~ ... it
would place it between 7:30 a.m. and 7:40 a.m.
that they were there. Now once again ... quibble
over ... minutes and I don't intend to start that, 15
but once again we get to that time factor which is
very, very significant.

Now if I may pause here and go
back to the scene that is pictured in the photo-
graphs where this girl is there. ~~Now if a person~~ 20
~~had been wrestling around or in contact with a~~
~~person under those circumstances, is it not~~
reasonable to suggest that one would expect at
least some blood, or some ... of dampness, either
from snow ... on the jacket on the outside ... 25
around the interior garments? I ask you to

031277

consider that because this once again comes back
to the Danchuk household where once again we are
dealing with people who get up in the morning, go
to work, presumably come home, do their household
chores, and I suggest to you that this is not
unreasonable for them. And I think Walter's
evidence was that he was chatting with David as to
what he did or what he was doing, the question of
being a magazine salesman came up, and I would
think you may infer from that that Walter was a
little cautious as to what they were doing there,
what they were -- or where they were from. This
is something you can consider, but knowing that
Walter spent quite a lot of time in their company.
Quite a lot. I think as evidence indicated it
must be at least over an hour. And I suggest to
you that he, in particular, talked to David at
quite some length, had an opportunity to observe
his manner, his demeanour, his clothes and so
forth.

031278

Now if my recollection of the
evidence is correct, and I know my learned friend
will ... wilfully misstate it, my recollection is
that this is not David who went to the bathroom at
Danchuks' but rather it was the girl. Now I may
be wrong in this but this is my firm recollection.

And I think in his argument he invited you to hold
and find on the facts that David had gone to the
bathroom and that this gave him an opportunity
presumably to wash himself off, or whatever as
soon as ... thereafter, I take it. But this visit
to the bathroom, as I say, my firm recollection of
that is that the evidence indicated that the girl
went there, and furthermore that Mrs. Danchuk was
asked later to check and see if there was any
signs and she said there weren't any. My recol- 1
lection is -- and once again you will be guided by
your own recollection -- that David got a glass of
water from her, but there is no suggestion that he
went to the bathroom. You can check this in your
own mind and if I am wrong, I can tell you that is 1
not a wilful misstatement of the evidence which
...

Now, these are facts, I suggest,
members of the jury, that ought to be given very
careful consideration, and I repeat that these 2
observations by Mr. Rasmussen, Walter Danchuk and
his wife, they are recollections and observations
of people who I think are solid and sincere type
of citizens, who, I think it is fair to say, best
answers what you say one way or the other and 2
accordingly should be uppermost in your minds

031279

during the course of your deliberations.

Now, in considering their observations, you might bear in mind that I think the evidence indicates the lighting was good for their sighting in the alleyway. If it had been a dark ... I would have to be quite frank with you and say that this is a fact which you would have to take into account in assessing their evidence. But I think it points to that.

There is no suggestion in this particular instance that David was anything but polite and soft-spoken. I think Walter Danchuk was close to all three of them, if I recollect the evidence, and as I recall he said he sort of wondered what they were doing. That is that I invite you to just ask yourselves, put yourselves in Walter's shoes and say, well, maybe I ought to ask what these people are doing here. Nothing unusual, no scratch marks, no signs of blood, and of course he confirms no indication of the use of alcohol or anything else like that.

031280

Now then, I want to turn to the question of the garage people and I think that I can lump their evidence together without going over it item by item. But I suggest to you that when you analyze their evidence there is no

suggestion that there was anything unusual. My learned friend invites you to draw a sinister conclusion about wanting to have a radio fixed. I suggest, frankly, that in this day and age that is really unwarranted; when you consider the number of cars that have radios, there are very few that don't have them, and if the radio is not working it is not unusual to try and have that fixed.

And also, there is the suggestion made later on in his submission about David wanting to go right away. Now, the suggestion, as I understand it, is that when he was at Cadrains' he wanted to have the car fixed right away and ... off at a run. Now, is that submission, which you are asked to accept, valid?

Well now, what happened when they got the car fixed, did they head right out? There was time to go and look for Shorty's girlfriend, time to go and visit with another friend, and I say to you that with all due respect the facts would not warrant that kind of a finding with all the evidence that is before you, that there is a contradiction in terms between it, when you examine what is suggested and what in fact did happen.

Now I want to turn and deal quite

031281

frankly with a number of other matters. And having ... from Walter's place down to Cadrain's may I pose a number of matters for you to consider on this and these are very serious matters, going to the very root of our system.

We have a series of events here that, in my submission merit very careful scrutiny, and I suggest to you that they simply cannot be credited when tested reasonably. You see, we have the suggestion at Cadrain's that David was in a rush, and I must emphasize this, a rush to get out of town, and yet we have very clear evidence that this is not the case, and even after the car was fixed. Now my learned friend cannot have it both ways and you must, I suggest, look at the other evidence, look at the factual situation and not simply divorce just one aspect of it from the other.

031282

Now, reference was made to the trip to Edmonton, in effect suggesting that he was ... to Edmonton right away. Well, now, once again, members of the jury, it is also open to you to find that this trip to the west, if I might characterize it as such, was not a spur of the moment thing, and you have to look at it in that light.

Now, one or the areas that I suggest to you must be scrutinized very carefully is the allegation of Cadrain that there was blood on David's clothes, and I am going to put the position as fairly and frankly as I can to you on this. When you are assessing this evidence, I say to you this: Isn't it a strange thing that this boy had no memory, had no memory of that blood not for a few days but for weeks -- and remember that in his case he was questioned by the police in Regina and he does not suggest that he was holding back on them, no suggestion of that. His evidence as I recall was -- and he changed it from the preliminary hearing -- was that he was trying to tell the truth at that time, trying to tell them what he knew, and if I recollect his evidence correctly, he laughed at them, and was quite clear in his mind at that time that nobody in the car had anything to do with this.

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Now it is true . . . he was a suspect himself, he comes back to Saskatoon and you may well infer that he considered himself a suspect but I say to you . . . that this is something that warrants very careful consideration and I saw nothing . . . through on the evidence of his interview in Regina. I hope that you have a

recollection of that and the circumstances under which it took place and of his position at that time. And as I understand it his position here is, and he was being quite sincere about it, and accordingly I say to you that this is evidence which you are entitled and ought to reject, having regard to the circumstances that were outlined in the case before this court. And in this connection you may remember that he was very clear on this, that when he was being questioned in Regina 1 he had no recollection of any garment, no recollection whatsoever.

Now when you are dealing with matters of this kind, I know you appreciate the heavy burden that you bear, and I must deal with a 1: number of other matters which are of vital importance in this case. Of vital importance to David, to all of us.

Now I want to deal with the evidence of Wilson, and once again my learned 20 friend has invited you to find him, on the question of credibility, a very credible witness, and it is frankly his story I most disagree with ... I have suggested to you, and I re-emphasize the point, that it is more reasonable, by the 21 practical, common sense tests, to give weight and

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consideration to evidence of people, average people who do their work, who do ...and show ...without regard to other activities. And that is why I have emphasized the evidence of the likes of Rasmussen, the Danchuks and so forth.

Now, my learned friend has pointed out a number of things and he invited you to adopt one or other theory on the question of the location of the car and so forth, and he said, well, maybe you will accept one or the other, or 1 maybe a combination of the two. But members of the jury, he did not give one side and tell you that if you are not sure about either the consequences are much different. ... And I know My Lord, the presiding judge will direct you on 1 matters of law and the rules to be applied to when you are not sure. Indeed, I gather by the alternative theories that were ... that my learned friend certainly did not express ...

Now, on the question of the time 2 element, my learned friend suggested that perhaps I was nitpicking to say there isn't much to really warrant going two blocks or two and a half blocks in comparison to five blocks. Now, lady and gentlemen when you are getting down to matters of 2 minutes, which is what this is, five blocks, or

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four blocks, or two blocks isn't a trifle matter, this is not something to be reckless with and you may understand that when I asked him those questions as to what he said on the preliminary hearing it wasn't ... of nitpicking or . . . about half a block or something like that. It was because the question of minutes is of importance in this case, and I suggest to you that you examine that evidence very carefully. And if my learned friend even takes the evidence of Wilson 1 as he invited you, I suggest to you that when you analyze the time it is unreasonable, it defies common sense to suggest that all of the things that he alleges, that everything that he ... true happened in that space of time. 1

Now I know that if there may be just one person give an estimate of time you would be entitled to say that, well, he may be out ten, fifteen, twenty minutes. In this case we have the effect of evidence of other people, Mr. Rasmussen, 2 if I may go back to him, ...Gail Miller ... that morning ... in to this time element and which are of vital importance especially when we are dealing with Wilson's evidence, that is not to quibble over a few feet or anything like that. We are 2 dealing with a very vital matter, a matter that is

031286

vital to you, to me, and more particularly to David.

Now, in this connection, once again I invite you to consider other aspects very carefully. I do not think you can advance one situation, one aspect or the other as my learned friend has invited you to. You have the evidence in this case about the toque this boy was wearing. Now the theory that the Crown put in is here. Now you have evidence on the length and colour of the 1
toque my client has worn and if we are going into the question of the physical evidence I suggest to you that there is just no basis on which to suggest that the toque that was in evidence was the toque that David had been wearing, and I can 10
only assume that that is the purpose that it was put in for, it was not put in with an attempt to suggest that someone else had worn it, although may I suggest to you that the evidence leads unalterably to the conclusion that it was not the 20
toque that David was wearing ... found in the area where some other items were not ...

031287

And it is suggested by my learned friend that David got rid of trousers and a toque somewhere in that vicinity. Now, I suggest, 25
members of the jury, that this is really asking

you to speculate. And I say that with the utmost
deference to my learned friend. It is not, it
just is not warranted. And it may well be that
these are factors which have already occurred to
you, but the question of the toque, the colour and
so on, and the effects that that caused that can
... into this, I am sure that... had no intention
of trying to mislead, once again she falls into
the category of a situation specific to just her
... and in her own mind somehow a ... which can be 1
natural there was an ... toque but yet that is not
the case.

But when you are dealing with
Wilson's evidence may I suggest to you that you
are dealing with a different type of individual 1.
than a Mr. Danchuk or a Mr. Rasmussen, and I say
this most seriously. You see a 50 per cent error
does not matter, but may justify ... whether you
... it 100 per cent ... At the preliminary
hearing ... a certain number of here he 2.
thought it over, it was double that amount.
Now, you may say, well, so what? But it is not
without significance that the change was a
detrimental change; any changes were detrimental
changes. 2

031288

Now what was his position when he

was questioned by Inspector ... in Regina? What
was his position on numerous occasions before?
His position was very clear... to his car and had
nothing to do with it. And even then, when under
cross-examination, as I understand it, he said
David was quite normal. You have all these
things, he's covered one way or another but his
position had always been until quite late in May
that there was no blood or anything like that
involved, there was no suggestion of blood when 1
David came back to the car, and that's ... and it
is not without significance that he was not asked
about the toque. I noticed that the toque in
question which was in evidence was not put to any
of the witnesses, was not shown to Wilson, and I 1.
can only assume ... to my learned friend, he would
have asked the question, there is no suggestion
that that is the toque.

Now, this business of the purse
in the trash can. Now, I suggest to you that it 20
is very difficult to assess the motives of some
people, the where's and the why-for's of a certain
class of people, but we cannot say. But I suggest
to you on the balance of probabilities he didn't
make any ... appeared in the trash can. I think 2.
if he had seen the purse and contents driving

031289

around the area ... As my learned friend has pointed out, he has sworn it, that his car was never in that alley on that morning in question. ... was west alley or the T-junction with it. Then he is quite ... that there was no blood on David's hands when he got back to the car or the outer jacket or anything like that. Now these are factors which are before you and which, in my submission, must be carefully considered by you. You have all these things, all the evidence covered here. 1

But my learned friend seized upon a matter and made reference to the question that was put to Wilson by His Lordship that he then ... Alberta and he was ... My learned friend says a ... answer ... but yet now, members of the jury, isn't it strange that that was his reaction if, in fact, as he now tells us, he had seen blood on David's clothes that morning, if in fact David came ... back to the car saying at that time, "I fixed her," or "I got her," or words to that effect. 2

Now when you are dealing with this, I suggest to you that this statement must be ... very carefully. My learned friend invites you to put another interpretation on it, but I 2

031290

suggested to you, and I suggest to you again
emphatically that that is ... must be tested
against what he says happened to things that he
remembered and if, that being so, then clearly, I
suggest to you, that just is not reliable
evidence, it does not stand the test of reliab-
ility. How can you be sure under those circum-
stances?

Now once again there are areas
that I invite you to consider, you have got to 10
consider his background, his education and so
forth. I am not going to dwell on it tell you
... upon his reputation, but these are things
which you must, in my submission, you ought to
consider how you may -- while considering the 15
vagueness of his answers when he was asked by My
Lord, the Chief Justice about the knife, in the
matter of how he could see it and so on. You may
while considering this and assessing the reliabil-
ity that you can place on this type of evidence 20
and you may, while considering the fact, that I
said, which is common ground, that he, himself,
was a suspect in this case ... as my learned
friend ... until May 22nd or 23rd, as my learned
friend said -- and I think the date is accurate -- 25
... when certain things are shown and so forth, I

031291

don't intend to ... which circumstances you are in
your minds on the basis of the evidence.
But what I do say is that these facts point in my
submission unalterably to the conclusion, clearly
that it is not reliable evidence. If you apply
the logical, common sense test to it. You are the
ones who are assessing it.

And then I want to turn, if I
might -- and there is no time limit on me, I think
I'd better impose a time limit -- I want to turn 1
to the question of Nichol John.

Now my learned friend has
detailed at great length what Nichol John said and
he referred to a number of things, including the
directions on the law that My Lord, the Chief 1
Justice will probably give you in this case. As I
said earlier, I hope I say nothing on the law and
I don't want to try to usurp His Lordships
function in this area. However, my learned friend
has emphasized certain aspects of her evidence 2
even, that he acknowledges that a certain direc-
tion has been and must be given as to ... as
against ... Now he anticipated that I was going to
refer to the circumstances under which she gave a
statement, and members of the jury I have no 2
intention of rehashing that. Those circumstances

031292

are before you and they are, in my submission, factors which you can quite properly take into account. I would raise that ... it might well be any one of you, I do raise it and I did raise it ... opportunity to comprehend the background of the ... that might be ... in her mind, and the effect of certain things may well be ...

Now my learned friend urged some ... to you, and once again My Lord will give you direction as to the relative value of this particular narrative, but certain ... were urged and my learned friend put it to the witness and quoted, as I recall it, there was a reference to seeing the girl stabbed right there. There was some reference to that. Now members of the jury I am not going to rehash the physical evidence ... and is that statement in that form even ... a possibility? I suggest to you that it isn't. After all it is common ground I think that those stabbing wounds on the back were inflicted when the coat -- after the coat had been taken off, the dress taken down and the coat put back on. The wounds in the frontal area must have been inflicted after the dress was rolled down, which I suggest meant the coat and the ... had to be taken off, and even the slash marks must have been

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inflicted after the uniform was off.

Now I ask you to consider that, and I don't think that much is unreasonable. This isn't a question of nitpicking, this is something I genuinely ... but it is something ... and that is a fact of life you must assess.

You may have felt that I dwelt a little too long on the forensic -- and I refer to the garments which you ... will have with you in the room -- but when you are testing some of these propositions, some of these theories, and frankly, I dislike the word theories, because it symbolizes the ... which you say when you are not sure, it means you cannot be sure, and when you have something like this staring you in the face, I suggest to you that my learned friend's suggestion that you completely ignore the ... on the question of these ... factors, is glossing over something that can't be glossed over if you apply the test of reasonableness.

Now on the question of Nichol John, she was asked questions and ... the question of the location of where they were stuck. I think it is quite clear that she was told it was a funeral home ... to a ... and so forth. Now there are many, many matters here that merit your

031294

consideration. My learned friend has suggested that on the whole the inconsistencies don't matter much. Now there may have been a few things, minor inconsistencies that don't matter, but when you get to the consistencies and inconsistencies of life or death, they do matter. And in this particular case there are many and they all fall into that category. Many of them that just can't be interpreted one way or the other and glossed over, just taken out of the picture and ... I have 1 already said.

About the question of the cosmetic bag, I am not going to belabour that overly, but when you are weighing Nichol John's evidence and you look at these exhibits, I can 1 just appeal to you to use your common sense. My learned friend says that ... theory is really shot down because it would look ... she was ... that is not a theory that I am propounding to you. All I am asking you to do is apply the test of reason- 2 ableness, examine the items, recall the ... consider the contents in the purse as a whole and ask yourselves a few basic questions about this. And having said that, I will repeat it. That you should apply your collective judgment and experi- 2 ence in making that determination.

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Now once again, there was other evidence here which would take far too long for me to review. I can only touch on the highlights of it. As I understand it, once again, she was at the ... I don't use the term ... in a censorious way, as far as I am concerned it is quite a respectable place, but I do say that it is my recollection that the evidence indicates that this girl was given certain details, and these are things that you may well take issue with or take into account in assessing the reliability. My learned friend has invited you to accept certain things, reject others. I say to you that when you get into circumstances such as this, can you ever be sure about anything? I submit you can't when you start to analyze her evidence.

1

1

Now once again, I think it is fair to say that you can't place Nichol John in the category of Mr. Rasmussen or Mr. Danchuk or his wife.

2

.....but I do say that when you are making up your minds or you are deciding whether or not you can be sure of certain things, those are things that you have to weigh and should weigh in ... matters of this kind.

2

Now in this particular case there

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is a certain amount of technical evidence, and I don't pretend to have any particular ... in any of these fields, and maybe you find yourselves in the same position. But I think, with respect, that when all is said and done, it can be considered by all of us in a common sense way and this expert evidence, in my submission, may well be ... for how much it doesn't show as well as for what it did show ... you can't divorce one aspect of it from the other.

1

Now I think it's pretty clear that there is nothing in the nature of fingerprints. That I suggest must be ... But on the question of hair samples, there is no suggestion of any matching of hair samples. And ... it is fair that you have these -- there may be these ... samples that cut from a piece of frozen ... that had been taken frozen ... but I suggest that is not of too much significance.

1:

There is no matching of any blood type, of body hair, pubic hair. And these are factors that I suggest you consider very carefully. While it is true the observations were made after the date of this offence, there has been no suggestion of scratch marks or anything else on David. I think Ed Karst -- perhaps I

2:

2

031297

should say Detective Karst -- made a point in checking him over in Winnipeg, now it will be quite normal when this was some little time after, but when you have an officer checking, an experienced officer must have had a reason for looking, otherwise he wouldn't do it just for the sake of looking.

Now in the area of the seminal fluid, I have one or two observations to make. First of all, this is no criticism of Dr. Emson, 1 but I think it is unfortunate that the sample that was from the vaginal cavity was not saved, because if it had been saved it is quite clear from his evidence that the blood could have been analyzed for grouping. Now much is said of ... this really 1 is of no significance. Now members of the jury there is no suggestion that other than a non-secretor -- and the possibility of secreting the blood factor in his seminal fluid is great -- ... the effect of that evidence that the seminal fluid 2 contained what are called "A" antigens. Now this may be, and I suggest is something that you should consider pretty carefully, and as you see, if in fact the donor of that seminal fluid was an "A" group secretor, and there was no blood, as such, 2 in the seminal fluid from that person with that

031298

"A" grouping, it cannot have been, the man could not have been the ...

Now it is suggested that the traces of blood that Sergeant Paynter found -- that might have been blood -- now frankly I am not here to argue that there was ... at that time of year and I am not ... anything to suggest that there is ... out in that alley at that time, but what I say to you, members of the jury, is this: when you get down to the question of reasonable- 1
ness, first of all, Dr. Emson points out that the blood in the seminal fluid in the vagina that he threw away -- spermatozoa -- could well have come from Miss Miller's "O" group. It could have come from her in two ways: from the inflammation that 1
was referred to, or from the possible onset of menstruation; or from the donor. And then let's examine another point in this connection, when that frozen lump was found out in that area that had been ... up, may I suggest to you that if 2
there was blood in this sample, as he thought there might be, he could not say that for sure, but let's forget what ... for the moment and be reasonable about this. Is it not more likely that since he scooped up the area to get the patch 2
where the blood had seeped through, that it was

031299

some other blood in the snow? Is this reasonable?
I suggest not. And as you see, if the blood that
got into that seminal fluid was "O" group, and the
donor didn't have any secreted blood in his
seminal fluid, then of course, the result would
have proved it. There is no suggestion in respect
of the sample that that was done.

There is no evidence that David
is a person who is afflicted with any condition
which caused blood to be in his seminal fluid, and 1
I suggest to you that these other matters that I
raised with you are more probable than the
possibilities that have been urged upon you. Now
as ... I ... it in this way because I suggest to
you that it is reasonable. I cannot ... in a 1
theory of ... is desired. Frankly, for any
counsel to suggest in these circumstances, and I
think that you would have felt the same way and
while you would not ...

Now those are factors when you 2
are assessing the forensic evidence, that I invite
you to consider very critically and I suggest to
you that they tell heavily in favour of David.
They are factors which are dealt with by honest
and reliable witnesses, and I say this with regard 2
to the crime detection laboratory people and the

031300

identification officers who dealt with this ...
very fairly and very frankly, and I am not here to
suggest that someone taking a syringe and drawing
a little blood ... I am not suggesting that, but I
am putting it to you on the basis of that, I think
... and draw to you that when you consider this,
when you consider the nature of the alleged
struggle and so forth the question of hair samples
and so forth, you just bear this in mind.

Now members of the jury, I shall 1
not trouble you too much longer, but there are one
or two things which I must mention before I leave
you. My learned friend urged very strongly upon
you the fact that certain admissions, certain
statements by the accused were made ... in a [redacted] 1
[redacted] that raise -- I should say that erase any
possible doubt.

Now once again, you people are
men and women of the world and I suggest to you
that you just can't gloss over the circumstances 2
in which these alleged statements were made. [redacted]
[redacted] can't gloss over the [redacted] 2
[redacted] forward. Now these are factors for you to
consider. I am not going to dwell on it. I think
to go beyond ... relish going through the details 2
when they are so ... What I do say to you is this,

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you can't take those statements and advance them out of context as my learned friend has done. You have the circumstances before you and I suggest to you that the allegation that -- first of all I invite you to reject that evidence and, secondly, I say to you that even if you find that some comments were made, you must view it against the background of ... these are the ... and their background and so forth, and ask yourselves what weight should be given to that kind of evidence. ... jury, that's a matter for you to decide, I don't want to usurp your function but I shall invite you to consider it very, very carefully because there are things there which may well have come to your attention which may cause you to say to yourself certain things. You must scrutinize that, as all evidence, pretty carefully ... that they would not support the theory advanced by the prosecution in this connection.

My learned friend suggests, in effect, that there may be no real discrepancies in the evidence of Lapchuk and Melnyk. This is a matter for you to decide, not my learned friend. ... you may well agree or you may well disagree, but I suggest to you that there may be some pretty substantial differences which you might well want

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to look at and consider very, very carefully in this particular case.

... which is suggested ... they may show that he must have known all about it. Well now, members of the jury, the evidence is pretty clear that he had -- all these kids knew that he had been questioned, although not necessarily how many times, and there is somewhat of an inconsistency here because Wilson's ... is that in Calgary he made some comment which would indicate 1 that he didn't know whether the girl was dead or not. You might bear that in mind when you are assessing these matters and deciding whether or not there is really such small contradictions as my learned friend invites you to find. 1.

Now in this particular case you already have a background on these two chaps and I am not going to dwell on them. My learned friend said, well they're not all American ... I go one step further, they are not all Canadian ... I 2 wouldn't want them as all Canadian ... But in any event, the matter here is really too serious to treat it with levity because the issue is much more than all American or all Canadian. The issue

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this to you and I suggest it merits careful consideration, and that is the conduct of David.

We have dealt with it ... but let's deal with his conduct ... he knew that this investigation was under way. And once again we're dealing here with ... and I say this with regards and with respect to Detective Karst, you didn't notice him prevaricating on any answers, no humming and hawing or hedging or anything else, and that is the way ... and I commend him for it. 1
What do we find? He ... David in Winnipeg where David was working. You recall that David was ... for ... Wilson then now you know the sequence of it. And as I understand the evidence, Detective Karst was with him for quite ... in 15
Winnipeg and I think the evidence, it's fair to say, would have been that David was polite and cooperative throughout that interview and he was released.

I think it's fair to say that 20
Detective Karst's knowledge and ... he had all the background on this case from ... and everything. He noted that David wrote left-handed. Now you didn't find Detective Karst quibbling over that in any way, and he explained the circumstances under 21
which he noticed this quite fairly and quite

031304

properly. There was co-operation as far as the search of not only the room but the body. ...

I think it only proper to point out to you is ... how John Oleksyn of the City Police, on the question of the blood sample, there was no hesitation. Dr. Brand confirms this and he himself checked it out as well ... made sure that he was bit transgressing any rules, as one would expect a medical practitioner to do.

And then, as I recall Mr. Kleiv 10
of the City Police ... hair samples from him and it is my recollection of the evidence he got one sample on April 17th, this is when David wasn't in custody, it turned out it wasn't a very good sample and he needed another one, and I think that 15
one ... David pulled it out, and the other he took the scissors and cut it himself, and Kleiv, with frankness, didn't ... And that is as I recollect his evidence.

One of the other officers who 20
gave evidence, Mr. Penkala -- your recollection may be better than mine on this -- took the saliva samples obviously for the purposes in connection with the investigation, and he did without hesitation ... was polite and co-operative. 25

Now you may well want to consider

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this and I suggest to you that you should consider this when you are assessing the conduct of a sixteen and a half or seventeen year old boy. I suggest to you that this is ... this type of conduct ... speaks -- well speaks louder than I can speak.

Now members of the jury, I have spent perhaps too long as far as you are concerned, and I am sure that you have listened attentively to what I have said. I am also sure that there are many other things that I could say, many other points of evidence that I could allude to, but I am sure that you will not overlook these matters in your deliberations. And mindful of the rules under which our system of jurisprudence operates and that ... of the experience of not just one or two generations but of many generations that have built up our system of jurisprudence, I suggest to you that when you consider the evidence that is before you, the circumstances that I have tried to touch on, the scientific evidence that I have tried to touch on, the question of the conduct of the accused, that the ... of evidence is such that it leads unalterably to this conclusion, that David is entitled to a verdict of not guilty on the evidence.

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