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

HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM
COMMISSIONER

SUBMISSIONS

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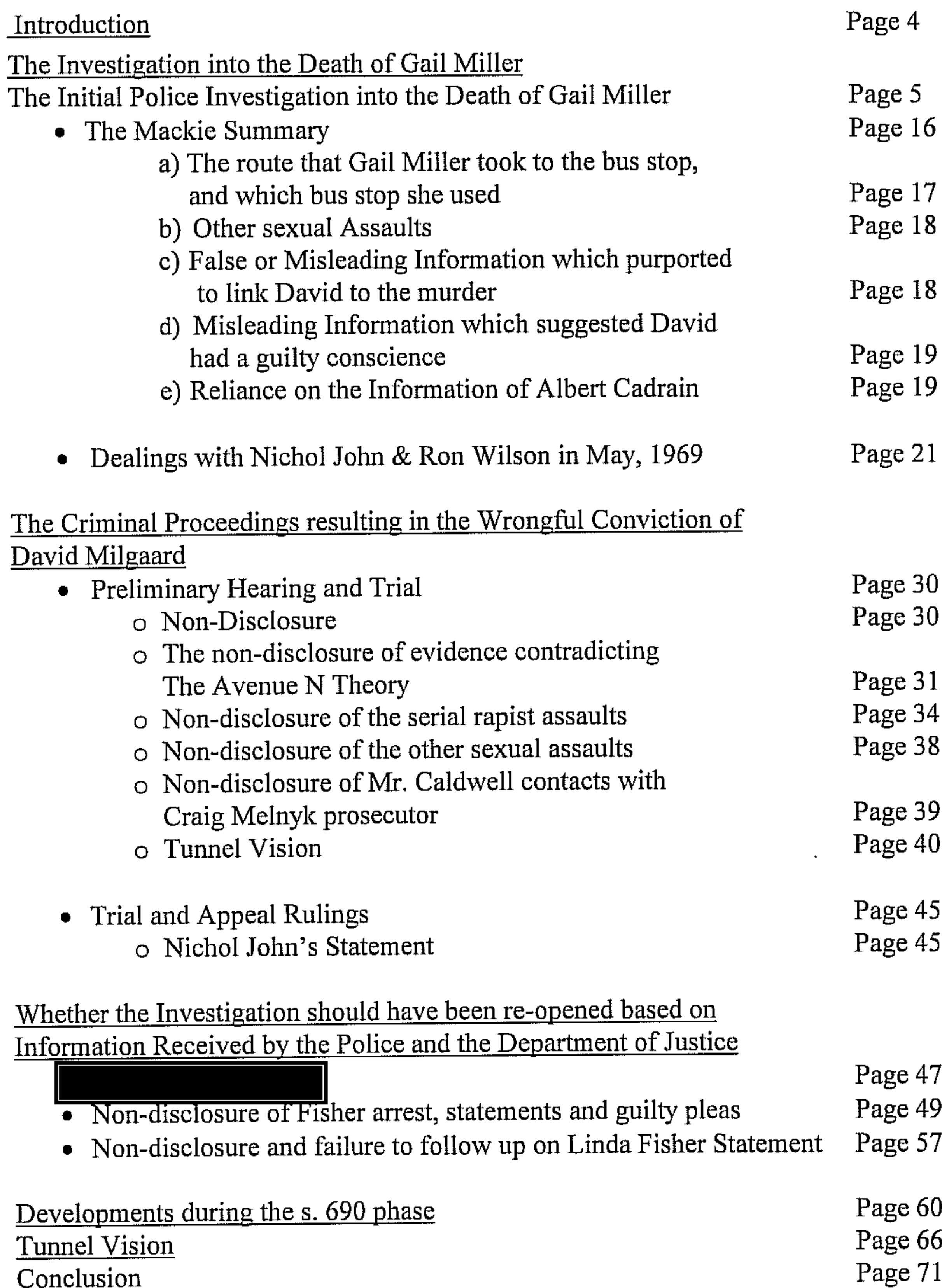

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INTRODUCTION

The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan.

David and Joyce Milgaard, among others, were granted standing by the Commission. Most parties were interested in protecting their own interests. David Milgaard and Joyce Milgaard have a far broader interest in the determinations made by this Commission. When David Milgaard, age 16, turned himself in to custody, he placed his faith in the justice system. Joyce Milgaard did the same. They both seek to determine the reasons the justice system failed them at every turn, that there be accountability and the system be improved by the recommendations of this Commission.

While their interests and perspective are not entirely the same, they are sufficiently consistent that it is both efficient and cost-effective to provide one written submission.

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THE INVESTIGATION INTO THE DEATH OF GAIL MILLER

The Initial Police Investigation into the Death of Gail Miller

1. Gail Miller left her home for work sometime about 6:45 a.m. on January 31, 1969. She was dressed in her white nurse's uniform, a sweater, winter boots and her winter coat. Her normal routine was to walk south from her home on Avenue O to the bus stop at Avenue O and 20th Street, and catch the 6:49 a.m. bus to the City Hospital. At approximately 8:30 a.m. that morning, the body of Gail Miller was found north of 20th Street in an alley between Avenue N and Avenue O. The sweater she had been wearing was found buried in the snow nearby, as was one of her boots. Her uniform dress had been forcibly removed to the waist, her brassiere was torn, exposing her breast(s), and she had been raped. At some point after her dress had been ripped and rolled down off her arms to the waist, her coat was replaced, either by Ms Miller herself, or her assailant. The killer then stabbed her through her coat, numerous times, and slashed her neck and throat. The blade of the murder weapon, a paring knife, was found under her body. Several days later, the maroon plastic handle of the murder weapon was found in a neighbouring backyard, frozen lumps containing semen were found near the location in which the body had been left, and Gail Miller's purse, with a broken strap, was found in a garbage can in the alley linking Avenues O and N. Several blocks away, on Avenue H, [redacted] was sexually assaulted at about 7:07 a.m. that morning while on the way to catch her bus at Avenue H and 22nd Street. She called the police and reported the incident.

065372 Autopsy report
006404 Handwritten statement of [redacted] ated January 31, 1969
040391 RCMP Continuation report May 4, 1993
040398 Testimony of [redacted] Supreme Court of Canada Reference
106110 Investigation report by Det. Bennett dated January 31, 1969
250597 Report of Rasmussen at paragraphs 15 and 16
052923 Penkala letter at p.052924

2. Saskatoon Police detectives and morality officers began investigating the murder as a sexually-motivated crime, likely perpetrated by the rapist who had been preying on women in Gail Miller's neighbourhood in the late fall of 1968.

$ At approximately 11:00 p.m. on October 21, 1968, [redacted]as walking on 18th Street when she was grabbed from behind and forced into an alley between Avenues G and H. Her attacker, a small dark haired man in his early 20's armed with a paring knife, forced her to remove most of her clothing, and raped her in the alley.

$ On November 13, 1968, at about 8:00 p.m. [redacted]as walking on 18th Street when she was grabbed and forced down a lane way next to Avenue E. The 5'5" man in his early 20's was armed with a small jack knife. Her coat and dress were removed and she was raped at knife point.

$ At 10:00 p.m. on November 29, 1968, [redacted]as grabbed from behind and forced down a lane in the 200 block of Wiggins Avenue. Her assailant, a man in his early 20's, was armed with a small paring knife. He forced her to the ground, but fled when a car turned into the lane way.

$ On December 14, 1968, the Saskatoon Star Phoenix, at the request of the Saskatoon Police, had published a warning to women in relation to these assaults. Six days after the murder of Gail Milller, on February 5, 1969, then Lieutenant Joseph Penkala, on behalf of the Chief of Police, wrote to the RCMP requesting that the facts of the Gail Miller murder be placed on the national crime index for "possible *modus operandi* suspect identification". In this regard, he wrote:

> "The facts indicate the possibility that the victim may have, through threats, been forced to undress herself.
>
> ...

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> Our Department has two unsolved cases, dating back into October and November of 1968, which involve complaints of rape. In both these cases, the victim was attacked from behind while walking in the late evening, forced into a lane and, under threat with a knife, made to undress and submit to intercourse. The victims were always threatened and forbidden to see the attacker who, after the attack, carried away some of the victim's clothing. In these cases, the attacker allowed the victims to replace some of the clothing, usually the outer garment or coat."

Then Lieutenant Penkala was the identification officer at the scene of the Miller murder. On February 27, 1969, he wrote a report in which he advised officers involved in any search to be on the watch for items, which could belong to Gail Miller. He also wrote:

> "the similarity of our departments occurrences numbers 10173/68 [redacted] complaints of rape, with this murder investigation, lists the following items which are reported missing, identifiable and could be of evidential value."

Included in the list of items were various articles belonging to the victims and a jack knife, a dirty white hard hat, and work boots, all items which could have raised suspicions about Larry Fisher, had anyone investigated the construction worker who had been at Gail Miller's bus stop on February 4, 1969.

042504 Handwritten statement of [redacted] dated October 22, 1968
039935 Handwritten statement of [redacted] November 14, 1968
065330 Handwritten statement of [redacted]
039527 News article - "Women given warning"
052923 Letter from Joseph Penkala to RCMP, February 5, 1969
105520 Investigation report by Joseph Penkala, February 27, 1969
002604 Notes of Det Parker February 3, 1969 at 002605 re Larry Fisher
010718 Letter from L.J.Corey to K.W. MacKay dated March 17, 1971
039068 Newspaper article "Killer possible rapist"
009298 Feb 5/69 Penkala letter to RCMP

3. Several members of the Saskatoon R.C.M.P. were detailed to assist with various aspects of the murder investigation. On February 21, 1969, RCMP officers Corporal Rasmussen and Sergeant Edmondson were seconded to the Saskatoon Police to provide full time assistance with the case. They remained until April 6, 1969. Much of their work consisted of following up on known sexual offenders, and re-interviewing complainants of sexual assaults.

250597 RCMP Report by Cpl. Rasmussen dated May 7, 1969, paragraph 7 (at 250599)
250609 RCMP Report by Insp. Riddell dated May 21, 1969

4. As the investigation progressed, the murder of Gail Miller continued to be linked to the very similar sexual attacks, which had been committed in the fall of 1968, and to the attack on on the morning of the murder as interviewed again by Inspector Riddell, but was unable to provide more information than she had already given to Saskatoon police. On March 19, 1969, Corporal Rasmussen noted that the R.C.M.P. lab had determined Gail Miller's assailant to be 'very probably' a Type A secretor. With regard to the three sexual assaults in the fall, he wrote:

> "In these three instances the M.O. was similar in that the male approached his victim from the rear, covering their mouth with his hand and pointed a knife into their back, forcing them down the lane. The descriptions of the assailant given by all three were very similar and it appeared that the same person was involved. The assailant would force his victim to undress at knife point and always managed to stay in the shadows or behind them in order that his identity would not be detected. He would then have the victim lie on her coat at which time intercourse would take place. In the ase, the assailant was scared away as a result of lights of a vehicle approaching down the lane."

A decision was made to test the forensic exhibits seized in the pes "to establish whether or not the person responsible in these incidents was the same one responsible for the Miller murder". There was insufficient material to test the blood type of Ms ssailant, but the xhibits revealed a Type A donor, the same as the donor of the semen tested in the Gail Miller case. Corporal Rasmussen observed, "there is a strong possibility the three rapes and the murder are directly connected." Accordingly, the

three girls [redacted] were interviewed at length. Later, he wrote that as it was believed that the rapes in the late fall of 1968 "are definitely connected to this offence and were committed by the same person", police interrogation of suspects focused on those who fit the descriptions given by [redacted] and [redacted] Corporal Rasmussen's reports lay unknown to Milgaard counsel in the offices of the Saskatoon Attorney General and the R.C.M.P. until 2004. They directly contradict the claims of Saskatoon police officers that no connection was made between the Saskatoon rapist and the murder of Gail Miller, and the claim that detectives working the homicide case were unaware of sexual assault cases, which were worked by morality officers.

250597 RCMP Report by Cpl. Rasmussen dated May 7, 1969 at paragraphs 15, 18, 19, 20, 21, 32
041919 RCMP Lab report dated March 12,1969 (re donor of Miller semen)
324672 RCMP Lab report dated April 1, 1969 (re donor of [redacted]
025566 RCMP Lab report dated April 11, 1969

5. Other aspects of the initial police investigation included:

$ stationing police officers at various points along Avenues O and N, and 20th Street in the early morning hours, in an attempt to locate any potential witnesses. A large number of people questioned had been in the area at the relevant times on the morning of January 31, 1969, but no one had noticed anything of significance.

$ A house-to-house canvass was conducted from Gail Miller's home on Avenue O to 20th Street, and along 20th Street. For reasons unknown, no house to house canvassing was done on Avenue O south of 20th Street. Had this been done, the Cadrain house, including the Fisher tenancy would have been uncovered. Linda and Larry Fisher would have been questioned.

$ police officers rode the bus along 20th Street and questioned the bus driver about any regular passengers who were missing on the day of the murder. The bus driver told them that a man who regularly wore a hard hat and was a regular passenger on the 6:49 bus with Gail Miller had not been on the bus that morning. Unfortunately, this

man was misidentified as Tony Hunen, and police followed up on his work alibi. No one appears to have followed up on Larry Fisher's claim (while waiting for the 6:49 Bus on Feb.4th) that he had taken the 6:30 a.m. bus on January 31, 1969 and had been at work that day. Had they done so, the real killer of Gail Miller might have been captured 28 2 years before he was.

075638 Bus route maps
245241 Bus route report
106108 Investigation Report by Cst. Gabruch dated January 31,1969
106189 Investigation Report by D/Sgt. G. Reid dated February 3,1969
076580 Various Documents

6. Although the Saskatoon Police, assisted by the officers on loan from the R.C.M.P., continued to chase down leads and follow up on suggested suspects (primarily sexual offenders), the investigation was unsuccessful. On March 2, 1969, Albert Cadrain walked into the police station and gave a statement inculpating his friend, David Milgaard, sending the murder investigation off the rails and shifting police attention away from the 'rapist as killer' theory, except insofar as David could be linked to any of the sexual assaults.

006723 Handwritten Statement of Albert Cadrain dated March 5, 1969
009233 Investigation report by Det. Larst dated March 7, 1969
018501 Typed and Handwritten Statements of Albert (Shorty) Cadrain dated March 2, 1969
106640 Investigation report by lt. Short dated March 22, 1969
106661 Investigation report by Det. Karst dated April 18, 1969
106680 Investigation report by Det. Karst dated July 2, 1969
106684 Investigation report by Det. Ullrich dated August 26, 1969

7. In his initial statement to the police, Albert Cadrain told of David Milgaard, Ronald Wilson and Nichol John's attendance at his house on the morning of January 31, 1969, details of their subsequent activities in Saskatoon, and of their trip westward to Alberta, culminating in Albert Cadrain and Nichol John being dropped off in Regina in early February. As far as the murder of Gail Miller was concerned, Albert Cadrain claimed that he had seen blood on David's pants when he was in the Cadrain home, that David had left the house alone in Ronald Wilson's car and returned, and that David had put his bloody clothing in a suitcase which was put back in the car when the four young people left the Cadrain residence. Albert

Cadrain also claimed that he had only learned of the murder from his family on March 1st. Detective Karst immediately set about locating David, Ronald Wilson and Nichol John.

8. On March 3, 1969, Detective Karst traveled to Winnipeg where he interviewed David Milgaard. Simultaneously, Ronald Wilson was interviewed in Regina by Inspector Riddell. Both boys denied that there had been any blood on David's clothing on January 31, 1969. David confirmed that he had changed his clothing, because of a rip in his pants, which he described. Ronald Wilson thought that they had changed clothes because of battery acid on their clothing. A number of other points mentioned by the boys were confirmed by independent evidence. While Ronald Wilson was at the police station, his car was impounded and searched. Nothing relevant to the murder was found. Detective Karst returned to Saskatoon and on March 5, 1969, re-interviewed Albert Cadrain, who repeated his claim that he had seen blood on David's clothing on January 31, 1969. He either could not describe the clothing, or was never asked to do so. That same day, Walter and Sandra Danchuk confirmed David and Ronald Wilson's statements that the three young people had stopped to assist them when their car was stuck in their laneway. David had been in their company and in their home, behaving normally, for over an hour. Neither noticed any blood.

002124 Typed Statement of Nichol John (Demyen) dated March 11,1969
002242 Handwritten Statement of Ron Wilson dated May 23, 1969
009222 Investigation Report dated May 29, 1969
018589 Typed and handwritten statements of Nichol John dated May 24, 1969

9. As far back as February 2, 1969, David, Ronald Wilson, Nichol John and Albert Cadrain had come to the attention of the police when William Campbell, of the garage where they had had Wilson's car repaired, reported that four hippies had been trying to leave town on the morning of the murder. He reported no blood on David Milgaard. He provided the police with the licence number of Ronald Wilson's car, and the Saskatoon police established that the car was registered to Ronald Wilson. In the first week of February, David and Ronald Wilson dropped off Albert Cadrain and Nichol John in Regina, and returned themselves to Wilson's home. Within days, Albert Cadrain was arrested by Regina Police on a charge of vagrancy and jailed. The murder of Gail Miller had been big news in Saskatchewan, and the

Regina Police were aware of the murder. When they learned that Albert Cadrain was a Saskatoon resident, he was questioned about the murder and, in Albert Cadrain's own words, treated as a suspect. Albert Cadrain undoubtedly received information from Regina Police about the location of the murder, and that Gail Miller had been stabbed to death. When this later came to Detective Karst's attention, he should have obtained a complete record of Regina Police dealings with Albert Cadrain, but did not do so. Later attempts were too late, as the records no longer existed.

006233 Handwritten statement of William Campbell dated February 2, 1969
106175 Investigation Report by D/Sgt. Reid dated February 2, 1969
250597 R.C.M.P. Report by Cpl. Rasmussen dated May 7, 1969
043929 Statement of George Davis dated June 12, 1969
006293 Handwritten statement of David Anderson dated June 12, 1969

10. Meanwhile, Nichol John had been located in Regina and was interviewed on March 11, 1969 by Inspector Riddell. She confirmed the statements of Ronald Wilson and David, and denied that David had any opportunity to commit the murder, or had any blood on his clothing. She described his pants as green and white striped and said that he had changed them because the crotch was ripped out (this had also been noticed by the Danchuks). On March 17 Albert Cadrain was taken to Regina and Nichol John was brought back to the police station. They were put together to talk. Detective Karst recorded that Nichol John emerged from her talk with Albert Cadrain and said that everything that Albert Cadrain had said about the trip was true. On the subject of the murder, Nichol John remained adamant that David had no opportunity to commit the crime, and had no bloody clothing. David's sometime girlfriend, Sharon Williams, was interviewed in Alberta by youth officer Malanowich on March 20, 1969. She shared a motel room with David and his friends and had an opportunity to look through his suitcase. She noticed no blood-stained clothing. Further questioning of the young people took place throughout March and April 1969. On April 18, 1969, Detective Karst recorded that Nichol John was extremely believable. As for David, there was no way to 'shake that youth's story'. Constable Walters, who knew Ronald Wilson well, was also of the view that Ronald Wilson had been truthful in answering the police questions.

006500 Handwritten statement of Sharon Williams dated March 20, 1969

009245 Investigation Report by Sgt. Malanowich dated March 22, 1969

11. Detective Karst attended at the Cadrain residence on a number of occasions. Police took statements from his brother and elder sister. They did not notice any blood on David's clothing. Inexplicably, in the repeated visits to the Cadrain residence, the Saskatoon Police apparently did not ask about any other occupants of the house. If they had, they would have learned of Larry and Linda Fisher, the tenants in the basement apartment. Presumably, they would questioned them as potential witnesses regarding the attendance of David and his friends at the house on the morning of the murder and also as potential witnesses to anything else on January 31, 1969. Detective Karst testified that his repeated encounters with Albert Cadrain were because he was checking his story, trying to establish his credibility. It appears that Detective Karst never challenged Albert Cadrain with the evidence of the Danchuks, motel operator Rasmussen, Sharon Williams, or Ronald Wilson's mother, who had washed the boys' clothing on their return to Regina and, at the police request, inspected David's coat for any sign of blood. Nor is there any record that Detective Karst considered those statements as supportive of David, Ronald Wilson and Nichol John. Detective Karst's investigation of the implausibility of Albert Cadrain's story seems to have been limited to repeatedly asking him if he was sure that he had seen blood, and Albert Cadrain insisting that he had.

019403 Statement of Leonard Gorgchuk dated April 17, 1969, typed version and handwritten
030680 Typed and handwritten statement of Celine Cadrain dated March 2, 1969
060232 Handwritten Statement of Dennis Cadrain dated March 2, 1969
106640 Investigation report bt Lt. Short dated March 22, 1969
106661 Investigation report by Det. Karst dated April 18, 1969

12. There were other reasons to doubt Albert Cadrain's story, and Detective Karst noted two of them in his report of April 18, 1969.

- Albert Cadrain claimed to have only learned of the murder the night before, yet had been questioned by Regina police as a suspect in that very murder a month earlier.
- He falsely denied that he had been using drugs the night before the murder.

In the same report, Detective Karst observed that the discovery of a bloody toque and some of Gail Miller's property near the Cadrain residence "could be incriminating for Cadrain or David", Ronald Wilson having been excluded by virtue of being Type B. [This evidence was also incriminating for Larry Fisher, but the Saskatoon Police had failed to establish that he lived in the Cadrain house, rode the same bus as Gail Miller, had failed to go to work on the day of the murder, had lied to the police about it, and was a type A secretor.] In making this observation, Detective Karst appears to have realized that Albert Cadrain may have had his own motives for claiming to have seen blood on David's clothing: to divert suspicion from himself. This realization, however, was limited to the idea that Albert Cadrain would only have wanted to divert suspicion from himself if he had actually killed Gail Miller himself. Neither Detective Karst nor any other police officer considered that Albert Cadrain may have made up the story of bloody clothing to divert suspicion from himself because he feared the police *suspected him* of the murder. Had he been told in Regina that a report of Ronald Wilson's car had been made two days after the murder, and that Gail Miller's belongings had been found in the vicinity of his house? A proper record of the Regina interrogation would have been valuable in this regard. Albert Cadrain himself later testified that he had been questioned at length as a suspect by the Regina police (and later by the Saskatoon police). The failure to consider that Albert Cadrain was motivated by fear, rather than guilt, meant that once Albert Cadrain was eliminated by blood tests as the killer of Gail Miller, the police were left with only one reason for Cadrain's statement: it must have been true.

106680 Investigation report by Det. Karst dated July 2, 1969 re toque

13. When he first walked into the police station on March 2, 1969, Albert Cadrain had only one thing to add to the murder investigation: his claim that he had seen blood on David Milgaard on the morning of January 31, 1969. Under the repeated questioning by Saskatoon Police, Albert Cadrain consistently embellished his story and added more and more bizarre details (mafia, bloody virgin Mary, virgins in the bath). None of this information was ever confirmed by anyone else. The police (and later, others) should have been troubled by the

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increasingly bizarre details added by Albert Cadrain under questioning. He was intellectually challenged, and it should have been obvious that he was subject to, at the very least, flights of fancy. His claim to have seen blood should have been viewed with a great deal of skepticism by the police. Instead, it became the cornerstone of the case against David Milgaard.

14. Numerous meetings and brain-storming sessions took place in March, April and May. It appears that no one considered why:

- $ if he had committed a murder within sight of the St Mary's cathedral, David would have left the area, traveled to the Traveleer Motel to obtain a map to find his way back there.

- $ if he had committed a murder and had blood on his clothing, David would have entered the motel at all, entered the Danchuk house and allowed them to see his clothing, entered the Cadrain house, or waited some two hours to change his clothing.

- $ if he had committed a murder within blocks of Cadrain's house, David would have wanted to go back to the area at all.

- $ if he had committed a murder and was anxious to leave town, David would have insisted on stopping to help the Danchuks or gone to Cadrain's house on the off chance he wanted to head west with them.

- $ if he had committed a murder, David would have behaved normally when interacting with Rasmussen and then again with the Danchuks.

- $ if he had raped and stabbed Gail Miller and returned to Ronald Wilson's car immediately afterward in his bloody clothing, there would have been no blood, and no forensic evidence in the Wilson car.

Mackie, and others, believed Cadrain's stories, and considered that David must have been Gail Miller's killer. Wood, and some others, were, however, of the opinion that there was insufficient evidence against David Milgaard. They had been unable to apprehend the serial rapist. Mackie set out to resolve both problems.

The Mackie Summary

15. On May 16, 1969 a pivotal meeting took place between senior investigating officers and members of the R.C.M.P. who were assisting in the Miller investigation. The investigation was at a standstill. Detective Mackie prepared a document, which was used at the meeting to focus discussions and assist in identifying the best suspect in the murder. This document was the proximate cause of an investigation that went off the rails. It was, at best, a deceptive, and slanted "summary" of the evidence gathered. Its purpose was to present David Milgaard as the killer of Gail Miller.

16. The first lines of the first page of the summary were unquestionably an attempt to link David Milgaard to the rape of [redacted] He wrote that:

$ [redacted] had been shown a photo spread of 19 individuals "from which she picked Milgaard and another" and omitted the significant information that [redacted] had actually pointed out two pictures of people (one of whom was David) who looked somewhat familiar, and did not associate *either* of them to her assailant.

$ [redacted] attacker was 'A' group secretor". A few lines later, he wrote that the frozen semen found near Gail Miller's body originated from an "'A' group blood secretor". On the next page, he noted that Ronald Wilson was blood group B, Albert Cadrain was group O, and David was group A. He omitted the information that David had been identified (incorrectly, as it happened) as an A group *non-secretor* who could not have been the source of the semen found in either the [redacted] or Miller exhibits.

Unless those at the meeting took the time to also check the source documents to which Mackie referred, they would have been misled as to the strength of the case against David for the [redacted]pe. Inferentially, as the police were operating on the reasonable belief that the serial rapist was the killer, this document would also have misled them as to the strength of the case against David for the murder.

Thereafter, the document purports to summarize the available information from statements taken in the Miller murder investigation. The latest dated reference in the document is noted as May 9th. The document was, therefore, completed after that date, and before the May 16th meeting at which it was used to present David Milgaard as the best suspect in the Miller murder. The document was misleading in several major regards:

a) *The route that Gail Miller took to the bus stop, and which bus stop she used*

Detective Mackie wrote of Simon Doell: "X-Ray, City Hospital - rides bus to work and is certain Gail Miller caught bus at Avenue N and 20th Street". In fact, Simon Doell had been interviewed briefly by officers and had neither given a written statement nor been re-interviewed. He had, however, indicated to the officers that he had moved from the area prior to the murder. Accordingly, he could not speak to Gail Miller's habits during the very cold months of the winter. Nor did he indicate that he was 'certain' that Gail Miller was the nurse about whom he spoke. None of this information made its way into the summary. Mackie also omitted all information obtained from the women who lived with Gail Miller and saw her every morning. Adeline Nyzcai, Linda Markwart, Betty Hundt and Anne Friesen were all interviewed, several by Detective Mackie himself, in the days following the murder. They told the police that Gail Miller regularly walked from their home southbound on Avenue O and took the bus from the bus stop at Avenue O and 20th Street. Their statements completely contradicted Detective Mackie's Avenue N theory. The document contained no reference to them. The housemates' information about Gail Miller's morning route was supported by Marie Gallucci who told the police about the pretty nurse who

walked south on Avenue O to catch the 6:49 a.m. bus (and the construction worker who walked north on Avenue O to the same bus) every morning. Gallucci's information was not referred to in the summary at all.

031573 Handwritten Witness statement of Adeline Nyczai dated January 31, 1969
006428 Handwritten Witness Statement of Adeline Nyczai dated February 7, 1969
070593 Typed Witness Statement of Adeline Nyzcai dated February 7, 1969
106116 Investigation report dated January 31, 1969 by Det. K. Mackie
106227 Investigation report dated February 5, 1969 by Sgt. R. Mackie
045435 Witness statement of Linda Markwart dated January 31, 1969
006628 Statement of Betty Hundt dated January 31, 1969
024935 Investigation report dated February 5, 1969 by Det./Sgt. R. Mackie
081071 Statements and investigation reports
106116 Investigation report by Det. K. Mackie dated January 31, 1969
106227 Investigation report Det. R. Mackie dated February 5,1969
044252 Affidavit of Simon Doell dated March 31, 1992
075900 RCMP Notes with attached Investigation Report re Simon Doell
075905 Handwritten Statement of Simon Doell dated March 4, 1993

b) *Other Sexual Assaults*

[redacted] was attacked at about 7:07 a.m., within half an hour of Gail Miller's murder and within blocks of where her body lay. David Milgaard was, at this time, miles away, attempting to get a map which would lead him to the Pleasant Hill area of Saskatoon. He could not have attacked [redacted] Her assault was not mentioned in Detective Mackie's summary. Nor was there mention of the two other sexual assaults for which Gail Miller's killer was believed to be responsible [redacted] presumably because there was no blood type available for their assailant, which could link David Milgaard to these crimes.

c) *False or Misleading Information which purported to link David to the murder*

A blue toque with human blood was found near the Cadrain house shortly after the murder and seized by Detective Karst on April 14th. On April 17th, Nichol John told the police that when they were *in Regina*, David had worn a toque which she had not seen again (after they left Regina). In his summary, Detective Mackie reported that a 'dark toque' with human blood on it had been found, and that in her March 11th statement, Nichol John had said that

she had come to Saskatoon with David and Ronald Wilson on January 31st, and that David wore a "dark color touque - which she has not seen since". Nichol John said no such thing. He further wrote, in regard to Nichol John's March 11th statement: "Admits seeing nurse (looked like nurse) near funeral home, asked directions." Nichol John's statement said no such thing. She was not to make this claim until weeks after Detective Mackie had predicted it.

d) *Misleading Information which suggested David had a guilty conscience*

In his 'summary' Detective Mackie wrote that Nichol John's March 11th statement "- says friend Barb Berard was told by Milgaard that he was going to be picked up for murder." This was undoubtedly included to make it seem that David expected to be arrested because of a guilty conscience. Nichol John's March 11th actually states that "Just yesterday or the day before, Barb Berard, a friend of mine, told me that David had returned to Regina and I think it was him that told her that he was going to be picked up for murder." This, of course, assuming that both Nichol John and Berard were correct, would have been sometime between March 3rd, when David had been told by the police questioning him that he might be charged with murder, and shortly before March 11th. This puts a different construction on it.

e) *Reliance on the Information of Albert Cadrain*

By the time this document was created, Albert Cadrain's stories had become more and more bizarre. In his 'summary' of the case, Detective Mackie referred, without comment, criticism or contradiction, to Albert Cadrain's claims that neither Nichole John, Ronald Wilson or David had any money when they arrived in Saskatoon (although Nichol John had paid the tow truck driver at the Danchuks), that David said he 'had to get out of town', that 'everyone' was afraid of Milgaard, that David had tried to enlist Albert Cadrain to help him get a gun and murder Nichol John and Ronald Wilson (this merited two references).

Mackie summary 033328
Adeline Nyzcai 006428
Linda Markwart 106227 (taken by Mackie)

Betty Hundt 024935 (taken by Mackie)
Anne Friesen 006585
Galluci 106234
006585 Statement of Anne Friesen dated January 31, 1969

17. The last page of the document contains a mixture of "fact" and theory. The "facts" continued to be slanted, and the conclusions and inferences drawn from them were unsupportable if the true known facts were examined. Two examples are:

$ the origin of the fiction that Nichol John saw David attack Gail Miller, ran away from the car, and then returned later, shunning David. Marie Indyk described seeing a woman in her 30's, wearing a black coat, and a white scarf hurrying along 20th street and heading north on Avenue O at around the time of the murder. On that day, Nichol John was 16 years old, wearing a purple parka with fur trim and pants. In his 'summary', Detective Mackie wrote: "Nichol John knows or suspects results and leaves car. Runs west on 20th Street in 1400 Block *and is girl seen by Indyk at St Mary Church.* At this point she changes her mind about saying anything and goes north on Avenue "O" where she meets car again."

$ building on his untrue statement that Nichol John had stated in her March 11th statement that they had asked a nurse for directions around the funeral home, Detective Mackie wrote:

> "- On seeing nurse (Miller) she was approached on pretence of getting directions with a view to stealing her purse.
>
> - This would be around funeral home which would coincide with statements of Nichol John - Diewold seeing lights in alley - Doell saying Miller took bus at Avenue N."

The unfairness was compounded by Detective Mackie's failure to include the previously detailed information which contradicted his theory.

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As for the offence itself, Detective Mackie posited that because "all were out of funds" David Milgaard had attempted to snatch Gail Miller's purse, been overcome by his sexual desires, raped and stabbed her. He further posited that both Ronald Wilson and Nichol John knew what had happened, and should be persuaded through the use of hypnosis and/or a polygraph to tell the 'truth' as Detective Mackie saw it.

19. At the conclusion of the meeting, David Milgaard was the 'best' target. Given that the document used to focus the discussion contained *no* information which pointed away from him, and that he had been portrayed as a blood-soaked rapist who had also attacke[redacted] and planned to kill the witnesses against him, this is not surprising. Seven days later, the police crossed the line from investigating evidence to creating evidence, and David had been inculpated in the murder by his friends.

250609 May 21/69 Riddell report

Dealings with Nichol John & Ron Wilson in May, 1969

20. The police dealings with the 16-year-old Nichol John and the 17-year-old Ron Wilson in May of 1969 were reprehensible, then and now. On May 22, 1969, both were taken (separately) from their Regina homes and questioned at length by a number of police officers in the Regina police station. Their parents were not notified. No contemporaneous record exists of the questions that were asked, the responses given by the teenagers, or even the duration of the interrogations. The interview of Ronald Wilson was taped by Detective Karst and the tape retained for 'safekeeping'. It no longer exists. No transcript was made. The interview of Nichol John was taped and the tape retained by Detective Mackie for 'safekeeping'. It no longer exists. No transcript was made.

21. At the conclusion of the Regina interviews, Nichol John remained firm that David had had no opportunity to commit the murder. Ronald Wilson had shifted his position somewhat and allowed that David had been separated from the others for a few minutes. There is no record available as to what Ronald Wilson actually said, or what was said to Ronald Wilson to elicit

whatever he did say. Did he perhaps simply answer 'yes' to a question 'do you think he might have done it while he was away from you?' A question such is this was very likely asked, given that the police were suspicious that Ronald Wilson was either involved himself, or knew that David was. No one has been able to give a satisfactory explanation for why a mere separation could lead Ronald Wilson to suspect that his friend committed a murder during that interval. This is especially problematic now, given that it is beyond question that David did not commit a murder.

22. Both Nichol John and Ronald Wilson agreed to accompany the police to Saskatoon and undergo polygraph testing of their exculpatory statements. When they arrived in Saskatoon (Ronald Wilson with Detective Karst and Nichol John with Detective Mackie), attempts were made to have Nichol John and Ronald Wilson identify the area of Saskatoon in which they were on January 31st. Neither could do so, although when driven past the Danchuk residence and the gas station where the car was repaired, Ronald Wilson at least recognized it. Both were taken, separately, to the scene of the murder itself. This was a recipe for disaster, and provided both with an opportunity; in addition to whatever they were told, to see the garbage cans, the funeral home, and St Mary's cathedral. This 'tour' of the murder scene hopelessly compromised the value of any subsequent statements from either Nichol John or Ronald Wilson.

23. Both Ronald Wilson and Nichol John were held in the police cells on the evening of May 22nd. With respect to Ronald Wilson, a note was left indicating that no one but Detective Karst should speak to him. Nichol John spent a traumatic night in the female cells, and had to be comforted by the matron. There was no reason to keep either in custody. The suggestion that Nichol John requested that she be held in the police cells is preposterous. She had no reason to fear David Milgaard (who was not then in Saskatchewan), no one knew she was in Saskatoon, she had said nothing to anger David, she had not abandoned him when they were at the Traveleer Motel, the Cadrain house, or the garage where the Wilson car was repaired, and she continued to travel with him in February after Gail Miller was killed.

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24. Unusual preparations were undertaken for Inspector Roberts' interviews of Ronald Wilson and Nichol John on May 23rd. Two adjoining rooms were rented at the Cavalier Hotel, and a hole drilled in the wall between them. Audio equipment was set up by Detective Chartier and the proceedings recorded. A number of senior officers, among them Inspector Wood, Lieutenant Short, Detective Mackie, Detective Chartier and Constable Morrison were in the adjoining room listening to the interviews as Inspector Roberts uncovered the "truth" as Detective Mackie had predicted it. The fact that the proceedings were recorded was not disclosed to Mr. Tallis. No written record from any of the officers involved exists. Although there are numerous police reports from the 1969 investigation which still exist, there are no contemporaneous records of the interviews.

25. Ronald Wilson attended in Saskatoon to have the truth of his exculpatory statements tested by polygraph. Anyone listening to the interviews must have known that Ronald Wilson was not polygraphed on *any* statement he had given to the police. He was, according to Inspector Roberts, asked only if he had killed Gail Miller, if he knew who had, or if he suspected who had killed her.

26. Anyone listening to the interview of Nichol John by Inspector Roberts would have known that she was not polygraphed at all (unless Inspector Roberts had pretended to do so). According to Inspector Roberts, he did not need to polygraph Nichol John because she had blurted out that she had suddenly 'remembered' witnessing the murder. The next day, she signed a statement to this effect, and thereafter 'forgot' that she had seen a murder. No one questioned that Nichol John supposedly remembered a murder (when she talked to Ronald Wilson in Calgary), forgot about it again for about a month, remembered it to tell her friend Barbara in March, forgot it again, and then remembered it again on May 23rd and May 24th, and thereafter permanently forgot it again.

27. Inspector Roberts' conduct with Nichol John and Ronald Wilson was a blueprint for contamination of their memories and subsequent statements. In the interview he gave to the R.C.M.P. in 1993, Inspector Roberts admitted that his goal in his dealings with Ronald

Wilson and Nichol John was to eliminate the possibility of discrepancy between them. He admittedly showed them exhibits (Gail Miller's bloody bra, nurse's uniform and black cloth coat) and autopsy pictures, questioned them together, and provided them with his theories about what had happened. (He had received these theories during lengthy meetings with senior officers the night before, and had toured the murder scene). The officers listening in the next room must have realized what was happening. It troubled none of them. Given that the statements meshed perfectly with Detective Mackie's prediction, it is apparent that this is the theory Inspector Roberts put to the witnesses, and which they ultimately adopted. The officers listening in the next room knew that the exhibits had been shown to the witnesses as did everyone involved in the chain of custody to retrieve the exhibits, as did Mr. Caldwell who had a notation in his file that Gail Miller's bra, coat and nurse's uniform had been picked up by Detective Mackie at 10:00 a.m. May 23rd and returned on May 24th at 3:00 p.m.

033876 Roberts R.C.M.P.
006959 Caldwell notes

28. While Ronald Wilson's credibility generally has been shattered and torn over the years, his claim that he was given a 'him or me' choice is supported by the alternate theory expressed in Detective Mackie's prediction (and shared amongst other officers as indicated in Detective Ullrich's summary): Ronald Wilson was also involved in the murder. It is submitted that it is beyond question that in his dealings with Inspector Roberts and the Saskatoon Police, it was made very clear to Ronald Wilson that if he did not incriminate David Milgaard, he would himself be a leading contender for a murder charge.

29. On May 23, 1969, Ronald Wilson was taken immediately from the interview with Inspector Roberts to the police station where Detective Karst 'signed him up' to his inculpatory statement and hustled him over to the Justice of the Peace to swear to the truth of it. Thereafter he was put up in a local hotel. It is inconceivable that Nichol John would not have received the same treatment if all was above-board. Instead, she was subjected to another traumatic night in the female cells. No attempt, apparently, was made to take a statement from her, at a time when she was claiming to have witnessed the stabbing of Gail Miller. The police were in no hurry to take a statement from the sole eye-witness to the brutal

murder. This admits of only one explanation: the police realized that Nichol John and Ronald Wilson's positions could not stand together. Ronald Wilson (May 23rd) had David walking away from the car, leaving he and Nichol John in the car. Yet Nichol John, in her interview with Inspector Roberts, had supposedly 'remembered' seeing David commit the murder while she sat in the car. Why then, wouldn't Ronald Wilson have seen the attack too? Nichol John's statement could not be formalized until Ronald Wilson had changed his. In his May 24th statement, he suddenly remembered that he himself had left the car too, leaving Nichol John as the only available witness to the murder itself. Half an hour later, Nichol John's statement was taken by Detective Mackie, and she was delivered to the Justice of the Peace to swear to it.

30. No one, however, was troubled by:

- $ the fact that Nichol John's statement could not possibly be true, based on the known physical fact that Gail Miller had been stabbed through her coat, but not through her dress, and Nichol John had witnessed no sexual attack.

- $ Nichol John's claim that she had seen David Milgaard (known to the police to be left-handed) use his right hand to stab Gail Miller.

- $ Ronald Wilson's failure to remember the crucial information that he had been out of the car (and so not available to contradict or confirm Nichol John's claim to have witnessed the murder) until the day after he had been interviewed by Inspector Roberts and sworn to the truth of his May 23rd statement

- $ Nichol John's statement to Inspector Roberts that 'now I remember' seeing a murder, and the repeated references in her May 24th statement to Detective Mackie that 'I now remember', 'I seem to recall' etc. This should have raised red flags as to the reliability of her statements.

The complete failure of Inspector Roberts or any of the Saskatoon Police to question the validity of Nichol John's May 24, 1969 represents, at the very least, wilful blindness as to whether or not the sole alleged eye-witness against David Milgaard had given an accurate, truthful statement. Mr. Caldwell's concerns with this seem to have been confined to how he was going to deal with the inconsistency of the dress and the coat, and how to account for the Danchuks not seeing any blood on David Milgaard.

006949 Caldwell notes for things to 'cover'

31. Until May 22-24, 1969, the only Saskatoon references in the statements of either Nichol John or Ronald Wilson were facts demonstrably true by reference to independent third parties: that a map had been obtained from the Traveleer Motel, that the teenagers had assisted the Danchuks, that the car had been repaired at the garage. No matter how many times they were interviewed, how many police officers were involved in the questioning, or how long the 'interrogations' went on, David Milgaard, Ronald Wilson and Nichol John were adamant that:

- they had never been separated in Saskatoon and David therefore had no opportunity to commit the murder.

- David had no blood on his clothing and Albert Cadrain therefore was wrong in his claim to have seen blood on the clothing he could not describe.

It appears that there was no interest in ascertaining why Ronald Wilson and Nichol John had persisted in their stories of David's innocence for so long, or what caused them to abruptly recant their previous statements in that fateful three-day period. To the extent that any police officer has addressed this issue, reliance is placed on the witness' alleged "fear" of David Milgaard (because he had killed Gail Miller and they knew it), and the police belief that the truth does not always emerge on the first questioning. If both Ronald Wilson and Nichol John lost their 'fear' of someone that they knew had committed a murder, what had the

police told them during that three-day period to cause them to lose it? Were they told that the police were certain that David had killed Gail Miller and that if they did not confirm it that they would be considered to be inculpated as well? It seems likely, especially since it is now demonstrable that the early statements (March, 1969) were true, and the later statements (May, 1969) were not. It is submitted that to the extent that any witness expressed a 'fear' of David Milgaard, it was a fear created by the police questioning which insisted that their friend was a vicious, murdering rapist. The uncritical acceptance that Ronald Wilson and Nichol John had suddenly decided to 'tell the truth' and recant their earlier statements raises further questions about why the police did not ask them anything about why, when, and how, they had decided to manufacture stories to cover up David's 'crime'. Surely this would have been helpful, inculpatory evidence they would have sought. Now that David is conclusively established to be innocent, Ronald Wilson and Nichol John's recantation of their *original* statements requires an answer. It is submitted that there is only one: they were told by the police that if they did not inculpate David, they would be facing murder charges themselves.

32. Ronald Wilson and Nichol John's May 23rd and 24th statements dove-tailed so well with Detective Mackie's prediction that it was obvious in 1992 when the document surfaced that the document had been used as a script and information 'fed' to the witnesses. Since 1997, when DNA evidence conclusively proved David's innocence, it has been an indisputable fact that the witnesses were 'fed' information. Without police 'assistance', neither Nichol John nor Ronald Wilson could have known that Gail Miller was dressed in a nurse's uniform, a black cloth coat, that her purse was stolen and put in a garbage can in the alley, that the murder took place behind the funeral home and within sight of the church, or that Gail Miller had been stabbed with a maroon-handled paring knife.

33. After May 24, 1969, the very reasonable theory that the Saskatoon serial rapist had escalated to murder was abandoned. All police investigation was focused on David Milgaard. There was little attempt to verify or question the statements received, and to the extent that attempts were made, nothing supported the new stories of Ronald Wilson and Nichol John, or the increasingly wild stories of Albert Cadrain. Only Detective Ullrich seemed to recognize that

the truth had not likely been obtained. In the summary he prepared for Mr. Caldwell's use at the preliminary hearing of David Milgaard, he wrote, after summarizing Nichol John's May 24th statement regarding her alleged observation of the murder:

> "NOTE - this area still seems uncertain. Both Wilson and John who originally claimed to know nothing of the murder now maintain that they were stuck and two men came to assist in pushing them free. The police have been unable to locate these two men. Police believe the first lack of knowledge and now the uncertainty surrounding the facts at the alley entrance may mean Wilson and John either are not telling the entire truth or are more involved in the offence than they wish to say."

After summarizing Ronald Wilson's May 23 and 24th claims about the morning of January 31, 1969, Detective Ulrich wrote:

> "NOTE - Wilson at first told police he knew nothing of this offence however has since told the story as set out in the brief. There still remains areas, especially at time of actual offence, which seem in doubt as far as Wilson is concerned."

Another document, entitled Summary for the preliminary hearing, was prepared by an unknown author, perhaps also Detective Ullrich. In it is written:

> "They are also alleged to have met a female walking on a street from whom Milgaard asked directions and offered her a ride which she refused. They allegedly continued to the entrance to an east-west lane where they allegedly became stuck. The police have not been able to determine the truthfulness of this.
>
> It is not clear exactly what occurred here as Wilson and John state two men arrived and assisted in pushing the car free, however the police have failed to identify such persons. Police wonder if this part of Wilson's and John's story is not somewhat shaded to cover their part. One possibility is that Miller was picked up in the car instead of just spoken to on the first instant. Keeping in mind there was two males and one female in the car at the time and it was about 40 degrees below and very foggy she might have accepted an offer for a

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> ride. It could be possible the assault started in the car, the uniform top and sweater pulled off, perhaps even one boot, then the top coat put on again. Miller could have fled the car at the lane or been forcibly made to leave. It is hard to believe Miller would have removed the top coat in the lane and been allowed to put it on again. If this is true, who buried the sweater and boot."

002267 Ullrich preliminary hearing summary
105605 Summary for preliminary hearing

THE CRIMINAL PROCEEDINGS RESULTING IN THE WRONGFUL CONVICTION OF DAVID MILGAARD

Preliminary Hearing and Trial

Non-Disclosure

34. The Supreme Court of Canada reviewed the Crown's disclosure obligations in the pre and post-*Stinchcombe* eras in *Regina v. Taillefer* (2003). It is noteworthy that in the opening paragraph of the judgment Lebel, J. said:

> "The way in which the disclosure of evidence was viewed in the past - as an act of goodwill and cooperation on the part of the Crown - played a significant part in catastrophic judicial errors. On this point, we need only recall that the Royal Commission on the Donald Marshall, Jr., Prosecution identified the failure to disclose all the relevant evidence as one of the causes of the judicial error that deprived Donald Marshall of his liberty for 11 years, for a crime he had not committed (*Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations* (1989), vol. 1, at pp. 238 *et seq.*)."

In response to the Respondent's argument on appeal that the Crown's disclosure obligation was uncertain in the years leading up to *Stinchcombe*, the Supreme Court held that the Crown's duty to disclose all relevant evidence whether favourable to the accused or not was a part of the common law right to a fair trial and to make full answer and defence and that this had been recognized by the Supreme Court of Canada as far back as *Lemay v. The King* [1952].

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The duty to disclose also arises from the Crown's position as an officer of the court, whose role, as set out in *Boucher v. The Queen* [1955]:

> "excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

It is submitted that Mr. Caldwell's failure to live up to his duties to disclose evidence to David Milgaard's counsel was one of the causes of the judicial error that deprived David Milgaard of his liberty for nearly 23 years, for a crime he had not committed.

R. *v.* Taillefer; R. *v.* Duguay, [2003] 3 S.C.R. 307, 2003 SCC 70, paragraphs 1 and 63 to 70
Lemay v. The King, [1952] 1 S.C.R. 232
Boucher v. The Queen, [1955] S.C.R. 16, at pp. 23-24

35. Mr. Tallis made two written disclosure requests to Mr. Caldwell. The first, written June 10, 1969, sought witness statements 'and related reports'. On August 21, 1969, during the preliminary hearing, Mr. Tallis again wrote to Mr. Caldwell requesting disclosure:

> "...in the light of our conversation on the afternoon of Wednesday, August 20th, I would certainly want you to make it a point to check to see whether or not there are any witnesses that you do not propose to call who may be able to give evidence of assistance to the defence. If the City Police Department have not turned over all of their material to you in this connection I would be obliged if you would look into this matter prior to the completion of the preliminary hearing.
>
> I might mention that I have always thought that the procedure in the case of this kind is correctly summarized by Lord Denning in the case of Dallison vs Caffery (1964) 2 All E.R. 610 at 618."

Thus, in addition to his general duty to disclose all evidence reasonably helpful to the defence, Mr. Caldwell was put on notice that he should check with the police to see that he had everything potentially relevant which he could then disclose to Mr. Tallis. Mr. Caldwell

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had many, but not all, of the Saskatoon Police reports in his file. He did not seek out any others from the police in response to Mr. Tallis' request, nor, it seems, did he read the many reports he did have with a view to making disclosure to Mr. Tallis. He should have carefully perused his own file and also sought the full file from the Saskatoon Police and made the necessary disclosure to David Milgaard's defence counsel. He did not.

218223 Argument on Behalf of David Milgaard dated March 1992
007063 Tallis disclosure letter June 10/69
007037 Tallis disclosure letter August 21/69
See Also 170404

The non-disclosure of evidence contradicting the Avenue N Theory

36. Detective Mackie's theory of guilt, to which Ronald Wilson and Nichol John ultimately subscribed, required that the supposed encounter with Gail Miller had to take place on Avenue N. Although Ronald Wilson and Nichol John did not agree on the location of where the car allegedly got stuck (a major intersection or in the lane behind the funeral home), any theory of David's guilt which was to exclude Ronald Wilson and Nichol John as participants and yet allowed Nichol John to be the sole eye-witness to the murder required that the car be stuck very close to where Gail Miller's body was found, and that there be an 'innocent' reason for the boys to leave the car and head off in different directions: i.e. to go for help. The police failure to find anyone who could support Ronald Wilson's claim that the car was stuck at the major intersection of Avenue O and 20th street, coupled with Nichol John's claim to have been an eyewitness to a murder which took place behind the funeral home, made Nichol John's choice of location the obvious one for the prosecution of David Milgaard.

37. Mr. Caldwell was given the Summary prepared by Detective Ullrich and alerted to the problems with the stories of Nichol John and Ronald Wilson prior to the preliminary hearing. According to his inquiry testimony, Mr. Caldwell nonetheless believed that Gail Miller had left her home on Avenue O, travelled east to Avenue N, and south on Avenue N enroute to the bus stop at 20th street and Avenue N. At trial, he promoted this theory, although he called no evidence in support of it. Indeed, the only available 'evidence' in support of it was a police report concerning Simon Doell, from whom the police never bothered obtaining a

statement. Mr. Doell was not called as a witness at the preliminary hearing or at trial. Mr. Caldwell was, however, in possession of the statement of one of Gail Miller's house mates which directly contradicted the Avenue N theory and indicated that her routine was to walk south on Avenue O and take the bus from the bus stop at Avenue O and 20th Street, a mere five minute walk from her home.

Betty Hundt gave a statement to the police on the day of Gail Miller's murder. In it, she said:

> "Gail told me she leaves every morning at 6:45 a.m. to catch the bus and goes out the front door. I believe she walks South on Avenue O to 20th Street and the bus stop."

Mr. Caldwell had this statement in his prosecution file and did not disclose it to Mr. Tallis. Betty Hundt did not testify at the preliminary hearing or trial.

Adeline Nyzcai gave a statement to the police on January 31, 1969 and a second one on February 7, 1969. She was the only one of Gail Miller's housemates to testify, and was called as a witness at the preliminary hearing and at trial. In response to questions from Mr. Tallis at the preliminary hearing, Adeline Nyzcai testified that she did not know how Gail Miller got to work. Her cross-examination by Mr. Tallis put Mr. Caldwell on notice that Gail Miller's route to the bus stop was a matter of significance and interest to the defence. On January 19, 1970, just before Adeline Nyzcai was called as a witness at trial, Mr. Caldwell wrote to Mr. Tallis and advised that the statement of Adeline Nyzcai, which Mr. Tallis had specifically requested, was "lost". [At least the first page of the January 31 statement has since surfaced, but contains no information about the bus stop or Gail Miller's route to it. Nor does the February 7, 1969 statement]. In cross-examination at trial, Adeline Nyzcai was asked about her own practice:

Q Now, do you usually take the bus at all on 20th street?
A yes, I take it quite often.
Q I see; and as I understand it your usual route is out the front door and down south on Avenue AO" to 20th Street is it?
A Yes.

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She was still unable to give evidence about Gail Miller's habits:

Q I see; now, do you know how Gail usually got to work at all?
A No, I didn't see what method of transportation she took but I believe it was usually the bus.

Under further questioning, Adeline Nyzcai said that she, herself, would always walk down 20th Street to the bus stop, even if she had left out the back door of the house, because she would never walk in the alleys.

Mr. Caldwell could have been in no doubt that Milgaard's counsel was attempting to undermine the Crown's Avenue N theory. If he had fulfilled his disclosure obligation, not only would he have disclosed the Betty Hundt statement which was in his file, he would have sought from the police any relevant reports or statements and disclosed them to Mr. Tallis. If he had done this, Mr. Tallis would have had the statement of Anne Friesen, further ammunition to expose the Avenue N theory for the sham that it was. Anne Friesen's statement, given to the police on the day of the murder said, as regards Gail Miller:

> "- she leaves every morning between 6:40 a.m. and 6:45 a.m. when the [bus] is due at 20th Street and Avenue O at 6:45 a.m. She walks south on Avenue O to the 20th Street bus stop. She leaves by the front door."

It is beyond belief that the non-disclosure of evidence of such crucial importance to the defence was inadvertent.

Mr. Caldwell treated the evidence that contradicted the Avenue N theory the same way Detective Mackie had in his summary: he simply ignored it. He 'believed' that the encounter with Gail Miller took place on Avenue N, and therefore the evidence of her house mates that she took the Avenue O route to the bus stop was meaningless to him - for whatever reason, she must have taken Avenue N on that day. David Milgaard's lawyer was not given anything

with which to contradict the police and prosecution theory. It is no answer to Mr. Caldwell's failure to disclose that Mr. Tallis knew (from the preliminary hearing) the names of Gail Miller's housemates and could have chased them around the country to see if they could say anything helpful. He relied on Mr. Caldwell to fulfill his duty to disclose. The reliance was misplaced.

005536 Evidence of Nyzcai at Trial, at p. 005632 to 005636
007421 Evidence of Nyzcai at Preliminary Hearing, at p.007427 to 007428
Evidence of Adeline Hall (Nyzcai) January 18, 2005 especially at 435
006628 Statement of Betty Hundt dated January 31, 1969
Evidence of Betty Silverfox (Hundt) January 18, 2005
006585 Statement of Anne Friesen dated January 31, 1969
Evidence of Anne Peters (Friesen) January 19, 2005
039537 Caldwell letter to Tallis January 19, 1970
031573 Statement of Adeline Nyzcai taken January 31/69, at 031574
218223 Argument on Behalf of David Milgaard dated March 1992 at paragraph 1a) to 1c) (pp 218228-218229)
210858 Transcript of Mr. Caldwell's Opening Address at Milgaard Trial
219125 T.D.R. Caldwell closing address
Evidence of Caldwell: Vol.79 October 3, 2005 pp 15791 to 15793, 15813 to 15815, 15821; Vol.80 October 4, 2005 p. 15914
Vol. 81 October 5, 2005 pp. 16174, 16184, 16188; Vol.86, October 27, 2005 pp. 17423 and following, 17552 to 17566; Vol.87 October 31, 2005 p. 17646; Vol. 89 November 2, 2005 pp..18030, 18036-37, 18047, 18111, 18116

38. The housemates' statements were very likely the reason that the police investigating the murder were not interested in taking a formal statement from Mr. Doell. Gail Miller, on the coldest day of the year, would not have taken a longer route to get to the bus stop, and would not have deviated from her normal route. When Mr. Doell was finally disclosed to and interviewed by the Milgaard counsel, he swore an affidavit which makes it clear that he did not personally know Gail Miller, and that he had moved from the area months prior to the murder. He had, therefore, no evidence to give relevant to her activities in the days, weeks and months leading up to her death.

044252 Affidavit of Simon Doell dated March 31, 1992
075900 RCMP Notes with attached Investigation Report
075905 Handwritten Statement of Simon Doell dated March 4, 1993

39. Mr. Caldwell had in his prosecution file a number of police reports indicating that numerous people travelling on Avenue N on the morning of January 31, 1969 and who should have seen the Wilson car, David Milgaard, Ronald Wilson or Gail Miller, did not. Mr. Caldwell did not seek production of all of the police reports, nor did he re-read the police reports he did have to see if he should disclose any of this information to David Milgaard's lawyer, because, he said, Mr. Tallis had requested 'witness statements', not 'police reports', and in any event, it was not his practice to disclose the actual police reports to defence counsel. Mr. Caldwell testified that although it would have been an "uphill struggle" for him, he could have summarized the information contained in the police reports and disclosed it to Mr. Tallis, and if he had it to do over again, 'would hope' that he would. One significant report that Mr. Caldwell did have in his file concerned Arthur and Margaret Merriman. The Merriman's home was on Avenue N, directly opposite the lane way behind the funeral home. At the very time that the Wilson car was supposedly stuck in the lane way, they were looking out their window, waiting for a taxi. They saw nothing unusual. The idea that the Wilson car had been stuck behind the funeral home was central to the Crown's theory of guilt. The Merrimans directly contradicted it. They were important witnesses who should have testified at the preliminary hearing and at trial. Mr. Caldwell did not reveal their existence to Mr. Tallis.

Evidence of Caldwell: Vol.79 October 3, 2005 pp 15791 to 15793, 15813 to 15815, 15821; Vol.80 October 4, 2005 p. 15914
Vol. 81 October 5, 2005 pp. 16174, 16184, 16188; Vol.86, October 27, 2005 pp. 17423 and following, 17552 to 17566 (and maybe further); Vol.87 October 31, 2005 p. 17646; Vol. 89 November 2, 2005 pp..18030, 18036-37, 18047, 18111, 18116
106648 Investigation report dated March 27, 1969 by Det./Sgt. Reid (re Merrimans)
007084 Mr. Caldwell's handwritten notes regarding Opening at Milgaard Trial
210858 Transcript of Mr. Caldwell's Opening Address at Milgaard Trial
219125 T.D.R. Caldwell closing address
007311 Closing address of Mr. Tallis
218223 Argument on Behalf of David Milgaard dated March 1992 at paragraph 2a) to 2x) (pp218229 to 218231)

40. One of the most significant witnesses relevant to Gail Miller's usual route to the bus stop was Mary Gallucci. When she spoke to the police on February 6, 1969, she described the very pretty young nurse who walked south on Avenue O to the 20th street bus stop, and the

construction worker who walked north on Avenue O to the same bus stop every morning. The police report which included Mary Gallucci's information was not among those which Mr. Caldwell was given. If he had, in response to Mr. Tallis' request, reviewed the police reports and sought them out from the police and disclosed the information to Mr. Tallis, not only would the Avenue N theory have self-destructed, but it would undoubtedly have triggered a further request from Mr. Tallis: had the construction worker been identified, questioned and/or investigated? This would very likely have resulted in an investigation of Larry Fisher's false alibi, and an examination of why he was taking a later bus (i.e. the time of Gail Miller's bus) on February 4th than he claimed to have taken on the morning of the murder. Linda Fisher may have been discovered as a witness at the same time. At the very least, Larry Fisher's name would have been front and foremost as a possible suspect later that year when he was 'discovered' as the Winnipeg and Saskatoon serial rapist.

106234 Investigation report by Det. Bennet dated February 6, 1969
106254 Investigation report by Det. Maurice Bennet & Det. Hein dated February 7, 1969
Evidence of Caldwell: Vol.90, November3, 2005 p.18225
Evidence of Pearson: Vol. 98, November 24, 2005 p.19885, 19930 to 19934; Vol. 99 November 28, 2005 p.20164-65; Vol.100 November 29, 2005 p.20304
Evidence of Asper: Vol.136 April 21, 2006 p.27522
Evidence of Penkala: Vol.50 June 8, 2005 p.9665
Evidence of Tallis: Vol. 122 February.10, 2006, p.24733

Non-disclosure of the serial rapist assaults

41. Mr. Caldwell's file contained a number of references to the sexual assaults committed by the Saskatoon serial rapist, which the original police theory linked to the murder of Gail Miller. It was the responsibility of Detective Ullrich to include in the prosecution brief all material relevant to the murder case brought against David Milgaard. He included, in particular, a draft of Lieutenant Penkala's February 5, 1969 letter to the R.C.M.P. which clearly linked the murder to the as yet unsolved rapes in the fall of 1968. Detective Ullrich also included police reports which referenced questioning of men suspected of attacking M[redacted] Ms. [redacted] and laboratory reports regarding the forensic testing in the cases of Ms. [redacted] Mr. Caldwell ought to have known from these reports that the attacker of Gail Miller and Ms [redacted] shared the same blood type: A+

secretor, and that David Milgaard was then (incorrectly) tested by the police to be a Type A+ non-secretor. Mr. Caldwell disclosed none of it to Mr. Tallis, despite Mr. Tallis' follow up request that he review his file most carefully. Nor did he bother to contact Detective Ullrich to determine why the supposedly extraneous and irrelevant material had been included in the prosecution brief. He testified at the inquiry that he had relied on the handwritten notes "not related" which had been written on some of the documents by an unknown person at an unknown time. It is beyond obvious that similar sexual assaults committed by a serial predator would be relevant to the defence of David Milgaard, a young man who had passed through Saskatoon only on the morning of January 31, 1969. Had Mr. Caldwell bothered to make inquiries, David Milgaard's lawyer would have hit the exculpatory evidence jackpot while the files of [redacted] ere still in existence.

009299 Lieutenant Penkala draft letter
052923 Letter from Joseph Penkala to R.C.M.P., February 5, 1969
004100 Investigation report by D/Sgt. Mackie dated April 7, 1969

42. [redacted] tatement is in a class by itself. Apart from the bizarre theory that there were two sexual offenders attacking women, blocks apart, between 6:45 and 7:15 a.m. on the coldest day of the year, it would have been a central point of Mr. Tallis' defence: someone other than David Milgaard was the attacker of Gail Miller an [redacted] Instea [redacted] rought *herself* to the attention of Milgaard's counsel in 1991. She testified that she always believed that she had been attacked by the same person who had killed Gail Miller. Her attacker could not have been David Milgaard who was, at the time of the sexual assault on her, at, or enroute to a motel on the outskirts of the city obtaining a map to locate the Pleasant Hill area, not prowling the residential yards of Avenue H. Mr. Caldwell was in possession of the statement taken from [redacted] on January 31, 1969. He should have disclosed it to Mr. Tallis and did not. When Mr. Tallis made the request for Mr. Caldwell to re-check his file, Mr. Caldwell responded that he had read *again* every witness statement in his file, and provided Mr. Tallis with several statements he had not previously disclosed. [redacted] atement (#40) was not one of them. An unknown person had written on her statement: "Ind. Assault Not Connected". This did not prevent Detective Ullrich from including it as a relevant document for the prosecution of the

Gail Miller murder, but apparently prevented Mr. Caldwell from providing it to David's defence counsel.

Evidence of Caldwell: Vol.81 October 5, 2005 p.16201, 16214 to 16225; Vol.85 October 26, 2005 p.17302 to 17304, 17262; Vol.86 October 27, 2005 p.17406, 17439; Vol.87 October 31, 2005 p.17598, 17660 to 17673; Vol.88 November 1, 2005 p.17707 to 17716, 17762 to 17778, 17845 to 17849, 17931, 17926 to 17966; Vol.89 November 2, 2005 p.18018 to 18024; Vol.90 November 3, 2005 p.18231 to 18233, 18243 to 18246, 18362, 18371; Vol.91 November 7, 2005 p.18520; Vol.92, November 8, 2005 p.18548 to 18577, 18582; Vol.93, November 9, 2005 p.18812, 18844, 18897
Evidence o[redacted] Vol.42 April 14, 2005 p.8144 to 8155 especially at 8175/4 - 10
Evidence of Asper: Vol.134 April 19, 2006 p.27171 to 27179, 27349, 27410, 27424; Vol.135 April 20, 2006 p.27218, 27349, 27410; Vol.136 April 21, 2006 p.27521, 27526, 27546
Evidence of Rossmo: Vol.138 April 25, 2006 p.27892, 28067, 28068; Vol.139 April 26, 2006 p.28141, 28154 to 28159, 28198, 28213 to 28218
Evidence of Karst, Vol.60 August 22, 2005 p.11784 to 11788 (thinks there are 2 assailants)
Evidence of Pearson: Vol.100 November 29, 2005 p.20404
006404 Handwritten statement o[redacted] dated January 31, 1969
156129 Letter from Earl Levy to David Asper enclosing copy of statement dated August 28, 1991
006301Memo[redacted]

Non-disclosure of the other sexual assaults

43. Among the statements Mr. Caldwell was given by Detective Ullrich were those of sexual assault victims[redacted] all came forward in the weeks following Gail Miller's murder and provided their statements to officers investigating the murder[redacted] statement had the Gail Miller occurrence number on it. She told the police that on the evening of January 15 or 22, 1969, she had been grabbed by a man who came up behind her on the street. He attempted to remove her sweater. She struggled with him and was rescued by a nearby motorist who chased the man off.[redacted] a nurse at St Paul's Hospital on 20th Street reported that at about 8:00 a.m. on January 15, 1969, while in uniform, she was accosted from behind by a man who held her arms back and ran his hands over her body. She hit him and managed to get away. Her statement was numbered '39' and had "Ind. Assault only - no connection" written on it in an unknown hand[redacted] reported being followed on the evening of February 3, 1969 by a man who had been hiding in the nurse's residence in the area of 20th Street and Avenue S. Her statement was numbered '38' and had the occurrence number of the Gail Miller murder and

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the writing of an unknown person: "Ind. Assault only - not connected". Mr. Caldwell did not disclose any of these statements to Mr. Tallis, even after Mr. Tallis' request that he carefully review his file for anything helpful to the defence. The statements were included in the prosecution brief because Detective Ullrich believed they were of some relevance. Mr. Caldwell relied on the handwriting of the unknown person that the matters were unrelated to the Gail Miller file. He should have realized that any sexual assault, particularly on nurses, or in the vicinity of nurses' residences in the weeks leading up to the Gail Miller murder could be significant to Mr. Tallis, whether or not the victims successfully escaped their attacker.

006400 Statement o[redacted]ebruary 4th1969
006402 Statement o[redacted]ruary 6, 1969
006486, Statement o[redacted]ebruary 18, 1969
Evidence of Caldwe[redacted]p. 16201 to 16225; Vol.85 Oct.26/05, p. 17262; Vol.88 Nov 1/05 p 17706 to 17716, 17734 to 17758, 17776 to 17778, 17845 to 17849, 17931; Vol.89 Nov 2/05 p. 18019 to 18024; Vol.91 Nov.7/05 p.18520; Vol.92 Nov.8/05 p. 18547 to 18560; Vol.93 Nov.9/05 p.18812
Evidence of Carlyle-Gordge, Vol.107 January 17, 2006 p.21514 to 21516
Evidence of Tallis, Vol.122 February 10, 2006 p. 24740 to 24743; Vol.124 February 21, 2006 p.24929 to 24931
Evidence of Asper, Vol.135 April 20, 2006 p.27389, 27424 to 27426
Evidence of Passett, Vol.55 June 16, 2005 p.10816 to 10824
Evidence of Fisher, Vol.72 September 19, 2005 p.14362 to 14364
006301 Memo[redacted]

Non-disclosure of Mr. Caldwell contacts with Craig Melnyk prosecutor

44. It is well-known that jail house informers and their ilk will tailor their evidence to obtain a benefit. The value of the benefit is often known only to the unsavoury witness. Mr. Caldwell exchanged a number of telephone calls with the prosecutor in charge of Craig Melnyk's case. His file contained a "To Do" list which noted that he should call the prosecutor handling Craig Melnyk's robbery charge. After pleading guilty, Craig Melnyk received what may have been the shortest sentence ever imposed in Saskatchewan for robbery. The contact should have been disclosed. Whether or not Mr. Caldwell assisted Craig Melnyk by putting in a good word for him, Craig Melnyk may have thought he would, and obliged with stronger prosecution evidence than he would have if Mr. Caldwell had not

contacted the prosecutor handling his case. Mr. Tallis should have had the opportunity to explore this at trial.

219652 News Article - "Melnyk given six months"
Evidence of Caldwell: Vol.82 October 6, 2005 p. 16470; Vol.89 November 2, 2005 p.18149 to 18159
006904 Caldwell "to do" list

Tunnel Vision

45. Mr. Caldwell failed in his duty to evaluate the strengths and weaknesses of his case. He never turned his mind to the utter impossibility of the scenario described by Nichol John and Ronald Wilson in their May, 1969 statements. He simply 'believed' them (and Albert Cadrain). This undoubtedly contributed to his failure to disclose relevant evidence which would have been helpful to the defence. Mr. Caldwell was taken to the scene of the murder by the police. He was a Saskatoon resident and aware of all key locations. Nonetheless, he never considered that Gail Miller would have reached her bus stop long before anyone driving a car past her could have got stuck, attempted to push the car out, and then separated looking for help and that the stories told by Nichol John and Ronald Wilson could not possibly be true. He seems to have ignored Detective Ullrich's warnings in this regard. Curiously, Mr. Caldwell also wrote in his Completed Case Report on February 12, 1970, that:

> "As the investigation progressed, Wilson was interviewed at length, in Saskatoon, by Inspector A. R. Roberts of the Calgary City Police Department with assistance of a polygraph, as a result of which Inspector Roberts was of the opinion that Wilson was now telling the truth about this matter as he knew it, and Wilson gave a truthful statement to Det. Karst on May 23rd, 1969, following which on May 24th, 1969, Nichol John gave a truthful statement of what she really knew about the matter, to Det/Sgt. R. W. Mackie of the Saskatoon Police Department."

Mr. Caldwell had interviewed Inspector Roberts in September, 1969 and knew that neither Ronald Wilson's nor Nichol John's May statements had been tested on the polygraph.

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Nichol John had not been polygraphed at all, and Wilson had only been asked three questions, none of them about his statements of March or May.

Caldwell Report on Completed Cases, February 12, 1970

46. Mr. Caldwell found support for the implausible stories of Nichol John and Ronald Wilson in a number of places. He adopted the absurd theory proposed by Detective Mackie: that Marie Indyk saw Nichol John running away from the car, when Marie Indyk clearly described a 30 year old woman dressed differently than Nichol John was that day. He blindly accepted whatever story Albert Cadrain was prepared to tell as time went on: David's mafia membership and his desire to put a 'hit' on Ronald Wilson and Nichol John, Albert Cadrain's visions of David and the Virgin Mary, virgins in the bathtub, and a host of contradictory positions.

007084 Caldwell notes & opening
210858 transcript of Caldwell opening
007028 report of Ullrich August 25/69 Cadrain adds bathtub virgins

47. Mr. Caldwell knew that Gail Miller had been stabbed through her coat and not through her dress at all, and that her undamaged sweater had been found buried in the snow. Notwithstanding this, Mr. Caldwell was untroubled by Nichol John's statement that she had seen David Milgaard stab Gail Miller through her coat, yet she had not witnessed a sexual assault. A sexual assault must have preceded the stabbing. He did, however, have the problem on a "To Cover" list in his file:

> "how sweater off - inside out & uniform top down"

Mr. Caldwell had in his file police documents which should have alerted him to the existence of victim statements and police reports which described offences similar to what happened to Gail Miller. He did nothing with them, made no inquiries about them, and did not seek further reports or statements. If he had followed up with the police, and made disclosure to Mr. Tallis, the jury trying David Milgaard could have been advised that what happened to Gail Miller was exactly how the serial rapist operated: he grabbed his victims from behind in the dark, covered their eyes with their own clothing, tore their clothes off or forced them at knife point to undress and lie on their coats, and raped them. Gail Miller, of course, was the only one of the serial rapist's victims who could recognize him as someone who rode the bus with her every morning, and the only one to die.

042504 Handwritten statement of [redacted] dated October 22, 1968
039935 Handwritten statement of [redacted] dated November 14, 1968
065330 Handwritten statement of [redacted]
039527 News article - "Women given warning"
052923 Letter from Joseph Penkala to R.C.M.P., February 5, 1969
105520 Investigation report by Joseph Penkala, February 27, 1969
010718 Letter from L.J.Corey to K.W. MacKay dated March 17, 1971
006949 Caldwell note of things >to cover'
Evidence of Caldwell October 5/05

48. Mr. Caldwell made a number of tactical decisions designed to dissuade the jury from being troubled by the Ronald Wilson/Nichol John evidence and to dissuade them from acquittal:

$ he told them to ignore the (exculpatory) evidence about the non-secretor status

$ he repeatedly referred to the 'blood' that supposedly was in the yellow lumps in the snow (as David had been classified as a non-secretor, the semen could only have originated with him if his blood was also in the deposit) although he knew that Bruce Paynter had only been able to attain a presumptive test for blood

$ he instructed Ronald Wilson and Nichol John to make no reference to criminal behaviour so as to avoid an accomplice/unsavoury witness warning to the jury (a strategy he reached in consultation with Mr. Serge Kujawa)

$ he considered David's statements to the police to be 'false' but searched through them for 'helpful' admissions and considered attempting to have the statements ruled voluntary so that he could use them in cross-examination if he testified

$ he delivered a jury address that was inflammatory, wrong and misleading

The jury heard Nichol John's May 24th statement in its entirety. They did not hear her March 11th statement. Nor did they hear the content of Ronald Wilson's or David's exculpatory statements given separately to the police on March 3rd. The jury should have heard the three statements given in March and David's second statement given to the police in April. Mr. Tallis had no ability to put them in. Mr. Caldwell merely assumed that they were false (although he has subsequently admitted they contained no false facts) and chose not to lead David's statements. Mr. Tallis had no ability to argue that the statements of David, Ronald Wilson and Nichol John on March 3 and 11th were in essence identical, with no opportunity of collusion.

Mr. Caldwell was fixated on securing the conviction of David Milgaard for the murder of Gail Miller, and lost sight of his obligations of fairness.

009372 Caldwell's notes re Paynter and the positive presumptive test for blood
006938 avoiding accomplice for Wilson
007049 point 6 re getting David's statement declared voluntary for cross-examination
006886 report on completed cases

49. Mr. Caldwell's tunnel vision continued long past his involvement in the trial. His letters to the parole board were unusual, to say the least. He has written no similar letters with respect to Fisher. Indeed, at the Supreme Court of Canada Reference in 1992 he attempted to assist Fisher in his putting forward David as the killer by disclosing to his counsel evidence that he had not given to Mr. Tallis: a supposed utterance of Nichol John at the time of the preliminary hearing made to unknown people, and reported by unknown people. He was so caught up in his involvement in the most significant case of his career that he hoped to write

a book about it one day. He instructed the courts to maintain the exhibits for just this eventuality. For the same reason, he co-operated with Mr. Carlyle-Gordge, who told him that he was writing a book about the case. Mr. Caldwell's grandiose self-importance can also be seen in his untruthful letter to the Miller family wherein he claimed to have represented the Crown at David Milgaard's unsuccessful appeal to the Supreme Court of Canada in 1971.

50. To borrow the language of another Commissioner, in describing the conduct of the senior prosecutor who secured the wrongful conviction of Guy Paul Morin, Mr. Caldwell exhibited tunnel vision of 'staggering proportions'. If he had expended a fraction of the time critically looking at the case against David Milgaard as he did attempting to maintain his conviction and blowing his own horn, David may have been freed years before he was.

Morin Report, Vol.1489-490

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TRIAL AND APPEAL RULINGS

Nichol John's Statement

51. It is not necessary to interview jurors from the original trial of David Milgaard to understand how significant Nichol John's statement was to their determination of guilt. Countless cases have demonstrated, especially in eyewitness (*Sophonow*) and unsavoury witness (*Morin*) cases, that a warning from the judge is an insufficient safeguard to prevent the jury from being unduly swayed by powerful, but impermissible inferences. It is most likely that the jury did exactly what every other police and Crown attorney did over the years: viewed Nichol John's failure to adopt her May 24th police statement at trial not as a repudiation of an untruthful statement but as an attempt to a) protect her 'friend' or b) protect herself from retaliation from her former friend, the 'killer'. Mr. Caldwell, in his report on completed cases, recognized this effect, and bragged about his success in getting the non-adopted inculpatory statement before the jury. He wrote:

> "I feel that the end result of this ruling and the cross-examination would be to remove a very grave hiatus between the evidence of Nichol John and that of Wilson as to what went on at about the time of the killing. I feel that the jury must eventually have decided to disbelieve Nichol John as to this part of her testimony, having heard that at one time she had said that she did see the stabbing take place."

In a similar vein, Mr. Caldwell wrote to Inspector Roberts to report on his successful achievement in convicting David Milgaard:

> "The witness Nichol John once again persisted in giving, during her examination in chief, similar evidence to that which she gave at the preliminary inquiry and in failing to describe what she actually saw of the attack on the victim by Milgaard.
>
> ...

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> I cross-examined her in the presence of the jury on the statement she gave to Det/Sgt. Mackie after your interview with Ron Wilson and yourself in May of 1969. This brought to the attention of the jury the fact that she had, at one time, given a statement indicating that she had seen the actual attack on the girl by Milgaard."

Mr. Caldwell suspected that Nichol John would not testify that she was an eyewitness to the murder, as she had not done so at the preliminary hearing. He left that part of her evidence out of his opening address to the jury. In discussions with Mr. Kujawa, Mr. Caldwell formulated a plan to have Nichol John declared an adverse witness. He succeeded only too well.

006886 Caldwell completed cases report, February 12, 1970
006864 Caldwell letter to Roberts, February 17, 1970
Evidence of Caldwell: October 6, 2005 October 25, 2005
006809 Notes of Caldwell
007084 Caldwell notes and opening address
039137 Star Phoenix article January 25, 1992

52. If a *voir dire* had been held (as requested by Mr. Caldwell and Mr. Tallis) the jury should not have heard of Nichol John's May 24th statement. The trial court should never have made a finding of adversity with respect to Nichol John. She did not claim that she had lied to the police (an admission which would have exposed her to a perjury charge). She stated that she could recall neither the statement nor the claims therein. Her evidence, therefore, was not contradicted by her statement. The appeal court did not overturn this ruling.

009340 Court of Appeal Judgment
Evidence of Caldwell October 25/05
006886 Caldwell completed cases report, February 12, 1970

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WHETHER THE INVESTIGATION SHOULD HAVE BEEN RE-OPENED BASED ON INFORMATION RECEIVED BY THE POLICE AND THE DEPARTMENT OF JUSTICE

Connie Nicholls

53. Within weeks of the conviction of David Milgaard, Larry Fisher resumed his pattern of raping women in the alleys of Saskatoon. [redacted] was raped by Larry Fisher on February 21, 1970. The case was investigated primarily by Detective Gus Weir, but others were also involved including Mr. Penkala, Detective Mackie and Detective Karst, all of whom had been significantly involved in the Miller murder investigation. In the case of Detective Mackie and Detective Karst, the preparation of a case against David for the murder of Gail Miller had consumed much of their time for the proceeding year. The attack on [redacted] must have seemed a flashback to the murder of Gail Miller. Apart from her survival, the circumstances of her attack were almost identical. It is simply unbelievable that Detective Karst and Detective Mackie did not consider that the perpetrator may have been the same person. That person could not have been David Milgaard, then just beginning his long ordeal in the penitentiary.

105211 Investigation report by D/Sgt. Mackie dated February 22, 1970
070545 Investigation report by Weir, dated February 21, 1970
254935 Investigation report of Lindgren, February 21, 1970
105201 Investigation report of Lindgren, February 22, 1970
105204 Investigation report of Blaney, February 22, 1970
105233 Investigation report of Weir, March 8, 1970
105237 Investigation report of Weir, March 21, 1970
105238 Investigation report of Weir, April 10, 1970
105239 Investigation report of Weir, April 22, 1970
105240 Investigation report of Weir, April 29, 1970
105241 Investigation report of Weir, May 10, 1970
105242 Investigation report of Weir, June 3, 1970
105243 Statement of [redacted] May 29, 1970
105244 Investigation report of Weir, June 28, 1970
105245 Investigation report of Weir, July 14, 1970
105246 Investigation report of Weir, February 5, 1971
230708 Laboratory report re [redacted]

105212 Statement of [redacted] dated February 21, 1970
Evidence of [redacted] April 19, 2005 and April 20, 2005

54. For reasons that have never been explained, Detective Karst and Detective Mackie, the day after the assault on [redacted] questioned Albert Cadrain about 'this suspect'. The report prepared about it contains no details of what he was asked, why he was asked, or what information he may have provided. When this report was ultimately disclosed (in 1991-2), neither Detective Karst, Detective Mackie or Albert Cadrain could shed any light on it. On March 10, 1983, after learning from Mr. Caldwell's file that Larry Fisher had been spoken to by the police on February 4, 1969 and told them his address was the Cadrain house, Mr. Carlyle-Gordge telephoned Albert Cadrain to ask if he knew anything about Larry Fisher and his current whereabouts. Told by Mr. Carlyle-Gordge that the police had questioned Larry Fisher, Albert Cadrain said:

> "I guess he was just a suspect, hey"

He went on to describe Larry Fisher as a gangster type, and a criminal. He then added:

> "Yeah, I suppose uh, I guess they caught him years later, or I don't know how much longer, later, in uh, rapes and shit like that, hey?"

Albert Cadrain knew in 1983 that Larry Fisher was a serial rapist. Larry Fisher had moved out of the Cadrain home and out of Saskatoon prior to his Winnipeg arrest in the fall of 1970, and never came to light again until 1980 when Linda Fisher (living elsewhere) went to the Saskatoon police, who did nothing to investigate her allegations. Thereafter, Larry Fisher was not heard of until 1990, when an anonymous caller tipped off Milgaard counsel to his identity. This raises troubling questions:

$ how did Albert Cadrain know that Larry Fisher was a repeat rapist?
$ when did he learn this, and from whom?
$ did the police tell Albert Cadrain?
$ did Larry Fisher tell Albert Cadrain?

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$ did Albert Cadrain tell Detective Mackie or Detective Karst (who had questioned him abou[redacted]ape)?

$ did Albert Cadrain tell any other police officer?

105211 Investigation report by D/Sgt. Mackie dated February 22, 1970
333013 Carlyle-Gordge telephone conversation with Cadrain March 11, 1983
Evidence of Asper, Vol.126 February 23, 2006 25332/6 to 25333/20

Non-disclosure of Fisher arrest, statements and guilty pleas

55. On September 19, 1970, while David's appeal was pending, Larry Fisher was caught in Winnipeg in the act of raping yet another victim[redacted]He was arrested and charged with the rapes of[redacted]who had been attacked on August 2, 1970. Larry Fisher denied raping[redacted]At that time, Larry Fisher had no criminal record. The investigating officers contacted Saskatoon police in an effort to obtain any available background information on him, and also to see if he was responsible for any unsolved Saskatoon rapes. Saskatoon police advised by letter that there were four unsolved crimes for which he might be responsible. The Winnipeg officers questioned Larry Fisher about these offences, and he denied any involvement. Within days, Larry Fisher decided to 'come clean' and admitted his involvement in the Winnipeg/Fort Garry offences, and also confessed to two of the four Saskatoon assaults.

Evidence of Lorne Huff, September 13, 2005
Evidence of Karst, Vol.62 August 24, 2005 12261/15 to
002043 August 2, 1970 Supplementary report of Donnelly
002050 Statement of [redacted] September 19, 1970
071223 Statement of [redacted] August 2, 1970
010326 Sept 25, 1970 letter to Saskatoon Police from Fort Garry Police
073787 October 20, 1970 letter to Saskatoon Police from Fort Garry Police
010302 Fisher Confession October 21, 1970 to Gilbert and Huff
002020 Report of Perry, September 28, 1970
255034 Statement of Fisher to Fort Garry Police re [redacted] September 19, 1970
002032 Statement of Fisher to Huff and Gilbert, October 21, 1970
042040 Report of Penner, September 23, 1970
047053 Report of Gilbert, September 21, 1970
071202 Report re [redacted]
093325 Repor of Huff
093339 Report of Perry

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093348 Report of Huff
261217 Report of Hoccom, September 19, 1970
321248 Crime Report r[redacted] August 2, 1970
331512 Report of Huff, August 2, 1970

56. Winnipeg police advised the Saskatoon police chief that Larry Fisher had admitted to two Saskatoon assaults. Inspector Nordstrum, the head of the morality division, was dispatched to Winnipeg. With him, was Detective Karst, who had had no involvement in any of the sexual assault (excep[redacted] and did not work in the morality division. The only explanation that has ever been given for Detective Karst's attendance in Winnipeg is that, unlike Inspector Nordstrum, he was a very good interviewer and took good statements. This explanation is not supported by the statements which Detective Karst took from Larry Fisher with respect to the two offences Larry Fisher admitted. They are as bare-boned as they possibly could be. It is also curious that a 'good interviewer' would be required to attend and obtain a statement from someone who had already provided cautioned statements of guilt to the Winnipeg officers. It is submitted that Detective Karst was sent to Winnipeg specifically because of his knowledge of the Gail Miller file, and because of continuing belief among some officers that the Saskatoon serial rapist had killed Gail Miller.

Evidence of Huff: September 13, 2005
Evidence of Karst: Vol. 62 August 24, 2005 12260/20 to
002019 Letter from Fort Garry Police to Saskatoon Police, October 20, 1970
093342 Letter from Fort Garry Police to Saskatoon Police, September 25, 1970

57. Detective Karst took two statements from Larry Fisher on October 22, 1970. According to a memo written the following spring by the Deputy Chief of the Saskatoon Police, Detective Karst also questioned Larry Fisher about the assaults on the two other Saskatoon victims. Larry Fisher denied any involvement. There is no available record of this questioning or denial. Larry Fisher's statements to Detective Karst made their way back to Saskatoon, and at some point, a decision was made to charge Larry Fisher with the four sexual assaults which bracketed the murder of Gail Miller, despite Larry Fisher's denials of his guilt with respect to two of them. The four informations were sworn out on December 30, 1970, and placed in the prosecutor's office in Saskatoon. There they were found 20 years later. No action had been taken on these informations, and they had never been placed before the court.

Larry Fisher decided to plead guilty to all four offences (including the two he had denied) prior to the direct indictment being laid in Regina in 1971. There is no explanation for how this unusual chain of events transpired.

010718 Letter from L.J.Corey to K.W. MacKay dated March 17, 1971
Evidence of Karst August 22, 23, 24, 25, 29 2005
Evidence of Karst: Vol.62 August 24, 2005 pp. 12280/ to
010721 Fisher Statement to Karst re [redacted] October 22, 1970
012111 Fisher Statement to Karst re [redacted] October 22, 1970
Evidence of Goa: September 13, 2005
Evidence of Ullrich: September 12, 2005
Evidence of Burron: September 13, 2005
010733 Information re [redacted] December 30, 1970
047051 Information re [redacted] December 30, 1970
056385 Information re [redacted] ember 30, 1970
260945 Information re [redacted] nber 30, 1970

58. While he was attempting to negotiate a guilty plea to the Winnipeg charges, Larry Fisher, through his counsel, sought to clear up the charges he thought he was facing in Saskatoon. Presumably this was in relation to the four informations which had been sworn to, but not acted upon, on December 30, 1970. Arrangements were made to have Larry Fisher brought to Regina where he was to plead guilty to all four charges relating to his Saskatoon victims once he had been sentenced in Winnipeg. On March 17, 1971, at the request of Mr. Caldwell, the Deputy Chief of Saskatoon Police wrote to Mr. Kujawa's junior and outlined, in substantial detail, the circumstances of the four charges against Larry Fisher, including the use of a paring knife in two of the cases. This letter could only have been composed by reference to the files of the Saskatoon victims, police reports authored by Detective Karst and Inspector Nordstrum, the four informations sworn in December 1970, and the two cautioned statements taken from Larry Fisher by Detective Karst in October 1970. As for Larry Fisher's denials of two of the offences, Mr. Corey wrote:

> "During October 22, 1970, Members of our Force interviewed Fisher while he was confined to cells at the Fort Garry, Manitoba, Police Station. Fisher admitted being responsible for the rape of [redacted] on February 21, 1970, and also the attempted rape of [redacted] n November 29, 1968. Fisher was questioned about the offences committed on October 28 and November 13, 1968 and denied any knowledge of same.

Police investigation revealed that Fisher lived within a block of the locations where these rapes occurred, the description of the culprit is very similar and the *modus operandi* is the same in all four cases. Fisher claims that he had never heard of these offences being committed, which is hard to believe as they happened within a three week period in the same area and received wide publicity."

On June 17, 1971, the Winnipeg prosecutor wrote to Saskatchewan authorities to advise that Larry Fisher had been sentenced on two charges of rape, one charge of robbery [money stolen from one of his victims] and one charge of possession of an offensive weapon [a paring knife used in one of the rapes). Mr. Morton continued:

> "He was sentenced by Mr. Justice Matas of the Court of Queen's Bench to a total of 13 years on all charges. I have been given to understand that he faces similar charges that arose prior to the Manitoba offences, in your province.
>
> I am further informed that counsel for the accused, Mr. Lawrence Greenberg, here in Manitoba, has indicated that in all likelihood Mr. Fisher will be pleading guilty to the Saskatchewan charges. This is so that Mr. Fisher, a resident of Saskatchewan, can be incarcerated in Saskatchewan in order that he may be closer to his family. I have been given to understand that arrangements have already been made with your department by Mr. Greenberg.
>
> You might wish to advise your crown attorney handling the prosecution of Fisher that at no time was Fisher's Saskatchewan involvement made known to the sentencing Judge and therefore this involvement was not taken into account in his 13 year sentence."

There was a clear expectation that Larry Fisher would be looking at additional jail time for his "Saskatchewan involvement". The following week, Mr. Kujawa wrote to the Attorney General of Saskatchewan seeking a direct indictment:

> "The above was convicted of rape in Manitoba and sentenced to thirteen years imprisonment. Now, through his counsel in Manitoba, he has requested that we dispose of the four outstanding charges against him in Saskatchewan so as to clean up his record and some day be in a position to start anew.

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> Without his confession in Manitoba, we have no evidence at all on which to charge Fisher but the offences he refers to were committed and reported to the police at the time.
>
> Since this is at the request of the accused and his counsel, I do not think a clearer case for a Direct Indictment can be made out and I would respectfully request that you sign the attached Indictment so we can process this case as soon as Fisher is transferred to the Penitentiary at Prince Albert, which may be within the next day or two."

An intervening political election delayed the issuance of the Direct Indictment. It was signed on December 9, 1971 and arrangements were made for Larry Fisher to plead guilty in Regina at 2:00 p.m. on December 21, 1971 to the four Saskatoon offences. Mr. Kujawa represented the Crown at the plea and sentencing. On December 24, 1971, he wrote a memo to file which said:

> "On December 21, 1971, Larry Earl Fisher, represented by Lawrence Greenberg from Winnipeg, (also a member of the Saskatchewan Bar) appeared before Johnson, J. in the Court of Queen's Bench and pleaded guilty to three charges of rape and one charge of indecent assault committed in Saskatoon. He had earlier this year received a thirteen-year sentence in Winnipeg for rape and wanted to clear all outstanding charges against him. Without his confession in Winnipeg we had no case at all against him and the confession would not likely be held to be voluntary.
>
> I asked for nothing more than a concurrent and Judge Johnson readily complied assessing a total of four and a half years on these offences."

Mr. Kujawa's claim that Larry Fisher's confessions to Detective Karst would not likely be held to be voluntary is completely unsupported by the known facts, and the state of the law in 1971. He also seems to have completely disregarded the potential for similar fact evidence, a concept that Mr. Corey had recognized. Larry Fisher terrorized the women of Saskatoon for months in the fall of 1968, generating newspaper warnings cautioning women to be wary of further attacks. He viciously raped two women, attempted to rape a third. His weapon of

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choice was a paring knife. After David Milgaard's conviction, Larry Fisher struck again, in circumstances remarkably similar to the vicious assault on Gail Miller which culminated in her death. For all of this, at Mr. Kujawa's request, he was to serve not a day in jail. Apart from a brief newspaper reference, Larry Fisher slipped quietly away to serve the sentence he had received in Manitoba.

001748 Warrant of Committal re [redacted] mber 21, 1971
001749 Warrant of Committal re [redacted] ember 21, 1971
001763 Certificate of Conviction [redacted] cember 21, 1971
010690 Kujawa letter to Herald, June 25, 1971
012649 Warrant of Committal r[redacted] ember 21, 1971
012651 Warrant of Committal r[redacted] ecember 21, 1971
067301 Warrant of Committal r[redacted] ecember 21, 1971
042960 Kujawa Memo to File, December 24, 1971
053206 Letter from Morton to Herald, June 7, 1971
331531 Fisher Pre-Sentence Report, May 20, 1971
331533 Psychiatric Report, February 18, 1971
331539 Winnipeg Court Documents re Fisher Sentencing, May 28, 1971
010718 Letter from L.J.Corey to K.W. MacKay dated March 17, 1971

59. Mr. Kujawa handled both the Milgaard appeal (Jan 1971), the application to the Supreme Court (November 1971) and the Larry Fisher guilty pleas to the series of Saskatoon rapes which occurred before and after Gail Miller's murder. His involvement in Larry Fisher's guilty pleas commenced in the spring of 1971 and concluded in December 1971. He was involved, therefore in both cases during the same time period. With respect to the Milgaard case, Mr. Kujawa was in possession of the entire prosecution file, which contained numerous references to the sexual assaults committed by the Saskatoon serial rapist (not then identified by name, although the victims were named). He had, and read, the trial transcripts and was aware of the condition in which Gail Miller was found, and specifically that she had been violently sexually assaulted, in an alley, under cover of darkness, and that a paring knife was the murder weapon. With respect to the Larry Fisher case, Mr. Kujawa has made much of the fact that he had very little information about Larry Fisher because he was going to plead guilty. He was, however, in possession of the names, dates and locations of each of the Saskatoon assault victims. Even on a guilty plea, he had to establish facts on which the judge could base a finding of guilt, and to do this, Mr. Kujawa had the letter written by Mr. Corey

which outlined the circumstances of each of the four assaults, and provided details of their similarity to each other. Their similarity to the circumstances of the Gail Miller murder is obvious and should have been obvious to the prosecutor who was at that very time arguing to uphold the conviction of David Milgaard for that very crime.

010718 Letter from L.J.Corey to K.W. MacKay dated March 17, 1971

60. Some of the investigating officers on the four sexual assaults were not told that Larry Fisher had been arrested and/or confessed to the rapes. They continued to investigate and try to find the perpetrator. [redacted] as told by a police officer that her attacker had been arrested in Winnipeg for two other rapes, and was being held in a mental hospital. Because of his mental health, he would not be prosecuted for the crime against her. She was not told that Larry Fisher had confessed, been charged, and that he was going to plead guilty to the rape. None of the other victims were told that their assailant had been caught until Joyce Milgaard and Paul Henderson told them in 1990. Several people in positions of authority tried to justify the failure to advise the victims that their rapist had been caught as the practice of an earlier age when there was little sensitivity to victims' rights. Even were this so, it would not account for a failure to notify the officers who were wasting their time trying to solve cases which had already been solved. Detective Weir, for example, was >hot' when he learned in 1975 or 1976 from Detective Karst, that he had taken confessions from Larry Fisher years earlier. Significantly, it was the evidence of the morality officers that victims were routinely notified when an arrest had been made. For instance [redacted] vas not told the truth, but she was told that her rapist had been caught. It was most unusual that this was not done in the case of Larry Fisher's other Saskatoon victims.

Evidence o[redacted] Vol.43, April 20, 2005 p.8335/10 to 8342/5
105246 Investigative Report of Gus Weir, February 5, 1971
Evidence of [redacted] ol.42, April 19, 2005 p.8145/10 to 8146/10
Evidence of [redacted] 41, April 18, 2005 p.8058/18 to 8059/15
Evidence of [redacted] Vol.41, April 20, 2005 p.8104/15 to 8105/3
Evidence of Weir: August 30, 2005 August 31, 2005
Evidence of Cressman: September 1, 2005
Evidence of Valila: August 18, 2005
Evidence of Oliver: August 18, 2005

61. The Saskatoon police did not advise David's lawyers or anyone else that Larry Fisher had been arrested in September, 1970, confessed to two Saskatoon sexual assaults in October, 1970, that Saskatoon Police had sworn out four informations charging him with the Saskatoon rapes which bracketed Gail Miller's murder, and that he pled guilty in December 1971, receiving no time in custody for the four offences. In 1990, the media learned some of this information. Detective Karst was interviewed and denied any knowledge of Larry Fisher, and said that he had never heard of him. When confronted with his signature on Larry Fisher's confessions (in Fort Garry) to assaults on two of the Saskatoon victims, Detective Karst admitted that the signature was his. He must, he said, had taken Larry Fisher's statements, but had no memory of any of it. It is submitted that Detective Karst's claims that he did not associate the Larry Fisher confessions to the Saskatoon serial rapes and their similarity to the Gail Miller murder, and that he forgot all about his involvement in the apprehension and conviction of Saskatoon's only known serial rapist within months of the conviction of David Milgaard is simply not credible. Detective Karst certainly remembered his involvement with Larry Fisher for several years afterwards, as he told Detective Weir about it.

62. The case against David Milgaard could, and should have been re-opened in the fall of 1970 when Larry Fisher confessed to the assaults on Ms [redacted] It should have been re-opened on December 30, 1970 when the decision was made to swear informations charging Larry Fisher with those two offences and with the rapes of Ms [redacted] and Ms [redacted] The three assaults which took place prior to the Gail Miller murder (Ms [redacted] had been linked to the Gail Miller murder within days of the murder. The rape of [redacted] which seems to have been Larry Fisher's celebration of David Milgaard's conviction, was alarmingly similar to the attack on Gail Miller. If Mr. Tallis had been notified of any of these developments, he could have tendered the evidence of Larry Fisher as fresh evidence on the appeal of his client's conviction in January 1971.

63. There was other potential fresh evidence which could have been available to present on David's appeal to the Court of Appeal or on his application to the Supreme Court in the fall of 1971. Mr. Kujawa was in possession of the reports of the R.C.M.P. officers who had assisted in the investigation of the Gail Miller murder which had been provided to him by the R.C.M.P. He testified that he did not bother to read them. They were never revealed to Milgaard's counsel, to the Department of Justice, or to the Supreme Court of Canada in 1992. The box of R.C.M.P. reports were delivered to this Commission by the Government of Saskatchewan in 2004, in preparation for this Inquiry. If Mr. Kujawa had read the reports, and disclosed their contents and acted upon them, as he should have, powerful evidence of similar fact connecting Larry Fisher to the murder of Gail Miller could have been available as early as 1971. In this regard, it is troubling that even now; Mr. Kujawa fails to recognize that he had a duty to turn over such material to Milgaard's counsel. He maintains that the Larry Fisher material is not relevant to the Gail Miller murder, that it could not admissible as similar fact in defence of David Milgaard, and that the Supreme Court was wrong to release David from custody and overturn his conviction for that reason in 1992. Therefore, even if Mr. Kujawa had read the materials he was provided in 1970-71, it is doubtful that he would have advised Mr. Tallis.

Non-disclosure and failure to follow up on Linda Fisher statement

64. David Milgaard, frustrated at repeated negative parole decisions, escaped during an escorted absence day release in the summer of 1980. He was captured 77 days later. Linda Fisher responded to media coverage of David's arrest and shooting in Toronto by going into the Saskatoon police station on August 28, 1980 and providing a statement in which she identified her former husband as the possible killer of Gail Miller. Inspector Wagner, who took her statement, found her to be both credible and reliable. He believed her statement should be investigated by someone who had had some involvement in and knowledge of the original murder investigation. It was assigned to Detective Parker for follow up. His investigation consisted of comparing Linda Fisher's description of her missing paring knife to the paring knife which had been used to stab Gail Miller. As the descriptions did not

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match, he did nothing further. In his evidence, Murray Brown described this as doing 'nothing':

> "Either you get a neutral, fresh set of eyes on it, or you run into problems where people are going to, as happened with the knife, say "well, in my view this amounts to nothing because the description doesn't [match]"
>
> *Q* Uh-huh.
>
> *A* I, with respect Mr. Commissioner, I still take that as meaning they did nothing about it. At the very least, someone should have inquired as to who Larry Fisher was, where he was at the time, and I mean there is a number of things that could have been done to follow that up. Did they know, for example, that when Linda Fisher came in, did they know that they were living in the very same place that the Cadrains had lived? That should have raised some suspicion, because one of the key pieces of evidence against David Milgaard was finding her wallet nearby."

The statement was filed in the Miller/Milgaard file and next saw the light of day in 1990, after an anonymous caller provided Larry Fisher's name to Milgaard counsel. At a minimum, Detective Parker (or someone else) should have re-interviewed Linda Fisher, obtained the criminal record of Larry Fisher, investigated the similarities between Larry Fisher's known rapes and the murder of Gail Miller, and ascertained Larry Fisher's whereabouts at the time of the murder. This, and a most cursory examination of the police investigative file on the Gail Miller murder would have resulted in the discovery that Larry Fisher was the serial rapist who had been terrorizing Saskatoon in the fall of 1968, and who had been suspected by the Saskatoon Police of having escalated to murder. Linda Fisher went to the police because she believed that David Milgaard might be innocent and she wanted to tell the authorities what she knew. She was right - David Milgaard *was* innocent, and he spent a further 12 years in jail after she came forward.

Evidence of Brown: Vol.183, September 14, 2006 38243/5 to 38245/24

65. Milgaard's lawyers should have been advised immediately that there was potential fresh evidence available in the form of an alternate suspect. This is particularly so as this occurred

at a time of massive media coverage over David's escape(s) and protestations of innocence. It appears that no prosecutors or anyone in the Attorney General's office was advised of the new development either. I f they were, they would have had an obligation to again review their files, and the police files, and disclose to Milgaard's counsel the police reports that suggested that the person [i.e. Larry Fisher] who had assaulted [redacted] had also killed Gail Miller.

66. 'Sydney Wilson' came forward to Milgaard's counsel in February, 1990 as a result of the media coverage of David's continuing claims of innocence. Although his identity has never been definitively determined, a number of circumstances suggest that Sydney Wilson was really Bruce Lafreniere. In the mid 1980's he had heard a story from a friend of his a third-hand story that Linda Fisher had information relevant to Larry Fisher's involvement in the murder of Gail Miller. Lafreniere testified:

> *A* Well I asked him if he told anybody.
>
> Q And what did he say?
>
> *A* He said he hadn't, and I said "well somebody has got to tell somebody".
>
> Q Okay. And why did you tell him that?
>
> *A* Well obviously, if there was an innocent person in jail, somebody had to be told.

Bruce Lafreniere attended his local police R.C.M.P. detachment and told Officer Symington what he had heard. He assumed it would be followed up. Officer Symington testified that he did not recall meeting with Bruce Lafreniere, but agreed that it was possible that it had occurred.

Evidence of Lafreniere: Vol. 71 September 15, 2005 14063/24 to 14071/24
Evidence of SymingtonVol.:74 September 21, 2005 14828/5 to 14838/24

67. There is substantial circumstantial evidence that the apprehension of Larry Fisher as the Saskatoon serial rapist was covered up, in the months and years following David Milgaard's conviction and appeal, and that that cover-up continued for over 20 years. While some of these unusual events, in isolation, may admit of innocent explanation, it defies belief that the cumulative circumstances of the non-disclosure of the apprehension of Larry Fisher and the evidence concerning him to David Milgaard was mere happenstance.

Developments during the s.690 phase

68. It is submitted that there were ample opportunities in 1970, 1971, 1980, and 1986 to re-open the case against David Milgaard, primarily in the area of the Larry Fisher evidence, but evidence was not disclosed to his counsel by the trial crown, the appeal crown, the Saskatoon Police, or the R.C.M.P. There were opportunities in 1970 and 1971 for the trial and appeal Crowns to disclose information in their possession which would have been helpful to David Milgaard. They did not disclose it to him for his use at trial or on appeal.

69. David Milgaard's application for leave to the Supreme Court of Canada was refused in November 1971. As of that date, his only recourse for justice was to apply to the Minister of Justice for 'mercy'. He received neither.

70. David was turned down repeatedly for parole. In 1986, he wrote to the Minister of Justice and explained that he had been wrongly imprisoned for a crime he had not committed, and wanted his case reviewed. A file was opened at the Ministry, and a letter advising him that he needed to submit an application with his fresh evidence was sent to him.

David Kyle, the former Chairman of the Criminal Cases Review Commission in the United Kingdom testified at the Inquiry. A letter such as that written by David to the Minister in 1986 would have triggered an independent investigation conducted by the Commission, starting with an investigation into how Nichol John and Ronald Wilson, in a three day period in May, 1969, came to suddenly change their exculpatory statements into extremely

inculpatory ones which did not accord with the known facts of the case. The investigation would have flowed into an examination of all facets of the case, including a thorough search for evidence which might have been overlooked, undisclosed, or unappreciated without some fresh information, at no cost to the Applicant.

71. Mr. Kyle testified that putting the onus to conduct an investigation and develop an application on the applicant claiming wrongful conviction or his supporters is generally not wise, and that a holistic approach to a review of the entirety of the case is what is required. The holistic approach is the one that was taken by the Milgaard family, their supporters, their lawyers, and various freelance and national journalists, authors, and members of the public. The first lawyer retained by the family was Gary Young who assisted in getting some documents from trial counsel, and attempted to get information from the police. Peter Carlyle-Gordge, who was writing a book about famous murder cases, assisted by getting access to Mr. Caldwell's file and going through it for new information. An analysis of the entire case demonstrated that the case against David Milgaard was extremely flawed. A former employer of David's came forward and provided funds to retain Tony Merchant to try and get the case re-opened. After reviewing the materials gathered and the arguments made, Mr. Merchant advised Joyce Milgaard that she would need a 'bombshell' to get the Minister of Justice to re-open the case - there would have to be new evidence, or perhaps a recanting witness.

72. Mr. Merchant was right, in that the rules created by the Minister of Justice as to what must be presented for a successful application require that the Applicant present fresh evidence. Mr. Kyle testified a common problem if Applicants must develop fresh evidence applications on their own is that they frequently attempt, at the outset, to get witnesses to recant, don't ask the right questions, don't have the right information, or have an approach or an identity which prevents them from obtaining the truth. There is a risk that they will also contaminate the witness' memories, rendering further or more focused interviews with them difficult or unproductive. Joyce Milgaard, following the advice received from set about trying to interview the witnesses who might recant. As David was innocent, it followed that the

witnesses who said he had killed Gail Miller or had confessed to doing so, were lying. She tried to persuade them to tell the truth, and made suggestions to them which might give them an opportunity to come clean. Mr. Carlyle-Gordge, and Paul Henderson made similar efforts. No one recanted.

73. The Milgaards also sought 'new' evidence of David's innocence which could be presented to the Minister. DNA testing, then in its infancy, was attempted, at their instance, by Mr. Ferris. As David had then asserted his innocence for 16 years, a holistic approach to a review of his case might suggest actual innocence by his willingness to undergo testing which, if he were guilty, would prove it conclusively. Mr. Ferris was unable to achieve a result, but did write a report which explained his analysis as to why the trial evidence itself demonstrated David's innocence. This report was the foundation for the first application for relief, while counsel and the Milgaards continued to try and develop a further bombshell.

74. Policies at the Ministry prevent a proactive approach to the examination of claims of wrongful conviction. Arbitrary rules which demand that an application must be >complete' before a review can commence cause unnecessary delay and uncertainty, particularly when the Applicant believes a strong case for innocence has been made out. Reviews within the Ministry are not reviews of the case as a whole, but rather consist of >testing' the value of the new evidence gathered and presented in written form by the Applicant. It must supplant the presumption of guilt which is the prism through which applications for ministerial relief are viewed. The 'testing' consists of cross-examining witnesses put forward by the Applicant, by career prosecutors in the Department of Justice. The utterly innocent person who has only one minor piece of new evidence is unable to achieve a remedy, because Ministerial policy is to presume that the jury verdict, if incorrect, would have been remedied on appeal. Thus the approach is to treat all applicants as correctly convicted, rightfully labeled guilty, until they can produce a >bombshell'. Nowhere in the process is an opportunity to have the circumstances of the case reviewed with a view to ascertaining whether or not the Applicant committed the crime. There can be no clearer demonstration of the worst aspects of this approach than in the Minister's letter of February 27, 1991 in which she dismissed all of the detailed analysis of the case for David's innocence.

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75. The Milgaard case should have been re-opened and the claim of innocence thoroughly investigated, in the manner described by Mr. Kyle in his evidence in 1986, when David wrote to the Minister of Justice. It should have been re-opened and thoroughly investigated when his counsel raised substantial arguments about the flaws in the case, and the utter impossibility of the Crown theory and the May 1969 statement of Nichol John being correct. And the fresh evidence relating to Larry Fisher should certainly have caused the case to be fully investigated as a possible wrongful conviction. Instead, Mr. Williams concentrated on trying to have Nichol John's supposedly lost memory revived under hypnosis, ignoring the arguments that undermined the Crown theory at trial, gathering new evidence which could be used against David, and diffusing the case against Larry Fisher as much as possible. This included directing Sergeant Pearson to stop his investigation of Larry Fisher. Sergeant Pearson was attempting to investigate Larry Fisher as a possible perpetrator of the murder. It is submitted that this is exactly what Sergeant Pearson should have been doing. He had reached the conclusion that Larry Fisher was a very good suspect. Mr. Williams concluded that there was not evidence to actually 'link' Larry Fisher directly to the crime. Perhaps if Larry Fisher had been revealed and investigated in 1970, 1971 or 1980, there would have been stronger and more readily available direct evidence. As it was, there was substantial similar fact evidence available. To the extent that he examined any of it, Mr. Williams conceded that he viewed potential similar fact evidence from a prosecution viewpoint, and not from the standard of whether it could raise a reasonable doubt about David Milgaard's guilt if a jury trying him heard it.

76. The similar fact evidence against Larry Fisher was substantial, persuasive and obvious. Bruce Lafreniere went to the police with his information about Linda Fisher's information because he thought there was a good possibility that Larry Fisher, the serial rapist who lived in the Cadrain house at the time of the murder, was the killer. Larry Fisher himself thought that he was a good suspect and told Mr. Williams so. Mr. Williams' only concern seemed to be that jailhouse justice might be meted out to Larry Fisher if other inmates learned his identity as the new suspect in the Milgaard case. The evidence developed by the Milgaard

family, with the volunteer assistance of Centurion Ministries and the unpaid labour of counsel, persuaded the media, members of the public, and the family of Gail Miller that the wrong person may have been convicted. It did not, however, persuade authorities in the Ministry of Justice, who only agreed to refer the case to the Supreme Court of Canada to quell public unrest that Canada's longest-serving prisoner was innocent, and to >prove' the conviction should remain untouched.

77. Although the only remedy for a person in David's situation in 1990 and 1991 was an application to the Federal Minister of Justice under Section 690, there was nothing preventing the Saskatchewan authorities from joining in and supporting his application. This was done by Manitoba Justice in the wrongful conviction case of James Driskell, and resulted in a rapid referral of the case for a re-trial. The Crown stayed the charge and ordered a provincial public inquiry into his wrongful conviction. The Commissioner in *Driskell* is to report on his findings and recommendations by the end of 2006. Murray Brown testified that if a wrongful conviction claimant made a substantial case to the Saskatchewan authorities, the case could be re-opened. It would, he said, have been sent back to the police to re-investigate. It takes little imagination to realize what conclusion the Saskatoon Police would have reached if this had happened in the Milgaard case.

78. Far from supporting David Milgaard's application to the Minister of Justice, Saskatchewan authorities or former representatives of the Crown or Saskatoon Police actively sought to undermine it and to resist the efforts to have the case referred to the Supreme Court. Mr. Kujawa, in an infamous quote, referred to David Milgaard as a >guilty kook'. When Alastair Logan, solicitor for the Guildford Four and the Maguire Seven, was trying to have his clients' cases reviewed and exonerations entered, he was the subject of an article in the London Times in which Lords Devlin and Scarman described him as:

> "one of those pilgrims of the law who, when Justice beckons, pick up the staff and the scrip and walk. Legal aid has long since dried up. He is walking still."

By contrast, Mr. Kujawa, as a member of the Saskatchewan legislature, publicly referred to Milgaard's counsel, who had worked for years and underwrote the substantial costs of the application, (for a total of $2000 received from Joyce Milgaard in 1986), as 'prostitute lawyers' and the media who reported on the developments in the case as 'whores'. In less colourful language in his cross-examination at this Inquiry, Mr. Brown, the director of appeals, accused David Milgaard's counsel of having publicly presented the allegations of Michael Breckinridge in September, 1992 "for the money". Brown was one of two counsel who represented the Saskatchewan Attorney General at the Supreme Court of Canada Reference and attempted to preserve David's wrongful conviction. In support of this, they called the preposterous evidence of Ben Dozenko, and sought to rely on the statements of Ron Sickle and Kenny Cadrain. In the wrongful conviction case of Stephen Truscott, the appeal Crowns sought to lead equally unreliable bootstrapping 'evidence'. The Ontario Court of Appeal described one of the Crown arguments as both 'novel and meritless'. It is submitted that it is representative of the lengths to which authorities will go to preserve against all reason, a conviction once secured.

Lord Devlin & Lord Scarman, Justice and the Guildford Four, THE TIMES (London), Nov. 30,1988, at 16
OCA ruling re Truscott Ontario Court of Appeal, October 18, 2006 at para 29

79. Section 690 gave the Minister of Justice to refer a case directly back to a trial court, or to a provincial Court of Appeal to be treated as if it were an appeal. In the latter case, fresh evidence would be admissible on appeal if it could reasonably be expected to have impacted the jury verdict. At the Supreme Court of Canada Reference, a similar test was applied: would a miscarriage of justice exist if David Milgaard's conviction was maintained. The Court answered in the affirmative - it would be a miscarriage of justice if he were not given an opportunity to present the fresh evidence to a jury. In rules created by the Ministry, an Applicant under Section 690 must successfully convince the Minister that there is a reasonable basis to conclude that a miscarriage of justice *likely* occurred in order to get his case referred to any level of court. The test created by the Department of Justice to *get* a court hearing is higher than the test that will be applied *at* the court hearing. In that Ministry officials and advisors twice concluded in 1991 that there was no basis to refer the case to the

Supreme Court, David Milgaard failed to show the Minister that there was a reasonable basis to conclude that there was *likely* a miscarriage of justice in his case. Yet, once public clamour necessitated the reference, the Supreme Court of Canada found there *was* a miscarriage of justice.

80. Once the Supreme Court of Canada rendered its judgment in April 1992, David was released from the penitentiary. Saskatchewan elected not to permit him to present his fresh evidence to a jury, and entered a stay of proceedings. He began a period of limbo which did not end until July 1997. In a report prepared for the Driskell Inquiry, Professor Roach of the University of Toronto explored the effects of this 'limbo' period on those who have been wrongly convicted, but not found to be 'innocent'. The report has been made an exhibit at this Inquiry. During the period after his conviction was overturned but before the DNA testing he sought, David was subjected to repeated slurs emanating from the authorities. Mr. Kujawa, in a televised argument with Mr. Asper, called the Supreme Court of Canada judgment 'silly' and defied anyone to show him a court in the land which would admit the evidence about Larry Fisher as similar fact. Five years later, the Crowns prosecuting Larry Fisher showed him the Saskatchewan trial court which would admit that very evidence, not at the instance of the defence (which has a lesser burden) but as similar fact *against* Larry Fisher. In 1995, Robert Mitchell, then the Minister of Justice in Saskatchewan, told a reporter for a national newspaper that David was properly convicted and 'I think he did it'. The ensuing lawsuit for slander was withdrawn as part of the compensation settlement in 1999.

Roach Report prepared for Driskell Inquiry
164842 Globe and Mail Article

Tunnel Vision

81. This case has demonstrated time and again that authorities who administer the system are generally very protective of the system, and the odds are stacked against the wrongful conviction claimant. The imbalance is tremendous. The Ministry approach to s.690 application was and is, that there is a presumption that an applicant was rightly convicted,

and must prove that the fresh evidence he has managed to locate displaces the presumption of guilt. David Milgaard's counsel twice sought funding to attempt to gather more evidence in support of his application and was twice denied. Against the Applicant's unfunded efforts are the limitless resources of the Federal and Provincial Governments and the police departments who are, or who become involved. An applicant is required to waive solicitor-client privilege. It is reasonable that the Minister would want to know whether or not someone claiming innocence has confessed his guilt to his lawyer. A limited waiver would accomplish this goal. In David's case, he waived privilege (twice). His lawyer was interviewed by Department of Justice officials who refused to tell him what his lawyer had said. It was used, not as a precaution to ensure that he had not confessed to his lawyer, but to gather any possible further information which could be used to enhance the case against him, or to undermine his credibility. That is exactly how it was used at the Supreme Court of Canada Reference: to pit David against his former lawyer in a credibility contest. The overall picture, that David had unwaveringly maintained his innocence for 23 years was ignored. The Minister of Justice to this day refuses to waive their own privilege and allow the Commission of Inquiry into the wrongful conviction of David Milgaard to find out what happened while his application was assessed. The irony, and the unfairness, is tremendous.
333676 Memo

82. An objective evaluation of a case, a re-investigation, or a re-opening of an investigation cannot presume guilt. This is exactly what was done at every level of David Milgaard's long fight for exoneration. In investigating Larry Fisher, Sergeant Pearson worked alone, and reached the conclusion that Fisher was a very good suspect. Inspector Sawatsky headed the RCMP investigation ordered in 1992, and admitted that he began his task with the presumption that David had killed Gail Miller. None of the twelve officers working on the Flicker investigation found Larry Fisher to be a credible suspect. None of them were curious as to what caused Ronald Wilson and Nichol John to recant their *original* statements, but major efforts were expended to try and see if Joyce Milgaard had paid Ronald Wilson to recant his *second* statement (essentially reverting to his original statement). There was little interest in the circumstances by which powerful exculpatory evidence did not reach David

Milgaard's counsel, but plenty of interest in who, in the Saskatoon police department had assisted Milgaard in the 1980's. The Saskatoon police failure to document a single word in any report about the procedures they witnessed being applied to Nichol John and Ronald Wilson to transform their evidence over a three day period in May of 1969 were not the subject of any concern, yet the inability of Paul Henderson to produce the tape recording of his conversation with Ronald Wilson (a conversation which Ronald Wilson recounted as innocuous) during which Ronald Wilson recanted his inculpatory statement was regarded as something sinister.

83. The ways in which those with a vested interest in preserving David Milgaard's conviction viewed the similar fact evidence concerning Larry Fisher is illustrative of a serious tunnel vision problem which is pervasive and unshakeable. By contrast, those whose faith in the system was not tied to preserving a conviction at all costs were able to readily see the obvious. The trial Crown (Caldwell), appeal Crown (Kujawa), director of appeals (Brown), the lead investigator (Karst), department of justice investigator (Williams), the Minister of Justice (Kim Campbell and her legal advisors), and the investigators into allegations of wrongdoing by the authorities (Sawatsky and his team) all failed to see or to acknowledge that Larry Fisher's *modus operandi* was unique, and readily identifiable, and bore a strong resemblance to the attack on Gail Miller. Mr. Brown even referred to Larry Fisher as a 'garden variety' rapist. Those whose task was not to preserve a conviction: the media, the public, Gail Miller's family, and the Supreme Court of Canada allowed that a jury trying David Milgaard and hearing of Larry Fisher's pattern might well have at the least a reasonable doubt about his guilt. The jury trying Larry Fisher for the murder of Gail Miller, having heard the same similar fact evidence had no doubt about *his* guilt.

84. Several members of Saskatoon police force, on an anonymous basis, assisted the Milgaard efforts. Once this became known, investigations focused on their identities and motives, rather than on why there was suppression of this most significant other suspect. As public support for David Milgaard grew, members of the public wrote to the newspapers and directly to the Chief of Police, and to the Attorney General. The responses to the concerns of

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the public were universally dismissive, and stressed that the conviction was sound, the investigation and prosecution flawless, there were no other suspects, and the right man was in jail.

Evidence of Vanin January 19, 2006, January 23, 2006, January 24, 2006
027210 Penkala letter, April 1991

85. It is beyond co-incidence that all of the Larry Fisher information lay buried in the police and prosecution. That it was deliberately ignored because it could have been helpful to the convicted 'killer' is an inescapable conclusion. It is submitted that the Saskatoon police insistence that they had the 'right' person in David Milgaard represented tunnel vision of the worst kind and prevented them from looking at the case, and particularly at new developments, from an objective viewpoint. This may have been the result of fears of lawsuits, loss of reputation and loss of public confidence. No one paid a higher price than David Milgaard. Mr. Kujawa was also in possession of a large quantity of material received from the R.C.M.P., detailing their involvement in the original murder investigation. These reports contain numerous references to the linkage of the serial rapist to the murder of Gail Miller. Mr. Kujawa quite proudly proclaims that he never bothered to read them. He certainly did not disclose them. Having read them now, he equally flippantly testified that if he had read them, he still would not have disclosed them to Milgaard's counsel.

86. The Supreme Court of Canada's ruling in April 1992 should have been a signal to authorities to re-open the investigation into Gail Miller's murder, and ought to have raised concerns that perhaps an innocent teenager had been wrongly convicted. Yet those who had the power to do something about it were concerned only that the Supreme Court had held that it had not been presented with evidence of wrongdoing (in fact, Milgaard counsel had not even argued wrongdoing), as if it was some sort of vindication for the failures which had prevented David Milgaard access to evidence which fairness required he be permitted to raise in his defence. The quashing of his conviction was not a release on a mere technicality, and should not have been treated as if it was.

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87. The response to the DNA testing and to preparation for its imminent results in the spring and summer of 1997 reveals persistent tunnel vision. The R.C.M.P. prepared draft responses to potential results. The possibility that David might be eliminated as a possible donor of the DNA was not one of the potential results for which they drafted a response. The government of Saskatchewan also drafted responses to potential results. In the event that David was not eliminated as the donor of the semen, the response was to be that the result confirmed what they already knew; in the event that he was eliminated as the donor, the response was to be that perhaps he had killed Gail Miller, but not raped her. As it happened, none of those responses were given, possibly because the results conclusively established Larry Fisher as the assailant. Mr. Caldwell and Mr. Brown were shocked at the result. They should not have been, but their failure to examine the case objectively had prevented them from seeing the flaws, warning signs and inconsistencies which had been present in the case against David Milgaard since 1969. Counsel for Mr. Caldwell and Mr. Kujawa wrote in a memo that Mr. Caldwell was adjusting to the new reality, but Mr. Kujawa was not. He warned that Mr. Kujawa was to be kept silent at the hastily arranged press conference to announce, through counsel, their apologies. The reaction of the Saskatoon police department to the DNA evidence which exonerated David Milgaard and inculpated Larry Fisher is the single most obvious example of persistent and systemic tunnel vision. The officers involved in the case had long retired, as had those who had direct involvement with Larry Fisher. Nonetheless, the attitude of the police department was to ignore the implications of the DNA testing until they had time to 'study' it. This compounded the insult to Milgaard, the victims of Larry Fisher, and Gail Miller's family. Not only had Larry Fisher gotten away with murder for 28 years, he was not even viewed as a suspect when the DNA evidence pointed directly to him. Ultimately, the Chief of Police acknowledged that Saskatoon police were unable to be objective, and requested that the re-opened investigation into Gail Miller's murder be assigned to another police agency.

033005 Memo re DNA results and press conference

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CONCLUSION

The 1989 Commission into Donald Marshall Jr.'s wrongful conviction said that the "criminal justice system had failed him at every turn." The same can be said of David Milgaard. He was released from custody and later exonerated because of the dedication of individuals and some happy accidents, not because the system worked. The criminal justice system missed many opportunities to correct itself in his case, and many opportunities when the case could have been re-opened were missed. When the system fails, as it failed David, it also fails the victim's family, and the public, who have a right and an expectation that the right person will be put away and the innocent freed.

Marshall Inquiry Report, 1989

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RECOMMENDATIONS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE IN SASKATCHEWAN

Investigation of Claims of Wrongful Conviction

Independent Review Board

1. The Section 690 (now s.696.1) process has been the subject of complaint for decades and should be replaced by an independent review board modeled after the UK Criminal Cases Review Commission. In 1989, the creation of an independent review board was the number one recommendation of the Marshall Report. In 1997, the Morin Report recommended the creation of an independent board to replace the ministerial powers exercised under then s.690. Unlike Donald Marshall and David Milgaard, Guy Paul Morin was exonerated by DNA testing before he had to have recourse to a Section 690 application. Commissioner Kaufman heard the evidence of David Kyle (and others) during the systemic phase, and recognized the important systemic need for the creation of an independent board to investigate and act on claims of wrongful conviction. Section 696.1, the revamped s.690, to a large extent simply codified the existing practices. As draft legislation, it was the subject of debate in the Standing Committee on Justice and Human Rights which, in the fall of October, 2001 heard evidence from the then Minister of Justice and some of her employees. Joyce Milgaard also testified before the Committee that the proposed legislation, if it had been in force during the process to free her son, would not have saved him one day of wrongful incarceration. The Committee concluded that the minor changes reflected in the draft legislation were better than no changes at all, and that major substantive change should await the report of the then pending Milgaard Inquiry.

   Section 696.1 is now in for force. Williams acknowledged in his evidence that the manner of review is much the same as it was in the 1980's and 1990's. It is still reactive, applicant-driven, and there is no funding for applicants, who have the burden of convincing the Minister. In his evidence, Kyle reviewed the history and accomplishments of the UK Criminal Cases Review Commission. More importantly, he explained in some detail how David Milgaard's cries of innocence would have been handled by the CCRC. His evidence,

in its entirety, demonstrates how such a review board would have provided an unbiased, complete re-investigation of the case which doubtlessly would have freed David years earlier.

Evidence of Kyle: Vol.191 October 2, 2006 pp.40012/5 to 40155/15; Vol.192 October 3, 2006 pp.40161/5 to 40446/11
340792 Commons Standing Committee on Justice and Human Rights, October 2, 2001
340801 Commons Standing Committee on Justice and Human Rights, October 3, 2001
340831 Commons Standing Committee on Justice and Human Rights, October 4, 2001
340891 The 2005/2006 Annual Report of the Criminal Cases Review Commission (United Kingdom)
340874 - Parliamentary Research Branch Report January 1992 prepare by Philip Rosen ("Wrongful Convictions in the Justice System")
Morin Report, Recommendation #117
Marshall Report, Recommendation #1

Creation of a Provincial Review Board

2. The Department of Justice has rebuffed all attempts thus far to create a fully independent board as set out in Recommendation 1. If this resistance continues, the Government of Saskatchewan should consider the creation of a fully independent provincial board. This body would operate, as does the CCRC - it would be independent, fully funded, proactive and conduct thorough examination of the cases brought before it. At the conclusion of its investigation, if it appears that a re-trial or a reference to an appellate court is warranted in the interests of fairness and justice, the board would prepare the Section 690 application and present it to the Minister of Justice, with the board's recommendation that the application be allowed and the appropriate referral made.

Funding for Claimants of Wrongful Conviction

3. David Milgaard, like all applicants for Ministerial relief before him, and all those afterwards, was not entitled to any financial assistance in the investigation, development or presentation of his Section 690 application, for which he had the entire burden of proof. He may have been the single most fortunate in that his mother, and the compelling arguments in his case, garnered him much donated assistance. It is, nonetheless, unacceptable that an applicant for justice must rely on the goodwill and conscience of members of the public, lawyers willing to work pro bono and under-write disbursements, experts who will donate their services, and the complete financial resources of the applicant's family. Ontario Legal Aid has, for some

years, granted legal aid certificates to Ontario victims of wrongful conviction who wish to make a Section 690 application, but even that is not available until a volunteer lawyer, or group such as AIDWYC has conducted, for no remuneration, sufficient investigation to be able to persuade Legal Aid that there is good reason to believe that an application to the Minister of Justice will be made. At a minimum, Saskatchewan should have the same policy.

Declarations of Innocence

4. A mechanism should be devised for an applicant who has had his conviction quashed to obtain a declaration of innocence. While an innocence hearing, as advocated in Roach's paper produced for the Driskell Inquiry, has some attraction, the area needs further study and dialogue with concerned stakeholders. It might be said that both the *Milgaard* and *Truscott* References to the Supreme Court of Canada were, in effect, innocence hearings, but both raise serious concerns about the fairness or utility of assessing the credibility of the evidence of the applicant who had nothing to offer evidentially but a denial of culpability, and was testifying decades later, after years in prison, about what was really a non-event in his life.

Roach report, exhibit to the Driskell Inquiry
Lamer Report into Newfoundland Wrongful Convictions, p.317 to 325

Counseling and Re-integration Assistance

5. Offenders who are released on parole generally are prepared within the institution for release, and have their re-integration monitored and assistance given to them upon release. Those who are released having made a successful application for review, are simply let out of prison, often after many years, with little preparation, no employment prospects and no financial or emotional support beyond that of their own families. A program should be put in place by which those released after successful post-judicial proceedings are given the necessary supports to facilitate their re-entry into society.

Disclosure

6. Lack of disclosure is a leading cause of wrongful convictions, and it is often difficult to unring the bell of conviction. Prevention is the better route, and the following recommendations are made to reduce the risk of wrongful conviction.

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Pre-trial Disclosure from Police Departments

7. Police departments must be required to disclose all information generated in the investigation to the Crown, whether such information is requested or not. There must be accountability for failure to do so.

In the Milgaard case, much of the information relevant to the police and prosecution theory, whether pro or con, was disclosed to the Crown. Some of it was not. The Crown did not seek out additional information, or seek to determine if disclosure was complete. Information, in the form of police reports, notes and other documents which would have been extremely helpful to the defence lay buried in the Saskatoon and RCMP police departments for years, and in some cases, decades.

Pre-Trial and Appellate Disclosure from the Crown to the Defence

8. The Crown's disclosure obligations are mandated. There is, however, little or no accountability for failure to fulfill the obligation. The achievement of a conviction, particularly in a high profile case (the most likely to result in wrongful convictions) is often rewarded by promotion, or by assignment to other difficult or high profile prosecutions. In the *Driskell* case, in Manitoba, the Crown attorney who prosecuted the case has four wrongful convictions on his resume, all achieved at least in part by a lack of disclosure to the defence. Saskatchewan should ensure that there is ongoing review to ensure that the Crown's disclosure obligations are met, with severe and meaningful sanctions if they are not.

Post Conviction Disclosure

9. Legitimate requests for disclosure after the Appellate process is completed should be honoured. In the process of fulfilling such requests, a Crown who was not involved in the trial or appellate process of that case should review the file to ensure that in addition to the specific request that any other appropriate disclosure was made. A process of accountability for failure to meet this obligation should be put in place.

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Post Conviction Disclosure (New Evidence)

10. In the Milgaard case, there was new evidence available as early as October 1970 (when Larry Fisher confessed to a number of rapes in Saskatoon), which would have very likely, have mitigated the wrong done to David Milgaard (who had been convicted of a similar rape/murder within blocks of the rapes). A senior officer, preferably one who was not involved in the case should review ongoing and completed cases (where a conviction has been challenged) to determine whether evidence generated in a new case is or might be relevant to the proper disposition of a completed case.

11. New evidence which directly impacted the Milgaard case was received directly by the Saskatoon Police in 1980 (Linda Fisher's statement), and by the RCMP in 1986 (Bruce Lafreniere's information about Linda Fisher). The new evidence was neither investigated nor disclosed. There ought to be a designated officer within each police department assigned as the post-conviction disclosure officer, whose task will be to ensure immediate disclosure to the Crown, and to ensure that the information is investigated. If the disclosure officer was personally involved in the original prosecution, a replacement officer should be designated to fulfill this obligation.

12. There should be a similar disclosure officer within the Attorney General's office to receive disclosure of new evidence from the police department, and to make immediate disclosure of the new information to the person previously convicted of the offence. This obligation may be fulfilled by making disclosure to his counsel. The disclosure officer must not have been involved in the trial or appeal process for the case concerned.

13. It must be recognized and made clear to all employees of police departments and justice officials, that the obligation to disclose relevant material is ongoing, and is not affected by the termination of the formal legal process.

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Education

Wrongful Convictions

14. DNA testing has been of tremendous value in overturning wrongful convictions in that it is capable of proving conclusive factual innocence. There remain, however, many cases in which forensic testing is not available, or would not be determinative, and yet the convicted person is factually innocence. Care must be taken that the spectacular achievement of DNA exonerations does not become the new bar which a claimant of wrongful conviction must meet. Illustrative of such a problem is the reaction in the Milgaard case by senior police and Crown officials who were >stunned' or >rocked' when they received the results of the DNA testing which was conducted in 1997. Without such successful testing, they would have remained locked in their position that David Milgaard was guilty of the murder of Gail Miller, despite the many red flags signifying that he was wrongly convicted.

15. Police cadets and police officers should be educated on the causes, process and prevention of wrongful conviction. This education should be ongoing. If there is currently a course in existence, its contents should be reviewed and evaluated regularly.

16. Crown Attorneys should similarly be educated, on an ongoing basis, on the causes, process and prevention of wrongful conviction. If there is currently a course in existence, its contents should be reviewed and evaluated regularly.

17. Ongoing judicial education should also include a course on wrongful conviction, and if such a course is already in existence, its contents should be reviewed regularly.

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Continuing Legal Education

18. Senior Crown Attorneys, senior police officers, and Department of Justice officials in the Milgaard case demonstrated in their evidence that their education and legal knowledge was sadly lacking, particularly as regards similar fact evidence, and its admissibility at the instance of the defence. There should be ongoing legal education to ensure that those charged with disclosure and prosecution duties are up to date with the law in this, and other areas.

Trial Procedure

Unsavoury Witnesses

19. Unsavoury witness and accomplice evidence warnings are designed and are a part of the law in order to minimize the chances that a jury will place undue reliance on evidence emanating from a class of people whose evidence has been shown to be a major cause of wrongful conviction.

20. Crown Attorneys should be barred from structuring and presenting their case in such a way as to avoid the jury receiving a warranted unsavoury witness or accomplice evidence warning in order to increase their chances of securing a conviction.

21. Witnesses who are facing outstanding charges or sentencing should have their arrangements with the Crown documented, clearly understood, and disclosed. Further, contact between the Crown Attorney and the police or prosecutor in charge of the witness' case must be fully documented and disclosed.

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Statements of the Accused

22. The trial judge should have the discretion to order the prosecution to place before the jury the statement of the accused, or the statement of any other witness, where the jury might otherwise be misled.

Witness Preparation

23. Wherever possible, witness interviews and statements should be videotaped. In particular, when efforts are made to have witnesses recant exculpatory statements, all dealings with them must be videotaped and fully documented.

The Court of Appeal

24. Mr. Justice Tallis gave evidence at this Inquiry as to some of his views on the need for broader powers in the Court of Appeal. These suggestions should receive very serious consideration and steps taken to implement them wherever possible.

25. In particular, the argument that >the jury heard it' is often raised as a bar to successive attempts to review a wrongful conviction. The courts must be more open to reviewing even that which a jury has heard and rendered a verdict on. Confirmed cases of wrongful conviction have demonstrated that the fact that a jury heard an argument or heard evidence on a particular issue does not mean they reached the right decision.

26. Recanting witnesses are given short-shrift at most appellate proceedings both here and in the United Kingdom, as indicated by the evidence of Kyle in this Inquiry. The treatment of the recantation of Ronald Wilson in this case was particularly problematic. Rather than dismissing a recantation of inculpatory evidence as not credible, more scrutiny should be applied to the circumstances underlying the original inculpatory statement, particularly where, as here, the original inculpatory statement was itself a recantation of an earlier exculpatory one, to which the witness has returned.

Notification to Victims

27. That the victims of Larry Fisher were forced to look over their shoulders for 20 years compounded the harm done to them by Fisher. Police and prosecution procedures must be in place to ensure that victims of crime are notified as to the apprehension and/or conviction of offenders, particularly where the offence was one of violence and degradation.

Forensic Testing

28. All authorities, and the courts, should be directed to preserve, indefinitely, all exhibits which may potentially afford forensic testing in the future.

29. In cases of sexual assault, no forensic exhibits should be disposed of. David Milgaard's innocence could have been proven by DNA testing years before it was, if the vaginal aspirate taken from the body of Gail Miller had not been thrown out immediately after the autopsy.

30. DNA testing, at the expense of the state, must be undertaken at the instance of the applicant who is claiming wrongful conviction, where such testing has the potential to exclude him as the perpetrator of a crime.

31. Funding of such DNA testing must include the attendance and/or participant of an expert on behalf of the applicant, and such testing must proceed at an agreed upon laboratory, preferably with a neutral expert in attendance as well.

32. Post-conviction DNA testing should follow protocols agreed to in advance by the parties. Wherever possible, such testing should be conducted "blind", without the scientists knowing the DNA profile of the applicant until a profile of the assailant is first obtained. This recommendation arises from the *Morin* case, where the expert on behalf of the Crown at the 1991 testing purported to 'see' a result which matched part of Morin's known profile, while the neutral expert and the defence expert did not. When the successful DNA testing was completed in 1995, it demonstrated that the 1991 expert for the Crown had 'seen' what he wanted to see, and there was no match at all.

33. The Government of Saskatchewan should implement a committee to oversee the implementation of such recommendations made by this Commission. The committee should have an obligation to report publicly and annually on the implementation of the recommendations. To the extent that recommendations are not implemented, the reasons for the non-implementation or the delay in implementation should be publicly released.

All of which is respectfully submitted.

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Hersh Wolch, Q.C. Counsel for David Milgaard	Joanne McLean Counsel for Joyce Milgaard

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