IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

WRITTEN SUBMISSION OF BEHALF ON SERGE KUJAWA

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This submission will address the Terms of Reference only to the extent that they potentially connect to Serge Kujawa. In doing so response will be made to the several attempts made by individuals and counsel associated with David Milgaard to fix blame upon Mr. Kujawa. Finally, some general comment will be made respecting the balance between avoiding wrongful conviction and maintaining a proper level of administration of justice.

1. The Investigation

Serge Kujawa played no role whatsoever in the investigation that led to the trial of David Milgaard. As Director in the developing and extremely busy office of Public Prosecutions in Saskatchewan Justice, Mr. Kujawa took no interest in police investigations, either RCMP or municipal, except on the very rare occasion when his advice or assistance was requested.[1] There was no such request respecting the Gail Miller murder investigation.

Although the RCMP, as a matter of routine, forwarded reports of assistance granted to Saskatoon City Police in the Gail Miller murder investigation to Saskatchewan Justice, and some of these appear to have crossed Mr. Kujawa's desk,[2] no attention was paid to them for the simple reason that no prosecution had yet been commenced.[3]

These reports were at the time considered to be merely advice from the RCMP of its activities pursuant to its provincial policing contract with Saskatchewan Justice, and of no particular interest or relevance to any of the department's prosecution files. This is evident from the fact that they were so filed and did not come to light until 1993 during the RCMP Flicker investigation.[4]

2. The Criminal Proceedings

(1) The Trial

Serge Kujawa took no part in the Crown's conduct of either the preliminary inquiry or the trial of David Milgaard other than a telephone discussion with prosecutor T.D.R. Caldwell about the appropriate application of Section 9(2) of The Canada Evidence Act with respect to the testimony of the witness Nichol John.[5]

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[1] *Vide*: evidence of Serge Kujawa, transcript page 26126, lines 18 to 25 inclusive, through to, and including, page 26127, lines 1 to 12, inclusive.

[2] *Vide*: RCMP "F" Division letter of 27 March, 1969, to Deputy Attorney General, document identification number 065398, and also evidence of Serge Kujawa, transcript page 26115, lines 19 to 25, through to, and including page 26120, lines 1 to 20, inclusive.

[3] *Vide*: evidence of Serge Kujawa, transcript page 26120, lines 1 to 20, inclusive.

[4] *Vide*: evidence of Murray Brown, transcript page 38097, lines 1 to 25, inclusive, through to, and including, page 38100, lines 1 to 7, inclusive.

[5] *Vide*: evidence of Serge Kujawa, transcript page 26128, lines 1 to 14 inclusive as well as page 26134, lines 11 to 25, inclusive, as well as the evidence of T.D.R. Caldwell, transcript page 15752, lines 2 to 9, inclusive, transcript page 16676,

The assertion by counsel to David Milgaard that Mr. Kujawa, "...was frequently consulted during Milgaard's trial by Bob (sic) Caldwell...,"[6] was based upon no evidence whatsoever and, presumably, was motivated only to elevate the publicity attack being directed against Saskatchewan Justice.

(2)The Milgaard Appeals

Serge Kujawa appeared for the Crown on David Milgaard's appeal to the Saskatchewan Court of Appeal on 6 November, 1970, and before the Supreme Court of Canada on 15 November, 1971 upon the application for leave to appeal. On the first appeal his file consisted solely of the transcripts of the Queen's Bench trial and the Notice of Appeal.[7] The trial transcripts contain nothing that would alert even an experienced counsel (which Mr. Kujawa certainly was) to the thought that an imperfect verdict had been rendered.

(3) The Larry Fisher Guilty Pleas

Larry Fisher appeared in the Court of Queen' Bench at Regina on 21 December, 1971, where, through his counsel, Lawrence Greenberg of Winnipeg, he pleaded guilty to three charges of rape and one charge of indecent assault, all arising out of Saskatoon. Three of the offences occurred in October and November 1968, not long prior to the rape and murder of Gail Miller on 31 January, 1969, and one occurred on February, 1970, shortly after the conviction of David Milgaard on 31 January, 1970. Mr. Kujawa represented the Crown on the Fisher appearance and has been accused by counsel to David Milgaard of serious misconduct in his handling of the file, as follows:

(i) That Mr. Kujawa handled both the Milgaard appeal file and the Larry Fisher file in 1970 when the Milgaard file contained numerous references to the Larry Fisher offences that should have been obvious to Mr. Kujawa and created doubt as to the validity of the Milgaard conviction.

The Milgaard appeal file did not contain references to the Larry Fisher offences. In the examination for discovery in the civil action brought by David Milgaard against Mr. Kujawa et al, a determined effort was made by Milgaard's counsel to establish that the Milgaard appeal file would have included the prosecution file with the police reports of the Fisher offences, without success.[8]

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lines 19 to 25, inclusive, through to, and including, page 16678, line 1, transcript page 16913, lines 15 to 25, inclusive, through to, and including, page 16914, lines 1 to 18, inclusive, and transcript page 17475, lines 16 to 25, through to, and including, page 17476, lines 1 to 15, inclusive.

[6] *Vide*: news clipping from the Winnipeg Free Press entitled, "Milgaard Lawyers Heap Scorn on Kujawa", dated April 22, 1992, document identification number 160397.

[7] *Vide*: evidence of Serge Kujawa, transcript page 26137, lines 4 through 20, inclusive.

Nota bene: The statement at page 140 of the RCMP Report of January 1994, document identification number 023167, is in error if it is intended to state that the 1969 RCMP reports on the Miller investigation were part of Mr. Kujawa's 1970 Milgaard appeal file. They were not. Page 146 contains a clarification.

[8] *Vide*: Examination for discovery of Serge Kujawa, conducted 22 April 1996, document identification number 147086.

Mr. Kujawa drew no connection between the Milgaard and the Fisher files.[9] At the time, neither did anyone else in Saskatchewan Justice, as determined by the RCMP Flicker investigation.[10]

(ii) That Mr. Kujawa arranged to have Larry Fisher appear by direct indictment in Regina solely to avoid any publicity in Saskatoon that might have thrown doubt on the Milgaard conviction. The date of 21 December, 1971, was deliberately chosen for the same purpose.

These entirely baseless allegations were fully negated by the testimony of Kenneth MacKay,[11] Lawrence Greenberg,[12] Murray Brown,[13] as well as that of Mr. Kujawa.[14]

(iii) That Mr. Kujawa consented to Larry Fisher receiving an unusually lenient sentence when he pleaded guilty in Regina, this also to ensure little or no attention was drawn to the matter.

In fact the concurrent sentence handed down to Larry Fisher in December, 1971, was well inside the sentencing standards of the day in Saskatchewan.[15]

(iv) That Mr. Kujawa, Premier and former Attorney General Roy Romanow, and Mr. Justice Kenneth Lysyk, former Deputy Attorney General, met secretly and conspired to suppress all knowledge of the wrongful conviction of David Milgaard.

This outrageous accusation was made recklessly and wantonly, without the slightest attempt to ensure its accuracy, with absolutely no concern for its impact upon the reputations of three outstanding members of the Canadian legal community, and for the single and only purpose of advancing the Milgaard claim for compensation. Counsel to David Milgaard, after participating in making the accusation with all the publicity that

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[9] *Vide*: evidence of Serge Kujawa, transcript page 26206, lines 20 through 25, to, and including, page 26208, lines 1 through 15, inclusive.
[10] RCMP Report of January 1994, document identification number 023167, *supra*, page 146.
[11] *Vide*: evidence of Kenneth MacKay, transcript page 25893, lines 10 through 25, to, and including, page 25898, lines 1 through 2, inclusive.
[12] *Vide*: evidence of Lawrence Greenberg, transcript page 13941, lines 11 through 25, to, and including, page 13946, lines 1 through 16, inclusive.
[13] *Vide*: evidence of Murray Brown, transcript page 37412 lines 18-25, page 37412 line 14, pages 37437, line 25 through to page 37468 line 15, pages 37531 line 13, through to 37535 line 18 inclusive.
[14] *Vide*: evidence of Serge Kujawa, transcript page 26188, lines 24 through 25, to, and including, page 26189, lines 1 through 18, inclusive, and transcript page 26191, lines 19 through 25, to, and including, page 26192, lines 1 through 8, inclusive, as well as transcript page 26410, lines 8 through 25, to, and including, page 26413, lines 1 through 20, inclusive.
[15] *Vide*: Evidence of Kenneth MacKay, transcript page 25878 line 20; page 25979 lines 6 – 15;page 25882 lines 1-7; Evidence of Murray Brown, page 38273 lines 4-17

could be mustered,[16] then admitted having no belief that such a conspiracy actually took place.[17]

The allegations of *"frame"* and *"cover-up"*, almost unheard of in Canada, appear to have originated with James McClosky of Centurion Ministries, in his public statements of August, 1991[18]. Prior to his involvement in Canada on behalf of David Milgaard, Mr. McClosky's only experience with law enforcement agencies had been in the United States. A few months later these contemptible accusations were seized upon by counsel to David Milgaard, expanded upon, and directed against not only the Saskatoon Police Service but Saskatchewan Justice and former officials of that department.

3. Should the Investigation Have Been Re-opened

(1) By decision or recommendation of Serge Kujawa

Mr. Kujawa had been the Director of Public Prosecutions at the time of the Gail Miller trial and the conviction of David Milgaard, as well as the subsequent proceedings before the Saskatchewan Court of Appeal and the Supreme Court of Canada. But, on 1 August, 1974, he moved on from the prosecutions branch and became Director of Policy and Planning. Four years later, on 1 May,1978, he was appointed Associate Deputy Minister.[19] As a result of these changes, Mr. Kujawa ceased to have direct responsibility for the prosecutions branch of Saskatchewan Justice. The authority to recommend or reject the re-opening of the Gail Miller murder investigation remained with the Director of Public Prosecutions of the day. There is no suggestion that subsequent to December, 1971, while Mr. Kujawa occupied any position with Saskatchewan Justice, he came into possession of any information, or was advised of the existence of any information, that might reasonably have called for the re-opening of the Gail Miller murder investigation.

Mr. Kujawa retired from Saskatchewan Justice on 30 November, 1989 when the first David Milgaard application to the federal Minister of Justice was in the early stages of investigation. Although later, and particularly when he became a member of the Saskatchewan Legislature, Mr. Kujawa unfortunately was drawn into the public controversy, he then had no responsibility whatsoever for the David Milgaard file or the Gail Miller murder investigation.

There is a great deal of material for speculative "what might have been" in the complex history of the David Milgaard file. Although much of "what might have been" necessarily is directed at the Saskatoon Police Service and Saskatchewan Justice, some of it draws attention to activities, or the lack thereof, on the part of those engaged on behalf of David Milgaard. Just two features of the latter are mentioned here.

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[16] *Vide*: transcript of press conference held on September 19, 1992, by Joyce Milgaard, David Milgaard and Hersh Wolch, document identification number 334827.

[17] *Vide*: transcript of a meeting held on November 26, 1992, amongst H. Wolch, G. Rodin, R. Bruce, Inspector M.J. Sawatsky and Sgt. R. Williams, in Winnipeg, Manitoba, document identification number 023046, with particular attention to pages 023047 and 023159 of said document.

[18] *Vide*: Winnipeg Free Press article, 11 August, 1991, document identification number 004623; and Saskatoon Star Phoenix article, 16 August, 1991, document identification number 325148.

[19] *Vide:* Evidence of Serge Kujawa, transcript page 26090, document identification number 332069.

In January 1981 Gary Young, a respected Saskatoon solicitor working on behalf of David Milgaard, was directing his research to the files of the Saskatoon Police. Advised that he required the consent of Saskatchewan Justice to access those files, he was on the verge of making his request for that consent when he was suddenly replaced on the file. It is clear from the evidence of Murray Brown and T.D.R. Caldwell that such a request would have been granted. Merely opening the police files on the Gail Miller murder investigation in January, 1981, would have disclosed the statement of Linda Fisher dated only six months earlier 28, August, 1980, suggesting that her former husband, Larry Fisher, was the true offender. It is not idle speculation to suggest that the dominos would then have begun to fall.

In March of 1986 the David Milgaard file, by then quite voluminous with research and investigation carried out by Joyce Milgaard and others, arrived in the law offices of Hersh Wolch, in Winnipeg. There it was handed off to an articling student with neither academic training nor practical experience in Canadian criminal law.[20] Taking directions from a client who was a lay person but nonetheless forceful and determined,[21] a state of war was declared with Saskatchewan Justice.[22] No effort was made to communicate with anyone in the offices of Saskatchewan Justice on the assumption that no cooperation would be forthcoming.[23] How wrong and unprofessional that approach was is now acknowledged .[24]

The first s.690 application to the federal Minister of Justice did not go forward until 28 December, 1988. Even then it was not accompanied by much of the information that had earlier been developed by Joyce Milgaard and others.[25]

Again, it is not idle speculation to suggest that a different handling of the David Milgaard file by those working on his behalf might have resulted in an earlier re-opening of the Gail Miller murder investigation.

4. Recommendations

Much public and professional attention has recently attended the tragedy that occurs when an innocent person is convicted of a criminal offence, and many recommendations have been forthcoming that will work to prevent such mishaps in the future.[26] When considering the proper balance in the criminal justice system that will not only protect the innocent but duly convict the guilty, the following paragraphs extracted from *The Proof of Guilt*[27], the seminal work of Glanville Williams, are relevant:

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[20] *Vide*: evidence of David Asper page 25111 lines 11-14, page 27564 line 8, page 27565 line 20
[21] *Vide*: page 25255 lines 2-9, page 27578 line 22, page 27579 lines 1-3
[22] *Vide*: page 25153 lines 1-12
[23] *Vide*: page 25373 lines 7-13
[24] *Vide*: page 28636 line 8; page 29637 lines 1-8
[25] *Vide*: Commission document identification number 337731.
[26] *Vide*: Report on the Prevention of Miscarriages of Justice; FPT Heads of Prosecution Working Group, 25 January, 2005.
[27] Steven & Sons, London, Third Edition, 1963, pp. 186-190

To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed: is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy; how far is it permissible, for the purpose of securing the conviction of the guilty, to run the risk of innocent persons being convicted?

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is in the mouth of Sir Edward Seymour, who, speaking for Fenwich upon a Bill of Attainder in 1696, said: "I am of the same opinion with the Roman, who, in the case of Cataline, declared, he had rather ten guilty persons should escape, than one innocent should suffer." Hale took the ration as five to one; Blackstone reverted to ten to one, and in that form it became established.

The maxim did not go altogether without challenge. Its most celebrated opponent was Paley, who, in his Principles of Moral and Political Philosophy, took issue with it because of the paramount social importance of convicting the guilty. "When certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested, courts of justice should not be deterred from the application of these rules by every suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by the mistaken sentence may be considered as falling for his country."

These sentiments were repudiated by Romilly. Bentham, however, felt inclined to add his own criticism of the maxim, which he took as referring to a ratio of a hundred guilty to one innocent. He thought that it "supposes a dilemma which does not exist: the security of the innocent may be complete, without favouring the impunity of crime." Bentham was thinking chiefly of those technical rules which favour the escape of proved criminals. As applied to the quantum of the burden of proof his criticism is misconceived: we do very often find ourselves in the dilemma of either acquitting one who is probably guilty or convicting one who may possibly be innocent.

Two more writers deserve to be noted in this survey. Stephen thought the maxim by no means true in all circumstances: "Everything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected." The first branch of this remark would seem to suggest that the graver the crime charged, the more ready we should be to accept proofs that involve danger to the innocent. This would

be a reversal of the generally accepted principle. As to the latter part of the remark, surely we do not think it right to strain the law against a man, or to be careless about the proof against him, merely because of some wrongdoing other than that with which he is charged. Stephen would have hit the target more accurately if he had said that the maxim is true to a certain extent but involves the necessity of drawing a line beyond which risk to the innocent is justifiable in the public interest.

It has been said that every legal maxim is either a platitude or a half-truth, and Sir Carleton Allen able demonstrates the way in which the present one may lead to error. He points out that the number used in stating the ratio is not without importance. "I dare say", he says, "some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

The evil of acquitting a guilty person goes much beyond the simple fact that one guilty person has gone unpunished. It frustrates the arduous and costly work of the police, who, if this tendency goes too far, may either become daunted or resort to improper methods of obtaining convictions. If unmerited acquittals become general, they tend to lead to a disregard of the law, and this is turn leads to a public demand for more severe punishment of those who are found guilty. Thus the acquittal of the guilty leads to a ferocious penal law. An acquittal is, of course, particularly serious when it is of a dangerous criminal who is likely to find a new victim. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent."

A rule giving excessive protection to an accused person becomes even less defensible as the criminal law turns to remedial treatment instead of punishment. It is certainly very regrettable if the wrong person is directed to take medical treatment for some neurotic disorder of which he has not in fact shown any symptoms; but at least the evil to him of such an order is considerably less than that of a sentence of imprisonment under the traditional penal system. This argument is not a strong one as applied to the present law, because so much of the criminal law and its administration is still punitive.

It is, then, a question of degree: some risk of convicting the innocent must be run. What this means in terms of burden or proof is that a case need not be proved beyond all doubt. The evidence of crime against a person may be overwhelming, and yet it may be

> *possible to conjecture a series of extraordinary circumstances that would be consistent with his innocence – as by supposing that some stranger, of whose existence there is no evidence, interposed at the crucial moment and actually committed the crime, when all the evidence points to the fact that the accused was alone on the spot, or by supposing, on a charge of murder, that the deceased died of heart failure the moment before the bullet entered his body. The fact that these unlikely contingencies do sometimes occur, so that neglecting them there is on rare occasion a miscarriage of justice, cannot be held against the administration of the law, which is compelled to run this risk.*

The principles enunciated by Glanville Williams more than forty years ago are still valid, but perhaps more difficult to adhere to in a society grown suddenly more complex and fearful. When arbitrary arrest and detention, as well as legislative constraints on the presumption of innocence, lurk on the horizon, pushing the pendulum too far in protection of the innocent risks a public backlash and the possible loss of basic rights and freedoms, some of which, like *habeas corpus*, reach back to Magna Carta.

As we strive to attain a justice system as nearly perfect as humanly possible, it would be well to keep in mind Viscount Simon's dictum that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent."[28] The perfect justice system will have succeeded in the delicate art of balancing the conviction of the guilty with the full protection of the innocent.

DATED at Regina, Saskatchewan, this 14th day of November, 2006.

Per: "Garrett Wilson"
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[28] *Stirland* (1994) A.C. 315 at 324.