

**COMMISSION OF INQUIRY INTO THE WRONGFUL
CONVICTION OF DAVID MILGAARD**

SUBMISSIONS ON BEHALF OF EDDIE KARST



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Overview

1. The Commissioner faces the difficult task of reviewing the facts and circumstances surrounding the prosecution and conviction of David Milgaard and trying to gain an accurate picture of what transpired in 1969 and 1970. People's recollections, memories and impressions have been altered by subsequent events including information that eventually came to light concerning the involvement of Larry Fisher, media reports which in some cases were very misleading and simply the realization that David Milgaard was not responsible for the death of Gail Miller. Much has changed since 1969 and 1970, including disclosure requirements, the advent of DNA and the realization now that juries are not infallible and innocent people from time to time are convicted of offences they didn't commit, a possibility which in 1969/70 seemed very remote. It is against this background that the evidence that has been presented at this Inquiry must be assessed.

2. While much has been made of the role of former Det. Eddie Karst ("Det. Karst") in the investigation and prosecution of David Milgaard, the fact remains that in 1969/70 he was a relatively junior detective with the Saskatoon City Police (the "SCP"). Prior to March 2, 1969, Det. Karst had minimal involvement in the investigation into the death of Gail Miller. Thereafter, any involvement he had was under the direction and supervision of senior officers. Those officers directed him to conduct a number of tasks concerning the statement given by Albert Cadrain identifying David Milgaard as a suspect in the death of Gail Miller and the follow up of that allegation.

3. Det. Karst's role was to conduct the follow up investigations and file his reports accordingly. He did not determine the direction of the investigation. He was not a party to the senior officers' meetings that considered the results of the investigation. He did not determine that David Milgaard should be charged. He did not have a role in the direction of the prosecution of David Milgaard. While Det. Karst did spend a considerable amount of time investigating the death of Gail Miller, he at the same time maintained his other 15 to 25 open and active files. Det. Karst candidly acknowledged that he did have input into the investigation and he did voice his opinions but he was not a party to the decisions made concerning the direction of the investigation or the decision to prosecute David Milgaard.

4. Much is made of the fact that Det. Karst was the only member of the SCP called to the Supreme Court of Canada reference. It appears he was called because of the suggestion by Wilson that the SCP had either misled him or mistreated him. After Wilson had testified a discussion took place before the Supreme Court as to whether or not Det. Karst was needed at all in light of Wilson's testimony, which in fact didn't suggest any wrongdoing on the part of Det. Karst.¹

5. After David Milgaard was convicted in January of 1970, Det. Karst's involvement in the file was at an end. In reality it had been almost at an end since Milgaard had been charged in mid-1969. He was at best peripherally involved in the investigations

¹ SCC Transcript – Vol. 6 – Doc #01397 at pp. 997 and 998

concerning the other rapes and sexual assaults.² He was never involved in pursuing one of the early theories of the SCP that the person who had committed the rapes and/or sexual assaults may have been the same person that killed Gail Miller. On 21 October 1970, Larry Fisher confessed to Winnipeg Police to one rape and an indecent assault/attempted rape in Saskatoon (Victim #3 and Victim #4) in addition to the Winnipeg offences. Det. Karst was tasked to accompany Inspector Nordstrom to obtain written confirmation of the two confessions that Fisher had given. Fisher subsequently confessed to two additional rapes in Saskatoon. Det. Karst had no involvement in those files or any further dealings with Fisher. There was no thought or suggestion at the time that Fisher may have been responsible for the death of Gail Miller and what at that time appeared to be a non-significant event was long forgotten with the passage of time. Larry Fisher only became a possible suspect many years later.

6. Det. Karst has never shied away from speaking about his involvement in the file, whether with the media or with the authorities. Det. Karst has never once suggested that there should not be a review of David Milgaard's conviction at any level and always agreed that if there was some basis on which the conviction of David Milgaard should be set aside it should be done. Det. Karst has cooperated at every turn with whatever investigation was going on, including this Inquiry. While Det. Karst at this time acknowledges that mistakes were made and that it would have been better if someone independent had reviewed the file and they perhaps would have seen the possible link to Larry Fisher earlier, this does not in any way detract from his position, which is well

² Mackie Report 024935 at 937, Karst Report - 106624 and Karst Report - 106664

established by the evidence, that he did not knowingly allow an innocent man to be convicted of an offence he didn't commit and remain incarcerated.³

7. In this memorandum we have confined our submissions to the role of Det. Karst in the investigation surrounding the death of Gail Miller, the subsequent prosecution of David Milgaard and in obtaining the two statements from Larry Fisher. There are a number of facts and circumstances which are significant and which establish:

- (i) There was sufficient evidence to reasonably establish that David Milgaard was a prime suspect in the Gail Miller murder;
- (ii) That Det. Karst at no point in time considered that David Milgaard was being prosecuted or had been convicted for an offence he did not commit; and
- (iii) That Det. Karst at no point in time was aware, or had any thought, that Larry Fisher may have been responsible for the death of Gail Miller.

In assessing his role and his conduct we submit that the following facts and circumstances are significant.

Rank of Det. Karst

8. In 1969 Det. Karst was a detective with the SCP. While he was well respected for his abilities and described as an excellent police officer, someone who could be trusted

³ Karst Inquiry Transcript pp. 12450, 12591

and did good work, the fact remained that he was a junior officer and received instructions on major files from officers who were more senior to him both in terms of years of service and rank.⁴ Concerning the Gail Miller investigation, it was overseen by Superintendent Wood. Det. Karst received his direct instructions concerning the investigation from Lt. Short or Det./Sgt. Mackie. These were the senior officers who met with Lt. Penkala and the RCMP in determining what should be done with the investigation.⁵ These were the officers who made the decisions as to the direction that the investigation should take and provided Det. Karst with his orders. While Det. Karst does not dispute that he had input, he did not attend meetings with the senior officers and did not make decisions as to who should be questioned and when, and ultimately who should be charged.⁶

Involvement Prior to March 2, 1969

9. Gail Miller was murdered on January 31, 1969. Prior to March 2, 1969 Det. Karst had virtually no involvement in the investigation of her death. He had done some door to door canvassing in the area along with many other police officers immediately after her death but not surprisingly he has no recollection of this. During the time period January 31, 1969 to March 2, 1969 his focus would have been on his other files.

Rapist Theory

10. The SCP initially considered the possibility that the person who had murdered Gail Miller had also been responsible for some earlier rapes and sexual assaults that had

⁴ Organizational Chart 325571 and Service Record 325555 at 557

⁵ Karst Inquiry Transcript p. 12693

⁶ Riddell Report – 065399 and Riddell Report – 250609

taken place in 1968 in the City of Saskatoon. This theory was outlined in Lt. Penkala's letter of February 5, 1969.⁷ This theory is referred to in the report of Insp. Riddell.⁸ Det. Karst was not involved in the investigation at that point. It was almost a month later before Det. Karst was given any active role in the Gail Miller investigation. By that time the rapist/murderer theory appears to have gone nowhere and there is no indication in the material that Det. Karst was directed to pursue that theory.

11. There were repeated references made during cross-examination of various witnesses that there was general public knowledge that there had been a number of rapes and sexual assaults committed in Saskatoon and it should have been obvious to any of the officers involved in the investigation of the death of Gail Miler that the perpetrator of these offences would have been a likely suspect in the killing of Gail Miller. The evidence does not bear this out. There is little evidence of media coverage of the rapes and sexual assaults, although a warning was issued to the public by the SCP in December, 1968.⁹ Interestingly, his Honour Calvin Tallis, former Justice of the Saskatchewan Court of Appeal and defence counsel for David Milgaard at the time of his trial, has no recollection of hearing about or being aware that the rapes and sexual assaults had been committed in Saskatoon. He states this notwithstanding that he actively investigated the possibility that someone else may have committed the murder of Gail Miller by having people questioned in the west side of Saskatoon where the murder had taken place. No one he questioned suggested the possibility that the "rapist" had also

⁷ Pankela Letter – 052923

⁸ Riddell Report – 065399

⁹ Star Phoenix – 039527

murdered Gail Miller.¹⁰ There was no evidence of a great concern from the public to locate the rapist and/or murderer of Gail Miller although there is no denying that there would have been a desire to do so by the SCP. Certainly there doesn't appear to have been any pressure to identify a suspect at any cost as was suggested.

Albert Cadrain

12. Det. Karst's involvement in the file came about somewhat fortuitously when Albert Cadrain, after consulting with his parents and brother about his observations of David Milgaard on January 31, 1969 and his concerns that Milgaard may have been responsible for the death of Gail Miller, attended at the SCP offices to report what he knew. Cadrain initially spoke to the Duty Sergeant who passed him on to Lt. Short who in turn directed Det. Karst to interview Cadrain. Det. Karst's interview of Cadrain led to further directions being given by the senior officers including a direction that Det. Karst attend to Winnipeg and interview David Milgaard which he did.¹¹

13. While Det. Karst has at various times been erroneously described as the "main investigator" or "lead investigator", the fact is that he was a detective who followed directions from his superior officers in terms of his role in the investigation. The records, including reports and, specifically those of the RCMP, indicate that the investigation was overseen by Superintendent Woods with specific direction coming from Lt. Short and Lt. Penkala. Next in line was Det./Sgt. Mackie and Reid. Thereafter Det. Karst and other investigators received their directions in terms of what was to be done. This was

¹⁰ Tallis – p. 24750-51

¹¹ Short Report – 106640 and Karst Report – 009233

corroborated by many of the officers who testified, including Lt. Joe Penkala and Det./Sgt. Mackie.¹²

14. While media reports surfaced many years later suggesting that Albert Cadrain was “tortured” by members of the SCP, that he was mentally unfit and the like, the following facts remain undisputed:

- (i) Cadrain voluntarily attended at the police station and advised the SCP that he saw blood on the clothes of David Milgaard on the morning of January 31, 1969. He never at any point in time recanted that statement. (For example, Paul Henderson’s report on Cadrain brought up the “torture” allegation, but nowhere does Cadrain back off from his position that David Milgaard had blood on his clothes);
- (ii) Before ever telling the SCP about having seen blood on David Milgaard, he had disclosed this same information to members of his family who accepted that what he was saying was truthful;
- (iii) Cadrain had no complaints about his dealings with Det. Karst and to the contrary spoke highly of him. This was corroborated by many of his family members who similarly spoke highly of Det. Karst and indicated that there was a good relationship between Det. Karst and Cadrain; and

¹² Lt. Penkala Inquiry Transcript p. 8770, Line 12 to p. 8772, Line 10 and Det./Sgt. Mackie Inquiry Transcript p. 10333, Line 10-12, p. 10340, Line 20 to p. 10341, Line 10

- (iv) Cadrain undoubtedly developed some mental problems years later. However, there was no suggestion or observation of any mental problems which would have affected his credibility or reliability in 1969 or 1970. This is confirmed by various family members, friends and associates of Cadrain, the police, Bobs Caldwell the prosecutor, and even Justice Tallis who cross-examined Cadrain extensively, both at the preliminary hearing and at the trial and at no point in time observed any problems with Cadrain.¹³

The Reports of Det. Karst

15. Det. Karst fairly portrayed in his reports the information he obtained – i.e. that there was information which implicated Milgaard and suggested he was capable of committing such an offence and also evidence that suggested that he was not the one responsible. It is also clear that Det. Karst filed his reports and then awaited further instructions as to what should be done with the investigation. Decisions on what witnesses should be interviewed or re-interviewed, what was to be done with exhibits and that polygraph testing should be done were made by senior officers. Det. Karst candidly acknowledged at the Inquiry that he had opinions and when he was asked for those opinions he provided them. However, Det. Karst was not a party to any of the meetings that took place among senior officers where they decided the direction of the investigation.

¹³ Tallis Inquiry Transcript p. 24051, Line 4 to 17

16. Det. Karst prepared three reports which are of significance to the Inquiry:

- (i) March 7, 1969¹⁴;
- (ii) April 18, 1969¹⁵; and
- (iii) May 25, 1969¹⁶.

17. A fair review of those reports reveals that Det. Karst set out the facts and circumstances which either implicated or exonerated David Milgaard as a suspect. Amongst other things this included:

- The April 18th report noted that if Nichol John was to be believed, and she appeared to be credible to Det. Karst, then David Milgaard had an alibi and could not have committed the murder. He also noted that Leonard Wytowich contradicted Cadrain in regard to his activities on the evening of January 30, 1969.
- In the May 25, 1969 report he summarized the changing position of Wilson on a number of issues, noting in the end that while Wilson was now saying there was blood, he had previously denied this. He concluded this report by stating what he understood to be the situation: "Investigation continuing".

¹⁴ 009233

¹⁵ 009254

¹⁶ 009264

18. Det. Karst in his testimony reviewed these reports and the other information that was gathered at the time of the investigation. Some of the information which now would be supportive of a conclusion that David Milgaard was guilty, he has no recollection of and candidly admitted that in giving his testimony. Other information he pointed out did cause him concerns and pointed to the possibility of guilt. Other information as well pointed either towards David Milgaard's guilt or had no impact on the issue one way or the other. The allegation was repeatedly made that the SCP had determined that David Milgaard was guilty and the only evidence that they were looking for was evidence which would establish his guilt, versus evidence which might exonerate him. The "smoking gun" that has been referred to is a theory document that appears to have been prepared by Sgt. Mackie sometime in mid-May of 1969.¹⁷ While this appears to be a clear misdescription of the document in that it concludes by stating that further investigation is required to determine whether Milgaard should be either implicated or exonerated concerning the offence, the reports of Det. Karst, including the one made on May 25, 1969, outline evidence which both implicates and exonerates Milgaard. Had he only been looking for evidence which implicated Milgaard, outlining in his reports the concerns or contradictions in the evidence would not have taken place.

19. Det. Karst remained dubious about the credibility of Ron Wilson. That concern was addressed by the polygraph testing that was carried out by Sgt. Art Roberts.¹⁸ A decision was made by the senior officers involved to retain the services of Sgt. Roberts of

¹⁷ Mackie Document - 006799

¹⁸ Karst - pp. 12222-23

the Calgary Police Service to conduct polygraph examinations of Ron Wilson and Nichol John. Det. Karst had no experience dealing with polygraphs and was not involved in this decision.¹⁹

20. Sgt. Roberts attended in Saskatoon where he received a briefing on the file from Superintendent Wood and it appears Sgt. Mackie as well.²⁰ Det. Karst's only role was to transport the officers to the Sheraton Cavalier where the polygraph examination was to take place and then to deliver Wilson to the Cavalier for the purpose of the polygraph. This is the first time that he became aware that polygraph testing was to occur. Former Sgt. Rusty Chartier who was tasked to monitor the polygraph interview recalls Superintendent Wood, Det. Sgt. Mackie and probably Lt. Short being present.

21. Det. Karst was not present for the polygraph. He was later in the day summoned to attend back at the Cavalier. To his knowledge by that time Wilson had already been tested by that time. He was advised by Roberts that Wilson had given a statement which he now wished to formalize and also identified a knife. (This is confirmed by the testimony of Roberts in the Supreme Court of Canada and Wilson himself at this Inquiry.)²¹ Det. Karst then attended upon Wilson and took a statement from him, a statement which was sworn to before a Commissioner for Oaths.²²

¹⁹ Karst – pp. 12031, 32, 74 and Riddell Report 250609

²⁰ Karst – p. 12704, 09, 12, Roberts – SCC Transcript – Document #043300 – pp. 043317 to 043334 and Mackie Report – 106676

²¹ Karst – p. 12702, Roberts – SCC 043300 at 355-6 and Wilson Inquiry Transcript 5589-90

²² Wilson Statement – 006701

22. It is interesting to note that in his report of May 25, 1969, Det. Karst outlines the information that he had received from Wilson prior to him taking the polygraph. Virtually all of this information has been subsequently confirmed to have been correct by David Milgaard himself to his counsel, Mr. Tallis. The damning information, if it can be described that way, that Wilson eventually provided came about as a result of his meeting with Sgt. Roberts. (This is reviewed in detail by Commission Counsel in his examination of Wilson.) Det. Karst, as he was instructed to do, took the statement from Roberts, but at the same time prepared his report outlining the information he had received, including the contradictions in the statements of Wilson.

23. Det. Karst had no role in the interviewing of Nichol John, either by Roberts or by Det./Sgt. Mackie who ultimately took the statement from her. It is again interesting to note that while much has been made about the suggestion that pressure was being placed on Nichol John to give false information, she at no point in time stated that she saw blood on the clothes of David Milgaard. Similarly, while there were repeated suggestions that Wilson and John were pressured by the police into giving statements, they have repeatedly said that they were treated well by the SCP and have no recollection of any undo pressure being placed upon them by any members of the SCP.²³

24. Det. Karst understood that the polygraph testing confirmed the reliability of the evidence of Wilson and John in terms of implicating David Milgaard. He was as a result of the view that it would be appropriate to proceed with a charge against Milgaard. That decision was not his and he was not a party to the ultimate decision to charge Milgaard.

²³ Wilson pp. 7210-14 and 7268-85, John pp. 4953 to 4958

Det. Karst stated that prior to the polygraph testing of Wilson he would not have relied on his evidence and believes that had it not been for the polygraph he would likely not have been agreeable to Milgaard being charged.²⁴

25. Det. Karst had various tasks and responsibilities such as transporting witnesses and the like for the trial but he was not involved in the overall trial strategy. He was not involved in the preparation of the court file which was delivered by the SCP to the prosecutor. He did not have a role in determining what information the prosecutor received and assumed the prosecutor received everything.²⁵

Ron Wilson/Nichol John Statements

26. The suggestion is made that once David Milgaard gave his statement on March 3, 1969 and after Nichol John and Ron Wilson both gave their statements in which they said that they had no knowledge of the death of Gail Miller and appeared to have supplied an alibi for David Milgaard, that the SCP should have either concluded at that time that Milgaard was not a suspect. Alternatively, the SCP unfairly discounted the value of these statements and instead continued to pursue Wilson and John to see if they could provide further evidence. The suggestion seems to be that these statements were consistent and corroborative of each other. A review of the statements establishes that this was not the case. There were a number of concerns with these three initial statements. As was testified to by Det. Karst and others, there are many reasons why people do not provide full information when a statement is initially given. This can include attempts to protect

²⁴ Karst pp. 12223-24

²⁵ Ullrich Document – 105605, Karst p. 12734 and Karst p. 12221

others, fear, lack of memory and so on. Some of the reasons are completely innocent. Some are not. There were contradictions in the statements which were obvious at the time. There are other errors and omissions in the statement which we now know suggest a lack of credibility.

27. Former Sgt. Ken Walters of the Regina Police Service who dealt with Nichol John and Ron Wilson provided an excellent summary in his testimony of the various reasons why people do not initially provide information to the police and why they also will embellish information when they do provide it. In the case of Ron Wilson specifically, he felt this was an individual who was not in any intimidated by the police and who on one had did not want to disclose information about his own wrongdoing, was quite happy to share information about the wrongdoings of others, and perhaps would even embellish it in order to help establish his status as someone in the know.²⁶

28. None of these errors, omissions and contradictions were conclusively determinative of the guilt of David Milgaard. What they however did do was raise questions which called for answers and further investigation. That is what took place. David Milgaard himself in his interview with the RCMP in 1983 agrees that he left out information about the break and enter and stealing the battery because he did not want to incriminate himself.²⁷ He at the same time had no complaints about how he was treated by Det. Karst or Lt. Short.²⁸

²⁶ Ken Walters Inquiry Transcript p. 10864, Line 8 to p. 10866, Line 11; p. 10867, Line 18 to Line 22

²⁷ 063619 at 685

²⁸ 063619 at 704

29. Ultimately Wilson and John provided further statements in May of 1969. Concerning Wilson, there are a number of elements in his subsequent statements which turned out to be correct. These included the following:

- (i) That they had stolen a battery in Regina prior to departing for Saskatoon;
- (ii) That they intended to roll or rob someone;
- (iii) That they had committed a break and enter at Aylesbury;
- (iv) That a knife was in the vehicle;
- (v) That they had asked a girl or woman for directions to Pleasant Hill or Peace Hill;
- (vi) That their vehicle became stuck shortly after speaking to the girl; and
- (vii) That Wilson and Milgaard left the vehicle and they were separated for a period of time.²⁹

30. In the case of Nichol John, the following is contained in her second statement and is accurate:

- (i) The reference to the compact being found in the glove box, a conversation with Milgaard about whose it was and his throwing it out the window without explanation. Justice Tallis subsequently confirmed in the

²⁹ Tallis Inquiry Transcript pp. 23781 to 23809 and pp. 23852 to 23853

Supreme Court of Canada that David Milgaard admitted that he had in fact done that.³⁰

- (ii) She referred to David Milgaard intending to snatch a purse or rob, this was subsequently confirmed by Ron Wilson³¹, by David Milgaard in the Supreme Court of Canada³² and Justice Tallis in the Supreme Court of Canada³³.
- (iii) Milgaard had talked to a woman. This was confirmed by David Milgaard in his first statement and also by Ron Wilson subsequently in the Supreme Court of Canada³⁴. Milgaard also confirmed this to Justice Tallis and admitted he spoke to the woman with a view of possibly robbing her.³⁵
- (iv) That the car was stuck and Ron Wilson and David Milgaard got out and left in different directions. This was subsequently confirmed by Ron Wilson in the Supreme Court of Canada³⁶ and by David Milgaard in his statement to Justice Tallis³⁷.

The above information appears only in her second statement and is extremely relevant.

³⁰ Tallis SCC – Document #300656 at 300686, Inquiry Transcript 23844 and 23845

³¹ Wilson Transcript Inquiry pp. 5362-63

³² Milgaard SCC 013327 at 335-36

³³ Tallis SCC – Document #300656 at 300667 and 300673

³⁴ Wilson SCC 013327 at 360-62 and SCC 013466 at 365

³⁵ Tallis SCC – Document #300656 at 300672 and 300673

³⁶ Wilson SCC 013327 at 370-71 and 471-72

³⁷ Tallis SCC – Document #300656 at 300677 and 300678. See Tallis Inquiry Transcript pp. 23782 to

31. It was suggested that the police had planted the information with Nichol John about Gail Miller's purse being in the garbage can. A great deal of the information about the Gail Miller murder was public record as the result of media reports, including the fact that the purse had been found in the garbage can.³⁸

32. In the case of Ron Wilson, Det. Karst set out in his report of May 25, 1969 in detail what Wilson had told him. A review of that report shows that Wilson acknowledged that he in fact had told Det. Karst all of this and that in most instances it was correct and in others it was his own lies or exaggerations. This was reviewed in detail during Wilson's examination in chief by Commission counsel and specifically when in cross-examination by counsel for Det. Karst, Wilson reviewed Det. Karst's report of May 25, 1969.³⁹

33. The fact is that Det. Karst's report:

- (i) Accurately reflects what Wilson told him in May of 1969;
- (ii) That the bulk of it contains facts which are true and correct; and
- (iii) That subsequent information was obtained by Roberts which Det. Karst again accurately reported and outlined in his report even if it was contradictory. (See the testimony of Ron Wilson given to Commission counsel where he reviews the information he provided in May of 1969

³⁸ Media Reports doc. 319175 at pp. 7 and 8

³⁹ Wilson Inquiry Transcript 7221-7267

pointing out that the most incriminating evidence was after the polygraph meeting/examination of Ron Wilson by Sgt. Roberts.)

34. It may be for these reasons that Wilson has never expressed concerns about his treatment at the hands of Det. Karst. Some notable comments in this regard include the following:

- (i) his statement to the RCMP that “My feelings would have been that they were doing their job”⁴⁰;
- (ii) his volunteering to the RCMP that Det. Karst and Lt. Short shouldn’t be named in the lawsuit commenced by David Milgaard⁴¹;
- (iii) that the problems he saw were:
 - (a) with the polygraph operator (Sgt. Roberts); and
 - (b) with whoever had got the ball rolling with Albert Cadrain seeing blood, which we know was Albert Cadrain himself⁴².
- (iv) he was not scared of Det. Karst or Lt. Short who he dealt with, he was not mistreated, no words were put in his mouth. He told many this, including Joyce Milgaard⁴³; and

⁴⁰ Wilson interview 022937 at 978

⁴¹ Wilson interview 063619 at 709-10

⁴² Wilson interview 063619 at 709-10

⁴³ Wilson Inquiry Transcript 7211-14, 7234, 7268-270, 7282 and 7285

- (v) Wilson confirmed at the inquiry his statement as to Mrs. Milgaard that he was never offered any reduced sentence in order to cooperate with the police, that he had never been threatened and that they never told him what to say or anything like that.⁴⁴

35. It is interesting to note that David Milgaard in the letter he sent to his then counsel, Mr. Tony Merchant, on July 12, 1983 described Mr. Wilson as a liar who basically would take whatever course of conduct he thought suited his own personal interests best. It doesn't appear that Mr. Milgaard's assessment of Mr. Wilson's credibility was any different then that of Det. Karst.⁴⁵

36. Concerning Wilson, even now he does not say that the information in his statements was planted with him by the SCP or that they pressured him into giving the statements. What he basically says is that he "lied".⁴⁶ The problem is that what he describes as a lie on one occasion changes on the next occasion and then may change back again (see for example his testimony at the Supreme Court of Canada). Nichol John has never suggested that she lied or that she was pressured by the police to lie or give false information. She has not recanted her position but testified, as she did at the trial, that she could not remember a number of the events of the morning of 31 January 1969. The inconsistencies and lack of credibility issues all were known to defence counsel at the time of trial and many of them were placed squarely before the jury. She repeatedly

⁴⁴ Wilson Inquiry Transcript 5983-84

⁴⁵ Document 213630

⁴⁶ Wilson Inquiry Transcript 5670-72, 6000-02, _____

confirmed that she was not pressured by the police in any point in time into providing false information.⁴⁷

37. While it was not Det. Karst's decision to determine that David Milgaard should be charged, he nonetheless was of the opinion that after the polygraph examination had been completed that Milgaard should be charged. The fact of the matter is that there was considerable evidence which implicated Milgaard and other information that the police had which would lead them to believe that they had the correct suspect. Some of this included the following:

- (i) The statement of Albert Cadrain that David Milgaard showed up at his residence early in the morning of January 31, 1969 near the area where Gail Miller had been murdered and there was blood on his clothes. Cadrain never backed down from that position;
- (ii) Milgaard, Wilson and John all confirmed that they had in fact been in the area of the murder early that morning, had attended to Cadrain's residence, had been stuck near the area of the murder, were looking for someone to rob or roll and were separated for a period of time;
- (iii) There were a number of suspicious acts on the part of Milgaard, including driving around the block after changing his clothes at the Cadrain residence notwithstanding that they were experiencing car trouble and it was -40

⁴⁷ Interview with Eugene Williams 125206 at 214 and 227, John Interview with Joyce Milgaard et al document 048643 at 662, Supreme Court of Canada Testimony 302469 at 522-523, John Inquiry Transcript p. 4945, Line 19 to p. 4948, Line 16; pp. 4953 to 4955

outside, and then later throwing the compact that was found in their car out the window without answering Nichol John's question as to whose it was;

- (iv) Milgaard in his initial interview while not admitting to committing any offence nonetheless was evasive in a number of answers including the reference to blood on his clothes;
- (v) The police received information which suggested Milgaard was capable of committing the offence they were investigating. This included Nichol John who stated that she believed Milgaard was capable of the offence and that he had had forced sexual intercourse with her the night before. Sharon Williams described similar conduct on the part of Milgaard. Sgt. Edmondson observed when he arrested Milgaard and brought him back to Saskatoon that during the trip he commented that he would like to "get into the pants" of the stewardess on the plane and he did not deny the offence;⁴⁸
- (vi) The disposal of the make-up compact by Milgaard on the road to Calgary.

38. Against this background the two main witnesses, Ron Wilson and Nichol John, met with a polygraph operator who was independent of the SCP and who after his meeting with them and what they believed was polygraph testing of them, then provided statements implicating Milgaard.

⁴⁸ Sharon Williams Statement p. 006500, Cst. Malanowick Report p. 009245

Melnyk/Lapchuk Evidence

39. Craig Melnyk and George Lapchuk testified that while in a motel room David Milgaard carried out a form of reenactment of the murder of Gail Murder and made a number of incriminating statements. This evidence was subsequently attacked, the suggestion being that Melnyk and Lapchuk had lied in exchange for some benefit that they received from the Department of Justice. The suggestion was that Debra Hall, who was also in the room at the time, would have confirmed this and instead her identity and knowledge of the incident was hidden from the defence. The evidence that we have heard at this Inquiry completely refutes these suggestions and it seems somewhat incredible that Melnyk and Lapchuk's evidence is still being questioned. We now know:

- (i) That defence counsel was aware of Ute Frank and Debra Hall. Justice Tallis interviewed Ute Frank and based on the information he received from her, which corroborated what Melnyk and Lapchuk said, made the decision that she should not be called as a witness and further that he would not want to have Debra Hall called either as both would be harmful to Milgaard's defence;⁴⁹
- (ii) That Debra Hall has now repeated what she saw in the room and in many ways it is more damaging than even what Melnyk and Lapchuk gave;⁵⁰
and

⁴⁹ Tallis Inquiry Transcript p. 24501, Line 1 to 24512, Line 21

⁵⁰ Debra Hall Inquiry Transcript p. 3216

- (iii) David Milgaard initially appears to have publicly denied the incident took place but we know that in reviewing the matter with his defence counsel at the time he did not deny it but suggested only that it was a joke.⁵¹

40. What now appears to have been a very bad joke on the part of David Milgaard, went in as evidence at his trial and was not contradicted by him as a result of the decision that he would not testify. There is not a single shred of evidence that suggests that this evidence was improperly obtained or that it was not credible.

The Trial

41. At the trial David Milgaard was represented by senior defence counsel whose reputation was well known to the SCP. Counsel for David Milgaard had access to information which disclosed the inconsistencies and unreliability of the testimony of Wilson, John and Cadrain. The jury heard evidence on many of those inconsistencies. At the end of the day the jury found Milgaard guilty. For Det. Karst the case was concluded and he continued work on his many other open and active files.

42. Justice Tallis described what he felt was the most damaging evidence at the trial. For him, the most significant evidence was the testimony of Nichol John coupled with the reading in of her statement to the jury. Interestingly, the prosecutor, Bobs Caldwell, agreed with Justice Tallis at the time that the statement should not be read to the jury, a position that was also adopted by the Department of Justice on the appeal. This flies in the face of the suggestion that the police and Crown were attempting at any cost to obtain

⁵¹ Tallis Inquiry Transcript p.24507

a conviction of David Milgaard. Had that been their mindset clearly they would have advocated the reading of Nichol John's statement to the jury.

43. In 1969 and 1970, DNA evidence was not available. The advent of DNA evidence not only has provided additional information in determining guilt or innocence, it has also taught us that in some cases, where guilt appeared to be certain, it was not the case at all. The mindset in 1969/70 was that once the trial was completed and all of the evidence heard the matter was concluded. This does not mean that if new and convincing evidence came forward suggesting that an innocent man had been convicted it would be ignored, but what it does mean is that one would not be actively looking for this or even be diligent in watching for it. That was the mindset of Det. Karst. The jury had heard all of the evidence and determined that David Milgaard was guilty. The case was concluded and he moved on to his other files.

Larry Fisher

44. The possibility that the person who was responsible for the rapes also murdered Gail Miller should have been a theory that would have been known to defence counsel at the time. It obviously did not lead anywhere. Justice Tallis made inquiries trying to locate a possible other suspect and his inquiries on the street revealed nothing. If David Milgaard had murdered Gail Miller he could not have committed the other rapes since he was not in Saskatoon. This led to the conclusion in the SCP that whoever committed the rapes was someone different from the person who committed the murder of Gail Miller.

(The Alberta Justice report made a similar observation.⁵²) Against this background, approximately 10 months later, Det. Karst was sent to accompany Inspector Nordstrom to Winnipeg to obtain two statements from Larry Fisher, who had confessed to Winnipeg Police of the rape of Victim #4 and attempted rape of Victim #3 in Saskatoon. There was no reason to associate Fisher with the death of Gail Miller.⁵³

45. Det. Karst was not actively involved in the Saskatoon rape investigations apart from taking the two statements. These were carried out by the morality division within the SCP and not the detective division, of which Det. Karst was a member. Although Det. Karst has no knowledge of why he was selected to accompany Inspector Nordstrom to Winnipeg, there is evidence that given his skills as an investigator, he was often selected to do out of town interviews and that this was not unusual.⁵⁴ There was no suggestion that Larry Fisher was somehow involved in the murder of Gail Miller. The fact is that in 1970 there wasn't any physical evidence connecting Fisher to the murder and no suggestion on the part of anyone that he was involved in the murder. After Det. Karst returned from Winnipeg, he had no further involvement in the Larry Fisher rape files. These were morality matters. He testified that he would likely have prepared the reports even though Inspector Nordstrom was a senior officer. The reports would have then been taken by Nordstrom and Det. Karst assumes placed on the files.

⁵² Alberta Justice Report - Document #032805 at p. 032811

⁵³ Fisher Statements – October 22, 1970 – Document #'s 012111 and 012639; 21 October 1970 – Document # 002032

⁵⁴ Harry Valila Transcript pp. 11670-11672, Tom Vanin Transcript pp. 22342 and 22343, Cressman Statement – RCMP Continuance Report 081588 at 586

46. There was a suggestion that the obtaining of the information about Larry Fisher was withheld from the investigating officers. This seems unlikely in light of the fact that Fisher did return to Saskatchewan, albeit in Regina, pled guilty to three rapes and an indecent assault and details about those rapes were forwarded by the SCP to the Department of Justice. The only witness who actually suggests this directly is now retired Sgt. Gus Weir who indicates that he only found out about the trip to Winnipeg by Det. Karst a number of years later and was extremely upset at the time. This is directly contradicted in his own concluding report and his own statement given to the RCMP in 1991 which indicates that he did speak with victim #4, whose rape he had been investigating, and told her that the person who was responsible for her rape had been apprehended. This was corroborated by victim #4 herself who confirmed that she received this same information.⁵⁵

47. It is submitted that Sgt. Weir's memory on this point is not reliable and his recollection is erroneous. Sgt. Weir did testify that he did not believe that Det. Karst was involved in any cover-up of the Fisher evidence. Sgt. Weir stated that Det. Karst was recognized as a top investigator and that may have been the reason why he was sent to Winnipeg to obtain statements from Fisher, or alternatively he may have been simply selected because Sgt. Weir was on holidays.⁵⁶

48. Years later when the theory began to develop that Larry Fisher was responsible for the death of Gail Miller various accusations were made against the SCP and the

⁵⁵ Weir Report – 015246, Weir Statement 034634 and V4 Statement 254911 at 991

⁵⁶ Weir Statement 034634 at 636 and 637

Department of Justice began to fly fast and furious. Concerning Det. Karst, the two principle accusations were:

- (a) That he was aware that Larry Fisher had murdered Gail Miller and that he concealed this information knowing that David Milgaard was innocent; or
- (b) That he at least should have been aware having interviewed Larry Fisher, that David Milgaard likely did not kill Gail Miller.

49. Det. Karst adamantly denies the suggestion that he knew or thought that Larry Fisher was responsible for the murder of Gail Miller and that he allowed an innocent man to spend time in jail for an offence he didn't commit. Based on what he knew at the time he did not make any connection between Fisher and the Miller murder and that to judge his conduct based on the knowledge that was obtained subsequently, including the DNA testing, is unfair.

Subsequent Interviews of Det. Eddie Karst

50. Once questions began to be raised publicly about the innocence of David Milgaard, the investigation that was carried out by the SCP and the prosecution of Milgaard, many involved for whatever reason chose to shy away from the media and preferred not to become involved. Det. Karst at all times was prepared to speak to the media or any investigators who were reviewing the matter. His comments were extremely candid on the issue:

- (a) He believed that David Milgaard was guilty;
- (b) He did not think Larry Fisher was responsible for the death of Gail Miller;
and
- (c) However, he had no objection to the matter being reviewed to determine if witnesses had lied or given false information and to see if in fact David Milgaard was innocent.

51. In his interviews with the media Det. Karst did not recall that he had interviewed Larry Fisher in 1969. He does not recall that to this date. However, once he was shown the two statements that he obtained from Fisher, he at no point in time disputed the fact that he had interviewed Fisher. He similarly was not aware that Fisher subsequently pled guilty to four offences. It is interesting to note that Fisher did not reveal in his statements to Det. Karst that he had resided at 334 Avenue O South. Det. Karst quite candidly admitted that had this been revealed he is not sure that it would have made any difference. In his mind, Larry Fisher was a rapist. Concerning the death of Gail Miller they were not looking for a rapist; they were looking for a murderer. He did not connect the two. Even now while you can see some similarity between the four offences in Saskatoon that were committed by Fisher and the Gail Miller murder, the principle difference remains that while the rapes and indecent assault were serious they were not the same as the violent murder that occurred in the Gail Miller case.

52. Det. Karst was interviewed by Dan Lett on August 21, 1991. We have a partial transcript of that interview (004110). While he was still convinced of David Milgaard's

guilt at that time (bearing in mind there still was no DNA evidence then), he was not opposed in any way to an inquiry or review to try and get to the bottom of why people now appeared to be changing their stories. In his interview he makes the following statements:

“Lett: Mmhm. What about now, that the Milgaards say they don’t want DAVID MILGAARD released. That they just want – they want to go back and they wanna do it all in a court. They wanna bring in all these people that, you know, like WILSON and JOHN and CADRAIN, and they wanna put them under oath; ‘cause nobody’s had a chance since the trial – put them under oath – do you think that that there would be this way put everything to rest once and for all if they just went back to some sort of a court and had it all out?

Karst: If they could get a proper court, I wouldn’t – I wouldn’t see anything wrong with that at all. But I don’t know how you’d get one. I’m sure there’s witnesses that aren’t around. I’m sure there’s witnesses like I said before – I’ve kept notes and I don’t think they’d ever find them down there. And there is reports which would refresh my memory anyway. And you are experienced at this kind of thing – how do people twenty some years who’ll remember what happened on that day that they, you know, it’s – it means nothing to them.

Lett: Mmhm.

Karst: But to that extent, I can’t see how you’d have a honest trial. I would rather – that’s just my opinion, I’m not a legal mind – I would rather, rather see this go to a panel or whatever they call a hearing ...

Lett: Judicial inquiry.

Karst: ... judicial inquiry. And if, if the prosecution or if the defence has new evidence, let the panel hear it – let these learned judges hear it. I was never an advocate of a jury in the first place.

Lett: Right.

Karst: I ... but then again I’m not a legal mind; but I can never see somebody that isn’t versed in law and that kind of stuff judging somebody else and you get some funny people on juries, I know that. But I’d rather see to me, have a – have a – in my mind if there’d be a real just thing –

excuse me – a just thing would be to have a hearing with some learned judges and present to their new evidence.

Lett: Mmhm. An announcement that you have because that's – like it sets in the frustration that so far the Justice Minister has decided that, you know, she's got _____ judgment herself – they wanna go and they wanna have an inquiry. I guess part of the problem is that there's a lot of people that think the case shouldn't be reopened at all. That it's just water under the bridge.

Karst: Don't – don't misunderstand me. I am not saying it should be, I'm saying I would have no objection, you know – I'm not telling those people in Ottawa what they should be doing.

53. Ironically Det. Karst in 1991 was predicting ultimately what would take place, a Judicial Inquiry. He also identified that one of the problems with the conviction which seems to have been repeatedly overlooked and that is that a jury found David Milgaard guilty on evidence which is contradictory. Now, on closer examination, it seems that maybe he should not have been convicted on that evidence in the first place.

54. Det. Karst continues at 004120:

Karst: Absolutely. No, no doubt in my mind. None. I just – I'd have to – to be convinced otherwise – I'd have to, I'd like to sit down and talk with MILGAARD, WILSON, CADRAIN, LAPCHUK, the other guy, NICHOL – all these people – I'd like to; I'd like to get together and say, you know. I'd like to be in the room with them altogether and say to them: "What's going on? You guys all lied to give – you know, did you all perjure yourselves or what?"

55. Again Det. Karst was suggesting doing what Joyce Milgaard and now this Inquiry is doing which is to bring all of these people together and try and get to the bottom of why they said what they did.

56. Finally Det. Karst made it clear that he had no objection to such an inquiry taking place at 04127:

Lett: Yeah, well then I guess that's another then – the MILGAARD lawyers says “Well, this is another reason why we need a review, we need a review so that we can look it over and ...”

Karst: As I say, I have no objection to it. I would welcome it. There's no ...

57. And at 004129:

Lett: Mmhm. Mmhm. And you do think it was – well, how do I get around it? You wouldn't – you're not advocating it, but you wouldn't, you know, you wouldn't disagree with some sort of a judicial inquiry?

Karst: Not at all. Nope. You're exactly right. I'm not advocating what they'd do what they're supposed to do, but I have certainly no objection if they had one.

Lett: Yeah. And if it were called, you would certainly support that and ...

Karst: Oh, certainly. That – without a doubt I haven't got no qualms about that at all.

58. These statements made in 1991 are completely consistent with an officer who had done his duty to the best of his ability and had nothing to hide.

Joyce Milgaard/Paul Henderson, David Asper Investigation

59. We decline from making any detailed submissions concerning the investigation of Joyce Milgaard as assisted by Paul Henderson, David Asper and others on her behalf. It is clear that at some point in time their focus became to find something sensational

enough that initially the federal government would intervene and that laterally would generate enough public support through the media that it would compel the government to act. Joyce Milgaard's position was simple: her son was innocent and therefore anyone who was involved in securing his conviction must have acted improperly, intentionally or otherwise. Paul Henderson and Centurion Ministries position was simple: they had to create the impression that the police or Crown had acted improperly. Whether they had or not was of no consequence. As for David Asper, he felt the cost of damaging reputations and perhaps inaccurate media reports was worth it if it meant freeing an innocent man.

60. In the case of Joyce Milgaard, it is difficult to criticize what she did. She believed her young son was incarcerated for a horrendous offence which he did not commit and she was prepared to do virtually anything to secure his freedom. It is unfortunate that the approach that she and others who supported her took may have unfairly damaged the reputations of a number of other people. It is also unfortunate that this approach may have caused the authorities, and specifically the federal government, to act less quickly in accepting her concerns, including the principal allegation that David Milgaard was innocent. The scope of the "conspiracy" they alleged went so far as to include various times even Justice Tallis who she felt had made his career and earned his position on the bench as a result of securing a conviction for David Milgaard.⁵⁷

⁵⁷ David Milgaard Letter - 213600, David Milgaard Letter - 213125

61. While the reports and statements generated by all of these people casts serious aspersions on Det. Karst, the fact remains that not a single witness has stepped forward and stated that they were improperly dealt with by Det. Karst.

62. An allegation was made that Det. Karst had instructed Cadrain, John and Wilson not to speak to representatives of the Milgaard family. In January of 1981 Det. Karst was instructed by then Chief Gibbon to locate the three witnesses which he did. He was advised by Cadrain that he did not want his whereabouts to be divulged to anyone with regard to the Milgaard matter. He was also able to locate Wilson and John.⁵⁸ Subsequently Det. Karst was instructed to follow up with Wilson and John to determine whether they wished their information to be released to the Milgaards. In his conversation with Wilson and John, Det. Karst never instructed either of them not to speak to representatives of the Milgaard family. He did inform them that they had no obligation to speak. Both Wilson and John informed Det. Karst that they did not wish to have their information concerning their whereabouts shared with the Milgaard representatives. Cadrain, Wilson and John all confirmed that this was their instruction to Det. Karst and they reached this decision of their own accord, each not wanting to speak to the Milgaards. Subsequently when the Milgaards were able to locate Nichol John, her counsel sent a letter to the SCP suggesting that they had released the information to Mrs. Milgaard contrary to their express wishes.⁵⁹

⁵⁸ Karst Letter -- January 16, 1981 - 025331

⁵⁹ Leslie Letter - January 26, 1981 - 025335

Subsequent Investigations

63. We also do not propose to enter into a detailed review of subsequent investigations that were carried out by the Province of Saskatchewan, the RCMP on two different occasions and the federal government in dealing with the two s. 690 review applications. We do however note the following:

- (i) In no instance is any improper conduct attributed to Det. Karst;
- (ii) In no instance is there a determination that Det. Karst withheld evidence or participated in any conspiracy to have David Milgaard either convicted as an innocent man or his conviction maintained knowing that Larry Fisher was likely responsible for the death of Gail Miller; and
- (iii) That prior to the DNA evidence which linked Larry Fisher to the death of Gail Miller, even once all of the facts and circumstances surrounding Larry Fisher's offences was known, they were not prepared to conclude that Larry Fisher was responsible for the death of Gail Miller, a position that was similarly adopted by the Supreme Court of Canada.

Conclusion

64. We have heard a great deal of evidence at the Inquiry about whether it was reasonable for Det. Karst to make the connection between Larry Fisher and the death of Gail Miller. It is ironic that Mrs. Milgaard while trying to establish David Milgaard's innocence, in 1980 became aware of Larry Fisher, the fact that he resided at the Cadrain residence and that he had been convicted of a number of rapes and sexual assaults that

had taken place at or about the time of the Gail Miller murder.⁶⁰ She obviously at that point did not make the connection that Larry Fisher may have been the actual murderer.

When asked by the RCMP why she didn't make the connection, she stated as follows:

Q. What brought you to follow that connection – to go back and look at the girl's murder ...

A. I got an, I was looking at everything; I was looking at all of the murders and everything that was connected around... It seemed to me David hadn't done it, like I'm starting from that premise and if David hadn't done it I felt that it must be someone with similar type of uhh, modus operandi, if you will, and so I started looking back to see – we, we followed up on McHarg, which was, was a guy at that time was um, actually came to St. Mary's Church and was seeing visions and everything and he was convicted of a murder with stabbing with a paring knife and he'd been visiting with the priest at St. Mary's. Uh, that was his priest and telling him about the visions that he had and all the rest of it so, we followed up on so many cases and it was, at the time that we found out about Fisher, we didn't follow up on him because we got locked into the McHarg, and we got, we were just like the police. We got tunnel vision (laugh). We got into a, one area, and you know, we're, we're finding that the police had tunnel vision on David. I know how that can happen because as soon as you get something that fits you just go after it. I followed many, many avenues – ohh – all these different things and – what I was doing all that time but it was because, you know you start ... You know how long it takes.

Q. You're right about the tunnel vision. There's no, no doubt whatsoever that happens. I've been the victim of that myself.

A. Um hmm. And you don't realize it, like I can look back now and I can say that was stupid. I mean you just, like you had Larry Fisher there, you could have found him at that time.

Q. At the time it's the logical chain of events.

Q. Yeah, that's right.

A. Yea, and so whenever I want to really, um, uh, nail those police officers I [laughs], I, I can understand it.⁶¹

⁶⁰ Merchant letter 213627,159890, 213945 at 48, 325634 at 44, 325616 at 21, _____

65. The information uncovered by Mrs. Milgaard and the journalist assisting her, Peter Carlyle-Gordge, with respect to Larry Fisher was presumably in the material provided by Mrs. Milgaard to her counsel, Mr. Wolch and Mr. Asper. Specifically, that Larry Fisher had resided in the same premises as Cadrain and had been convicted of various sexual assaults. Mr. Wolch and Mr. Asper were retained in January of 1986 by Mrs. Milgaard for the purposes of overturning the conviction of her son. Although this information was available to them from Mrs. Milgaard's file, they did not make the connection between Fisher and the Gail Miller murder until the anonymous tip from Bruce Lafreniere sometime in February of 1990.

66. If Joyce Milgaard and her counsel, who were convinced of the innocence of her son, David Milgaard, and were of the view that someone else must have committed the murder, did not make the connection, is it reasonable to suggest that Det. Karst somehow erred in not making the connection at a time when David Milgaard had been convicted and there was no evidence to suggest that the conviction was erroneous?

Recommendations

67. Much has changed concerning the manner in which criminal allegations are investigated now versus what took place in 1969/70. There are some recommendations nonetheless that we would propose:

⁶¹ RCMP Interview 331214 at 240

- (i) Although Det. Karst was reluctant to tape witness statements because of a concern that witnesses would be reluctant to speak, he acknowledges now that the best practice would be to have all statements audio and videotaped;
- (ii) On major investigations like the death of Gail Miller, where there is a great deal of circumstantial evidence and perhaps not much direct evidence, it is important that as independent a review as possible take place of the evidence before a prosecution is proceeded with; and
- (iii) Many of the frailties in the case against David Milgaard were fully before the jury when it rendered its guilty verdict in 1970. It is difficult to know what impact the testimony of Nichol John had on the jury. As Justice Tallis noted, had she simply recanted her statement this would have been less damaging than her stating that she did not remember and then having her statement read in. The Court of Appeal has a very limited role in setting aside a conviction in these circumstances as was identified by Justice Tallis. This present test appears to be that there must be a "lurking doubt". He notes that the test in the United Kingdom now is whether the verdict is "unsafe". The test he suggests is: "If after careful review of the record, the Court of Appeal is left with such a sense of unease or

disquietude that they feel the verdict is unsafe, then they should be able to intervene". We would support this recommendation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of
November, A.D. 2006.

McDOUGALL GAULEY LLP
Per:

AARON A. FOX, Q.C. and
CHRISTOPHER C. BOYCHUK,
Counsel for Eddie Karst