THE INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW

20TH INTERNATIONAL CONFERENCE

Justice for All - Victims, Defendants, Prisoners and the Community

Brisbane Queensland, Australia, July 2 – 6, 2006

Workshop A-3

July 3, 2006 1345 – 1730

Wrongful Convictions: Some Case Studies
Preventing Miscarriages of Justice

BACKGROUND PAPER

Neil Boyd and Kim Rossmo

Milgaard v. The Queen
Finding Justice – Problems and Process

Seminar Presenter:

Donald J. Sorochan, Q.C.
Miller Thomson LLP
Barristers and Solicitors
Vancouver, B.C., Canada

Milgaard v. The Queen: Finding Justice - Problems, and Process

Neil Boyd
Professor
School of Criminology
Simon Fraser University

D. Kim Rossmo
Ph.D candidate
School of Criminology
Simon Fraser University

October, 1991

It was 42 below freezing in Saskatoon on the morning of January 31, 1969 and visibility was poor because of ice crystals in the air. It was dark when Gail Miller left her rooming house at about seven a.m, wearing her black winter coat. She was a 20 year old nursing assistant on her way to work. She was walking to a bus stop a block and a half away when she was either abducted or offered a ride by the person who killed her. She was stabbed repeatedly in the back and chest with a small paring knife, and sexually assaulted. She died within 30 minutes of leaving her home.

Her body was found about an hour later, just after dawn, in the snowy back alley between her rooming house and the bus stop. One year to the day after this crime, David Edgar Milgaard was convicted of the non-capital murder of Gail Miller; he has since served almost 22 years of his life sentence. Milgaard, a 16 year old believer in "free love" and psychedelic drug use, had arrived in Saskatoon from Regina on the same morning that the murder occurred. He was travelling in a car with two like-minded companions, Nichol John, and Ron Wilson; Wilson was driving. The three teenagers were looking for the home of their friend, Albert "Shorty" Cadrain. They left the city, with Albert Cadrain, shortly after noon.

David Milgaard's three companions gave evidence at trial that implicated him in the murder. Albert Cadrain said that he saw blood on Milgaard's clothes that morning. Ron Wilson said that he also saw blood on David Milgaard's clothes, and that Milgaard was carrying a paring knife with a reddish brown handle in the car between Regina and Saskatoon. Nichol John told police that she had seen Milgaard stabbing a woman. At trial she said that she could not recall such an incident, but the jury was made aware of her statement. Just before the close of the trial, the Crown prosecutor introduced two witnesses - Craig Melnyk and George Lapchuk - who told of Milgaard's re-enactment of the crime months later in a Regina motel room.

In January of 1971 the Saskatchewan Court of Appeal dismissed Milgaard's appeal against his conviction, and in November of that year leave to appeal to the Supreme Court of Canada was denied.[1] In December of 1988 counsel for Milgaard made an application under then section 617 of the Criminal Code to the

---

[1] R. v. Milgaard, 2 Canadian Criminal Cases (2d) 206.

Minister of Justice for reconsideration of the case.[2] This application was ultimately refused in February of 1991.[3] In August of 1991 counsel for Milgaard made a second application to the Minister, under the existing section 690 of the Code.[4]

The Case for the Crown at Trial

The theory put to the jury by the Crown prosecutor was that the crime probably began as a purse snatching incident, and later turned into a rape and a murder.[5] Crown counsel T.D.R. Caldwell called 45 witnesses in the nine day trial, devoting about two-thirds of his time to the statements of witnesses, and the remainder to the forensic evidence.[6] Counsel Cal Tallis and Ian Disbery did not call any witnesses for the defence.

(A) The Statements of Witnesses

At about a quarter to seven Gail Miller was seen on the second floor of her three story rooming house; she was dressed in her nurse's uniform, but had neither her boots nor her coat on. Adeline Nyczai, who lived on the third floor, testified that she heard someone leave the building from the second floor, presumably Gail Miller, at about seven.[7]

There were only two witnesses who were outdoors in the vicinity of the crime at about the time that it was occurring - church caretaker Henry Diewald, and Maria Indyk, a parishioner of the church. Henry Diewald lived in the rectory of St. Mary's Church (see Map 1) and every morning, at about seven o'clock, he would walk from the rectory to the church to open it for early parishioners. On the morning of January 31 he saw headlights in the icy mist, facing him from the alley across Avenue O. The headlights were about fifty feet from where Gail Miller's body was found. When he returned

---

2 Letter from Hersh Wolch to Rt. Honourable Joe Clark, Minister of Justice, December 28, 1988.

3 Letter from A. Kim Campbell, Minister of Justice, to Hersh Wolch, February 27, 1991.

4 Letter from Hersh Wolch to the Honourable Kim Campbell, Minister of Justice, August 14, 1991, pp.1-2.

5 Saskatoon Star-Phoenix, January 30, 1970, p.4.

6 Trial transcript, Court of Queen's Bench, Her Majesty the Queen against David Edgar Milgaard, pp. 1-1266.

7 Testimony of Adeline Nyczai, Trial transcript, pp.631-644.

from the church and walked back to the rectory about ten minutes later, he noticed that the headlights were still there. At trial he indicated that he saw a person go from the driver's side in front of the headlights (towards the direction where the body was found), and back again. At the preliminary hearing he indicated that this person was a little over five feet in height. [8]

Mrs. Indyk testified that she had gone to St. Mary's Church shortly after seven a.m., and found it closed. She saw two women walking separately north on Avenue O (see Map 1), hurrying in the cold. She testified that she hadn't seen any headlights, and that she didn't know when the church had been opened. She said that she spent about ten minutes in the church, arriving at her work across the street at about twenty minutes to eight.

Mrs. Indyk was in the church, then, somewhere between 7:20 and 7:35 on the morning of Gail Miller's murder. What is unclear is how long Mrs. Indyk was outdoors in the vicinity of the crime, before going in to the church. She testified at trial that her husband would usually drop her at Spotless Cleaners, and that while they were driving over the 19th Street bridge, she saw a clock that read five minutes after seven.

It is a seven to 10 minute drive from the 19th Street bridge to Spotless Cleaners, depending on the road conditions. Given the ice fog of January 31, 1969 Mrs. Indyk probably arrived at Spotless Cleaners at about 7:15, and at the church a few minutes later.

Mrs. Indyk's testimony about finding the church closed sometime after 7:15 conflicts with that given by the church caretaker, Henry Diewald. He testified, at both the preliminary hearing and the trial, that he opened the church at seven a.m., and that he saw headlights in the alley at 7 and again at 7:10. [9]

---

[8] Testimony of Henry Diewald, Trial transcript, pp.654-662; testimony of Henry Diewald, Preliminary hearing transcript, pp.201-217.

[9] With the benefit of hindsight, it is possible to find consistency in these statements. Maria Indyk has indicated that she never found the door of the church locked. (Maria Indyk, personal communication, October, 1991). After finding that Spotless Cleaners was locked, she went across 20th Street and in to the church. This possibility of confusing Spotless Cleaners with the church can be bolstered by considering Mrs. Indyk's difficulties with English, and by looking carefully at Mrs. Indyk's testimony at trial. See, particularly, pages 1178, 1184.

The evidence established, in any event, that Henry Diewald and Maria Indyk were in the vicinity of the crime at different times, that a car may have been parked in the alley for about ten minutes, and that two women were likely walking north on Avenue 'O' at about 7:20 a.m.

The key witnesses in the conviction of David Milgaard were his two companions in the car on that cold morning in January, Ron Wilson and Nichol John; their testimony took almost three days of the nine day trial. Ron Wilson testified that he, Nichol John, and David Milgaard drove into Saskatoon at about 6:30 a.m. Not long after their arrival they were driving south on what he later learned was either Avenue 'N' or 'O', when they noticed a young woman in a black coat, also walking south along the sidewalk. They asked her for directions and continued to drive to the end of the block, where, in the process of turning, they became stuck in the ice in the middle of the intersection.

Initially, Ron Wilson tried to drive the car out of the snow, but his summer tires continued to spin on the ice. He testified at the preliminary hearing that he and David Milgaard then got out of the car and spent two to three minutes pushing the car both forwards and backwards, but without any luck.[10] They ultimately decided that they would look for help along the street, heading off in different directions.

At the preliminary hearing Ron Wilson said that he was away from the car for about five minutes before returning to find Nichol John hysterical. David Milgaard was away from the car for no more than 10 minutes. [11] Wilson varied that testimony at trial, saying that he was away from the car for about 10 minutes and that he found Nichol John hysterical on his return. Five more minutes passed before David Milgaard returned to the car, breathing heavily.

Nichol John didn't testify at the preliminary hearing; at trial she said that their car had been stuck in the ice, but not at the location claimed by Ron Wilson. She testified that they had been

---

10 Direct examination of Ronald Dale Wilson, Trial transcript p.195, Preliminary hearing transcript, p.509.

11 Cross examination of Ronald Dale Wilson, Preliminary hearing transcript, pp.507-515.

stuck in the alley behind the funeral home, within footsteps of the murder scene. She testified that both Wilson and Milgaard went for help and returned in "a few minutes". She could not remember who returned first, and did not indicate that she was hysterical at the time.[12]

Nichol John was cross-examined at trial by the prosecution, with respect to a statement that she had made to police on May 24, 1969. In that statement Nichol John had indicated that David Milgaard left the car, tried to snatch the purse of a woman, and then stabbed her repeatedly, just in front of the car. At trial she said that she couldn't remember any stabbing or any purse snatching. Questioned by Chief Justice Bence, she responded in the following manner.

Q. Do you remember any part of it?

A. No.

Q. Are you saying you didn't tell Sergeant Mackie that?

A. I'm saying I don't remember if I did or didn't.

Q. Well, if you did see the accused grab the purse it's something you would have remembered, isn't it? Isn't it? Witness?

A. I don't know.

Q. Take a drink of water and stop crying.

A. If I could tell you what happened I'd tell you. I don't know. I can't remember....[13]

The evidence of Nichol John conflicted with that given by Ron Wilson; she said that their car had been stuck in a back alley; he was very certain that they had been stuck in the middle of a four way intersection. He said that David Milgaard was away from the car between 10 and 15 minutes; Nichol John said it was only "a few minutes". Police found no tire tracks in the back alley to suggest that

---

12 Testimony of Nichol John, Trial transcript, pp.390-400.

13 Testimony of Nichol John, Trial transcript, p. 471.

a car had been stuck, spinning its wheels. Police also did not find any signs of blood, despite an extensive search in that lane.

Shortly after 7 a.m., after getting unstuck, Ron Wilson, Nichol John, and David Milgaard drove up to the Traveleer motel (see Map 2), about a mile away from where Gail Miller's body was found. David Milgaard went into the motel and obtained directions and a map from the motel manager, Robert Rasmussen. Rasmussen testified that Milgaard spent about five minutes in the motel with him; he said that he hadn't noticed anything unusual about Milgaard or about his clothes, except that he was wearing only socks on his feet. He testified that David was polite, thanking him for the map.

Shortly before 7:30 a.m. the three teenagers left the motel and set out again to find the home of their friend, Albert Cadrain. At about 7:30 they became stuck in a back alley about ten blocks from the motel, behind a car that was also stuck in the ice. The couple that owned the car, the Danchuks, ultimately called a service station for assistance and invited Wilson, Milgaard and John into their home to warm up.

The Danchuks testified that lighting had been good in their home, and that they had not noticed anything unusual about David Milgaard or seen anything on his clothes during the hour that they spent together that morning. No witness observed that David Milgaard's clothing was wet, a likely outcome of a struggle in a snowbank. Walter Danchuk said that Milgaard was polite and softspoken, that he had been doing most of the talking for the group - about selling magazines, and about trying to find their friend, Albert Cadrain.[14]

Shortly after nine that morning Milgaard, Wilson, and John arrived at the home of the Cadrains, located about a block and a half away from where Gail Miller's body was found. Albert Cadrain testified that he paid to have Ron Wilson's car repaired at a local service station. The car was ready a little after noon and the four teenagers - Wilson, Cadrain, John, and Milgaard - then left Saskatoon and travelled west to Calgary and Edmonton, in search of illegal drugs. They returned from this trip a few days later, each ultimately going their separate ways.

---

14 Cross-examination of Walter J. Danchuk, Trial transcript, pp.680-685.

In early March, a little over a month after the murder, Albert Cadrain went to Saskatoon police, and told them that he had seen blood on David Milgaard's clothes the morning of the murder. Cadrain told the court that he first heard about Gail Miller's murder in February, when he was questioned by Regina police about the crime. He testified that five Regina plain clothes officers strip searched him, rectally examined him and asked him about the morning that Gail Miller had been killed. He said that he laughed at the suggestion either he, Milgaard or Wilson could be responsible. He was charged with vagrancy, convicted, and sentenced to a week in jail.[15]

To the police, initially suspicious of Cadrain's story, one startling fact must have leapt out. Milgaard had been within a block of the crime scene on the day of the murder. Furthermore, a trail of physical evidence led from Gail Miller's body to the Cadrain house (see Map 1). When first contacted by police in March, both Ron Wilson and Nichol John consistently said that they had no knowledge of Gail Miller's murder, and that neither they nor David Milgaard could be responsible. Ron Wilson, serving a jail sentence for theft at the time that he was interviewed, was questioned on six occasions by police about the Gail Miller murder, before his release. He repeatedly denied any involvement, or knowledge of involvement. He was told that he was a suspect.

On May 24, 1969, the day after being driven to Saskatoon by Saskatoon police, Ron Wilson made a statement implicating David Milgaard in the crime. He said that he had seen blood on Milgaard's clothing that morning, that Milgaard had a paring knife in the car, and that Milgaard had said "I fixed her" after returning to the car. On the same day, after spending a night in the Saskatoon jail cells, Nichol John made a statement implicating David Milgaard. She said that while she hadn't seen any blood on his clothes or hands that morning, she had seen him stab a woman after trying to steal her purse. "The knife was in his right hand....All I recall seeing is him stabbing her with the knife", she told police, "The next I recall is him taking her around the corner of the alley".

"I think I ran in the direction Ron had gone", she continued, "I recall running down the street. I don't recall seeing anyone. The next thing I know I was sitting in the car again. I don't know how I got back to the car." Nichol John also indicated that when David Milgaard

---

15 Cross-examination of Albert Cadrain, Trial transcript, pp.587-605.

returned to the car, "I remember moving over toward the driver's side because I didn't want to be near him."[16]

There were two last minute witnesses at the Milgaard trial Craig Melnyk and George Lapchuk - two men who came forward as the trial was progressing, in January of 1970. They told the court of a party in a Regina motel room in late May of 1969. David Milgaard knew he was a suspect in the Gail Miller murder, and when an item about the killing appeared on the television news, he was asked by George Lapchuk about what was happening. According to Lapchuk and Melnyk, Milgaard stated that he had stabbed her 14 times, made stabbing motions into the pillow in the motel room, and then laughed. Both Lapchuk and Melnyk told the court that, in their view, Milgaard was re-enacting the Gail Miller murder. The court heard that Milgaard was naked, in bed at the time with a young woman, Ute Frank; another woman, Debbie Hall, was also in the room.[17] The court also heard that David Milgaard and some of the others had taken LSD earlier that evening.

David Milgaard was convicted on January 31, 1970, after the jury had deliberated for approximately 11 hours. The headlines from the nine day trial suggest that the statements of his companions were keys to his conviction. There were two headlines coming from Nichol John and Ron Wilson's testimony: "Witness tells of knives in car with accused" and "Witness Quoted at Trial as saying she saw Milgaard stabbing woman". After the testimony of Albert Cadrain the headline read, "Youth says blood on Milgaard clothing". And after Melnyk and Lapchuk had taken the stand the headline read, "Yes, I stabbed her, Milgaard quoted".

(B) The Physical and Forensic Evidence: The Case for the Crown At Trial

The other headlines from the Saskatoon Star-Phoenix coverage of the trial were focussed on the physical and forensic evidence:"No indication body moved", "Knife blade, handle linked at trial", "Court examines stabbing victim's purse", and "Crown completes case at Milgaard trial".[18]

---

16 Witness Statement Form, Occurrence 641, 1969, May 24, Nichol John, pp.4-5.

17 Testimony of Craig Melnyk and George Lapchuk, Trial transcript, p.1010-1067.

18 Saskatoon Star Phoenix, January 20 to January 31, 1970.

Gail Miller was found face down in the back alley. Her dress had been pulled down to her waist, and her winter coat put back on. Her underwear was down around her ankles, as was her girdle and one of her stockings. Her brassiere strap had been broken and her half slip was around her waist.

She had been stabbed in the back four times near her right shoulder blade, and seven times below and above her left breast. The four stab wounds in her back had penetrated her coat, but none of the total of 11 wounds had penetrated her nurse's uniform. The left side of her neck had also been badly slashed by a knife. Spermatazoa were found in her vagina. A paring knife blade was found underneath her body on the morning of the murder. Some weeks later the matching maroon handle was found a short distance away.

Hair samples and blood were taken from Gail Miller on autopsy, but for some unknown reason the semen found in her vagina was not subjected to any laboratory tests. Four days after the murder, however, two pale yellowish frozen clumps were found in the snow at the scene. They were tested, and one was said to contain both human seminal fluid and seven pubic hairs.

These two clumps were of considerable importance at trial. In his almost two hour introduction to the case against David Milgaard, prosecutor T.D.R. Caldwell spent more than 20 minutes on their significance.

The clumps were analysed in March of 1969 by serologist Bruce Paynter of Regina's Crime Detection Laboratory. He found that the semen from the crime scene came from a type 'A' secretor, a person who has type 'A' blood, who secretes his blood type "antigens" into other bodily fluids, specifically, semen, urine, and saliva.

Hair and blood samples were taken from Albert Cadrain, Ron Wilson, and David Milgaard; a saliva sample was taken from David Milgaard in April of 1969. David Milgaard, like about 40 per cent of the population, was found to have type 'A' blood; his saliva test indicated, however, that he was a non-secretor. According to Staff Sergeant Bruce Paynter's testimony on direct examination, he found

no antigens in Milgaard's sample. "This would indicate that the person was a non-secretor", he testified.[19]

In June of 1969 the vial containing the clump of pubic hair and semen was sent back to the Crime Detection Laboratory in Regina, and Staff Sergeant Paynter was asked to test for the possible presence of blood. He testified that he was not able to positively identify blood, but that one test led him to suspect that blood might well be present.

If there was blood from a type 'A' person in the sample, this would yield a positive antigen reading, regardless of whether the person was a secretor or a non-secretor. The theory of the Crown was, then, that David Milgaard's blood had contaminated the sample found in the snow, thus rendering his non-secretor status irrelevant. This was a vital and necessary element in the Crown's case. Without the blood, the seminal stain excluded Milgaard.

Testimony from pathologist H.E. Emson was supportive of this interpretation. He indicated that the blood could have come from the assailant, explaining this possibility to prosecutor T.D.R. Caldwell at trial:

Q. Are there conditions under which human blood as such can get into seminal fluid or spermatazoa in the male person?

A. Yes.

Q. Could you tell the Court what they are please?

A. One would be local injury to the male genitals. A second and quite common occurrence would be any inflammation, either internal or external, of the male genitals.

Q. Are there any other causes?

A. There are rarer conditions, but I think the injury and the inflammation are the most common ones.[20]

---

19 Direct examination of Staff Sergeant Bruce Paynter, Trial transcript, p.961.
20 Direct examination of Dr. H.E. Emson, Trial transcript, pp.1157-1158.

This was the extent of the forensic evidence that connected David Milgaard to Gail Miller. Chief Justice Bence, in charging the jury at the conclusion of the trial, did not mention this evidence, however, allowing them to draw their own conclusions as to its probative value.

Problems with the Case for the Crown at Trial

In many ways the case against David Milgaard must have seemed very strong. His three companions had all implicated him, albeit in different ways, and the seminal stain found at the scene of the crime appeared to have been connected to him. Lapchuk and Melnyk's assertion of a re-enactment provided the coup de grace.

But some important questions emerge from the trial transcript. As defence counsel noted at trial, the timing that would make this crime possible is extremely tight. Within no more than 10 minutes of having stabbed and raped Gail Miller, David Milgaard is seen by motel manager Rasmussen over a mile from the site of the murder, relaxed, polite, and wearing only socks on his feet. Within no more than 30 minutes of having killed Gail Miller, David Milgaard is seen by Walter and Olesia Danchuk; he is said to be chatty and polite.

None of these three disinterested observers noticed blood on his clothes, or anything unusual about his demeanour. Nichol John also testified that she did not notice blood on Milgaard's clothes, despite being closest to him during this period of time.

More problematic is the testimony of Nichol John and Ron Wilson with respect to the few minutes in which the murder was said to have occurred. There was no evidence that the car had been stuck in the back alley, as Nichol John said to police in May of 1969. And it would have been impossible for Nichol John to witness a stabbing in that alley, if she had been in the intersection of either Avenue N or O and 20th Street. Her evidence also didn't explain how four of the 11 stab wounds penetrated Gail Miller's coat, and none penetrated her white hospital uniform; Miss John indicated to police that Milgaard simply began to stab a woman in the alley after a failed purse snatching. Unless this woman had first been undressed these cuts would have penetrated her nurse's uniform. Finally, despite what one would have expected from Miss John's account, there was no trail of blood found, leading along the alley to the place where the body was found.

Ron Wilson's testimony with respect to meeting a young woman in a black coat, then driving on, getting stuck, and leaving the car has at least one significant flaw. By the time David Milgaard and Ron Wilson had left the car, the woman in question, theoretically Gail Miller, would have easily walked the 100 metres in question to the bus stop.[21] It takes a person, walking at a relaxed pace, no more than two minutes to cover this distance (with a temperature of -42 degrees a relaxed pace would be unlikely). And once this woman reached the bus stop, she would have had to be dragged across two streets, one a four lane artery, in order to have been found in the alley - a most unlikely method of attack. There were other back alleys suitable for an assault much closer to the bus stop. Wilson testified at trial that he and Milgaard spent at least three minutes trying to push the car from the ice. He had also initially spent some time, unsuccessfully, trying to drive from the ice in the intersection.

The validity of Albert Cadrain's testimony was also impugned during cross-examination at trial. He had seen blood on David Milgaard's shirt, but not his sweater; Milgaard had been wearing his sweater from the time of the alleged attack to the time of his arrival at the Cadrain home. Cadrain also testified that when he was questioned in Regina by police about the Gail Miller murder, he initially had no recollection of seeing blood on David Milgaard.

Q. And I take it that you were being questioned about the Gail Miller murder?

A. Yes, I was questioned.

Q. And you were endeavouring to tell them the truth to the best of your recollection at that time?

A. Yes.

Q. And at that time you had no recollection of this blood that we are talking about here today - isn't that correct?

A. I don't think so.

---

21 Exhibit 1, R. v. Milgaard, Map drawn to scale, Saskatoon Police Identification Section, T.H. Kliev.

Q. You have no recollection of it at that time?

A. No.[22]

The forensic evidence was inconclusive, at its most optimistic tying David Milgaard to the 44 per cent of the population who have type 'A' or 'AB' blood, and hence to the 44 per cent of male Canadians who might have committed this crime.[23] There is no evidence that the jury understood the limitations of this data. There was testimony that the stab wounds and the throat slashes found on the victim were most likely to be inflicted by a right-handed person; the police, however, noted that David Milgaard is left-handed.

David Milgaard was convicted on the basis of testimony from his three companions, Cadrain, Wilson, and John. The evidence at trial revealed that all three had given inconsistent statements to police between February and May of 1969. Both Cadrain and Wilson had been told that they were suspects; both had given hair and blood samples to the police. Wilson indicated at trial that he was a regular user of LSD, and that he also injected heroin and LSD intravenously.

18 Years Later: The First Section 690 Application

In December of 1988 Winnipeg lawyer Hersh Wolch applied to Joe Clark, then Minister of Justice, for a judicial review in the case of David Milgaard. The application read, "The Applicant submits that this case is worthy of review by the Minister of Justice on the basis that advances in scientific technology have called into question the scientific evidence presented at the trial."

Counsel for Milgaard enclosed a seven page report from Vancouver forensic pathologist, Dr. James Ferris. Ferris, a professor of pathology at the University of British Columbia, and the head of forensic pathology at Vancouver General Hospital, concluded, "On the basis of the evidence that I have examined, I have no reasonable doubt that serological evidence presented at the trial failed to link David Milgaard with the offence and that in fact, could be reasonably considered to exclude him from being the perpetrator of the murder."[24]

---

22 Cross-examination of Albert Cadrain, Trial transcript, pp.594-595.

23. F.A. Jaffe, A Guide to Pathological Evidence. Toronto, Carswell, 1983.

24 Letter from James A.J. Ferris to Hersh Wolch, September 13, 1988, pp.1-7.

Also enclosed with the application was an affidavit from Deborah Hall. She was in the Regina motel room when David Milgaard "re-enacted" the crime; she swore that she did not think it was a confession. "My interpretation of David Milgaard's response was that it was a completely innocent and perhaps crudely comical comment. I know that if I had thought he was serious I would have left immediately. No one in the room thought anything of that particular conversation."[24a]

Over the next two and a half years counsel for David Milgaard brought a series of affidavits to the attention of the Minister of Justice, further questioning the validity of David Milgaard's conviction. In March of 1990 counsel David Asper wrote to E.F. Williams of the Department of Justice, informing him of an alternative scenario for the morning of January 31, 1969. A man by the name of Larry Fisher was living in the basement of the Cadrain house with his wife Linda at the time of the killing. In September of 1970 he confessed to Winnipeg police that he had raped and indecently assaulted four women in Saskatoon between the fall of 1968 and early 1970. His former wife Linda gave a statement to Joyce Milgaard, the mother of David, in March of 1990. She said that she recalled the morning of the murder. She swore that Larry did not go to work that morning, and that during an argument she accused him, in a moment of anger, of committing the crime. She initially reported her suspicions to Saskatoon police in 1980.[25]

In June of 1990 private investigator Paul Henderson took a statement from Ron Wilson, in which Wilson recanted most of his trial testimony. Wilson said that Milgaard didn't have a paring knife, that he had never seen blood on his clothes, and that Milgaard hadn't said, "I fixed her". Wilson said that he and David had been away from the car once that morning, but for no more than three minutes. Wilson explained his statement at trial by saying that there had been a "sweat session" with police, and that he had been "manipulated". Contacted at her home in Kelowna, Nichol John refused to speak with Paul Henderson about the Milgaard case.[26]

[24a] Affidavit of Deborah Hall, sworn November 23, 1986, pp.1-6.

[25] Statement of Linda Fisher, March 10, 1990, Cando, Saskatchewan, pp.1-4.

[26] Statement of Ronald Dale Wilson, June 4, 1990, Nakusp, B.C. pp.1-6.

Henderson also took statements from Albert Cadrain and his brother Dennis. Albert said that he was picked up by police and questioned 15 to 20 times, that there was "constant pressure, threats, and bullying", that he developed serious stomach ulcers, and became "very paranoid". He was committed to the psychiatric ward at University Hospital in Saskatoon approximately a year after the trial.[27]

Dennis Cadrain said that his brother Albert would not lie about anything knowingly, but that he was prone to exaggeration and suggestion, and could be "manipulated" by police, "If ideas were planted in Albert's mind, it is quite possible that he would come to accept them as truth. Frankly, I would not consider my brother to be a reliable witness at that time, and for this reason."

In February of 1991, A. Kim Campbell, the Minister of Justice, responded to the Milgaard application. She denied the application, writing that a review would be "inappropriate". She viewed the new evidence of Deborah Hall with skepticism, "(Hall) felt that David Milgaard was making a sick remark and was not serious. Whether her opinion of Milgaard's sincerity would have been shared by the jury is, at best, debatable". Of the forensic evidence, the Minister concluded, "The suggestion that the forensic evidence exonerates Migaard mis-states the value of that evidence. The forensic evidence tendered at trial, when elevated to its highest probative value, is neutral, establishing neither guilt nor innocence."

She wrote of the recantation of Ron Wilson, "The current retraction by Mr. Wilson of much of his trial evidence is unconvincing". She called Wilson's claim that he was only separated from Milgaard for three minutes "simply not credible". She stated that Albert Cadrain had only experienced "personal and emotional difficulties" after the trial, not before. And of the alternative scenario of Larry Fisher, she wrote, "no guilt or suspicion of guilt can be attributed to Fisher in the absence of some form of evidence linking him to the crime". A second application is now before the Minister.

The Milgaard Conviction Revisited: A Coincidence of Errors, Omissions, and Human Frailties

---

27 Statement of Dennis Cadrain, May 26, 1990, Port Coquitlam, B.C. pp.1-4; Statement of Albert Cadrain, June 24, 1990, Port Coquitlam, B.C. pp.1-3.

Vancouver forensic pathologist James Ferris addressed this issue in his 1988 report on the Milgaard case, calling the contamination of a seminal sample with the assailant's own blood unlikely, "I have also spoken to a number of personal contacts in other forensic science laboratories and on the basis of their experiences and my own experience, we are not familiar with a single case where seminal fluid or stains have been found to be contaminated by blood from the alleged assailant."

There have been many concerns expressed about "the integrity and continuity" of the evidence.[30] The crime scene was subject to a good deal of trampling in the four days before the sample was recovered, and it cannot be proven conclusively that the semen found there was related to the murder of Gail Miller. It seems unlikely, however, that someone other than the assailant would have left a seminal stain at that location - outdoors in sub-zero temperatures - within the preceding few days.

It is also not impossible that contamination by other organic substances could have caused a positive reading for the 'A' antigen. This could have occurred, for example, through contact between the sample and dirt on a shovel or through contact between the sample and a leather glove. In June of 1990 the Chief Medical Examiner for the Province of Manitoba, Dr. Peter Markestyn, suggested that the semen found at the scene might be dog semen from dog urine. He noted that dog urine is the most common yellowish substance found in the snow, and that dog urine contains traces of dog semen, which test positive for the presence of the 'A' antigen. In his report on the Milgaard case he noted that, "The only way of excluding this semen from being of non-human origin would have been the morphology and/or species specific antigen-antibody reaction tests."[31]

What Dr. Markestyn did not consider is the trial evidence from hair and fibre specialist Victor Malchanko of the RCMP Crime Detection Laboratory; Malchanko told the Court that he found seven pubic hairs in the semen stain. Dr. Markestyn now agrees that it is more probable that this was a human semen stain.[32] He also agrees with a suggestion put forward by Dr. Emson - that a small amount of

---

30 Letter from J.A.J. Ferris to Hersh Wolch, note 23, above, at p.4.

31 Letter from Peter Markestyn to David Asper, June 4, 1990, pp.1-9, at p.7

32 Personal communication, Dr. Peter Markestyn, Winnipeg, September, 1991.

blood in semen could turn the sample a pale yellow colour upon drying.

What seems most probable, then, is that the seminal stain is related to the assailant. While it may have been contaminated by blood or another substance, there was no evidence at trial to suggest such contamination. If there was blood in the sample, it was most likely to come from the victim, Gail Miller. Miller had type 'O' blood, and this blood type would not influence readings of 'A' antigens.

There have been doubts raised about David Milgaard's status as a non-secretor. Both the reports of Ferris and Markestyn note that the current blood test of secretor status, the Lewis antigen test, is more accurate than the the test of air-dried saliva stains on cloth. In their opinion one cannot rule out the possibility that David Milgaard is a secretor, even though he obtained two negative readings from tests in 1969.

But the best interpretation of the forensic data, in 1969, and at the current time, is that it tends to exclude David Milgaard. The seminal stain is likely human, there was no direct evidence of contamination, and if there was blood in the vial, it was most likely Gail Miller's blood. On the subject of secretor status, RCMP serologist Bruce Paynter testified that his results indicated Milgaard was a non-secretor. Twenty-two years later, this seems the most plausible interpretation. There is no evidence to suggest that air dried saliva tests are notoriously unreliable -- that their introduction into Canadian courts over the past 20 years has been an entirely haphazard or random process, in terms of reliability and validity.

The jury was not instructed by Chief Justice Bence as to how to interpret the forensic evidence introduced by the prosecutor. In retrospect, if this evidence was considered to be relevant to put to the jury, they would have to have been told that it probably excluded David Milgaard.

<u>The Credibility of Ron Wilson's Recantation</u>

The Minister of Justice did not believe the recantation given by Ron Wilson to private investigator Paul Henderson in June of 1990, and later confirmed before Department of Justice investigator Eugene

Williams in July of that year.[33] The Minister said that Wilson exaggerated the length of his polygraph testing with police, and she rejected his claim of undue police pressure. She noted that testimony at trial from Albert Cadrain and Nichol John contradicted Wilson's retraction.

Wilson had told Paul Henderson, an investigator working for David Milgaard, that he had been subject to a six hour "sweat session" by police, at the close of which he provided his statement of May 24, 1969. In fact, the session of polygraph testing and questioning lasted somewhere between three and a half and five hours.

Wilson's claims of manipulation and pressure by police are difficult to assess. The police were persistent in their pursuit of Wilson, John, and Cadrain, but this would not be unexpected, given their perception that David Milgaard was responsible for such a serious crime. On the other hand, Wilson, Cadrain, and John were also unsophisticated, socially and economically disadvantaged teenagers, and some of the tactics police employed may have inadvertently helped to produce the inconsistency of the statements that these three witnesses provided between January and May of 1969. Nichol John was kept in police cells overnight before making her statement, an event which has not been adequately explained.

Ron Wilson indicated to Eugene Williams in 1990, and in a more recent interview, that police treated him well, "They all treated me nice. What I tried to get across to Williams, which I never could, was that, like when you're watching TV...you've got that bad cop who wants to beat this out of you and stuff - it doesn't happen that way. Later on in my dealings I had bad cops. But these guys were nice. I think, now that I look back on it, being nice gets them further ahead than being nasty to you."[34]

Ron Wilson's description of the morning of the murder has Milgaard away from the car for about two minutes, a length of time more consistent with the weather conditions that day. He says that Nichol John was "fine" upon his return, and that it would have been "totally impossible" for David Milgaard to have killed anyone during this time.

---

33 Examination of Ronald Dale Wilson, July 20, 1990, Nakusp, B.C. pp.1-143.

34 Interview with Ron Wilson, Kelowna, B.C., October 7, 1991, p.21.

Of Nichol John's statement to police Ron Wilson says, "If she would have seen that, she would have been gone so fucking fast it would make your head spin. There's no way she would have stuck around."

Wilson: What she described couldn't have happened, period, because it never did happen.

Q. So why do you think she said that?

A. I think they scared her so bad that she just told them a hell of a lot more than I told them and just to get her damn well out of there.

Q. So why do you think she hasn't said anything since?

A. Cause she doesn't want to deal with it. Like I'm dealing with it. And I'm paying for it....As far as she's concerned, it's in the past and that's where it's going to stay.

Ron Wilson, in his statement to Eugene Williams, indicated that he and Nichol John had a conversation on the day that they gave their statements to police. He elaborated on this discussion in a recent interview.

Q. What kinds of things did you talk about?

A. Well, I know we definitely said, let's give them what they want, so...

Q. And what did that mean?

A. Get us off the hook and let's get the hell out of here, type of thing. I don't know if we discussed what we were going to tell them...[35]

In 1980 Joyce Milgaard contacted both Ron Wilson and Nichol John by telephone. Neither Wilson nor John were willing to speak with her about David Milgaard's case. According to Wilson, John phoned him at that time. It was the first time that he had heard from her in over 10 years. She was crying.

---

35 Ibid, p.22.

Q. Why was she crying?

A. Because Joyce Milgaard wanted the truth.

Q. And why would that upset her?

A. Cause she knew as well as I did that David didn't do it.

Wilson told Nichol John that she didn't have to talk to Joyce Milgaard, She didn't and has continued with this approach to the Milgaard case, refusing to discuss her testimony.

After his recantation to Paul Henderson in June of 1990, Ron Wilson lost his job, began drinking heavily, and almost lost his marriage. The self interest that might have propelled his recantation is difficult to find. His motivation for his trial testimony was explained in the following manner.

Q. When you were testifying in court, did you feel you were lying?

A. I felt I was and I felt I wasn't. I figured, well, somehow it was getting put together, so it's got to be right.

Q. Did you look at David Milgaard at all?

A. I had no choice but to look at David. He was right in front of you. Kind of tried not to look at him.

Q. Did it not bother you... let me just back up a second, here. So, at trial you knew that what you were saying wasn't correct, that you hadn't actually seen that stuff, right?

A. Exactly.

Q. But at the time, did you think that David Milgaard had done the murder?

A. I was starting to think he had, yeah...

Q. Did it bother you that David was going to be put away for life?

A. Not really. At that point in time I didn't give a shit.

Q. Okay, now, did not give a shit because you thought that he had done it, or did you not give a shit because you didn't like him, or didn't care for him, or did you not give a shit because of your mind being messed up on drugs, or...?

A. I would say I did not give a shit because it wasn't me, and y'know, I was happy for that. I just wanted to get the hell out of there and whatever happened, happened. And I figured, well, okay in two years he'll be out on parole, no big deal. And then I was kind of thinking if he gets out on parole, he's going to come looking for me, so I was paranoid about that.

Q. Why would he come looking for you?

A. Cause I testified against him.

Q. Just because you testified against him, or because you lied?

A. A combination of both. Because the one time he did escape, the police phoned me right away, warning me he was headed in that direction. But I was not too worried about it.

Q. Had you seen any violence on his part before?

A. No, none.

According to Ron Wilson, he was simply interested in getting free from police questioning on May 24, 1969, going home, and "getting loaded". He was not forced to implicate David Milgaard, but implicating Milgaard was the easiest way to remove himself from a persistently stressful situation - two months of questioning by police. Wilson was a 17 year old delinquent who would usually place his own interests first. He was involved in drugs and crime until the early Eighties, using and selling heroin and LSD, and for 10 years a member of the Regina motorcycle club, the Apollos.

Ron Wilson sketches a picture of disenfranchised street youth in 1969, on the fringes of the fledgling hippie culture and on the edge of a criminal lifestyle. They were all involved in using illegal drugs. "Friends" were passing acquaintances who you ran into in the park, spent a few days with, and who would then disappear for months. Loyalties and allegiances were non-existent, the primary

concern being only to look out for yourself - survival, "better him than me".

David Milgaard spent the night with Nichol John just before leaving on a trip to see his girlfriend. According to Ron Wilson, Nichol retaliated by "hopping into bed with Shorty". David and Ron Wilson used Shorty for his money, taking his cash to pay for repairs, and then to buy drugs in Alberta, drugs that Shorty never saw. Ron Wilson and George Lapchuk passed bad cheques, using David Milgaard's name without his knowledge.

The Minister's conclusion that Ron Wilson's recantation is "simply not credible" is difficult to support. Wilson's reasons for lying now are not easy to find; he risks a perjury charge related to his statements at trial, and there is no evidence or suspicion that he has received any financial benefits from his recantation. He seems, rather, to have suffered both personally and financially since his statement to Paul Henderson.

It seems surprising that the Department of Justice did not pursue polygraph testing of Ron Wilson, given that his credibility was the key issue. Counsel Ken Watson, representing Ron Wilson, indicated in August of 1990 that his client would be willing to take a polygraph, provided that an independent examiner were agreed upon, and that the results of his previous polygraph tests at trial were made available.[36] Crown Counsel Eugene Williams wrote in response, "After further consideration of all the circumstances and following a review of the materials obtained to date, it appears that there may be limited value in performing a polygraph test on your client at this time. Consequently, this avenue of investigation will not be pursued further."[37]

The Minister argues that the testimony of Nichol John and Albert Cadrain both contradict Wilson's retraction, but neither John nor Cadrain can be seen as credible witnesses. Nichol John's statement of witnessing a stabbing is, on the physical evidence alone, a fabrication, and her inability to acknowledge it as such casts serious doubt on all the testimony that she has given in relation to the Gail Miller murder.

---

36 Letter From Kenneth R. Watson to Mr. Eugene Williams, August 9, 1990.

37 Letter from E. F. Williams, Crown Counsel, September 6, 1990.

The Minister writes that Cadrain's emotional difficulties began after David Milgaard's conviction, but the best available evidence contradicts this claim. Albert Cadrain told private investigator Paul Henderson of experiencing paranoia prior to the preliminary hearing, of stomach ulcers, and spitting up blood, "They asked me the same questions repeatedly, time after time after time, until I was exhausted and couldn't take it anymore. This went on for months, continuing through the preliminary hearing. They put me through hell and mental torture. It finally reached the point where I couldn't stand the constant pressure, threats and bullying anymore."

Dennis Cadrain recalled this period of time in his brother's life:

Q. Once Albert saw the blood, everything sort of fell into place?

A. That's right, yeah...Detectives Short and Karst...they had the fedoras, the whole works, sitting in the car there. Oh yeah, they looked like you see on TV. They looked like hoods. Oh yeah. Boy, they were....anyways, they come and pick him up early in the morning, eight o'clock, and bring him back nine-thirty, 10 o'clock at night every day.

Q. You know how long?

A. For weeks, for weeks.

Q. Did Albert enjoy that, or did he not like it, or was he indifferent to it?

A. Oh, it was hard on him, I know it was hard on him. But he wouldn't talk much about what they were talking about, but I know that the stories, when he first told me, it was just blood. And then, everyday he would come home and it was getting bigger and bigger and bigger. And I seen it. I seen it.[38]

Dennis Cadrain confirms that Albert experienced visions prior to the preliminary hearing.

A. It was about two months after he first went in to the police... and then he started talking stupid, y'know, like visions and all this bullshit.

---

38 Interview with Dennis Cadrain, September, 1991, Port Coquitlam, B.C.

Q. Why do you think he was talking about that?

A. Well, because he is obviously not in control of his...mind....y'know, the Virgin Mary up there stepping on a stake, and David's head was a snake, and all this bullshit.

Dennis Cadrain does not believe that his brother would intentionally lie, "I'll tell you something, he would never say it if he didn't believe it. But whether it happened or not, who knows? Nobody'll ever know. And I'm sure he has no way of even knowing now, even remembering now. I'm sure he could never picture it now, 'cause he's been through so much, eh? Shock treatments and the whole works. He's had it all, and now, I don't think there's a hope he could even ever know. It's gone. But them other two, that's the part that for me....why didn't those other two save him?"

Dennis Cadrain has one further reason to doubt the testimony of his brother in relation to the conviction of David Milgaard. A few years after the trial, Albert claimed to know who was responsible for a series of crimes at his workplace in Vancouver, and told both Dennis and an uncle in the RCMP about his suspicions. According to Dennis Cadrain, both he and his uncle knew that there was no accuracy to Albert's allegations at the time, despite the persistence of his claims.[39]

The Alternative Scenario: Larry Fisher

It is difficult to make the leap from the childhood of Larry Fisher, when he raised young chicks in a shoe box and gave friends rides on his new bicycle, to the stark ugliness of his adult life: sexual brutality, psychiatric confinement, and prison beatings.[40] As a young boy he played hockey, placed pictures of horses on his bedroom walls, and developed an interest in ships during his time as a Sea Cadet. As an adult, he became a strong, hard worker, who did not drink to excess. He also became a savagely violent serial rapist.

---

39 This information regarding the possibility of a second false implication by Albert Cadrain was provided to Justice Department counsel Eugene Williams in 1990 by Dennis Cadrain. The Minister does not seem to have believed that this apparently false allegation was relevant to the question of Albert Cadrain's reliability as a witness.

40 Interview with Marceline Fisher, North Battleford, August 1, 1991. (Peter Edwards, Toronto Star)

Larry Fisher grew up in Saskatchewan in a single parent home, raised by his mother after his father left, apparently encouraged in this departure by the local RCMP. Fisher's father used to beat his mother and force her and the children out of the house when he brought a woman home for the night. It is not known what effect this had on Larry Fisher; his mother insists that he was too young to remember any of it. It is known that Larry had some serious difficulties with his mother, resenting her drinking and her drinking companions.

In December of 1967 Larry and Linda Fisher were married in North Battleford. They moved to the working class Riversdale area of Saskatoon a few months later. Linda was pregnant and their daughter, Tammy, was born in late April of 1968. Six months later, the rapes began.[41]

Sexual Assault #1 - Saskatoon, October 21, 1968

At about 7:30 p.m. Larry Fisher committed his first known rape on a woman in her early twenties, returning home from a local store. The victim used the same bus route as Larry Fisher. He approached her in the 400 block of Avenue H South with a large bread knife (see Map 2), put his hand over her mouth, and threatened to kill her if she screamed. She was pulled into an alley and forced to remove her clothing; he then inserted the knife into her vagina. The attack was interrupted by something that scared Fisher away.

Sexual Assault #2 - Saskatoon, November 13, 1968

Larry Fisher attacked his second victim sometime between 6:30 and 8:00 p.m. while she was walking from her home to meet a friend. Fisher grabbed her from behind, put his hand over her mouth, held a small paring knife to her throat and said, "If you want to live, do as I say." After warning her not to scream he dragged the victim into a lane off the 500 block of 18th Street East (see Map 2), and raped her in a darkened yard. When he left he took several articles of her

---

41 The details of these sexual assaults were obtained from a report by Centurion Ministries, on their investigation into the crimes of Larry Fisher. As the police reports on these cases are apparently missing, there is no independent verification of the Centurion Ministries investigation.

clothing, including her dress, bra, panty hose, and shoes. The victim was 16 years old.

Sexual Assault # 3 - Saskatoon, November 29, 1968

A 19 year old student, walking home from a University of Saskatchewan night class, was approached by Larry Fisher near Temperance Street and Wiggins Avenue[42] (see Map 2). He asked for directions, then grabbed her from behind, placed his hand over her mouth, and told her that he had a knife. When she screamed and struggled, he threatened to kill her if she wasn't quiet. While dragging her down an alley to a vehicle that he said he had nearby, Fisher was scared away by approaching headlights. On December 14, 1968 the Saskatoon Star-Phoenix published a police warning concerning the attacks of a serial rapist, active in the Riversdale area.

Sexual Assault #4 - Saskatoon, February 21, 1970

After a 15 month hiatus, Larry Fisher attacked again.[44] The victim was an 18 year old high school student working at the City Hospital canteen.[45] She was returning home from work one evening on the 20th Street bus, as was Fisher. He followed her when she left the bus, grabbed her from behind, and pulled her into a house yard in the 200 block of Avenue V South (see Map 2). When she resisted and bit him, Fisher hit her several times in the face, threatening that he could easily break her neck. He forced her to undress, raped her, and then fled. A Saskatoon police detective investigating the attack mentioned to the victim the similarities with the Gail Miller case.

Sexual Assault #5 - Winnipeg, August 2, 1970

In the summer of 1970 Larry Fisher moved to Winnipeg to take up a construction job. His fifth known victim was a nursing student at the Health Science Centre, not far from where Fisher was staying. At about midnight she caught the last bus to her home in the south end of Winnipeg. As she was walking from the transit stop and just

---

42 This location, unlike the three other assaults in Saskatoon, was away from Fisher's home in the Riversdale area. He was working on a construction project at the University of Saskatchewan, however, at this time.

44 Larry Fisher is not known to have committed any assaults between the time of Gail Miller's murder, and the conviction of David Milgaard a year later.

45 City Hospital is also where Gail Miller worked as a nurse's assistant.

before she had reached her home, Fisher approached her and asked for directions.

He then grabbed her from behind, placed his hand over her mouth, and pressed a knife against her throat. When the woman screamed, he beat her beyond recognition, dragged her into a vacant lot, and ripped off her clothing. After the rape was finished, Fisher hogtied the victim with her own clothing and threatened to kill her if she called for help. He finished his attack by robbing the woman.

Sexual Assault #6 - Winnipeg, September 19, 1970

Larry Fisher's second Winnipeg victim was a dental hygiene student who often wore a white lab coat to her classes downtown, at a location near where Fisher lived. The victim caught a bus to her home in south Winnipeg just after midnight. In an echo of his last rape, Fisher grabbed the woman from behind on a residential street, within a block of her home. He put his hand over her nose and mouth, warned her that he ahd a knife, and pulled her between two buildings. While she struggled and screamed, he yanked her clothing aside and savagely bit her breasts.

After this rape Fisher ran off, only to be caught by the police nearby. Detectives found a paring knife at the scene and located his pickup truck parked closeby. Fisher was arrested, jailed, and charged. He pled guilty to two charges of rape, robbery, and possession of a weapon dangerous to the public peace.[46] In May of 1971 Fisher received a 13 year prison sentence for the Winnipeg attacks, and in December of 1971, he received concurrent sentences from a Regina court for his confessions to the four sexual offences in Saskatoon. For reasons yet to be explained, the victims of the Saskatoon rapes were never notified of the clearance of their cases.

Sexual Assault #7 - North Battleford, March 31, 1980

In January of 1980 Larry Fisher was granted parole, and moved to his mother's home in North Battleford. In late March he struck again. in his most savage confirmed attack. Sometime after 9:00 p.m. he sprung out from behind a hedge and grabbed a 56 year old woman from behind. He pressed a knife against her neck and dragged her

---

[46] Fisher also admitted to four or five additional indecent assaults in Winnipeg, but as the victims could not be located, no charges were laid.

into the snowy backyard of a burned-out house. He pushed her to the ground and pulled off her clothing. Fisher warned the victim not to scream and threatened to kill her, saying that he had done it before.

After raping her, Fisher pulled the victim into the abandoned house, forced her to perform oral sex on him, and raped her again. He then bound her hands behind her back with her nylon stockings, tied her feet with her scarf, gagged her by stuffing her girdle in her mouth, and took her money from her purse. Then, despite the victim's lack of resistance, and with no explanation, Fisher slit her throat, stabbed her several times in the chest, and tried to suffocate her by holding his hand over her nose and mouth. The victim did not have a pulse when she arrived at the hospital, but ultimately recovered from her physical if not her psychological injuries.

Fisher was caught by the police in the basement of his mother's house, washing blood from his work boots. In June of 1980 he pled guilty to charges of attempted murder and rape and was sentenced to 10 years imprisonment. He is currently incarcerated in British Columbia's Mountain Institution, recently remarried to a woman in Saskatchewan, and scheduled to be released to the community no later than May of 1994.

The Gail Miller Murder - Saskatoon, January 31, 1969

Larry and Linda Fisher were living in the basement of the Cadrain house at the time of the crime, two blocks from Gail Miller's residence, and just over a block from the murder scene. Linda Fisher claims to remember vividly the day of the murder. After staying up late the night before, waiting for Larry to come home, she awoke sometime after 9 a.m. and found him in their basement suite, wearing dress clothes.

Like Gail Miller, Larry Fisher normally caught the 7:00 a.m. 20th Street bus; he travelled to the Jones Construction Company job site, where he worked as a labourer. Linda Fisher thought his presence in the basement was highly unusual, for, despite his habit of staying out late, he would always manage to make it to work in the morning.

A long argument developed, not uncommon between them, and upon hearing the news of the Gail Miller murder on the radio, Linda

Fisher almost jokingly accused Larry, "My paring knife is missing. You're probably the one who was out stabbing that girl." She has described his reaction as one of shock and fright. "He was really shocked and went pale and quit yapping", she said recently, "And so then I felt kind of bad for accusing him...y'know, like, that's going a little overboard."[47]

A day after the murder a neighbour returned Larry Fisher's wallet; Gail Miller's wallet was found in the same vicinity, a few houses away from the Cadrain home. On February 4, 1969 the Regina Leader Post ran a story on a possible connection between the killing in Saskatoon and the three unsolved rapes in the city in the fall of 1968. "Killer possible rapist", the headline read. There is no record of further attacks by Larry Fisher until three weeks after David Milgaard's conviction for non-capital murder.

Psychological and Geographic Profiling of Sex Offenders

The purpose of criminal profiling is to develop a behavioural composite - a social and psychological profile - of the perpetrator of certain types of crimes. This investigative strategy is based on the premise that the proper interpretation of crime scene evidence can indicate the personality type of the individual or individuals who committed the offence. Certain personality types exhibit similar behavioural patterns and knowledge of such patterns can assist in the investigation of the crime and potential suspects.[48]

Offences suitable for profiling usually involve incidents where the suspect has demonstrated some consistent form of aberrant behaviour: mutilation, torture, homicides involving post-mortem cutting, evisceration or body exploration, ritualistic or cult crimes, or apparently motiveless arsons. Profiling is used to identify probable suspects, to establish reasonable grounds for police investigation, to develop appropriate interviewing strategies, and to assist generally

---

47 Interview with Linda Fisher, September 8, 1991, Cando, Saskatchewan. The paring knife found at the scene of the crime was not the one that Linda Fisher was missing from her kitchen. There is some evidence to suggest, however, that more than one knife was used in the stabbing of Gail Miller.

48 Robert K. Ressler, Ann W. Burgess, and John E. Douglas, Sexual Homicide: Patterns and Motives, Lexington Books, 1988. Ronald M. Holmes, Profiling Violent Crimes: An Investigative Tool, Newbury, California, Sage Publications, 1985.

in the prosecution, trial and sentencing stages of the criminal justice process.

Criminal profiling is nothing more than an investigative aid. The probable characteristics of the offender are strictly that behavioural traits that may or may not apply in a given case. Research and experience indicate, however, that most characteristics will be applicable to most criminals who exhibit the critical elements in that particular type of crime scene.

Geographic profiling focusses on the probable spatial behaviour of the offender, within the location of the known crime sites. With the intersection in time and place between the victim and the offender, one can consider the dynamics of the crime and its probable antecedents. As psychological profiling provides insight into the likely motivation, behaviour and lifestyle of the offender, it is directly connected to the geographic behaviour of the offender, and so the two profiles can act in tandem to help investigators develop a "picture" of the person responsible for the crimes in questions.

Criminal offenders search for and encounter victims in accordance with certain concepts of spatial interaction. Target locations and "activity or awareness spaces" (derived from the residence, work, social/entertainment locations, and the connecting travel routes) of suspects can be geographically related.[49] Such a process involves the examination of the key geographic elements of a connected series of offences: first contact points, crime sites, body and evidence recovery locations, and so on.

Larry Fisher is best profiled as an "anger/retaliatory" or "punishment" rapist, the least common of all rapists, but the most likely to inflict serious harm or death upon his victim.[50] These attackers invoke a sudden, blitz style of attack, with excessive and unnecessary violence. Their purpose is to punish, debase, and degrade their female victims, for whom they have a great deal of anger. These victims are often symbolic, the rapist transferring his anger from some other woman he feels has hurt or wronged him. The

---

49 Paul J. and Patricia L. Brantingham, Patterns in Crime, New York, Macmillan, 1984, chapter 12, pp.332-365.

50 Vernon J. Geberth, Practical Homicide Investigation: Tactics, Procedures and Forensic Techniques (2nd edition) New York, Elsevier, 1990

attack usually occurs after he has suffered an imagined ego blow from another female.

The punishment rapist attacks anywhere, indoors or out, and anytime, with no temporal cycle, or episodic pattern. He chooses victims of opportunity he perceives as vulnerable, and it is not unknown for him to attack more than one victim in a short time period. He may beat his victim before, during, and after the rape, which can involved multiple sexual attacks. His weapon is usually one of opportunity.

The punishment rapist is a male, usually more than 30 years of age, married or separated, his relationships stormy, characterized by much conflict and fighting. He is of normal intelligence, muscular and stocky in build, likes contact sports, and is probably involved in manual labour or an action-oriented job.[51]

This type of rapist is usually of low socio-economic status, probably lives in cheap rental property, and may have a record for interpersonal violence or sexual assault. He is impulsive and self-centred, has an explosive temper, and may be a wife or a child beater. His rapes will usually take place in the immediate vicinity of his residence or place of work - his "comfort zone".

This sort of profile closely matches the crimes and the personal characteristics of Larry Fisher. Additionally, the modus operandi of his attacks has striking similarities: victims selected from his comfort zone, stalked and attacked on the street, sometimes with the presence of a car, victims grabbed from behind with the use or threat of a knife. They were violent rapes, with clothing manipulation as part of the anger. Many of his victims wore uniforms of some sort, perhaps suggesting some deep-rooted hatred of working females or women in uniforms; Fisher's mother wore a uniform to work, first while employed by a dry cleaners, and later, when employed by a hospital.

All of Fisher's Saskatoon rapes occurred in older, working class, residential neighbourhoods. The alleys that he pulled his victims down were like the alley in which Gail Miller's body was found:

---

51 Robert R. Hazelwood, "Analyzing the Rape and Profiling the Offender", in Practical Aspects of Rape Investigation : A Multidisciplinary Approach, R.R. Hazelwood and A.W. Burgess, (eds.), New York, Elsevier, 1987.

protected from observation by garages, fences, and vegetation. The police initially thought that there might be a connection between the Miller murder and the Riversdale rapes. They had good reason: same immediate area, same type of alley, the use of a knife, and a brutal sexual assault. Today, all these crimes would be profiled as having been committed by the same type of offender, and given the size of Saskatoon and the Riversdale area in 1969, they would likely be profiled as having been committed by the same offender.[52]

Does this mean that Larry Fisher killed Gail Miller? While he is definitely a good suspect, such similarities are not proof. And at the same time, while the profile of this murder does not fit a 16 year old teenager with no previous history of violence or sex offences, and well outside his "comfort zone", it does not prove David Milgaard's innocence. Profiling deals with probabilities, not with proof beyond a reasonable doubt. What is more probable here, given all the available evidence, is that Larry Fisher committed this crime, and that David Milgaard did not.

There is one claim, however, that can be made with a high degree of confidence. The Crown's theory that Gail Miller was murdered as the result of a purse snatching that went wrong is highly improbable. She was almost definitely killed by someone who harboured an incredible amount of anger towards women. Her purse and clothing were taken for psychological reasons, perhaps to mentally prolong the event, possibly to serve as a souvenir or trophy. It is also probable that whoever committed this crime had done something similar before, and if unchecked, would likely commit other acts of comparable violence in the future.

Conclusion

There is virtually no case against David Milgaard. Only Albert Cadrain still believes that he saw blood on David Milgaard. Albert Cadrain also believes that David Milgaard will try to kill him if he gets out of jail. Ron Wilson now says that he lied at trial, and Nichol

---

52 Statistics Canada data indicate that there were four rapes reported to police in the city of Saskatoon between October 1, 1968 and March 1, 1969. One man was charged with rape; the other three crimes were unsolved until Larry Fisher pleaded guilty to the attacks in Regina in 1971. Number of rape offences for Saskatoon, 1968-69, Statistics Canada.

John doesn't want to speak about the case; she has indicated that she would not like to see the case re-opened.[53]

The forensic evidence tends to exclude David Milgaard,[54] and the evidence of three disinterested observers within half an hour of the killing is similarly exculpatory. They didn't see any blood, and they didn't think David Milgaard acted at all unusually. The assailant was, in all likelihood, right-handed; Milgaard is left-handed.

There are persistent questions that remain. Why have Saskatoon police been unwilling to talk about this case? In what way does the case of David Milgaard tie in to the case of Larry Fisher? Why were Fisher's rape victims in Saskatoon never notified? Why did Larry Fisher plead guilty in Regina, rather than Saskatoon? Was the possibility of a mistake in the Gail Miller murder recognized after Fisher's arrest in Winnipeg in 1970? And if so, what did the various authorities do, in response to this possibility?

The Saskatoon Police Department was notified of Fisher's confessions, but their inadequate response to these confessions requires public scrutiny; the current absence of Fisher's files from the Saskatoon police department adds to this concern.

Section 690 Applications: The Need for Reform

The Milgaard case provides empirical support for the inadequate operation of section 690 of the Criminal Code. By late 1990 counsel David Asper and Hersh Wolch had provided the Department of Justice with evidence of much more than a reasonable doubt of Milgaard's guilt. The justifications set out in the Minister's decision in February of 1991 have been shown to be without foundation: the forensic evidence actually tends to be exculpatory, Albert Cadrain experienced emotional difficulties prior to trial, not after, Ron Wilson's recantation seems at least as credible as his trial testimony, and lot more internally consistent. Finally, Larry Fisher is a much better suspect than David Milgaard - an established motive, a

---

53 Nichol John, personal communication, September, 1991.

54 Forensic evidence is generally regarded as more reliable than any other form of evidence. See Frederick Cunliffe and Peter B. Piazza, Criminalistics and Scientific Investigation, Englewood Cliffs, New Jersey, Prentice-Hall, 1980, chapter 1. On the weaknesses of eyewitness identification see A. Daniel Yarmey, Understanding Police and Police Work - Psychosocial Issues, New York, New York University Press, 1990, chapter 12.

similar modus operandi, and a greater opportunity, in terms of both time and knowledge of the area, to commit the crime.

Section 690 has been criticized on the ground that it fails to afford the appellant any kind of procedural fairness.[55] Under the terms of this section of the Criminal Code, the Department of Justice is given unlimited discretion with respect to the investigation of a criminal conviction; there is no responsibility of disclosure to the appellant. This was a problem in the Milgaard case; counsel for Milgaard were unaware of the form of the investigation, or of the responses of witnesses to Justice Department inquiries. Several of those interviewed - Dennis Cadrain, Ron Wilson and his counsel, Ken Watson, and Dr. Ferris - did not feel that Justice Department counsel Eugene Williams was impartial in his assessment of Milgaard's guilt.

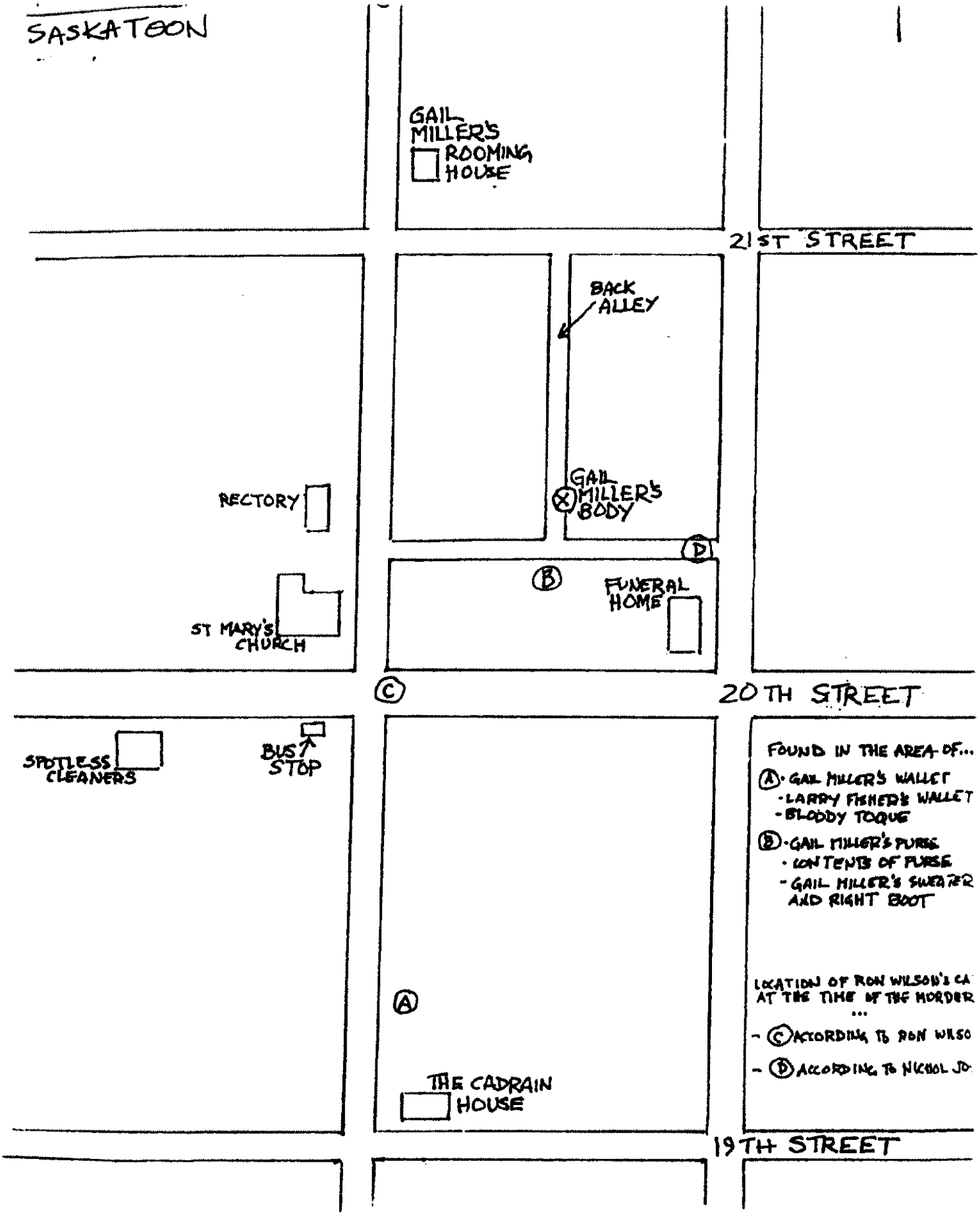
In 1989 a Royal Commission on the Donald Marshall prosecution concluded that section 690 should be replaced by an independent review mechanism.[56] In specific terms the Commissioners wrote, "We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information."

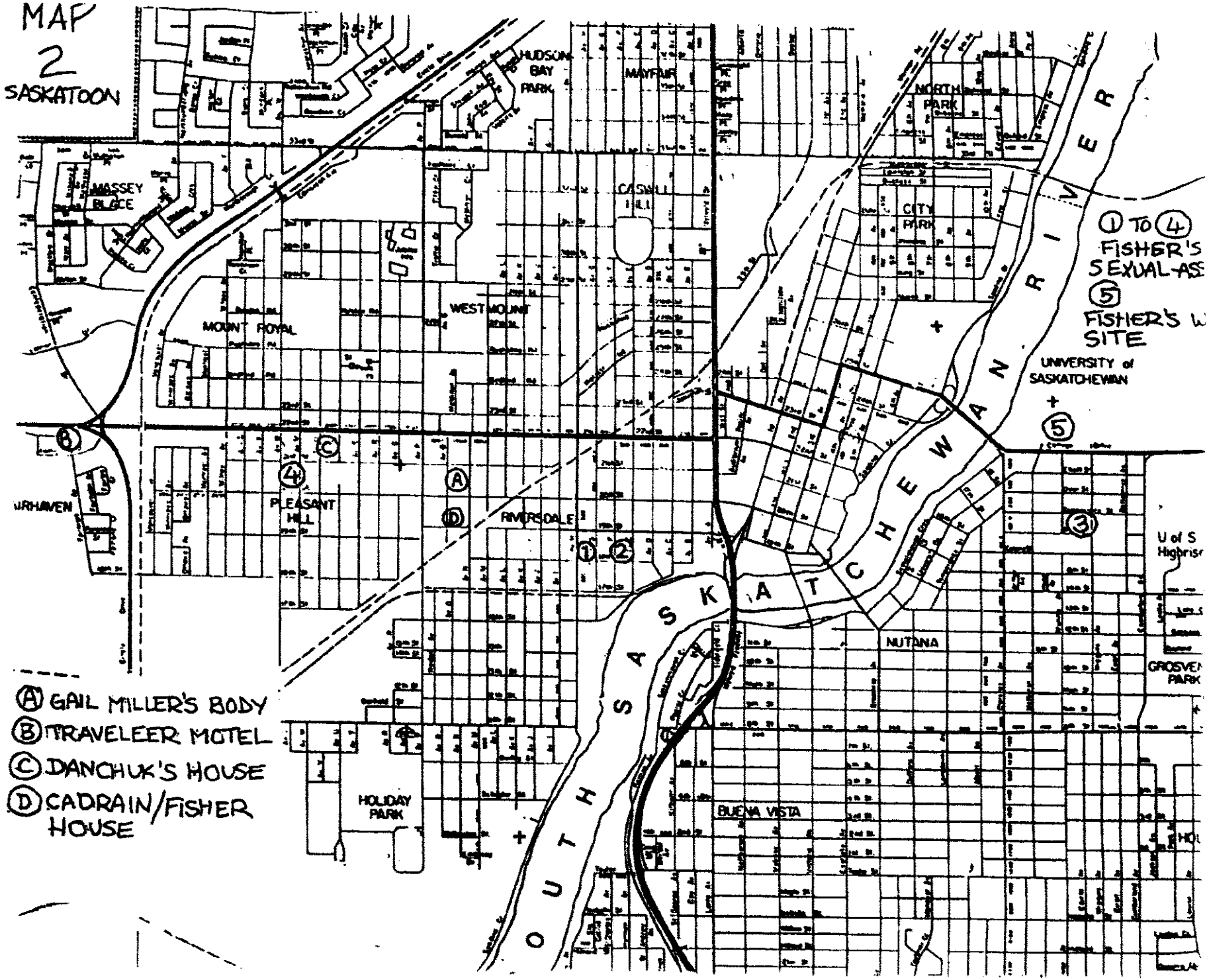
If the case of David Milgaard is ever to provide a measure or a symbol of justice in our country, this kind of review mechanism will need to be entrenched within Canadian law. Based on the best available evidence, it would appear that David Milgaard did not murder Gail Miller. Innocence or guilt is, however, a matter to be decided in a judicial forum, and so we leave this issue for others. The Department of Justice should re-open the Milgaard case, providing for the power to call witnesses, and for advocacy in front of a disinterested appellate tribunal.

---

[55] See C. Barr, "The Milgaard Case: Was Justice Served?", The Christian Science Monitor, May 15, 1991, p.12. This article contains different opinions with respect to the need to replace this section of the Criminal Code.

[56] Chief Justice T. Alexander Hickman, Royal Commission on the Donald Marshall Jr., Prosecution, Digest of Findings and Recommendations, Halifax, Province of Nova Scotia, 1989.


SASKATOON
GAIL MILLER'S ROOMING HOUSE
21ST STREET
BACK ALLEY
GAIL MILLER'S BODY
RECTORY
ST MARY'S CHURCH
FUNERAL HOME
20TH STREET
SPOTLESS CLEANERS
BUS STOP
THE CADRAIN HOUSE
19TH STREET
FOUND IN THE AREA OF...
A - GAIL MILLER'S WALLET
- LARRY FISHER'S WALLET
- BLOODY TOQUE
B - GAIL MILLER'S PURSE
- CONTENTS OF PURSE
- GAIL MILLER'S SWEATER AND RIGHT BOOT
LOCATION OF RON WILSON'S CA AT THE TIME OF THE MORDER
...
- C ACCORDING TO RON WILSO
- D ACCORDING TO NICHOL JO


MAP 2
SASKATOON
HUDSON BAY PARK
MAYFAIR
NORTH PARK
MASSEY PLACE
CASWELL HILL
CITY PARK
SASKATCHEWAN RIVER
① TO ④ FISHER'S SEXUAL-ASS
⑤ FISHER'S W SITE
UNIVERSITY of SASKATCHEWAN
MOUNT ROYAL
WEST MOUNT
PLEASANT HILL
RIVERSDALE
U of S Highrise
NUTANA
GROSVEN PARK
SOUTH SASK
HOLIDAY PARK
BUENA VISTA
Ⓐ GAIL MILLER'S BODY
Ⓑ TRAVELEER MOTEL
Ⓒ DANCHUK'S HOUSE
Ⓓ CADRAIN/FISHER HOUSE