

**Commission of Inquiry Into the Wrongful
Conviction of David Milgaard**

Before

The Honourable Mr. Justice Edward P. MacCallum

Written Submission
On behalf of the
Saskatoon Police Service

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SUBMISSION FILED ON BEHALF OF THE SASKATOON POLICE SERVICE

The quest of any criminal jurisdiction, faced with incidents of miscarriages of justice, is to discover whether there is a systemic problem to be addressed or whether some idiosyncratic reason can be attributed to the individual case.

(David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 Drake L. Review p. 657. 2003-04)

AIn the absence of any sort of systemic deficiency, the sort of idiosyncratic reason why a case may result in a wrongful conviction is because, it's either going to be because there is a one-of (*sic*) act of failure to act properly or it is going to result from the fact that someone, ... somewhere in the system, whether it's the police, the prosecutor, the Defendant or the trial judge has done -- has not done, to the full extent, that which should have been done, and that need not be deliberate, it may just be a mistake.

Q And so again, so I understand it, the majority of the cases where a remedy is granted are cases where there has been no misconduct or deliberate wrongdoing by anybody involved, i.e., police, witnesses, Crown prosecutor; is that correct?

A That's correct, yes.
(Evidence of Mr. David Kyle before this Commission of Inquiry, October 3, 2006, Vol. 192, p. 40253, line 22 to p. 40254, line 23)

I. Introduction

1. This is the written submission of the Saskatoon Police Service, as submitted to this Commission of Inquiry ("Commission"). At the time of Gail Miller's murder, and the subsequent investigation of that offence, the municipal police service in the City of Saskatoon was known interchangeably as the "Saskatoon Police Department" and/or the "Saskatoon City Police". In 1992, the entity formally adopted the name "Saskatoon Police Service". For the purposes of this submission, the term "Saskatoon Police Service" will be used to refer to the police service irrespective of the reference to any particular period of time.

2. This submission is not presented as a comprehensive analysis of the police issues in this Inquiry. Rather, it is an attempt to set out a relatively concise reference to the notable police issues which have arisen. Some issues have not been covered in that they now appear to be less significant or notable given the evidence received. To the extent they take on greater

significance in the written submissions of other parties, they can be addressed in a reply submission or in oral argument.

3. Before embarking on an analysis of the issues and evidence raised at this Commission of Inquiry, the Saskatoon Police Service believes it is important to make one matter fundamentally clear. The Saskatoon Police Service fully accepts the statement that David Milgaard is, and was, innocent of the murder of Gail Miller. The Saskatoon Police Service accepts that Mr. Milgaard's innocence in this respect exists not because of a declaration by the Government of Saskatchewan, or because it is the premise upon which this Commission is based, but because it is simply a fact. Given the fact of his innocence, it necessarily follows that Mr. Milgaard was wrongfully convicted and that, as a matter of law, his conviction constitutes a miscarriage of justice.

4. Having said this, it is important to remember David Kyle's insightful comments and to recognize that the existence of any wrongful conviction does not, of itself, compel the conclusion that it arose from the misconduct of any official in the administration of justice. More particularly, Mr. Milgaard's wrongful conviction cannot stand as proof that there was misconduct, or even unreasonable conduct, in the investigation of Miss Miller's murder and the decision to lay the charge. As this written submission contends, the evidence shows that, having regard to the training, resources and technology available at the time, the investigation of Gail Miller's murder was conducted reasonably, with the requisite level of competence and good faith.

5. It is also respectfully submitted that, despite allegations to the contrary, there is no persuasive evidence to suggest that there was any cover-up, conspiracy or other inappropriate conduct on the part of the Saskatoon Police Service in regard to any evidence arising after the Milgaard trial in January of 1970.

II. The Investigation

6. At approximately 8:40 a.m. on January 31, 1969, Detective Sergeant George Reid and Detective Jack Parker, of the Saskatoon Police Service, received a radio call from Superintendent Wood to respond to a report about a "suspicious person" in the laneway at the 200 block of

Avenue N South. Ten minutes later, the two officers arrived at the scene and discovered the near frozen body of Gail Olena Miller age 20 years. The appearance of Miss Miller's body was recorded in considerable detail in an Occurrence Report, bearing occurrence number 641/69 (Doc. No. 006255). Thus began the investigation into one of only four homicides to take place in Saskatoon in 1969.

7. It is clear that the decision to lay charges was not the result of a rush to judgment. Within four months of the murder, the Saskatoon Police Service wrote up 191 investigation reports, authored by 62 different officers, all filed under the 641/69 occurrence number. There were written statements taken from 39 witnesses. In addition to these 39 witnesses, hundreds of others were interviewed without giving statements.

8. The evidence also demonstrates that more than 200 suspects were considered, with an equal number of possibilities and theories of the case. Some of the notable possibilities, considered by the investigators, were as follows:

- (a) that the offence was committed by a boyfriend of Miss Miller;
- (b) that the offence had been committed by someone she had met at a party the night before her death;
- (c) that there was some involvement by the owner or occupant of a Pontiac Parisienne seen parked outside Miss Miller's home the night before her death;
- (d) that the offence was somehow connected to someone Miss Miller had befriended on the bus she frequently rode to work;
- (e) that the offence was committed by the same person who had committed three sex related offences in 1968.

Connection With the 1968 Attacks

9. With respect to the last possibility, described above, it has been suggested that, in the course of the investigation, the Saskatoon Police Service did not give this theory the required attention it deserved. Associated with this allegation is the contention that the Saskatoon Police

Service was, in some way, involved in a decision to conceal the investigators' consideration of this theory from Mr. Milgaard and his counsel.

10. It is respectfully submitted that the evidence presented before this Commission does not bear out these suggestions. Firstly, it is evident the Saskatoon Police Service gave this matter reasoned consideration from the outset, and stated so publicly. The evidence shows that, prior to the murder of Miss Miller, the Saskatoon Police Service were pursuing the perpetrator of the 1968 attacks, and had issued a public warning about them (Saskatoon Star Phoenix article, December 14, 1968, Doc. No. 039103). After the murder, no effort was made to conceal the fact that investigators were alive to the possibility this offence was created by the perpetrator of the earlier attacks. In a newspaper article appearing the day after the murder, it was disclosed that this was one of the possibilities being investigated (Saskatoon Star Phoenix article February 1, 1969, Doc. No. 004085). This was followed by subsequent articles, which again referred to a possible connection (Saskatoon Star Phoenix articles February 3, 1969, Doc. No. 039073; February 4, 1969, Doc. No. 039068; and February 6, 1969, Doc. No. 039093).

11. Consistent with the comments made to the press, the theory played a reasonably significant role in the investigation by the Saskatoon Police Service. On February 5, 1969, the head of the Identification Section, Lieutenant Joseph Penkala (as he then was), submitted a summary of the facts to the Crime Index Section of the Royal Canadian Mounted Police. The ostensible purpose for this submission was described as "crime index modus operandi suspect identification." In the summary of facts, Lieutenant Penkala referred to two of the 1968 complaints. In doing so, Lieutenant Penkala alluded to the fact that these victims had each been forced into a lane and, under threat with a knife, were made to undress and submit to sexual intercourse (Doc. No. 009299 and 054876).

12. On February 1, 1969, Detective Sergeant Raymond Mackie interviewed one of the 1968 complainants and asked her to review a group of photographs, one of which depicted a suspect in the Miller investigation (Doc. No. 106142).

13. It is also evident that someone within the Saskatoon Police Service prepared a chart, subsequently found in Lieutenant Penkala's file, which drew certain similarities between the three 1968 offences. While no reference is made to the Miller offence, the chart was located on

the identification file Lieutenant Penkala maintained for the case. Consequently, it can readily be inferred that the chart was considered in the investigation (Doc. No. 324806).

14. Finally, this theory was in play as late as April of 1969, when Lieutenant Penkala made arrangements for exhibits in two of the 1968 files to be examined for the presence of human seminal fluid and ABO agglutinogens (Doc. No. 324671). This unfolded somewhat further when arrangements were later made to have one of these two victims provide a blood sample and a saliva sample to determine the presence of agglutinogens of blood groups "A" or "B" (Doc. No. 009386).

15. From the foregoing evidence, it is apparent that the Saskatoon Police Service gave adequate consideration to the theory that the perpetrator of the 1968 offences was the same person responsible for the murder of Gail Miller. The present knowledge that Mr. Fisher had committed the murder, as well as the 1968 offences, does not change this view. Indeed, it is submitted that it would be abjectly unfair for any observer of these proceedings to employ hindsight knowledge as a means of suggesting either that the Service acted either unfairly or unreasonably in shifting its attention to Mr. Milgaard in the period from March to May of 1969.

16. In fact, at the time Mr. Milgaard was regarded as a prime suspect in the case, in mid May of 1969, it would have been an example of "tunnel vision" for the Saskatoon Police Service to have focused exclusively on the unknown perpetrator of the 1968 offences. At the time of the meeting on May 16, 1969, referenced in the RCMP Investigation Report prepared by Inspector Riddell (Doc. No. 250609), there were no prime suspects in the 1968 attacks. Conversely, a discrete body of evidence had been accumulated to establish Mr. Milgaard as a prime suspect in the Miller murder. This evidence was summarized by Inspector Riddell in paragraph 4 of his Investigation Report and included the following:

- (a) Mr. Milgaard was near the immediate area of the murder at, or very near to, the time it occurred;
- (b) Mr. Milgaard was seen by Albert Cadrain with blood on his trousers when he arrived at the Cadrain residence at roughly 9:00 a.m. on the day of the murder;

- (c) The Cadrain residence was located a little more than three blocks from Miss Miller's residence and two blocks from the scene of the murder;
- (d) Mr. Milgaard changed his clothes shortly after arriving at the Cadrain residence;
- (e) Miss Miller's wallet was found on a boulevard next to the Cadrain residence, where Mr. Milgaard was known to have been;
- (f) A toque was found in roughly the same area as the wallet and Nichol John had given information to the effect that Mr. Milgaard was wearing a toque at one point during their time together.

Not unreasonably, this evidence prompted the Saskatoon Police Service to explore the possibility that the murder of Miss Miller was not related to the 1968 attacks.

Police Interaction With Witnesses

17. It is respectfully submitted that there is nothing sinister, malicious or unreasonable about the manner in which members of the Saskatoon Police Service interacted with any of the people who were interviewed and from whom statements were taken. In particular, it is submitted that there was nothing unusual or unbecoming about the police interactions with Albert Cadrain, Ron Wilson and Nichol John.

Albert Cadrain

18. Albert Cadrain was the first person to raise suspicions about Mr. Milgaard. It goes without saying that the information received from him was extremely significant. For the first time, the Saskatoon Police Service had information about specifically identified people being in the neighbourhood of the murder at roughly the time it occurred, and at a time of day when they would not otherwise be expected to be there. Added to this, was information that Mr. Milgaard had blood on his clothes, took the opportunity to change his clothes at the Cadrain residence, and demonstrated unusual behaviour during much of the time he spent with Mr. Cadrain.

19. Despite the suspicions this information raised about Mr. Milgaard, it is evident that the Saskatoon Police Service had early reservations about Mr. Cadrain's story. Although it is somewhat unclear as to the number of interactions Mr. Cadrain had with members of the Service, it is clear that he was interviewed on March 2 and 5, 1969. While there are differences between Mr. Cadrain and Mr. Eddie Karst as to the manner in which this questioning occurred, there is little doubt that the questioning was persistent and that Mr. Cadrain was challenged somewhat. The persistence and challenging nature of the questions is certainly understandable. Given the obvious significance of Mr. Cadrain's story, it was important for the investigators to take reasonable measures to ensure that the story could withstand challenges before any formal action could be taken.

20. It is also noteworthy that, except for one occasion, and despite Mr. Cadrain's later criticisms for the police having "played with his head" and subjected him to "torture", his evidence *never* changed in any material respect. The only occasion Mr. Cadrain could be said to have backtracked from his story was during the questioning by Paul Henderson, when he said it was possible he may not have seen blood on Mr. Milgaard's clothes. However, there is ample evidence to suggest that Mr. Cadrain gave this information to Mr. Henderson not because he believed it to be true but because it was his intention to obstruct Mr. Henderson's investigation, and because he felt Mr. Milgaard had served enough prison time (Transcript, Vol. 12, p. 1992, line 2 to p. 1995, line 14; Doc. No. 326707).

Ron Wilson

21. It is clear that Ron Wilson interacted with investigators on two separate occasions, the first on March 3, 1969 and the second during the period May 21-24, 1969. There is some suggestion of an interview having been given between these two interactions (referenced in Doc. No. 106640) although Mr. Wilson cannot recall same. He does recall having submitted to giving a blood sample (referenced in Supt. Wood's Investigation Report of late April, 1969, Doc. No. 106666).

22. It is respectfully submitted that the decision to question Mr. Wilson further, in May of 1969, was not unreasonable. As the evidence discloses, this decision was made at or around the time of the aforementioned meeting on May 16, 1969. By the time of that meeting, and aside

from the facts identified in paragraph 4 of the Report covering that meeting (Doc. No. 250609), the Saskatoon Police Service had received information which created an unfavourable impression of Mr. Milgaard. Specifically, they had been advised by Ms. John that, while she did not believe Mr. Milgaard had committed this offence, she felt he was capable of it in that he was more of the "animal nature" than one would expect. In the same interview, Ms. John had told Detective Karst that Mr. Milgaard had been acting "in a queer manner" when he was in Saskatoon and seemed to be in a hurry, driving unusually fast when they left Saskatoon later on January 31 (Doc. No. 002196). Investigators had also received a lengthy statement from Sharon Williams, Mr. Milgaard's former girlfriend, which described inappropriate and violent behaviour on the part of Mr. Milgaard (Doc. No. 009245). While much of this evidence would not have been admissible at trial, it certainly raised an impression of Mr. Milgaard to warrant further investigation.

23. With respect to the interaction with Mr. Wilson during the period from May 21 to 24, 1969, it is noteworthy that, before he met with the polygrapher, Mr. Wilson gave the police information which was either in addition to, or inconsistent with, information provided in his first statement (this information is contained within Doc. No. 106669):

- (a) Specifically, when interviewed in Regina by Detective Karst and Detective Sgt. Mackie, Mr. Wilson told the officers that, while looking for Mr. Cadrain's residence his car had become stuck at approximately 6:45 a.m. at which time Milgaard had left the car. Mr. Wilson went on further to state that, when he returned, Mr. Milgaard appeared to be puffing and running. Mr. Wilson also speculated that this might have been the time Milgaard was "probably involved in a murder".
- (b) Secondly, on the trip to Saskatoon, Mr. Wilson advised Detective Karst that he and Mr. Milgaard had discussed the possibility of committing certain offences such as break and enters, "rolling someone" and purse snatching in order to get money.

- (c) Thirdly, Mr. Wilson advised Detective Karst that, before reaching Saskatoon, he and Mr. Milgaard had broken into a United Grain Growers elevator in Aylesbury at which time they stole a flashlight.
- (d) Finally, Mr. Wilson had also speculated that Mr. Milgaard could have picked up a knife from the Champs Hotel prior to leaving Regina although he could still not specifically recall having seen a knife in Mr. Milgaard's possession.
- (e) Upon arriving in Saskatoon later that day, Mr. Wilson provided further information, which had not been included in his first statement. Specifically, he advised Detective Karst of the fact that they had stopped on two occasions to ask for directions, once asking a woman walking down the street and another occasion asking the clerk at the Trav-A-Leer Motel.

24. There is nothing to suggest that Mr. Wilson was in any way told what to tell the police, nor was he bullied or intimidated. Mr. Wilson, himself, was unable to describe any conduct on the part of the police that would approach anything that could reasonably be regarded as unacceptable or inappropriate. Moreover, in his interview with RCMP Constables Jorgenson and Dyck on September 13, 1993, Mr. Wilson admitted that certain of the information provided in his statements to police, after meeting with Insp. Art Roberts were made up by him, entirely on his own volition (Transcript Vol. 32 at p. 6311, line 11 to p. 6314, line 4; Doc. No. 022937).

25. It is also notable that Mr. Wilson volunteered other information that was ultimately more damaging than his own testimony. Indeed, some of the most incriminating evidence at the trial arose from Mr. Wilson's decision, made freely and voluntarily, to advise investigators of the information given to him by Craig Melnyk and George Lapchuk. It is submitted that the evidence of these two witnesses was perhaps the most devastating evidence presented against Mr. Milgaard. Although Mr. Wilson cannot specifically recall telling police of the story they gave, he did not deny having done so (Transcript Vol. 29 at p. 5723, line 12 to p. 5724, line 16). It is submitted that Mr. Wilson must have given this information freely and voluntarily as there was no other way for the Saskatoon Police Service to have become aware of it.

26. At best, Mr. Wilson's definition of manipulation and coercion surrounded the fact that the police persistently asked him questions and drove him around the neighbourhood where the murder took place, in an attempt to retrace the path they made on the morning of the murder. None of the police witnesses before this Commission could find fault with this approach. In fact, Kim Rossmo, a former Vancouver police officer and current criminologist, was of the opinion that persistent questioning is often called for when dealing with reluctant witnesses (Transcript Vol. 139 at p. 28277, line 9 to 17).

27. To the extent Mr. Wilson falsely incriminated Mr. Milgaard, it is respectfully submitted that the responsibility for this does not lie with Saskatoon Police Service. While Mr. Wilson was critical of the police in his statements to Paul Henderson, these statements contrasted significantly with the information Mr. Wilson gave to Constables Jorgenson and Dyck in one instance and to Neil Boyd and Kim Rossmo in another. In his statements to Mr. Boyd and Mr. Rossmo, Mr. Wilson could not identify any inappropriate conduct on the part of the police that would account for him having given false and incriminating information against Mr. Milgaard. Mr. Rossmo's theory for the inconsistencies in Mr. Wilson's versions of events deserves comment. In his testimony before this Commission, Mr. Rossmo described his theory for the inconsistencies. In this respect his testimony was as follows (Transcript, Vol. 139 p. 28086, line 9 to 21):

"Well, Paul Henderson is the first one to get Ron Wilson to admit that he made a mistake, which is going to be hard for one Ron Wilson. At that point it might be a lot easier for Mr. Wilson to share the blame, 'yes, I lied, but the police made me do it.' By the time we get to him he's been interviewed by Eugene Williams, he's had more time to think about it and he might be more willing just to be frank and say, 'yeah, you know, I just wanted to give up David, it was a lot easier for me,' and he's not pulling the police into it any more. In other words, his acceptance is greater at this point of his previous actions."

Nichol John

28. It is respectfully submitted that there is no persuasive evidence to support the conclusion that the Saskatoon Police Service intimidated or bullied Nichol John into giving the statement

she gave on May 24, 1969. There is no evidence before this Commission that Ms. John consider herself to be intimidated into giving any information to any police officers. The only allegation in this respect relates to the suggestion that Ms. John was kept, against her will, in the cells of the Saskatoon Police Service during the time she was in Saskatoon from May 21 to 25, 1969. The more credible evidence in this regard is that Ms. John stayed in the cells voluntarily at her own choice (Transcript, Vol. 54, p. 10488, line 19 to 10489, line 8).

Investigative Summary

29. It has been alleged that Mr. Wilson and Ms. John were fed information which was later repeated in their statements shortly after their interactions with Insp. Art Roberts. This allegation is premised significantly on the Investigative Summary prepared by Saskatoon Police Service at or shortly before the meeting of May 16, 1969, where it was decided that Mr. Wilson and Miss John would be brought back to Saskatoon for further questioning. This document has been described, from time to time, as the "script" or the "smoking gun" (Doc. No. 006799).

30. It has been alleged that it was improper for the investigators even to have prepared this document. In this regard, it is noteworthy that none of the witnesses with any qualifications, training or expertise in law enforcement has agreed with this criticism. Murray Sawatsky, who was in charge of the "Flicker" investigation and the person who labelled the document as an "Investigative Summary", described the document as an operational plan which could be pursued either to implicate or to eliminate Mr. Milgaard, who was known to be the prime suspect at the time. Mr. Sawatsky went on to say that operational plans of this kind were common practice in police investigations, and serve a positive purpose.

31. With respect to whether this Investigative Summary served as a script for the information ultimately received from Mr. Wilson and Ms. John, Mr. Sawatsky's evidence on this score is also compelling. It is his evidence that if the document served to feed information to the two witnesses, it did not do it particularly well. It is noted that the May statements of Mr. Wilson and Ms. John did not conform entirely to the scenario set out in the Summary. To this, one could add the comment that if the Saskatoon Police Service wanted these witnesses to implicate Mr. Milgaard as directly as possible, one would have expected their information to conform more favourably to that received from Mr. Cadrain. It is notable that, in a number of respects, this is

not so. As it was observed in Mr. Sawatsky's report, "the best that could be said is that their disclosures vaguely conformed to the police theories" (Doc. No. 023256, p. 90).

32. The interaction between Insp. Art Roberts and Mr. Wilson and Ms. John also deserves some comment. As the evidence received before the Commission illustrates, polygraphy was a relatively new investigative tool in 1969. Unlike today, the Saskatoon Police Service did not have a polygraph machine and had no trained personnel in the operation of the equipment. The evidence suggests that Insp. Roberts, then of the Calgary City Police, was probably the only police officer in western Canada with any training in the field at the applicable time (Transcript, Vol. 71, p.14193, line 7 to 16). Consequently, it was not unreasonable for the Saskatoon Police Service to give considerable deference to Insp. Roberts in deciding how he would deal with the witnesses who were presented to him. Insp. Roberts passed away before this Commission was created, and could not give evidence. Nonetheless, his testimony before the Supreme Court of Canada in the Milgaard Reference is available to the Commission, and has been the subject of comment.

33. While it is not the role of the Saskatoon Police Service to defend Insp. Roberts' conduct in the investigation, it is noteworthy that the Supreme Court expressed no criticism of his interaction with either Mr. Wilson or Ms. John. Moreover, none of the former police officers who testified before this Commission, including those officers who were assigned to review and comment on the overall investigation, could describe Insp. Roberts' conduct as unreasonable or inappropriate (See the evidence, generally, of Michael Robinson, Transcript, Vol. 71, and the evidence of Murray Sawatsky, Transcript, Vol. 176).

III. Police Conduct Post-Conviction

34. It is respectfully submitted that there is nothing untoward or unreasonable about the actions of the Saskatoon Police Service, or any of its members, after Mr. Milgaard was convicted on January 31, 1970. The allegation has been made that Mr. Fisher's responsibility for the V1, V2, V3 and V5 attacks (hereinafter referred to as the "Fisher attacks") was covered up in a deliberate effort to conceal his responsibility for the Miller murder. It stands to reason that this

allegation presuppose two things. Firstly, it presupposes that the investigators within the Saskatoon Police Service knew or suspected that Mr. Fisher had committed the Miller murder. Secondly, and more alarmingly, this allegation presupposes that the Saskatoon Police Service was prepared to let the known, but unconvicted, perpetrator of Miss Miller's murder avoid any accountability for his offence. It is respectfully submitted that there is no evidence to support either presupposition.

35. On the first point, there is no evidence from which it could reasonably be concluded that any of the investigators had concluded, or even suspected, that Mr. Fisher was responsible for the murder of Gail Miller. Four investigators, involved in the investigation of the 1968 attacks, testified before this Commission. They were Harry Valila, Gus Weir, Bev Cressman and Eddie Karst. None of these witnesses testified that, after Mr. Milgaard's conviction, they suspected the perpetrator of the 1968 attacks was also responsible for Gail Miller's murder.

36. According to the records, Mr. Valila had some involvement into the investigation of the V2 attack, and also had recollections with respect to the V5 attack, which occurred after Mr. Milgaard's conviction. Although there were some references to Mr. Valila drawing a connection between these attacks and the Miller murder (RCMP interview with Harry Valila, Doc. No. 048933), Mr. Valila has categorically denied having drawn a connection and has further denied discussing a connection with any other member of the Saskatoon Police Services (Transcript, Vol. 59, p. 11636, line 4 to 12; p. 11650, line 7 to 19).

37. Mr. Cressman was in charge of the V1 investigation. He testified that, when he was instructed to investigate the circumstances of Larry Fisher in late 1970, he drew no connection between the Miller murder and the offences to which Mr. Fisher was confessing (Transcript, Vol. 67, p. 13293, line 24 to p. 13294, line 8).

38. Mr. Weir, who was in charge of the investigation into the V5 attack, which occurred after Mr. Milgaard's conviction, testified that, while he was generally aware of the circumstances related to the Miller offence, he did not draw any connection between that offence and the V5 attack (Transcript, Vol. 65, p. 12890, line 23 to p. 12891, line 9).

39. Finally, Eddie Karst was instructed to go to Winnipeg to obtain a statement from Mr. Fisher in October of 1970. Although Mr. Karst has no independent recollection of his meeting with Mr. Fisher, the records indicate that he had taken a statement from Mr. Fisher, and Mr. Karst accepts that information accordingly. In the alleged similarities between Mr. Fisher's attacks and the Miller murder, it is submitted that Mr. Karst's testimony is compelling. Specifically, he testified that he drew no connection between the cases. He bases this primarily on the fact that, if he had drawn a connection, he would have remembered the interaction with Mr. Fisher (Transcript, Vol. 62, p. 12289, line 10 to 15). Furthermore, from the perspective of hindsight, it was apparent to Mr. Karst that there were a number of "*dissimilarities*" between the cases, primarily based on the differences between the degrees of violence (Transcript, Vol. 62, p. 12295, line 20 to p. 12296, line 11).

40. As mentioned earlier, the second presupposition is more alarming in that it suggests that members, in the interest of avoiding embarrassment, were prepared to let someone they knew to be guilty avoid accountability for his crime. There is simply no evidence to support this.

41. It is acknowledged that, except for Mr. Weir's discussions with [REDACTED] the victims of the Fisher attacks were not advised of Mr. Fisher's conviction. While it has been alleged that this lack of notification should be regarded as further proof of an effort to conceal the connection between Mr. Fisher and the Miller murder, the evidence before this Commission suggests otherwise. All of the former members of the Saskatoon Police Service, who were asked questions about this issue, testified that there was no policy or standard practice for victims to be notified of the disposition of their cases. At best, the practice was left to the discretion of the officer in charge of the investigation. A summary of the officers' respective testimony in this regard is as follows:

- (a) Rusty Chartier: Mr. Chartier testified that, at the time in question, it was not the practice to notify victims on the disposition of their cases. This practice changed significantly before his retirement in 1988. By that time, there was considerably more contact between investigators and victims (Transcript, Vol. 45 p. 8523, line 5 to 8524, line 7; p. 8574, line 5 to p. 8578, line 19);

- (b) Joe Penkala: Mr. Penkala testified that, at the time in question, there was no standard policy in place and the practice was left to individual investigators (Transcript, Vol. 49 p. 9362, line 14 to p. 9363, line 9);
- (c) George Reid: Mr. Reid testified that he was not aware of any policy for victim support (Transcript, Vol. 53 p. 10148, line 20 to 10149, line 6);
- (d) Jack Wood: Mr. Wood testified that there was no formal practice in place for advising victims on the disposition of their cases (Transcript, Vol. 58 p. 11351, line 6 to 10);
- (e) Harry Valila: Mr. Valila testified that there was no formal practice in place requiring victims to be notified. He testified that, when he was in charge of an investigation, he would use his own discretion in deciding whether the victim would be advised or not (Transcript, Vol. 59 p. 11655, line 7 to p. 11658, line 25)
- (f) Gus Weir: Mr. Weir testified that the practice was generally "hit and miss". His personal practice was to inform victims to the extent he could. However, he also testified that, if the matter was disposed of by way of a guilty plea, he would not have been advised of that. His only way of learning about this would be to check the Court docket. If the docket provided the necessary information, he would so inform the victim (Transcript, Vol. 65 p. 12808, line 23 to p. 12813, line 4);
- (g) Bev Cressman: Mr. Cressman testified that there was no standard practice in place at the time in question. He also testified that it was not his personal practice to inform victims on the disposition of their cases and he cannot recall giving notification to anyone (Transcript, Vol. 67 p. 13237, line 4 to line 21).

42. It is also significant to note that the circumstances of the confession and guilty plea on the Fisher attacks are unusual. It is not unreasonable to conclude that the uniqueness of these circumstances contributed to the fact that investigators were not advised of the disposition and, as such, would not likely have been in a position to advise the victims even if they were inclined to do so.

IV. Systemic Changes in Police Practices Since 1969

43. The systemic issues relating to police conduct in the wrongful conviction of Mr. Milgaard are essentially raised by two questions. Firstly, if Mr. Milgaard's wrongful conviction was, in any way, attributable to a systemic problem in police operation, was that problem specific to the operation of the Saskatoon Police Service in 1969, or was it a function of the manner in which police services, in general, operated at that time? Secondly, if systemic problems of any kind, whether applicable to police services generally or the Saskatoon Police Service in particular, had a role in Mr. Milgaard's conviction, the question arises as to whether there have been any changes since that time which will either prevent, or significantly reduce, the probability of wrongful convictions.

44. In answer to the first question, the Saskatoon Police Service maintains that it acted reasonably in its conduct of this investigation. Having said this, it acknowledges that there were aspects of police practice in this case which, when viewed with the full benefit of hindsight, may have contributed to the wrongful conviction. In particular, one could point to the fact that case management on this file could have been more focused, particularly if it was the responsibility of one lead investigator to receive information and assign investigative tasks. One could also point to the circumstances under which the case officer, Elmer Ulrich, liaised with the prosecutor, T.D.R. Caldwell, so that disclosure of all material, including the material related to the 1968 perpetrator, could have been provided to Mr. Milgaard's counsel. Having said all this, it is respectfully submitted that these problems, if they could be described as systemic, were no more particular to the Saskatoon Police Service than to any other municipal police force in Canada at the time.

45. The answer to the second question is probably the more critical of the two. Irrespective of whether it is found that systemic police problems played a role in this wrongful conviction, it is evident that there have been significant changes in police practices, and major crime investigation, over the last 37 years. Some of these changes have been mandated by law, some by technology and others by the development of training programs designed to improve techniques in the collection, preservation and utilization of evidence. All of these changes have been implemented for the purpose of creating greater accuracy in the investigation and assessment of major crime.

46. As was emphasized in the opening statement, tendered on behalf of the Saskatoon Police Service at the outset of these proceedings, the context in which the Miller murder investigation was conducted cannot be ignored. According to the 1966 Census, the population of Saskatoon was just over 115,000. In 1969, the Saskatoon Police Service consisted of 203 police personnel, of which only 21 officers were detectives (Annual Report; Doc. No. 306437). The evidence also reveals that there was no formal course of study for police officers at the time of the investigation. According to George Reid, a Detective Sergeant at the time, the training detectives received was limited to on-the-job experience as well as the occasional seminar, given with the assistance of the Prosecutor's Office (Transcript, Vol. 52, p. 10054, line 20 to p. 10055, line 23).

47. The legal context is important, as well. At the time this investigation took place, there was no *Charter of Rights and Freedoms*, and there was no *Young Offenders' Act* or *Youth Criminal Justice Act*. The rules for disclosure of material to the defence were significantly different from those which prevail today, as set out in the Supreme Court of Canada decision in *R. v. Stinchcombe* [1991] 3 S.C.R. 326. It is fair to say that, had these changes been in place in 1969, different judgments and different decisions would certainly have been made. Whether those differences would have changed the outcome is not as easy to predict.

48. It is also important to note the statutory basis for the operation of municipal police forces in Saskatchewan in 1969. The only statutory provisions of any significance at that time were contained within sections 89 to 105 of *The City Act*, R.S.S. 1965, Ch. 137. These provisions simply required cities of 15,000 people or more to establish a board of police commissioners for the purposes of operating and regulating urban police forces. Although the boards were given authority to enact bylaws and create regulations for the operation of the forces, the statute did not establish a basis or a method for police officers to receive standardized training in police practices or techniques. In 1970, these provisions were restated, with few amendments, in sections 108 to 132 of *The Urban Municipality Act, 1970*, S.S. 1970, Ch 78.

49. The first significant legislative change in this respect came about with the enactment of *The Police Act, 1974*, S.S. 1973-74, Ch. 77, followed later by *The Police Act, 1990*, S.S. 1990. Both of these statutes have successively provided for the existence of the Saskatchewan Police

Commission (hereinafter referred to as the "Police Commission"), which is charged with the responsibility of promoting the preservation of peace, the prevention of crime, the efficiency of police services and police relationships with communities in Saskatchewan. While the Police Commission is given a relatively broad authority in this regard, it is notable that it is specifically given authority to enact regulations:

- (a) prescribing minimum standards in the selection and training of police personnel;
- (b) prescribing police training programs for officers, or any category of officer;
- (c) prescribing a code of ethical conduct for police officers; and
- (d) establishing a uniform disciplinary code for all police services in Saskatchewan.

Mr. Sawatsky, who is currently the Executive Director of the Police Commission, testified that the role of the Police Commission is essentially one of oversight, with no oversight role for RCMP services in the province (Transcript, Vol. 177, p. 36922, line 20 to p. 36924, line 4).

50. Within its statutory authority, the Police Commission established the Saskatchewan Police College, which provides all basic training for municipal police officers, as well as continuing education in the form of in-service training on a number of subjects, with some in-services specifically mandated by the Police Commission. (Transcript, Vol. 177, p. 36932, line 9 to 24).

51. In addition, police officers in Saskatchewan can access programs and courses in the Canadian Police College. Mr. Sawatsky testified that the Canadian Police College is a national police training facility under the administration of the RCMP, although it is funded by police services across the country. The Canadian Police College offers advanced courses in various fields, including courses in major case management (Transcript, Vol. 177, p. 36928, line 9 to p. 36929, line 24).

52. Particularly relevant to this Commission's work is the major case management course offered by the Canadian Police College. Mr. Sawatsky testified that the Police Commission has established a policy requiring all major investigations, undertaken by police services in Saskatchewan, are to use the major case management methodology. Under this approach, first

developed by the FBI in the United States, an investigator is assigned lead responsibility for a major investigation with other investigators assigned to tasks within the investigation. These tasks would include file management, exhibit collection, crime scene examination, interviewing witnesses, etc.. The information collected by the investigators is brought back and coordinated through the senior case manager. In this way, the senior case manager acts as the "reader" of file in the sense that it would be his/her responsibility to have coordinated and cross-referenced all of the information received (Transcript, Vol. 177, p. 36925, line 18 to p. 36927, line 11).

53. Mr. Sawatsky also testified that forensic examinations have changed significantly since 1969. Aside from the obvious significance of DNA matching, identification officers receive specific training in such matters as the examination of exhibits, examination of crime scenes and blood pattern analysis. One of the most significant changes, in Mr. Sawatsky's opinion, was the decision by the Government of Saskatchewan to hire a forensic pathologist, with the expectation that a second person with similar training would be hired in the near future. Mr. Sawatsky explained that forensic pathologists receive more specific training in crime related examinations than do general pathologists (Transcript, Vol. 177, p. 36932, line 25 to p. 36935, line 5).

54. Evidence has also been received by the Commission related to computer-assisted storage and retrieval of information collected in a major crime investigation. Currently, information gathered during an investigation would be inputted to a computer. If the senior case manager came across a new item of information and wished to explore its significance, the information would be used as a basis for an inquiry from the database and the information, if any existed, would be relatively easy to retrieve. In 1969, if an investigator had thought there was some significance to be attached to a person wearing a yellow hard hat, he would have had no choice but to go through all the investigation reports and statements in order to cross-reference it. The amount of time and tedium involved in such a process might dissuade the investigator from considering it (Transcript, Vol. 177, p. 36935, line 13 to p. 36936, line 11; Vol. 178, p. 37028, line 3 to p. 37036, line 11).

55. Another institutional change, exclusively in the investigation of violent crime, is the Violent Crime Linkage Analysis System (ViCLAS), which was created by the RCMP in the early 1990s. This system is designed to collect data on violent crimes and track patterns in the

cases which may be of assistance in the investigation of those cases and others. At present, there is a ViCLAS centre in Saskatchewan.

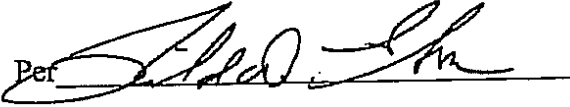
56. Finally, on the matter of police practices, Mr. Sawatsky testified that most police services have changed their interview and interrogation techniques, the most significant of which is the audio or audio-visual recording of the dialogue. In this way, the quality of the interview or interrogation can be properly assessed in terms of determining whether the information obtained, be it from a suspect or a witness, was given voluntarily or whether it was coerced in any way (Transcript, Vol. 177, p. 36937, line 4 to 11).

V. Conclusion

57. In conclusion, it is worth remembering the opinions expressed by the next-to-last witness testifying before this Commission, Mr. David Kyle, formerly of the Criminal Cases Review Commission in the United Kingdom. During direct examination by Commission Counsel, Mr. Kyle repeated a conclusion he had earlier set out in an article in the Drake Law Review, which is referenced at the beginning of this submission. This conclusion was that wrongful convictions arise either systemically or idiosyncratically, with the latter circumstance being more prevalent than the former. In answer to a specific question by counsel for the Saskatoon Police Service, Mr. Kyle amplified this further by acknowledging that an idiosyncratically caused wrongful conviction can arise despite the exercise of reasonable practice on the part of the officials involved (Transcript, Vol. 192 p. 40425, line 6 to p. 40428, line 6). Effectively, Mr. Kyle's comments underscore two stark realities. The first reality has formed the main thesis of this submission, namely, that the eventual proof of a wrongful conviction cannot, without more, stand as proof of official malfeasance. The second reality is that the process of determining the truth is not always easy and it can result in circumstances where just and civilized societies inadvertently punish the innocent or exonerate the guilty. While acknowledging these realities, it does not obviate the need for civilized societies to improve techniques and procedures which will provide for more accurate investigations, better considerations of evidence and verdicts that will stand the tests of both time and scrutiny.

All of which is respectfully submitted this 14th day of November, 2006.

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Per 

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