

August, 2014

**IN THE MATTER OF AN APPLICATION FOR
MINISTERIAL REVIEW (MISCARRIAGES OF JUSTICE)
SUBMITTED BY GLEN ASSOUN PURSUANT TO
SECTIONS 696.1-696.6 OF THE *CRIMINAL CODE***

PRELIMINARY ASSESSMENT

Mark Green
Department of Justice Canada
Criminal Conviction Review Group
284 Wellington Street
Ottawa, ON K1A 0H8

Tel. (613) 991-8200
Fax (613) 998-4030

E-mail: mark.green@justice.gc.ca

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
NATIONAL CENTER FOR HUMAN GENE TYPING
10100 ROCKVILLE PIKE
BETHESDA, MARYLAND 20895

PROBATION IN A SUBSEQUENT

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
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Criminal Conviction Review Group
284 Wellington Street
Ottawa, Ontario
K1A 0H8

August 29, 2014

Glen Eugene Assoun
c/o Philip Campbell
Lockyer Campbell Posner LLP
Suite 103, 30 St. Clair Avenue West
Toronto, Ontario
M4V 3A1

Dear Mr. Assoun:

RE: Glen Eugene Assoun

Application under section 696.1 of the *Criminal Code*

This correspondence outlines the preliminary assessment of your application to the Minister of Justice which was submitted pursuant to s. 696.1 of the *Criminal Code* in May 2013. For the reasons outlined below, your application will advance to the investigation stage of the criminal conviction review process. Further information on the conviction review process can be found on the last page of this correspondence.

BACKGROUND

In the early morning hours of November 12, 1995 Brenda Way was murdered and her partially clothed body was left near a dumpster behind the parking lot at 109 Albro Lake Road in Dartmouth, Nova Scotia. She was found at approximately 7:30 A.M. Her throat had been cut and stabbed and her liver had sustained blunt force trauma.

Brenda Way was a 28 year old woman who went by the nickname "Pit Bull". She was a drug addict and supported herself through prostitution. You and she had been involved in a volatile romantic relationship for more than two years at the time of her death. You had recently been charged with assaulting her. The charges were outstanding at the time of her murder.

A few hours after Ms. Way's body was found, the police spoke with you. You told the police that you had spent the previous night with Isabel Morse, at her apartment at 40 Lahey Road in Dartmouth. Ms. Morse confirmed to police what you told them. There was no physical evidence linking you to the murder. Nothing of substance occurred for more than a year. You were in contact with the police, on occasion, supplying them with possible leads regarding the murder. In July, 1996 you moved to British Columbia.

In August, 1996, two new police officers took over responsibility for the murder investigation – Cst. Dave MacDonald and Sgt. Mike Spurr. This resulted from the amalgamation of the municipalities of Halifax and Dartmouth and the creation of a new regional police force. MacDonald and Spurr apparently considered you the prime suspect in the murder given your relationship with Brenda Way. More than a year after the actual murder, other evidence emerged some of which was new and some of which was already known to police, including:

- Margaret Hartrick, a Dartmouth prostitute, claimed to have seen and spoken to you very close to the murder scene, at 4:15 A.M. on the morning of the murder. Hartrick first told police about this in November, 1996 and provided her first statement at that time. She subsequently provided a KGB statement in January, 1998 ;
- Isabel Morse was interviewed a short time after the murder and said you were with her the entire night. In early 1997, after being told by police that she failed a polygraph test and being subjected to intense police interviews, Morse said she was no longer certain you were in her apartment at the time of the murder;
- Wayne Wise, your nephew, told police in January, 1997 that during a telephone call to him you confessed to the murder; and
- Mary Cameron told police in March, 1997 that she heard you confess to your friend, Cathy Valade, that you committed the murder.

Relying on the above information, you were arrested in British Columbia in April, 1998 and charged with first degree murder. A short time later, two more witnesses came forward:

- David Carvery, a jailhouse informant, told police in May, 1998 that you told him you cut Brenda Way's throat and dropped her body near a dumpster; and
- Melissa Gazzard, a prostitute, gave her first statement to police in September, 1998 after a news report of your arrest on television on April 8, 1998. Gazzard claimed that she recognized you as the person that abducted and raped her and admitted to killing "Pit Bull" – Brenda Way's street name.

THE HISTORY OF YOUR CASE

THE PRELIMINARY INQUIRY

Your preliminary inquiry lasted two days, August 18 and 19, 1998. It was held before His Honour Judge E. MacDonald of the Provincial Court of Dartmouth. Counsel for the Crown was Dennis Theman who indicated at the start of the hearing that he expected asking, at its conclusion, for your committal to stand trial for second degree murder. You were represented by Halifax lawyer, Donald Murray. The Crown called seven witnesses:

- the person that discovered Brenda Way's body on November 12, 1995;
- a police officer that attended the crime scene to collect evidence;
- another police officer who described an outstanding charge against you for assaulting Ms. Way;
- the medical examiner who attended the death scene behind 109 Albro Lake Road;
- Wayne Wise and Mary Cameron who described your murder confessions; and
- Margaret Hartrick who described an encounter she had with you, around the time of the murder, near the murder scene.

Judge MacDonald determined there was sufficient evidence to commit you for trial for second degree murder.

THE TRIAL

You dismissed your legal counsel, Don Murray, early in the trial proceedings and decided to conduct your own defence since you did not think there was sufficient time for a new lawyer to become acquainted with your case. Mr. Murray acted for you for nine of the forty-seven witnesses. You decided not to testify at trial. At various times throughout the trial you second-guessed your decision to represent yourself and asked for an adjournment to retain counsel, however, your requests were denied. Some assistance was provided to you by the trial judge. The statements you provided to police, where you denied killing Brenda Way, were not tendered as evidence by the Crown. After two and half days of deliberation, on September 17, 1999, the jury found you guilty of second degree murder. The jury made no recommendation as to your period of parole ineligibility. On December 17, 1999, represented by counsel at the time, Justice Hood sentenced you to life imprisonment with no parole eligibility for 18 ½ years. You are currently serving your sentence at Pacific Institution in British Columbia.

The Key Crown Evidence

a) Mary Cameron

Mary "Tina" Cameron testified that she heard you admit Brenda Way's murder to a friend of yours, Cathy Valade. Cameron said she met you at Valade's house a few weeks after the murder. She said you arrived with Valade while Cameron was already there. Cameron said you told Valade "I did it" and she said "Who Brenda?" and you said "Yes". Cameron said she was in the kitchen but heard you say you got her from ear to ear and that a tip of your blade was broken off.¹

Cameron admitted to knowing your nephew, Wayne Wise, through Wise's girlfriend Karla Jinkerson. Cameron also admitted to knowing Brenda Way's sister, Jane Downey.² Cameron testified that although she did not want to get involved initially, she later thought it was the right

¹ Trial Transcript, Evidence of Mary Tina Cameron, Tab 1.

² Trial Transcript, Evidence of Mary Tina Cameron, Tab 2.

thing to do. There was a suggestion that Cameron and Jinkerson talked about the Way murder before going to police. On re-examination, Cameron denied this was the case.³ However, a handwritten note documenting the Crown's pre-trial interview with Cameron, dated May 26, 1999,⁴ states that Cameron and Jinkerson did talk about the murder although they did not, apparently, discuss the details or what each other knew. The same memo also says that Cameron does not know if Jinkerson ever went to the police.

During cross-examination, Cameron testified that she talked to Jinkerson about the Way murder, and, as a result of their conversation, decided to go to police a couple of days later where she spoke with Cst. Dave MacDonald. Cameron gave her first statement to police on March 27, 1997 more than 16 months after the murder. When you asked her about the different version she gave during her testimony at the preliminary inquiry, she changed her trial evidence. Cameron acknowledged that she went to the police station with her friend Karla Jinkerson, but said that she did not find out they were there for the same reason until they arrived at the station.⁵

b) Cathy Valade

As indicated above, Mary Cameron said that Cathy Valade heard you admit to killing Brenda Way. Valade was involved in an intermittent romantic relationship with you, which overlapped your relationship with Brenda Way. She was a trial witness with respect to your relationship with Brenda Way as well as what Mary Cameron said she heard you say.

Valade gave evidence during the trial about your abuse of Brenda Way. Valade also testified about Mary Cameron being at her apartment after Way's murder although she did have some difficulty remembering this due to all of the people who were there at that time. On cross-examination she said she was not sure of this. Also during cross-examination, you referred to a statement that Valade gave to the Crown on May 17, 1999⁶ just weeks before the trial commenced. In this statement, Valade said she thought Cameron was lying at the Preliminary Inquiry and that she had never been at her apartment around the time of the murder. Valade said she did not recall any conversation between herself, Cameron and you at her apartment after Way's murder. However, it was suggested by the Crown that Valade may have overlooked this because of all of the other people in the apartment at the time.

c) Wayne Wise

Wayne Wise is your nephew. He testified at your trial that in January, 1997 he phoned you while you were in Vancouver to ask you about work prospects there. He said you told him you were hiding in British Columbia due to being a suspect in the Way murder and that you had killed Brenda Way.⁷

³ Trial Transcript, Evidence of Mary Tina Cameron, Tab 3.

⁴ Crown Notes of Interview with Mary Tina Cameron, dated May 26, 1999, Tab 4.

⁵ Trial Transcript, Evidence of Mary Tina Cameron, Tab 5.

⁶ Crown Notes of Interview with Cathy Valade, dated May 17, 1999, Tab 6.

⁷ Trial Transcript, Evidence of Wayne Wise, Tab 7.

Wise was arrested on fraud related charges in late January, 1997. He told police he had information about you killing Brenda Way. On February 4, 1997 he was sentenced to 120 days in prison following his guilty plea and on February 25, 1997 he gave a full statement on the Way murder to Det. MacDonald and Det. Spurr.⁸ Wise testified that he received nothing in return for his testimony.

d) Corey Tuma

Tuma worked as the front desk manager at the Four Star Motel. You and Brenda Way lived together at that motel at various times. Tuma testified about arguments he had seen between you and Brenda Way. Tuma said he learned about Way's death from a cleaning lady at the motel.

Tuma provided two statements to police. The first, dated December 4, 1995 about a month after the murder, stated that Brenda Way came by the motel the night before her death. The statement makes no reference to you coming by the motel that night.⁹

The second statement, dated August 10, 1998, was totally different. Tuma stated that you came by the motel between 8 and 9 P.M. the night before the murder and that Brenda had also been at the motel between midnight and 1:00 A.M that same night.¹⁰

Tuma testified that he recalled Brenda coming by the motel at approximately 10:00 P.M. the night before her murder. He said she left after about five minutes. He also remembered you coming by the motel the same night at around midnight and you asked him if he had seen Brenda.¹¹ On cross-examination by your counsel Mr. Murray, Tuma said it was Brenda that he saw around midnight and he couldn't recall if he had seen you at all. Tuma was very confused. Tuma also changed the length of time that Brenda was there from 5 minutes to 45 minutes.¹² Despite your lawyer's opposition, the Crown was permitted to refresh Tuma's memory using his statement after which he confirmed that you were definitely at the motel the night before the murder.¹³ This was very important to the Crown's theory of the case with respect to two things. First that you were searching for Brenda that night and, second, that you were not with Isabel Morse when she said you were.

e) Melissa Gazzard

Melissa Gazzard identified you as the person that kidnapped and raped her and, most significantly, told her that you killed "Pitbull" – Brenda Way's street name.

When you were arrested on April 8, 1998, there was video footage of you during the arrest. This was broadcast on various news channels. Melissa Gazzard saw the news report on channel 6 -

⁸ Statement of Wayne Wise, dated February 25, 1997, Tab 8.

⁹ Statement of Corey Tuma, dated December 4, 1995, Tab 9.

¹⁰ Statement of Corey Tuma, dated August 10, 1998, Tab 10.

¹¹ Trial Transcript, Evidence of Corey Tuma, Tab 11.

¹² Trial Transcript, Evidence of Corey Tuma, Tab 12.

¹³ Trial Transcript, Evidence of Corey Tuma, Tab 13.

MITV news. A DVD containing a copy of the news footage has been attached.¹⁴ This was provided by Sgt. Dave Worrell of the Halifax Regional Police (“HRP”).

Gazzard gave her first written statement to police on September 17, 1998¹⁵ - the day after her 18th birthday. She gave police a KGB statement on October 20, 1998.¹⁶

Gazzard testified that on the night of the assault, she was working as a prostitute. Gazzard thinks the assault took place sometime between March, 1996 and November, 1997 with the most likely time being March, 1997. She was approached on Windmill Road by someone in a blue pick-up truck with a white cab and two white stripes down the back. She recalls the truck being messy with chip bags all over it. No vehicle was ever identified matching this description. Gazzard was driven to a shed-type building near Burnside, taking exit 13W; the exit number was not mentioned in either of her statements. During the drive there, Gazzard was physically and sexually assaulted. The person that picked her up had keys to the building. He wore blue jeans, a blue sweatshirt, and sandals. This was surprising given it was winter and there was snow on the ground. He had a beard, a moustache, short hair and wore glasses. The fact that he wore glasses was never mentioned in either of her statements. You wore glasses during the trial. She testified that the glasses were similar to the ones you were wearing. She said her attacker was about 5 feet 6 inches tall and medium build. The individual had a scar under his eye. Gazzard varied her testimony as to whether it was under his right or left eye. They went inside the shed and Gazzard was beaten, cut with a razor and sexually assaulted for approximately two hours. The assailant wiped off the razor he used to cut Gazzard with a cloth and put it back into a tool box. He also locked the door as they left. Gazzard testified that she passed out for a short time on two occasions during the assault. She remembers the person carrying a large key ring with about 30 keys on a dog leash type hook attached to his belt. The individual wore lots of chains around his neck, had one stud like earring and wore rings on his fingers. During the assault, the individual mentioned the name “Pit Bull” and when she asked him if he killed her, he said he had.¹⁷

Gazzard testified that she didn’t go to police sooner as she was worried about outstanding warrants for her arrest. During the voir dire only, Gazzard stated that the police “took care” of these outstanding charges.¹⁸ The following chart shows the evolution of Gazzard’s identification of her attacker.

¹⁴ MITV News Footage of Assoun’s Arrest, aired on April 8 1998, CD 1, Tab 14.

¹⁵ Statement of Melissa Gazzard, dated September 17, 1998, Tab 15.

¹⁶ Transcript of Melissa Gazzard’s KGB Statement, dated October 20, 1998, Tab 16.

¹⁷ Trial Transcript, Evidence of Melissa Gazzard, Tab 17.

¹⁸ Trial Transcript, Voir Dire, Evidence of Melissa Gazzard, Tab 18.

Date of Statements and Testimonies

Description of Attacker	<i>Available at Trial and Court of Appeal</i>			
	Sept 17 1998: Original statement to police*	Oct 20 1998: KGB statement *	Aug 23-24 1999: Voir dire testimony	Aug 25-26 1999: Trial testimony before the jury
Shape and Stature	"Sort of tall, chubby"	Deep voice	Tall & thin then changes to "medium sized" Notes that Assoun lost weight. In cross examination says 5'6", 150-160lbs	No description in direct examination. In cross-examination: sorta tall, about 5'6", medium build
Hair	Greyish black hair, beard and mustache		Greyish-black short hair. Beard and mustache "Scruffy looking" When asked to compare to how Assoun looked in court, she said that he looked more neatly shaven in court.	Greyish-black short hair. Black beard and mustache
Socks & Sandals	Yes	Yes	Yes	Yes
Glasses			<u>Yes glasses.</u> Was not wearing them the whole time of the attack. <u>This was her first time identifying glasses, Assoun was wearing glasses in court on that day</u>	Yes. When asked what type, said same as Assoun was wearing
Large bunch of keys hooked onto belt	Yes, about 30 keys. He used a key to open the door of the shed where the attack occurred	Nothing unusual about the key ring	About 30 keys, on a dog leash keychain. Hooked onto a loop on his pants	Yes
Location of scar under the eye	Left eye	Right eye. She originally said left eye but the police helped her to consider	Left eye, a little over an inch wide	In direct examination: scar under <u>left</u> eye In cross-

		that the attacker was in front of her, so it would have been <i>his</i> right eye		examination, scar under <u>right</u> eye, an inch wide
Earring	Stud on right ear		Initially says no. But then says right ear after reviewing statement. Initially unsure if stud, then says yes stud	Stud on right ear
Chains	4-5 golden chains	4-5 chains, a cross on one chain		Lots of chains, and also rings
Clothing	Blue sweatshirt, jeans, green underwear		Blue sweatshirt, jeans	Blue sweatshirt, jeans
Legs			Hairy and otherwise normal (Assoun's legs have visible deformities, are notably pale and hairless)	
Vehicle	Blue-pickup truck with a white cab & two white stripes. No license plate number recalled	Truck was messy, chip bags all over	Blue pick-up truck, unsure of make and model.	
Residence				
Photo identification shown at the time	Gazzard identified Glen Assoun as her attacker after seeing his picture on the MITV news.	Gazzard identified Glen Assoun as her attacker after seeing his picture on the MITV news		

*Sept 17, 1998 and Oct 20, 1998 statements were taken before Melissa Gazzard saw you in person in court.

f) Jennifer McKay

McKay, your ex-wife, testified for the Crown. She talked about an injury you suffered when you were married and the fact that a scar resulted on your face. She also talked about knives you carried with you as well as the fact that you used a dog collar clip to carry keys on your side.¹⁹

g) Carol Lynn Beals

Beals was Brenda Way's sister. She testified as to having known you since 1994. She also talked about your abuse of Brenda and the fact that Brenda told her she was going to lay assault charges against you. Just prior to Brenda's death she said Brenda told her she was hiding from you. She testified that she recalled you wearing a hoop earring in your left ear but did not know if it was a clip on or pierced. She also recalled you wearing gold chains around your neck.²⁰

h) Jane Downey

Downey was also Brenda Way's sister. She testified extensively about you abusing Brenda. She also testified that a psychic told her that Brenda had been killed with a broken-tipped knife. Downey testified that approximately one and one half years after Brenda's death she found a knife, with a broken tip and wooden handle, in a wooded area very close to where Brenda's body was found.²¹ It appears from police records that the knife was actually found just under one year after the murder.

i) David Carvery

You and David Carvery were incarcerated at the same time at the Halifax County Correctional Centre in May, 1998. Carvery testified that you told him you killed Brenda Way. According to Carvery, the two of you were watching television news and it was reported that a female body was found on Cherry Brook Road. Carvery said you told him that whoever dumped the body there is a very smart murderer. Carvery asked you why you said that to which you replied that that's what you did to your ex-girlfriend. Carvery warned you about saying something like that as someone could "rat" on you. You replied that you did not believe he would do that since Carvery was the friend of an inmate by the name of Wade Parsons on "B" block who was "pretty heavy". Carvery said you detailed to him how you killed Brenda Way. You told Carvery that you drove around, slit her throat, and ditched her body by a dumpster in Dartmouth. You said you killed her because you were very upset with her and were trying to get back with her. Carvery says you told him that she was a prostitute who was using crack cocaine and drinking. No one else was present during this one-time conversation. Carvery also says you told him you were from Vancouver and had four children.²²

Carvery informed his girlfriend, during a visit, about an inmate that had murdered a woman in Dartmouth. Carvery's girlfriend told him the victim was a friend of her sister (in reality Brenda

¹⁹ Trial Transcript, Evidence of Jennifer McKay, Tab 19.

²⁰ Trial Transcript, Evidence of Carol Lynn Beals, Tab 20.

²¹ Trial Transcript, Evidence of Jane Marie Downey, Tab 21.

²² Trial Transcript, Evidence of David Carvery, Tab 22.

Way was the sister of her friend). Carvery also told his girlfriend to contact her friend and to tell her that he knows something about the murder and that she should ask the investigating police officer to come and see him.²³

During his testimony, Carvery said that he gave his statement to police without any kind of deal being talked about. Carvery also testified that there was no real difference between what he would have otherwise received as a sentence (5 years' incarceration) and the deal he ultimately struck with the Crown for agreeing to testify (2 years' incarceration and 3 years' probation).²⁴

During cross-examination, Carvery said that his girlfriend knew Jane Downey (Brenda Way's sister) from a long time ago. You raised the fact that you found Carvery in your cell going through your personal possessions. You suggested that he was looking for disclosure information about your case to bolster the information he says you told him about the murder. After complaining about this to correctional staff, Carvery was moved to another area of the jail. Carvery responded that he was not the only one that went into your cell and it had nothing to do with going through your personal information.²⁵

j) Margaret Hartrick

Margaret "Robin" Hartrick was a cocaine addict who worked as a prostitute. She told police that she met you at 109 Albro Road at 4:15 A.M. on November 12, 1995. At your preliminary inquiry she testified that you told her that Brenda was "gone". Hartrick said it was at 7:00 A.M. that morning that she learned from a friend that Brenda Way had been murdered.²⁶ The friend said he had seen a story about the murder on the news. However, the time must have been wrong as Brenda Way's body was not found until 7:30 A.M. The body was found near a dumpster in a parking lot behind the same address that Hartrick says she saw you - 109 Albro Lake Road.

Hartrick gave police a written statement on November 14, 1996 - a little more than a year after the murder. She gave a KGB statement on January 22, 1998. She testified at your preliminary inquiry on August 18, 1998. Hartrick was murdered after the preliminary inquiry but before your trial. At your trial, the jury saw Hartrick's January, 1998 KGB statement and heard her audio-taped testimony from the preliminary inquiry.

Hartrick's first statement to police, which also formed the basis for her KGB statement, said that she went to 109 Albro Road to visit her friend Linda Grandy. When she was leaving Grandy's apartment, at 4:15 A.M., Hartrick says she ran into you and you told her that Brenda was dead. Hartrick stated that she asked you what time it was. Hartrick acknowledged that she was doing

²³ Trial Transcript, Evidence of David Carvery, Tab 22.

²⁴ Trial Transcript, Evidence of David Carvery, Tab 22.

²⁵ Trial Transcript, Evidence of David Carvery, Tab 23.

²⁶ Preliminary Inquiry Transcript, Evidence of Margaret Hartrick, Tab 24.

drugs that night.²⁷ At the preliminary inquiry, Hartrick added that immediately after leaving Grandy's apartment, she also visited Gerald "Mickey" Bates who lived in the same building and that it was after she left his apartment that she met you.²⁸

The Autopsy and Time of Death

Dr. Christopher Graham, the Halifax medical examiner, arrived at the murder scene at approximately 10:00 A.M. and examined the body at that time. He testified that the deceased had been dead for at least 4-5 hours; in other words, between 5:00 A.M. and 6:00 A.M. He attributed cause of death as blood loss from a cut to the neck. He did not perform an autopsy.²⁹

Dr. Charles Hutton performed Brenda Way's autopsy on November 13, 1995. He issued his report on December 6, 1995. His finding was that she died from a severe loss of blood due to her jugular vein being severed. His autopsy report did not identify a time of death. He testified that there is no scientific basis for determining a precise time of death. Based on police reports as to when she was last seen alive and when she was found dead he estimated that she died between 4:00 A.M. and 7:30 A.M. He testified that there was evidence of both sharp and blunt force injury to her body; that a pointed weapon was used, and it could have been a knife or something else. The weapon was likely a dull knife. There were defensive wounds on her hands but there was no evidence of sexual assault. Although he did not perform an x-ray, on examination of the body, he did not notice any broken tips. On cross-examination, Dr. Hutton confirmed that Brenda Way likely died sometime between 4:00 A.M. and 7:30 A.M. the morning of November 12, 1995.³⁰

Your Decision to Represent Yourself

Although you demonstrated clear logical thinking and a thorough understanding of the case, you lacked knowledge of basic trial techniques, rules of court procedure, as well as the law of evidence. As a result, your cross-examination resulted in frequent disruptions, confusing overlaps, and mistakes that took away from what you were trying to accomplish. As well, the atmosphere created in the courtroom was problematic as you struggled to gain the respect of key witnesses at various times throughout the proceedings.

In terms of some specific examples of problems, you asked broad, open-ended questions, which is not the norm during cross-examination. And, you made sudden jumps from one point to another, which created confusion. As time went on, you seemed to get better as demonstrated by your cross-examinations of Wayne Wise and Cathy Valade. However, when you strayed from closed questions, it often backfired on you.

²⁷ Statement of Margaret Hartrick, dated November 14, 1996, Tab 25.

²⁸ Preliminary Inquiry Transcript, Evidence of Margaret Hartrick, Tab 26.

²⁹ Trial Transcript, Evidence of Dr. Christopher Graham, Tab 27.

³⁰ Trial Transcript, Evidence of Dr. Charles Hutton, Tab 28.

The Crown regularly objected to your line of questioning. The format of your questions, as well as the proper procedure, was often at issue. This became disruptive and confusing for you and resulted in you sometimes leaving a particular area that might have proven beneficial if you had known what to do. This happened in your cross-examination of Mary Cameron after an intervention by the judge. You ended up saying that you were not satisfied with what was taking place, leading to another Crown objection.

You also had difficulty trying to undermine the reliability of some witnesses such as Melissa Gazzard. When trying to suggest that Gazzard had identified the wrong person, you ended up alienating both her as well as the jury in all likelihood by suggesting she was lying as opposed to possibly mistaken.

There were many instances where the witness and jury had to leave the courtroom while the judge and Crown discussed problems with your questioning. This was very disruptive and likely caused frustration on the part of the witness being examined as well as the jury members with the latter told repeatedly to disregard what they had just heard.

You eventually told the court, about halfway through the Crown's case, that you were unable to do an effective job of cross-examination since you did not understand the rules of procedure. The judge warned you about the disruptions and suggested you might be doing it on purpose. Justice Hood refused to grant your request for a mistrial having ruled against it once already. She reminded you that she had given you several adjournments to prepare and to get a lawyer.

Although the objections and disruptions were reduced somewhat after this discussion, the evidence of Cathy Valade created a major challenge for you. At one point, the jury was asked to leave the courtroom four times in a very short period of time. There were problems with entering an exhibit, you giving evidence, asking questions improperly, and impeaching a witness. You complained that you could not be expected to raise any doubt in the Crown's case when your questions were being regulated and the jury was constantly being sent out of the court room, preventing you from getting your point across. You expressed further concern and confusion when examining police officers involved with Margaret "Robin" Hartrick when you learned that the police officers were limited in what they could testify to.

There was a significant amount of information presented by the Crown respecting your character. The Crown was permitted to bring into evidence the abusive relationship between you and Brenda Way. This evidence was likely very damaging to your case. You were obviously very frustrated with this and resulted in certain witnesses becoming hostile and rude when responding to you.

Your Witnesses

You represented yourself at this point in the trial and conducted the examination of all of your own witnesses.

a) Juan Sanchez, Hector Benedict Deagle, Scott Samuel Keefe

Sanchez and Deagle were inmates at the Halifax Regional Correctional Centre at the same time as you were. Keefe was a correctional officer at the same institution. All three testified that you were someone that kept to yourself while doing your time. They said they never witnessed you discussing your case with other inmates.³¹ You were attempting to demonstrate that you would not have had the discussion with Bruce Carvery that Carvery said you had.

b) Isabel Ann Morse

Isabel Morse gave a number of official statements to police – November 12, 1995³², November 13, 1995³³, February 24, 1997³⁴ and April 23, 1998³⁵. There is also a handwritten note of an interview conducted with her by the Crown, dated May 14, 1999.³⁶ She was also interviewed by your former lawyer, Donald Murray, on May 25, 1999.³⁷ Morse testified on a voir dire and was your witness during your trial.

You and Isabel Morse were close personal friends. Although you were not in a formal relationship, you occasionally had sex with her. You maintain that you were with her the night of Brenda Way's murder. In her first statement, Morse told police that you were in bed with her at the time of the murder, giving you an alibi. However, Morse's certainty, as to whether you were actually with her became more and more questionable over time. Specifically, after Morse was told that she failed a polygraph test, she said she could not say for certain that you were actually with her the night of the murder. The court would not, of course, allow you to mention the polygraph test and what affect that may have had on her testimony. On cross-examination, Morse acknowledged that you had two sets of car keys on a big chain that was attached to the belt loop on your pants.

The chart below shows the changes in Morse's statements and testimony as to your whereabouts on the night of the murder.

³¹ Trial Transcript, Evidence of Juan Sanchez, Evidence of Hector Deagle & Evidence of Scott Keefe, Tab 29.

³² Statement of Isabel Morse, dated November 12, 1995, Tab 30.

³³ Statement of Isabel Morse, dated November 13, 1995, Tab 31.

³⁴ Statement of Isabel Morse, dated February 24, 1997, Tab 32.

³⁵ Statement of Isabel Morse, dated April 23, 1998, Tab 33.

³⁶ Crown Notes of Interview with Isabel Morse, dated May 14, 1999, Tab 34.

³⁷ Interview of Isabel Morse by D. Murray, dated May 25, 1999, Tab 35.

Details of Morse's Statements and Testimonies

Date of Statement/ Testimony	The Evening of November 11, 1995	The overnight/early morning hours of November 12, 1995	November 12, 1995
<p>November 12, 1995: First Statement to Police (Cst. Williams and Cst. Borden)</p>	<p>Assoun arrived at Morse's home between 4:00-4:30 P.M.</p> <p>Assoun drank beer, sat and talked to Mostafa, Morse's roommate. Mostafa and Jackie (another roommate) went out for a coffee and a drive, and came back at 8:25 P.M.</p> <p>Morse went for a bath and when she came out, Assoun was in bed and Mostafa and Jackie were on the couch listening to tapes.</p> <p>Morse had one puff of Hash and was feeling "messed up". Mostafa made her a glass of sugar and water to drink to help her calm down.</p> <p>At 9:05 P.M. Morse heard Assoun's pager go off. Assoun did not hear it. Morse thought it was a woman's voice, but she could not make out the voice or what was said. She did not tell Assoun at the time.</p> <p><u>At approximately 10:00 P.M.</u>, Assoun called Morse into the bedroom and told her she would be all right. Morse lay in Assoun's arms and he talked to her for some time.</p>	<p>At approximately 2:30 A.M. Assoun went to the kitchen and made something to eat. Morse got up with him and sat in the living room. Assoun kept asking her if she was all right.</p> <p>Morse told Assoun that he got a page but she did not know who it was from. Assoun called to try to pick up the page, but it was already deleted <u>because it only lasts for 4 hours.</u></p> <p>Assoun and Morse fell asleep around 5:30 A.M.</p>	<p>Assoun and Morse woke up at 1:00 P.M. Assoun showered, ate and went out to work on his car and do laundry. Morse asked Assoun to get her a coffee.</p> <p>Later on, Assoun returned to Morse's apartment. When Morse opened the door, Assoun was lying against the wall, crying. Morse told him she knew what happened as she had called her mother and her mother said that Pit Bull was murdered on Albro Lake Rd. the previous night.</p> <p>Assoun said he saw a bike down the road and thought that Way was on the back of it. So he turned around and followed the bike but it wasn't Way.</p> <p>Assoun went to "My Son's" place; he called Way's parents and asked her father to speak to Way. Way's father told him that Brenda was dead. Assoun went to Way's parents place.</p>
<p>November 13, 1995: Statement to Police (Cst. Williams)</p>			

<p><i>Morse called police on Nov 13, 1995 and said she wanted to clarify something in her previous statement in regards to Assoun meeting with Way on <u>November 7, 1995 and November 10, 1995.</u> In this statement, she did not add any information about the whereabouts of Assoun on November 11 or 12, 1995.</i></p>			
<p>On February 24, 1997 Sgt. Mark Hartlin of the Halifax Police gave Morse a polygraph test. Police notes indicate that Morse was found to be “deceptive”. Morse was told that she failed the polygraph test. She gave her next statement the same day.</p>			
<p>February 24 1997: Statement to Police (Cst. MacDonald and Spurr)</p>	<p>Assoun got a page from Way about half an hour before Mostafa and Jackie went to work that night (she did not mention that Mostafa and Jackie went to work in her previous statements)</p>	<p>Q: In your first statement to the police back in November of 1995, you stated that Assoun was with you all night over the night of November 11-12, 1995, is that correct? A: I believed it at that time, yes I did. Q: <u>Do you still maintain today that Assoun was with you all that night of November 11-12, 1995 and did not go out?</u> A: <u>I can't say that now, I can't.</u> Q: Why have you changed your mind? A: <u>Because the polygraph says I'm lying and I can't say he got out of the apartment, or he did not. I'm not aware of him</u></p>	<p>Morse recalls seeing Assoun when she woke up, “whatever time it was; 11 or 11:30 A.M.”.</p>

		<p>leaving. Morse does not remember who went to sleep first, but she thinks it was probably her because she was scared (due to the Hash). She is unsure whether Assoun could have left the apartment while she was sleeping. She says it is possible.</p>	
<p>April 23 1998: Statement to Police (Cst. MacDonald and Hurst) <i>*This statement was taken when Morse was arrested by Cst. MacDonald for accessory to murder and was interrogated for about 11 hours. At trial, Morse asserted that during this time, she was threatened to three to five years imprisonment, was told "fuck you Isabel", and was shown a photo of Brenda Way's dead body. Other than the timing, these assertions were not challenged by the Crown at trial.</i></p>	<p>After supper, Morse, Assoun, Jackie and Mostafa were sitting in the living room. Assoun was drinking beer and Morse and Assoun each had one puff (of Hash).</p> <p>Morse went to the bathroom, when she came out Assoun was in the bedroom. Morse heard Assoun's pager go off, it sounded like a woman's voice but she did not know who it was. Assoun did not hear it at the time and Morse did not tell Assoun.</p> <p>Morse finished the water, sugar and bread; Mostafa and Jackie were getting ready to leave for work. She joined Assoun in the room, he had his arm under her neck and kept saying everything was going to be all right (because Morse was not feeling well from the Hash). Assoun "did that for a couple of hours and we got up at 2:00 A.M."</p>	<p>At 2:00A.M., Assoun and Morse got up and Assoun made himself something to eat. They were out of bed for half an hour.</p> <p>Morse told Assoun that his pager went off and he said he would check it in the morning since it will last between four and seven hours. <i>(In her Nov. 12, 1995 statement, she said that Assoun tried to check the page right away).</i></p> <p>Morse and Assoun went back to bed and talked for a couple of hours. She was not sure exactly how long. She did not look at the clock but it seemed long to Morse. Morse eventually went to sleep.</p> <p>Morse said that the puff of Hash did not seem to have hit Assoun the way it hit her. Assoun was in control.</p> <p>Q: Could Assoun have gone out the night Way was murdered? A. Possibly, but not to my knowledge. He could have gone out the side door and nobody would have known. Q: Had there been</p>	<p>Assoun was there when Morse woke-up, She does not know if he was with her the whole time while she was sleeping. <i>(This was not in her original statement.)</i></p> <p>Assoun got up and went out to get the mail and to get Morse a coffee that she asked for. While he was gone, Morse heard about the murder (from her mother). She tried to page Assoun to tell him but did not reach him.</p> <p>Assoun came back home later on that evening, he was crying. Assoun told Morse that he was driving and he thought he saw Way at the back of a bike, but he followed them and it was not her. Assoun went to "My Sons" place, called Way's father and asked to speak to Way. Way's father then told Assoun that Way was dead. Assoun went to Way's father's place. The police were "blocking him up everywhere up</p>

		<p>occasions in the past that Assoun slipped out of bed without your knowledge...?</p> <p>A: Yes and she recalls one occasion when Assoun had gotten up to have a drink and because he heard someone knocking.</p> <p>Q: Had Assoun been known to use the back door of your apartment?</p> <p>A: Yes, to get to his car.</p> <p>When asked by police, Morse also said that Assoun had been violent with her in the past. He smashed her coffee table, grabbed her arms, threw her on the floor and on another occasion he forced her to take pills.</p>	there”.
<p>May 25 1999: Interview with Donald Murray (Assoun’s first counsel) <i>In this interview, Morse tells Mr. Murray that the police told her she failed her polygraph test, but Morse did not know how to read the results. Morse again spoke about the police threats during her previous police interviews.</i></p>	<p>Same narrative and details as her 1995 statement, the only differences were that: Mostafa and Jackie were working on the night of the 11th-12th; they left Morse’s home at 10:30-11:00 P.M. Mostafa got home around 5:00-5:30 A.M., we heard him in the driveway. (<i>this is the first mention of this information</i>)</p> <p>Morse said she is a sound sleeper, but she would have known if Assoun tried to leave, as she would have felt his arm moving her. (<i>new information</i>) Assoun would have had to pass Mostafa to go out and Mostafa would have woken up. Morse claimed that her 1995 statement is the truth.</p> <p>On November 11-12, Morse was on nerve pills (Lectopam). She took 4 a</p>	<p>Same narrative and details as 1995 statement.</p> <p>At 2:00 A.M., Assoun and Morse went to the kitchen to eat then went back to bed at 2:30 A.M.</p> <p>They talked for a while in bed and went to sleep at 5:00-5:30 A.M.</p>	<p>Assoun and Morse woke up together at 1P.M.. She recalled the same story as her 1995 statement, with great precision: Assoun getting her a coffee, Assoun thinking he saw Way on a bike, the phone call from Assoun to Way’s parents, the phone call from her mom announcing Way’s death.</p> <p>Assoun returned to Morse’s home in the late afternoon; (3:00 P.M., 4:00 P.M. or 5:00 P.M., she is not sure of the exact time. When Assoun got back to her place, he called an old ex of his, Margaret, and asked her to bring him a pint of rum. (<i>New information</i>). He drank that night.</p>

	day – 2 in the morning and 2 at night).		
<p>September 8 1999: Voir Dire <i>The judge instructs Morse that she is not allowed to refer to polygraph testing.</i></p> <p>Morse’s testimony at the voir dire dealt with the admissibility of evidence about a third party suspect (Margaret Assoun and Cathy Valade). It was not relevant to the alibi.</p>	<p>At the time of Way’s death, Morse took 2 medications: Ranitidine for her stomach and Lectopam for her nerves. Lectopam has the ability to put her to sleep.</p>		
<p>Trial Testimony</p>	<p><u>Direct Examination (by Assoun)</u> Morse, Assoun, Jackie and Mostafa all had supper and were talking. They had a couple of beers and then Mostafa rolled a joint. Morse had a puff and she immediately went to the bathroom. She was feeling unwell and scared (due to the Hash). When Morse went back to the living room Assoun had already gone into the bedroom to lie down because he felt the same way.</p> <p>Mostafa made Assoun some warm water with sugar and a piece of pita bread. While she was sitting and talking with Mostafa and Jackie,</p>	<p><u>Direct Examination (by Assoun)</u> At 2:00 A.M., Assoun and Morse got up and went to the kitchen for something to eat.</p> <p>Morse told Assoun that he got a page. Assoun told her that he would check it later, because it “lasted for so many hours”.</p> <p>Morse and Assoun went back to the bedroom; they <u>talked until 5:00 am or 5:15 A.M.</u> Morse thought that Assoun fell asleep a few minutes before her because she looked at the clock and it was 5:00A.M. and Assoun had just started</p>	<p><u>Direct Examination (by Assoun)</u> Assoun and Morse woke up at 1:00 P.M.</p> <p>Assoun went out to go get his mail and came back to Morse’s apartment around suppertime or shortly before supper. Morse asked Assoun for a coffee from Tim Hortons. When Assoun left, Morse called her mother and her mother told her that Pit Bull was dead. Morse tried paging Assoun 50 or 60 times, but there was no response. Four or five hours later, Assoun came home crying. Assoun</p>

	<p>Morse heard Assoun's pager go off. Assoun did not hear it and Morse did not mention it to him at the time. Morse knew it was a woman's voice, but could not make out who it was. Jackie and Mostafa left for work.</p> <p>Morse went into the room, <u>Assoun and Morse talked until 2:00A.M.</u></p> <p><u>Cross-Examination by Mr. Fetterly (Crown)</u> At the time of her testimony, Morse took Demerol for pain, Lectopam for nerves, Imipramine for severe anxiety, depression. Stomach pills, Premarin and Ranitidine for her stomach. The medications sometimes affect her memory. <u>Back in Nov. of 1995</u>, she took stomach pills and nerve pills (Lectopam). Lectopam is a minor tranquilizer that could have the effect of putting her to sleep.</p>	<p>snoring. <i>(these details are new)</i> Morse knew Assoun was asleep, and she started to doze off.</p> <p>Morse said that Mr. Fetterly (Crown) wanted her to change her statement. He did not want her to say that they went to sleep at 5:00 am since it didn't say this in her 1995 statement and she did not say how she knew the time. The Crown responded to this during cross-examination and made the point that Morse was never asked to commit perjury.</p> <p><u>The Crown challenged Morse's memory and recollection of dates and times.</u> The Crown pointed out Morse's contradiction with her February 24, 1997 statement when she says: "I don't know who went to sleep first, but it was probably me because I was scared of the feelings I had." Morse said she does not know how to reconcile the two versions because there was a lot going on and she was very confused.</p> <p>Crown questioned Morse's inconsistencies in regards to Assoun getting his mail.</p> <p>Morse confirmed that she and Assoun went back to bed between 2:20-2:30 A.M. Morse knew the time because she looked at the clock right in front of her in the living room. Morse did not remember what time</p>	<p>and Morse were sitting in the living room and about half an hour later, the police came. The police asked her to come to the Dartmouth police station to write a statement.</p> <p><u>Cross-Examination by Mr. Fetterly (Crown)</u> At some point, Assoun asked her if she had anything to do with Way's murder. It struck her as funny because she had been there all night with him.</p> <p>Assoun had two sets of car keys that he carried on his belt buckle on "some kind of a big chain". Assoun would attach it to the loop on his pants using a clasp.</p>
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		<p>she fell asleep. The last time she looked at the clock, it was 5:00 A.M. She knew she was awake until 5:00 A.M. at least.</p> <p>Assoun could have gone out the side door without her knowledge, but not before 5:00 A.M. Morse knew that Assoun was with <u>her until 5:00 A.M.</u> but did not know if Assoun was with her until <u>5:30 A.M.</u> She said she is a sound sleeper.</p> <p>Crown raised inconsistencies with regards to Morse's testimony about the pager.</p> <p>Morse did not remember any incidents when Assoun had gotten up in the middle of night without her noticing it. Her apartment had a side door that Assoun would use sometimes to go fix his car.</p>	
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c) Cst. Milton Williams

As stated by Isabel Morse, you attempted to have the police meet with Margaret Hartrick to discuss the Way murder. You believed that Hartrick had important information about the murder that she would not share with you so you wanted her to meet with the police. Williams was one of the officers that you say you attempted to have Hartrick meet with.

When you examined Williams, he had no recollection of you attempting to arrange such a meeting.³⁸ You were trying to demonstrate that if you had killed Brenda Way, you would not be encouraging someone with key information meeting with police.

d) Linda Margaret Grandy

Linda Grandy was a former resident of 109 Albro Lake Road. She testified that she moved out of 109 Albro Lake Road in September or October 1995, and was living at 21 Jackson Road on

³⁸ Trial Transcript, Evidence of Cst. Milton Williams, Tab 36.

November 12, 1995, the day Brenda Way was murdered. She also testified that she did not know Margaret Hartrick.³⁹

Grandy also testified that Mickey Bates was still living at 109 Albro Lake Road when she moved out.⁴⁰ Bates himself, testifying for the Crown, stated that he was not living at 109 Albro Lake Road at the time of the murder.⁴¹

All of the above is inconsistent with the testimony of Margaret Hartrick who said that she met with both Grandy and Bates, at 109 Albro Lake Road, just prior to your admission that you killed Brenda Way.

e) Cathy Anne Cameron

Cathy Cameron was an aesthetician and was qualified by the court to give expert opinion evidence about ear piercing and about ears that show signs of having been pierced. While Cameron was on the stand, Assoun approached her and she examined his ears to determine if they had ever been pierced. She concluded that Assoun had never had his ears pierced.⁴²

On cross-examination, Cameron said that she only examined Assoun's lower ear lobes; she did not examine his upper cartilage and does not have experience with piercing cartilage. Cameron also said that there may be some types of earrings such as magnetic or sleeper earrings that look like the ear has been pierced when they haven't. These earrings would not leave a scar on the ear. However, the only non-pierce earring that she has seen that *really* looks like a real piercing is tiny magnetic studs for the nose.⁴³

You were attempting to show that you did not fit the description given by Melissa Gazzard with respect to her attacker having a stud earring.

f) Brenda Williams

As previously indicated, it is believed that Melissa Gazzard was abducted and raped sometime between March, 1996 and November, 1997 with the most likely time being March, 1997. At trial, you called Brenda Jean Williams as a witness. Ms. Williams is your sister-in-law as she is married to your brother, Kevin. She was in regular contact with you when you lived in British Columbia. She testified that she usually saw you on a weekly basis from the end of July, 1996 until you were arrested in March, 1998 as you used her address for your mail. She testified that there could have been a few weeks or a month that went by when she didn't see you at all. She confirmed that you were living in British Columbia and said she saw you in March, 1997.⁴⁴

³⁹ Trial Transcript, Evidence of Linda Grandy, Tab 37.

⁴⁰ Trial Transcript, Evidence of Linda Grandy, Tab 38.

⁴¹ Trial Transcript, Evidence of Gerald Bates, Tab 39.

⁴² Trial Transcript, Evidence of Cathy Anne Cameron, Tab 40.

⁴³ Trial Transcript, Evidence of Cathy Anne Cameron, Tab 41.

⁴⁴ Trial Transcript, Evidence of Brenda Williams, Tab 42.

Note that there is some overlap between when you were still in Nova Scotia and when the Gazzard assault may have occurred – March 1996 to July 30, 1996.

On cross-examination, Ms. Williams acknowledged that her brother-in-law (and yours), Eddie Ivany, worked for Air Canada and could arrange very inexpensive air fares for family members. She acknowledged that she took advantage of this to attend the trial as she paid only \$100 to fly from British Columbia to Nova Scotia.⁴⁵ In his closing address, the Crown made reference to this cheap airfare and suggested that you could have used this connection to fly back to Nova Scotia at any time and could have assaulted Melissa Gazzard on your return. However, at no time did the Crown tender evidence that a ticket in your name was purchased between the time you left B.C. and your arrest. The Crown also emphasized the fact that there were periods of time – weeks and longer – when you were not in contact with Ms. Williams.

YOUR APPEAL TO THE NOVA SCOTIA COURT OF APPEAL

You appealed your conviction for second degree murder to the Nova Scotia Court of Appeal. You attempted to obtain an order under s. 684 of the *Criminal Code* for the appointment of counsel for your appeal. Your initial application was denied whereas a second application was granted. Jerome Kennedy represented you in the Nova Scotia Court of Appeal on January 17, 2006.⁴⁶

You raised a total of ten grounds of appeal.

a) The Evidence of Margaret Hartrick

A number of concerns were raised about the evidence of Margaret Hartrick. The appeal court ruled that the trial judge did not err in failing to edit Hartrick's KGB statement and preliminary inquiry evidence before the commencement of the trial. The court did not agree that there were insufficient circumstantial guarantees of trustworthiness to admit Hartrick's evidence. Her KGB statement was found to have significant guarantees of trustworthiness, the proper procedural protocols were established, she was under oath, her demeanour could have been assessed and she was cross examined on her KGB statement by defence counsel at the preliminary inquiry. The only matters not fully explored on cross-examination concerned her "psychic visions" and her full criminal history with respect to her prostitution charges. The court said that these matters would not have caused her to change the critical part of her evidence. The court ruled that both her KGB statement and her preliminary inquiry evidence were needed to provide a full picture of Hartrick's evidence. Although the court acknowledged that the trial judge could have done a better job of charging the jury on Hartrick's testimony, there was no reviewable error. Finally, the appeal court found that the trial judge adequately cautioned the jury in considering Hartrick's hearsay evidence and she also gave a sufficient review of your position.

⁴⁵ Trial Transcript, Evidence of Brenda Williams, Tab 43.

⁴⁶ *R v Assoun*, 2006 NSCA 47, Tab 44.

There was also no problem with the fact that the trial judge failed to file her reasons for judgement until well after the filing of your notice of appeal.

b) Brenda Way's Statements

Various witnesses testified about alleged statements that Brenda Way made to them, before the murder, primarily regarding the volatile relationship between you and Brenda Way. The Court of Appeal ruled that these statements were highly probative to determine motive as they dealt with the abusive relationship between you and Way. The statements also demonstrated Way's efforts to end her relationship with you, to have you charged with assault, and to hide from you. Neither you nor the Crown raised the issue of repetition at trial. The Court of Appeal concluded that there was no error on this ground.

Jane Downey testified about alleged statements made by Ms. Way about Assoun beating her, and Cst. Johnson gave evidence in regards to an incident where Assoun allegedly assaulted Brenda Way. The trial judge admitted this evidence under the principled approach to hearsay. The Court of Appeal agreed with your argument that this evidence should not have been admitted. However, the court ruled that even if this evidence had been excluded, it would not have changed the final verdict since there was other admissible, non-hearsay evidence to establish the abusive relationship between you and Way.

The trial judge permitted the admission of statements made by Way, about the deteriorating relationship between you and her. On appeal, you argued that the judge erred by not taking a principled analysis concerning the reliability and necessity of each individual statement, and that if she had taken an individual analysis, the statements would not have been admitted. The Court of Appeal was not satisfied that the individual statements of Way would not have been admitted if the judge had considered them individually. The court went on to say that if the statements were admitted in error, reversing this would not change the verdict.

You argued that the trial judge erred in her charge to the jury in regards to the manner that Way's prior statements could be used. You said that the trial judge did not remind the jury that the statements were not made under oath; that Way was not on the stand so the jury could not observe her demeanour, and she was unable to be cross-examined. The court ruled that the trial judge did not err by improperly directing the jury.

c) Vetovec Warnings

You argued that the trial judge erred in not giving Vetovec warnings to the jury in relation to the evidence of David Carvery, Wayne Wise and Margaret Hartrick.

The Court of Appeal ruled that the trial judge gave a sufficient warning about the characteristics of Carvery which detracted from his credibility. The jury was directed to be cautious about Carvery's evidence, taking into account his prior criminal convictions and the sentencing deal. Furthermore, the court said that Carvery's confession was important but not crucial to the

Crown's case and there were three other witnesses that gave evidence about alleged admissions. A formal Vetrovec warning was not required.

For similar reasons, the Court of Appeal found that a Vetrovec warning in relation to the evidence of Wayne Wise, was not necessary. In its reasons, the Court of Appeal stated that "while it may have been more a more prudent course to give the clear and sharp warning, we are not persuaded to interfere with the discretion of the trial judge." In any event, the Crown conceded that Wise was not a credible witness.

Hartrick's evidence was important to the Crown's case as she was the only person who testified to seeing you near the crime scene on the morning of the murder, her evidence was contrary to your alibi, and the jury asked to replay her testimony during their deliberations. The Court of Appeal found that Hartrick was not a "disreputable or unsavory witness" who required a Vetrovec warning. Her criminal record consisted of petty crimes, not crimes of dishonesty or fraud. Although there were concerns about her credibility in terms of her memory, because of drug use and lifestyle, that was not enough to warrant a Vetrovec warning. The charge to the jury sufficiently pointed out inconsistencies in Hartrick's statements and evidence that contradicted her statements.

d) Melissa Gazzard's Statements

In the charge to the jury, the trial judge stated that Gazzard's evidence "of sexual assault, assault and uttering of death threats by Glen Assoun, was to put in context her evidence of the admission by Glen Assoun that he had killed Brenda Way" On appeal, you argued the contextual details in Gazzard's evidence was irrelevant and that the judge erred in admitting the evidence about the contextual circumstances under which you allegedly made the inculpatory statement. You argued that the contextual evidence was either irrelevant or unduly prejudicial and should have been told to the jury in a summary manner, generally about how she came into contact with her attacker as the details of her alleged assault were not relevant. The Court of Appeal ruled that Gazzard's contextual evidence was necessary in order for the jury to properly evaluate the alleged admission and Gazzard's credibility and reliability. The Court of Appeal ruled that the trial judge did not err in admitting Gazzard's evidence.

Assoun also argued that the trial judge erred in admitting the evidence of other witnesses who corroborated parts of Gazzard's testimony as to identity, such as witnesses who testified that you had a scar near your left eye, carried many keys, and wore an earring. The Court of Appeal concluded that this evidence was relevant to assess the credibility of Gazzard's evidence

You argued that the charge to the jury did not adequately inform the jury that Gazzard's contextual evidence could not be used to show propensity or bad character. The Court of Appeal was satisfied that the charge by the trial judge was adequate.

e) Mary Cameron's Evidence

Cameron testified that she overheard you admit to Cathy Valade that you killed Brenda Way. You argued that Cameron's evidence should not have been admitted as evidence because she only heard part of the conversation. It therefore had little probative value and its prejudice outweighed the probative value. You argued that Cameron heard just a fragment of a conversation and it was taken out of context. The Court of Appeal disagreed and ruled that Cameron's evidence showed that she heard enough of the conversation to place it in context. The trial judge did not err in admitting Cameron's evidence.

f) Miscellaneous Admissibility Issues

You argued that other evidence should not have been admitted. The court found that there may have been some error in allowing the admission of the evidence of Stephen Assoun. He is your nephew who testified that you owned a Chevrolet Scottsdale truck at the time of the murder and the truck looked similar to a suspect vehicle – Chevrolet Blazer. The court ruled that this evidence had a "possible lack of relevance". However, the evidence was considered to be innocuous and was not an error that would result in an unfair trial.

The court rejected your arguments about the admissibility of evidence about your alleged threats and purchase of a gun, numerous assaults and threats, Jane Downey's evidence of finding the broken tipped knife, and evidence that you carried knives.

g) The Included Offence of Manslaughter

You argued that the trial judge should have instructed the jury on the possibility of convicting you of manslaughter as there was sufficient evidence of the defences' of intoxication and provocation to provide for an evidentiary basis for that instruction. The Court of Appeal ruled that there was insufficient evidence to create an air of reality to support a charge of intoxication or provocation, and, therefore, the trial judge did not err in her failure to instruct the jury on the alternative verdict of manslaughter. According to the Court of Appeal, your defence at trial was complete denial supported by an alibi as you did not lead any evidence of intoxication or provocation.

h) Conduct of the Crown

You argued that the Crown acted inappropriately thereby causing a miscarriage of justice. You suggested that because you were unrepresented, the Crown should have given you more leeway with respect to the rules of evidence. The Crown made numerous objections during the trial. The Court of Appeal ruled that inadmissible evidence should not be heard by the jury, regardless of whether the accused is unrepresented. The Crown and judge are expected to assist a self-represented accused comply with the rules of evidence, which the Crown did in this case. However, procedural safeguards such as the rules of evidence are still in effect. The Crown helped Assoun to reformulate direct and cross-examination questions so they were in compliance with the rules of evidence. Furthermore, the Crown suggested that you seek counsel and provided resources to you such as an application form for legal aid.

i) Obligations of the Trial Judge with an Unrepresented Litigant

You argued that the trial judge failed in her duty to assist you as an unrepresented accused and that this should entitle you to a new trial. You initially said in your Notice of Appeal that the trial judge erred by forcing you to represent yourself. However, this ground for appeal was abandoned in 2005 by your appeal counsel.

After a lengthy review of the case law in regards to the level of assistance a trial judge is required to provide an unrepresented litigant, as well as an evaluation of the conduct of the judge through a review of the trial transcripts, the Court of Appeal ruled that the trial judge's conduct was necessary for her to maintain control of the trial and there was not a pattern of trial unfairness. The judge must ensure that the jury only hears admissible evidence. The Court of Appeal concluded that the trial judge sufficiently assisted you.

j) The Admission of Fresh Evidence of Alleged Third Party Suspects

At the Court of Appeal, you sought to introduce new evidence relating to the possibility that Brenda Way was murdered by Avery Greenough, Robert George Poole, Ashley Herridge or Michael McGray. Your counsel submitted excerpts from the Crown disclosure package to support the application.

The Court of Appeal went through the legal test for determining whether to admit fresh evidence on appeal. You sought to admit your own affidavit as fresh evidence, which the court ruled contained no relevant or admissible evidence respecting third party suspects.

Fred Fitzsimmons, a retired RCMP officer who was hired as a private investigator by your appeal counsel, tendered two affidavits.⁴⁷

In the first affidavit, he reviewed the case file including the Crown's disclosure and, as stated by the court,

“[Fitzsimmons] criticizes the thoroughness of the police investigation, especially with respect to third party suspects. Mr. Fitzsimmons says that in his opinion, Mr. Greenough, Mr. Poole and Mr. Herridge were “good suspects”.⁴⁸

In the same affidavit, Fitzsimmons specifically referred to a suspect vehicle (a red Blazer) and his view that Avery Greenough was not thoroughly investigated by police in relation to such a vehicle as well as his possible involvement in the murder.

In his second affidavit, Fitzsimmons stated that third party suspects Messrs, Greenough, Poole and Herridge were known to the police and were discussed in the Crown's disclosure to Don Murray (your first counsel) before the trial commenced. McGray was not known until after the

⁴⁷ Excerpts from the Crown disclosure package and Affidavits of Fred Fitzsimmons; new evidence that was submitted to the Nova Scotia Court of Appeal, Tab 45.

⁴⁸ *R v Assoun*, 2006 NSCA 47, para 305, Tab 44.

trial. Fitzsimmons' affidavit states that he was told by McGray's girlfriend that McGray lived in the same neighbourhood where Way's body was found and he was also told by an unnamed person that McGray lived several minutes walk away from the murder scene. Fitzsimmons' also refers to the memorandum by Detective Hurst, dated May 19, 2005,⁴⁹ which is discussed below. The court ruled that Fitzsimmons' affidavits contained hearsay from interviews that he conducted with named and unnamed persons and that this was not admissible evidence. The Court of Appeal also said that "Mr. Fitzsimmons' opinion that these individuals are "good" suspects is not admissible. If, at trial, Mr. Fitzsimmons had attempted to testify that other individuals were "good" suspects, his evidence would have been rejected as irrelevant".⁵⁰

With respect to the connection between the third party suspects and the crime, the Court of Appeal said that:

"the suggested connections between these four suspects and Ms. Way's murder were flimsier than the connection considered in *Grandinetti* itself. In *Grandinetti* the Supreme Court rejected the third party evidence as a "chain of speculation". In our view, the same can be said with respect to the alleged connections of Poole, Greenough, Herridge and McGray to the murder of Brenda Way. There may be disposition and proximity in the neighbourhood, but there is no connection to the circumstances of Way's murder. The evidence would be inadmissible under *MacMillian* and *Grandinetti*. The evidence could not have affected the result under Palmer's fourth criterion".⁵¹

i) The Hurst Memorandum

Detective Hurst's May 19, 2005 memo, in regards to McGray, was ruled admissible by the court and was considered to be factual by the Crown. The memo, which was in response to a request by your legal counsel, refers to a "Time Line" prepared by Sgt. Worrell and the fact that it appeared that McGray was not in custody at the time of Brenda Way's murder. However, Hurst indicated that he did not have any documents indicating where McGray was living from June 10, 1995 until the time of Brenda Way's murder on November 12. Furthermore, he says that the primary investigator, Dave McDonald, did not consider McGray to be a suspect in Way's murder.

Detective Hurst also wrote that he spoke to Cst. Steve Maxwell and Sgt. Dave Worrell, who were involved in investigating McGray. Sgt. Worrell told Hurst that he had no information linking McGray to the murder. The memo also states that Cst. Maxwell interviewed Michael McGray about the Way murder as well as other murderers and that McGray told Maxwell that although he knew Brenda Way and that he "lived handy" the police got the right guy - referring to you. The memo also confirms McGray's preferred methods of killing, which included

⁴⁹ Memorandum from Detective Wayne Hurst to Crown MacRury, dated May 19, 2005; new evidence submitted to the Nova Scotia Court of Appeal, Tab 46.

⁵⁰ *R v Assoun*, 2006 NSCA 47, para 309, Tab 44.

⁵¹ *R v Assoun*, 2006 NSCA 47, para 314, Tab 44.

stabbing, cutting, strangulation and blunt force trauma. The memo states there are no known cases of McGray killing a prostitute by cutting her throat. The officers noted that they provided this information in haste, without having the benefit of referring to their notes and files, and that they would check for more information.

The court ruled that there was no basis for your submission that the trial was unfair or that the trial judge failed in her responsibility to assist you with respect to the evidence of third party suspects. Greenough, Poole and Herridge were known as possible suspects before the trial, as the Crown disclosed this to you when you were represented by Mr. Murray. Information about McGray was not known at the time of trial. There is no indication that the trial judge knew of these third party suspects, therefore, the judge would not have been able to offer any more assistance to you in this regard. The Court of Appeal dismissed your application to admit fresh evidence.

Decision of the Court of Appeal

As previously stated, The Court of Appeal found three "minor or insignificant error(s)" in relation to the proper admission of evidence. By way of summary, the first error was the trial judge's reliance on corroboration as a factor in determining threshold reliability when admitting the evidence of Jane Downey and Cst. Johnson. The second error was the failure to take a principled approach analysis to each individual hearsay statement allegedly said by Brenda Way to various witnesses prior to the murder. The final error was the admission of Stephen Assoun's irrelevant evidence regarding the similarity of makes of trucks. The Court of Appeal analyzed the cumulative effect of these errors and concluded that they would not cast doubt on the reliability of the verdict or the fairness of the trial and that a new trial was not warranted. On April 20, 2006, Justices Roscoe, Hamilton and Fichaud dismissed your appeal.

SUPREME COURT OF CANADA

Leave to appeal to the Supreme Court of Canada was denied on September 14, 2006. As usual, no reasons were given.

THE NATURE AND PROCESS OF A CRIMINAL CONVICTION REVIEW

Sections 696.1 to 696.6 (formerly section 690) of the *Criminal Code* allows the Minister of Justice to order a new trial or refer a case back to the Court of Appeal. This remedy, however, is an extraordinary one and can only be exercised where the Minister is satisfied that an application raises new matters of significance which, when considered with the evidence heard at trial, establish a reasonable basis to conclude that a miscarriage of justice likely occurred. In other words, it is not the role of the Minister to review the same evidence and arguments previously presented to the court and substitute his or her own decision for that of the court. Rather, the Minister must examine whether new matters of significance have arisen since the conviction and appeal, and determine whether these matters could have impacted the outcome of the trial had they been known to the trier of fact (judge or jury) at the time of your trial.

New matters of significance can include any new information or evidence that was not previously considered by the courts or by the Minister on a previous application. Information will be considered “new” if it was not considered by the court during your trial or on appeal and you became aware of it only after these court proceedings were over.

Information will be considered “significant” if it is relevant, reasonably capable of belief, and could have affected the verdict had it been presented at trial.

FRESH EVIDENCE ON APPEAL

In determining whether evidence is new and significant, the Minister is governed by and normally adheres to the principles used by the appeal courts in assessing the admissibility of fresh evidence on appeal. Evidence that is purported to be “fresh evidence” is not automatically admitted by an appeal court. To be admissible as fresh evidence, the appellant will generally have to demonstrate to the court that the evidence was:

- 1) not reasonably available at trial with due diligence;
- 2) that the evidence is relevant;
- 3) that the evidence is credible in the sense that it is reasonably capable of belief; and
- 4) most importantly, that if believed, it could reasonably have affected the verdict.⁵²

In conducting reviews of applications submitted under s. 696.1 of the *Criminal Code* and deciding on their merits, the Minister is entitled to review, consider and in fact rely on any information he/she believes to be relevant and credible before making a decision. However, as mentioned above, the admissibility requirements of introducing fresh evidence on appeal are paramount considerations in any decision made by or on behalf of the Minister.

Finally, it is important to note that there are four stages in the conviction review process: preliminary assessment, investigation, preparation of an investigation report, and decision by the Minister. A matter will only proceed to the investigation stage if, after a preliminary assessment is completed, the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred.

All applications to the Minister, including your application that is the subject of this preliminary assessment, are reviewed in accordance with the general principles outlined in the preceding paragraphs.

⁵² *Palmer and Palmer v The Queen* (1979), [1980] 1 S.C.R. 759, Tab 47.

THE LAW ON DISCLOSURE

General Crown Disclosure Obligations

In *R v Stinchcombe*,⁵³ the Supreme Court of Canada held that the right to disclosure is a component of the right to make full answer and defence, and is a principle of fundamental justice under section 7 of the *Charter*. The right to make full answer and defence is a pillar of the criminal justice system and is critical to ensuring that the innocent are not convicted. As stated in *Stinchcombe*, “the fruits of the investigation which are in possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”

Crown prosecutors have an obligation to disclose all inculpatory and exculpatory information to the defence, except information that is clearly irrelevant or privileged. Relevance is defined broadly and any information that has a reasonable possibility of assisting the defence in making full answer and defence is considered relevant. Relevant information must be disclosed whether or not the prosecution introduces the evidence at trial. Furthermore, the Crown’s disclosure obligations are continuous; therefore additional disclosure must be made if more information is received.

If the Crown chooses not to disclose information, on the basis that it is either irrelevant or privileged, the onus is on the Crown to justify the non-disclosure. The police have a corollary duty to disclose information about a case to the Crown. However, the Crown cannot justify non-disclosure by asserting that the police did not disclose the information to the Crown.

Non-Disclosure Post-Conviction

In *R v Dixon*,⁵⁴ the Supreme Court of Canada set out a process by which to determine whether non-disclosure, discovered post-conviction, resulted in a section 7 breach of the right to make full answer and defence. This analysis assesses fresh evidence in the context of the Crown’s failure of its duty to disclose.

In the first part of the test, the accused must show that there was a reasonable possibility that the failure to disclose affected the outcome at trial; or, secondly, that the failure to disclose affected the overall fairness of the trial process.

When applying the first part of the *Dixon* analysis, whether the failure to disclose affected the outcome at trial, the fresh evidence is assessed as a whole with all of the other evidence in order to provide a general picture of the effect the evidence would have had at trial. The evidence is not assessed on an individual basis.

⁵³ *R v Stinchcombe*, [1991] 3 SCR 326, Tab 48.

⁵⁴ *R v Dixon*, [1998] 1 SCR 244, Tab 49.

To determine the second part of the *Dixon* analysis, whether the failure to disclose affected the overall fairness of the trial process, the court asks “what realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence” were lost. The accused does not have a heavy burden, as stated by the Supreme Court of Canada in *R v Taillefer*, “this court did not wish to impose such a high burden on an accused seeking to have fresh evidence submitted, where the accused was deprived of that evidence because of a breach by the Crown of its duty to disclose.”⁵⁵

YOUR NEW INFORMATION

THE CONFESSIONS

a) Mary Cameron

Your legal counsel has tendered a new 2011 affidavit from Crown witness Mary Cameron.⁵⁶ In it, Cameron repeats the same evidence she gave at trial. However, she now has additional recollections about these events that she did not mention in her police statement or her trial testimony.

Cameron’s new affidavit was written 16 years after the alleged conversation between you and Valade. She now says that although she heard the conversation from the kitchen, she does not believe you knew she was in Valade’s apartment at the time. She also says that she did not know, at the time, that Brenda was dead. Cameron says she heard what you said either the day of the murder or the following day. The day after the conversation, she says she spoke to Cathy Valade on the telephone and told her not to tell anyone about it. Cameron also confirmed her previous testimony that when she went to the police station with Karla Jinkerson in 1997, she did not know that Wayne Wise or Jinkerson had any involvement in the Brenda Way investigation. Cameron said she found out about their involvement on the day she gave her statement to police. She confirmed what she said previously that she thought going to police was the right thing to do and she did not hope for, or expect to receive, any benefit and was unaware of any benefit that Wayne Wise might have received. During that time, she said she was a single mother and earned money as an escort. She told police that she did not want to testify about her means of income in court and it did not come out. As a result, this did not detract from her credibility with the jury as was the case with some of the other witnesses.

There has been no follow-up with Mary Cameron by the CCRG.

⁵⁵ *R v Taillefer*, 2003 SCC 70, para 78, Tab 50.

⁵⁶ Affidavit of Mary Cameron, dated December 15, 2011, Tab 51.

b) Cathy Valade

Your legal counsel tendered a new 2011 affidavit from Cathy Valade.⁵⁷ In her new affidavit, Valade denies the description of events provided by Mary Cameron at trial. Valade confirms that her evidence at trial was accurate and that she does not have any recollection of Mary Cameron coming to her home after Way's death. At trial, Cameron testified that Valade told her on the phone that Brenda's body had been moved from where it was found and that Way had been stabbed more than one time. Valade now states that no such conversation ever took place. Valade maintains that you never told her that you killed Brenda Way. Even though Valade thought that Cameron lied at the preliminary inquiry, she believed that you were guilty since the police had charged you. From August, 1995 until the end of November, 1995 (just after the murder occurred), Valade kept a journal with notes about you and your relationship with both her and Brenda Way.⁵⁸ Valade maintains that if she had heard you confess to Brenda's murder, she would have written it down in the journal and reported it to police. There is no such statement in the journal entries that were reviewed. However, there are large gaps in the time periods covered in the journal.

There has been no follow-up with Cathy Valade by the CCRG.

Is this information from Cathy Valade new and significant? Is it reliable? If it is, what is the status of Mary Cameron's evidence?

c) Wayne Wise/Karla Jinkerson

At the time of Brenda Way's murder, Karla Jinkerson was Wayne Wise's girlfriend. They were together from 1995 to 2000 and they had a son together. Jinkerson did not testify during your trial.

Jinkerson provided your legal counsel with two new affidavits, in 2011⁵⁹ and 2012.⁶⁰ She maintains that she recalls the events of 1997 to 1999 when Wise became a witness against you. Sometime in the fall of 1996, she and Wise moved to Dartmouth, Nova Scotia where Wise continued to commit criminal acts to support his crack cocaine addiction. And, in January or February of 1997, Wise was arrested and taken into police custody for cheque fraud. Shortly after his arrest, Jinkerson recalls Wise calling her from jail to tell her the police had offered him a deal to shorten the amount of time he would have to serve if he told them about a telephone conversation he had with you during which you confessed to murdering Brenda Way. This was the first time that Wise told Jinkerson about a conversation with you and the first time he suggested that you had confessed to murdering Brenda Way.

⁵⁷ Affidavit of Cathy Valade, dated December 14, 2011, Tab 52.

⁵⁸ Diary of Cathy Valade, August 27, 1995- November 28, 1995, Tab 53.

⁵⁹ Affidavit of Karla Jinkerson, dated June 28, 2011, Tab 54.

⁶⁰ Affidavit of Karla Jinkerson, dated May 11, 2012, Tab 55.

Jinkerson spent a great deal of time with Wise in the period leading up to his arrest and said she never heard him suggest that you had anything to do with the murder, which was a topic of conversation in Wise's family (your relatives) at that time. Jinkerson recalls asking Wise why his uncle would kill this woman and he told her it was because she cheated on you. Wise gave his statement to police and told Jinkerson that, in return, he received less time on the charges he was facing. The police also helped Jinkerson move from the shelter she was in to an apartment and promised a new life in another province for both of them. On the same day that Wise gave his statement, Jinkerson says she was picked up by police and brought to the police station. Once at the station, the police let her sit alone with Wise in a room. The police wanted Jinkerson to give a statement as well so Wise told her what she should say and how she should say it. Jinkerson gave her statement to a grey haired detective on that same day. The Halifax Regional Police have advised by letter through M. Fortune-Stone, dated May 7, 2014, that no statement has been found.

Around the same time, Jinkerson recalls telling Mary Cameron how Wise had given a statement to police in a case involving a prostitute that you (his uncle) went out with. Cameron told Jinkerson that she knew the Way family and had been told that you used to beat Brenda. Cameron did not say anything to Jinkerson to suggest that she knew you were guilty or that she had heard you confess to the murder. Sometime later, Jinkerson recalls Wise getting upset with her after learning she told Cameron about him helping police with the Way murder investigation. During a telephone conversation between Wise and Cameron, Jinkerson recalls hearing Cameron telling Wise about knowing the Way family and that you had beaten Brenda. Jinkerson believes that Wise was trying to convince Cameron to provide a statement to police. Wise told Cameron what the police had promised him in exchange for his statement. Jinkerson and Cameron also discussed the promises that the police made to Wise. Jinkerson recalls Cameron telling her that she was not going to testify for free and would try to get something in return.

Contrary to Cameron's evidence, Jinkerson says she never went to the police station with Cameron to talk about Brenda Way's murder.

There has been no follow-up with either Wayne Wise or Karla Jinkerson by the CCRG.

Is Karla Jinkerson's information new and significant? Is Wayne Wise's testimony of any value to the Crown's case? Did Wayne Wise receive something in return for testifying?

d) David Carvery

(i) The link between Carvery and Wayne Wise

In one of her affidavits, Karla Jinkerson talks about a link between her former boyfriend, Wayne Wise and David Carvery. This issue did not surface during any of the earlier legal proceedings. Jinkerson's 2012 affidavit⁶¹ states that when she and Wise lived in Dartmouth, Jinkerson recalls

⁶¹ Affidavit of Karla Jinkerson, dated May 11, 2012, Tab 55.

Wise buying crack cocaine from an African-Canadian who went by the nickname "Burger". Jinkerson does not remember his real name. Jinkerson says she was in Burger's company on several occasions both at her home as well as other locations in the Halifax-Dartmouth area when Wise was buying drugs from him.

In addition to the above, we were provided with a 2012 Affidavit from Stephen Wayne Downey.⁶² Downey is 50 years old and resides in Toronto. Downey says he has known David Carvery since they were both small children in Halifax. Downey says he and Carvery were close friends growing up. Downey maintains that Carvery's nickname has always been "Burger" which came from his fondness of hamburgers. Downey stated that "Burger" is normally what he called Carvery and what he heard most of his friends call him. Downey stated that he does not know you.

Is this information new and significant? Was Carvery's testimony misleading? Has Carvery's evidence been discredited?

(ii) CCRG Review: Chronology of Events Leading up to the Carvery Deal

Most of the following information was obtained through the CCRG reviewing the Carvery file at PPSC offices in Halifax, Nova Scotia.

Carvery gave his first statement to police on May 18, 1998.⁶³ The statement describes much of the information indicated above. Carvery also stated that the reason he was coming forward with this information is that you were guilty of the crime, his girlfriend was a friend of the victim's sister and he would like some help with his outstanding charges.

There is a "Telephone Call Record" dated June 30, 1998.⁶⁴ It is to Denis Theman the Crown prosecutor in your matter, re: R. v. David Carvery. It is impossible to determine who it is from as the initials/name are not identifiable. However, it appears from other correspondence (see below) to be from someone named James. It says that the writer would consider a sentence of 4 years and this is the best deal he can offer.

In a Justice Canada Memo, dated August 31, 1998,⁶⁵ from Federal Crown Ray Mitchell to File it states that there had been an earlier offer to Carvery on April 6, 1998 of 6 years. The memo also refers to James' June 30 offer of 4 years. The Memo refers to a discussion with Cst. Mellon, a reluctance to have Carvery testify at the preliminary inquiry, and that a five year sentence was fine with Mellon. There is reference to a discussion with Carvery's lawyer, Don Presse, and that Carvery is interested in the 5 year deal. The Memo concludes that if Carvery refuses the five year deal, "then all bets are off".

⁶² Affidavit of Stephen Wayne Downey, dated July 17, 2012, Tab 56.

⁶³ Statement of David Carvery, dated May 18 1998, Tab 57.

⁶⁴ Telephone Call Record to Crown Denis Theman from unknown writer, dated June 30, 1998, Tab 58.

⁶⁵ Justice Canada Memo, dated August 31, 1998, Tab 59.

A Justice Canada Memo dated September 21, 1998⁶⁶ from Federal Crown Ray Mitchell to File states that he received a phone call from Don Presse, Carvery's lawyer. It states that Denis Theman, the Crown in your matter, had been talking directly to Carvery who wants a sentence of 2 years less a day in exchange for his co-operation. The memo talks about the problems with jailhouse informants, that the Assoun matter was based on circumstantial evidence, that the Assoun family were violent and that all of the Crown's other witnesses have a criminal past. A handwritten note dated November 10, 1998⁶⁷ talks about a meeting with Carvery's lawyer, Don Presse, about compensation for remand time. Another handwritten note, dated November 16, 1998,⁶⁸ entitled "Discussion with Paul Mellon", states that Carvery has nothing to add. That Carvery had nothing to offer last year and does not know why the situation has changed. Carvery gave a KGB statement to police on December 10, 1998.⁶⁹ The following day, December 11, 1998, Justice Canada and Carvery entered into a signed "Agreement to co-operate"⁷⁰ whereby Carvery agreed to co-operate with the police and prosecution respecting your charges as well as testify against you. The Agreement indicates that the Crown will enter stays on one trafficking and one proceeds of crime charge and Carvery would enter a guilty plea on one trafficking charge. Carvery was to receive a sentence of 2 years' incarceration followed by 3 years probation. Carvery's criminal record indicates something different. It states that on December 11, 1998 Carvery was sentenced to 2 years less one day and 3 years probation for two charges of trafficking. Despite the two year sentence, the probation order also dated December 11, 1998, states that Carvery "...be imprisoned in a correctional facility for the term of 8 months."

Another handwritten note, dated May 27, 1999⁷¹ regarding a pre-trial meeting which seems to have taken place in the office of Crown Dan MacRury, talks about a discussion with Carvery to prepare for trial. The note also states that "Rob" (likely another Crown) explains jury procedure to "David". The note says that Dan goes through Carvery's criminal record with him. The note makes reference to the conversation between you and Carvery taking place one evening. However, all other statements refer to the conversation taking place around 1:00 P.M. For what appears to be the first time, Carvery states that he recalls you screaming in your sleep due to having nightmares. The note also refers to a request by Carvery to do something about his charges. This appears to be referring to the earlier deal. The note states that no deals were made and that Cst. Dave MacDonald would talk to Crown Denis Theman. The note concludes with the fact that Carvery went into your cell to get some writing paper and was subsequently moved to a different area in the jail.

⁶⁶ Justice Canada Memo, dated September 21, 1998, Tab 60.

⁶⁷ Handwritten note by unknown writer, dated November 10, 1998, Tab 61.

⁶⁸ Handwritten note entitled "Discussion with Paul Mellon" by unknown writer, dated November 16, 1998, Tab 62.

⁶⁹ Transcript of KGB Statement of David Carvery, dated December 10, 1998, Tab 63.

⁷⁰ Justice Canada Agreement to Cooperate, dated December 11, 1998, Tab 64.

⁷¹ Handwritten note by unknown writer, dated May 27, 1999, Tab 65.

Finally, a memo dated February 2, 1999 from Crown Ray Mitchell to RCMP Cpl. Dave Roper and Cst. Paul Melon describes the sentence that Carvery received as “lenient” but given “The accused murderer is a person far more dangerous to society than Mr. Carvery...is “...appropriate in these unusual circumstances.”⁷²

By way of summary, Carvery was initially being considered for a sentence in the neighbourhood of between 4 and 6 years’ incarceration. He ended up receiving a sentence of 2 years less one day incarceration and 3 years’ probation (Note that the Agreement indicated a sentence of 2 years’ incarceration and 3 years’ probation). There is also a handwritten note on the PPSC file, as well as the court record, suggesting that Carvery may have spent as much as 7 ½ months on remand.

Carvery made the point during his testimony that there was virtually no difference between 5 years’ incarceration and the 2 years’ incarceration and 3 years probation he actually received. This logic is highly questionable. As well, it is important to note the amount of time Carvery actually spent in custody. Carvery began his incarceration on December 11, 1998 and he received his full release on May 21, 1999 amounting to a total of just over 5 months. As well, it is possible that Carvery may have received temporary absences for part of that time. Attempts were made to determine this without success as the relevant records have been destroyed. You led evidence at trial supporting your contention that Carvery had been in your cell without your permission or knowledge and that you lodged a formal complaint about it. You also called witnesses who confirmed that you were not in the habit of discussing your case with other inmates.

It was suggested by your legal counsel that Carvery may have received a financial benefit for testifying against you. To date, there has been nothing found to support that contention.

There has been no contact with David Carvery by the CCRG.

e) Melissa Gazzard

(i) Gazzard’s 2010 KGB Statement

In August 2010, Melissa Gazzard provided a new KGB Statement to your legal counsel. A copy of her video statement has been attached.⁷³

Gazzard stated that before giving her first written statement to police on September 17, 1998, she recalls a series of events and conversations that happened at the Halifax Police Station. She remembers being picked up for public intoxication or prostitution and being locked up. Police officers brought her into an interview room and showed her a video with you in it and said to her

⁷² Justice Canada Disposition of Charges Letter dated February 2, 1999, Tab 66.

⁷³ KGB Statement of Melissa Gazzard, dated August 20, 2010, CD 1, Tab 14.

“This was him, wasn’t it?” From that point on, she says police officers kept harassing her about you being the one that assaulted her and admitted to killing “Pit Bull”. She said the police kept picking her up for insignificant things. She was told that if she didn’t tell the police everything she knew, she would sit in the cell and told she could be charged with withholding evidence. She said that she was not shown pictures of any other suspects.

Gazzard said that her attacker told her he lived on Jackson Road. A few months prior to the trial in 1999, Gazzard said she moved to Ontario to try and get away from negative influences in the Halifax area. She said she was arrested in Ontario and incarcerated. After being released, she learned that she had to get on the next plane back to Halifax for your trial that had been scheduled for early June, 1999. She said that police provided her accommodation in the Sheraton Casino Hotel where, known to the police, she did drugs and prostituted herself. As the trial did not go ahead at that time, she returned to Ontario and then came back to Halifax in late August, 1999 to testify. None of the above was mentioned during Gazzard’s trial testimony.

As part of her new KGB statement, Gazzard was shown a photograph of Michael McGray. A copy of that photograph has been attached.⁷⁴ Gazzard identified McGray as the person that abducted and raped her. She said that her attacker kept calling her “Pitbull”; he said that he killed her, and that she would be next if she didn’t do what he said.

(ii) Gazzard’s 2011 Affidavit

A little more than one year after providing the new KGB statement, Gazzard swore an affidavit in December, 2011.⁷⁵ Gazzard acknowledged that the pictures she saw of you were similar to the man that raped her. She said she believed at the time that police must have arrested the right person and that affected her identification of you as her attacker. Gazzard reiterated being picked up by police and threatened with charges if she did not cooperate. None of this was revealed during your trial.

Gazzard recalls that when she first saw you at trial, she had some doubt as to whether you were the person that attacked her. Although on cocaine at the time of the assault, she said she remembered her attacker being taller and heavier than you appeared to be. Even though two or three years had passed by the time of the trial, Gazzard said your mannerisms and movements were not the same as the person that assaulted her. Gazzard confirmed that her attacker had hairy legs and no deformities or scars on his legs and he wore a stud (pierced) earring. He had a scar under his eye and he told her he lived on Jackson Road. And, the man wore socks and sandals despite the fact there was snow on the ground. She confirmed that, consistent with her two statements to police, her attacker did not wear glasses.

⁷⁴ Photograph of Michael McGray, Tab 67.

⁷⁵ Affidavit of Melissa Gazzard, dated December 14, 2011, Tab 68.

Finally, Gazzard confirmed that the photograph of Michael McGray, which was the same one as she was shown in 2010, was the person that attacked her and admitted to killing "Pit Bull".

(iii) CCRG Review

On March 21, 2014, this writer met with Melissa Gazzard at her residence in Halifax, Nova Scotia. A digital recording of the interview is attached.⁷⁶

Ms. Gazzard was reluctant to meet. Along with being afraid of Michael McGray, she feels she has already provided everything she knows to your legal counsel and there was, therefore, no need to provide this information again.

She confirmed much of the information that she provided to your legal counsel over the past few years including:

- the fact that she was prostituting herself just prior to the trial while under the watch of the police; and
- that she was threatened with charges by police if she did not cooperate.

Gazzard previously said that police had dealt with some of her outstanding charges. She now says she cannot remember this. Gazzard indicated that she mentioned "Pitbull" to one of the officers she was dealing with on other charges and that is why they ended up interrogating her about the Brenda Way murder.

In terms of the information she provided about being in the Burnside shed, Gazzard recalled that there was a light on the entire time and she could see everything clearly. Sgt. Worrell of the Halifax Regional Police was asked whether police ever investigated ownership of the shed where Gazzard was taken and I was told that there was no record of any such investigation ever taking place. D/Cst. MacLaughlin also told Sgt. Worrell that she has no recollection of anything being done to follow-up on that information.

Gazzard recalls her attacker being bigger than her (she is 5'7") and having a scar under one of his eyes although she is now not sure which one. He was definitely wearing socks and sandals and there was snow on the ground. He had a beard and there was nothing unusual about his legs other than being very hairy. Gazzard now says that her attacker was wearing glasses but took them off and that he had a lazy eye. You have a lazy eye. Her attacker told her he lived on Jackson Road. Gazzard was shown the same picture of Michael McGray that has been shown to her over the past few years as well as a still photo of you from the MITV news report. Gazzard said she is "pretty sure" that her attacker was McGray. Gazzard stated that she does not think it is fair for you to be sitting in jail if you are not the killer.

⁷⁶ Audio recorded interview with Melissa Gazzard, by the CCRG, dated March 21, 2014, CD 1, Tab 14.

Gazzard was asked to explain her own physical appearance during her 2010 KGB statement. A few days before providing her statement to your legal counsel, she was kidnapped, duct-taped and beaten and escaped by jumping out of the trunk of a moving vehicle. She said her abductor was subsequently convicted of attempted murder.

(iv) Description of Assoun vs. McGray

The Nova Scotia Court of Appeal in its decision dated April 20, 2006, stated that “The crucial issue was the identity of the assailant. No one witnessed the murder.” The following information, which is relevant with respect to Gazzard’s description of her attacker, was obtained from various sources:

Michael McGray

- no information about scars;
- no information that he carried keys;
- no information about earrings;
- information from various sources that he wore socks and sandals even in winter;
- six feet tall according to Correctional Services Canada records;
- no information about his eyes;
- no information about his legs;
- had a beard at the relevant time and pictures from 2001 show it was partially grey;
- no information about glasses; and
- police information that he lived on Jackson Road around the time of the murder.

Glen Assoun

- you apparently have a scar near your left eyebrow, close to your nose, not under your eye (Note that your police Booking Sheet, dated March 20, 1996, does not refer to any scars on your face)⁷⁷;
- testimony of your ex-wife Jennifer MacKay as well as Isabel Morse that you wore keys on your belt;
- even though you state in your affidavit that you have never worn an earring, Carol Lynn Beals, the victim’s sister, testified that you wore a hoop earring a few times but not sure if pierced as well as some gold chains;
- no information on footwear;
- 5 foot 6 inches tall;
- you have one “lazy” eye (right eye is turned inward and has very little vision);
- your legs are hairless and have large and obvious scars and appear deformed due to an earlier motorcycle accident;

⁷⁷ Police Booking Sheet for Glen Assoun, dated March 20, 1996, Tab 69.

- you say you had a beard at the relevant time but you say it was all black and there was no grey in 1996-97;
- you need glasses to drive and never take them off; and
- you say you have never lived on Jackson Road.

The following chart shows the recent changes in Gazzard's identification of her attacker:

	Date of Statements and Testimonies		
	<i>Obtained After Trial and Court of Appeal</i>		
Description of Attacker	Aug 20 2010: KGB statement to Sean Macdonald (Assoun's lawyer)	Dec 14 2011: New Affidavit	March 21 2014 Audio recorded interview with Mark Green, CCRG Counsel
Shape and Stature	"He was bigger, not a big guy." Gazzard first said, 5'6" then 5'8" as he was taller than her. Gazzard is 5'6" or 5'7"	Talking about when she first saw Assoun in court: "I remember that the man who assaulted me was quite bigger than I was. He was somewhat taller and quite bulky and heavy." "He (Assoun) was about the same height as me, which I would not consider a tall man." (Gazzard is about 5'6"- 5'7" and so is Assoun.) "He was not chubby at all and I testified that he had lost weight." "His manner and voice and movements did not remind me of the man."	Tall, bigger than her (she is 5'7") "I had to look up at him and I am 5'7"" Not much taller, heavy set. When she saw Assoun in court she thought he was shorter than what she remembered
Hair			Beard. Does not remember colour of hair
Socks & Sandals	Yes Thick , grey wool socks and Velcro sandals	Yes	Yes

Glasses	<u>No glasses</u> No lazy eye (Assoun has a lazy eye)	Did not remember if attacker wore glasses	Had glasses on first then took them off. He has a lazy eye. <i>First time she mentions that her attacker had a lazy eye... Assoun had a lazy eye. This question was asked by AIDWYC in 2010.</i>
Large bunch of keys hooked onto belt			Does not remember anything about keys
Location of scar under the eye		Under the left eye, close to his nose. Not close to eyebrow	Thinks it was under left eye, but not sure
Earring		"by stud, I mean that the earring went through a pierced ear on the man's earlobe"	He had a stud earring, does not remember which ear.
Chains			
Clothing	Jeans		
Legs	Hairy, nothing unusual. No deformities	Hairy legs, nothing unusual. No scars or deformities	Hairy legs, nothing unusual
Vehicle			
Residence	Attacker said he lived on Jackson Road	Attacker said he lived on Jackson Road. (Assoun has never lived on Jackson Road but McGray did in late 1995 according to HRP Time Line.	Attacker lived on Jackson Road
Photo identification shown at the time	Sean MacDonald, Assoun's counsel, showed her photographs of McGray. She recognized McGray as the person who abducted, assaulted and raped her.		Shown pictures of both Assoun and McGray. Says she is "pretty sure" that her attacker was McGray

It was suggested by some of those who have either investigated or worked with Michael McGray that McGray would never leave one of his victims alive unless he had some sort of previous or ongoing relationship with them.

Is Melissa Gazzard's information reliable? What is the likelihood that Michael McGray assaulted Melissa Gazzard?

YOUR ALIBIS

a) Your British Columbia Alibi

Your legal counsel provided a new affidavit from your former brother-in-law, Mr. Ivany.⁷⁸ He is no longer married to your sister. The affidavit confirms he is a pilot with Air Canada. His affidavit states that Air Canada keeps computer records of anyone using “friends and family” discount flights. In August 2012, on the request of your legal counsel, Mr. Ivany checked the Air Canada data base and confirmed that he did not obtain a discounted flight for anyone between January 1, 1996 and March 25, 1998. It would seem likely that this information would have been available at your trial had you or the Crown sought to confirm whether such a pass had been used.

b) Isabel Ann Morse

Isabel Morse provided your current legal counsel with a new affidavit in 2011.⁷⁹ Morse stated that her most reliable and accurate statement is the one that she provided on November 12, 1995. In that statement, she said that you were with her all night and went to bed between 5:00-5:30 AM that morning. When Morse gave her statement on November 12, 1995, she did not know what time Brenda Way had been murdered or when her body had been found so she would not have been able to fabricate the time for your alibi. Also, she said that she did not talk to you about her statement prior to providing it to police.

Morse said that when giving her second statement in February 1997, she became very confused as a result of being told that she failed a polygraph test. While giving another statement to police in 1998, Morse was arrested and charged with acting as an accessory to Way’s murder as a result of the alibi she provided for you.

When she testified at your trial, it had been almost four years since Way’s death and she said she did not have as clear a memory of the details as she had on November 12, 1995 when she gave her first statement to police. In any event, Morse says she told the truth at your trial. She maintains you were with her the evening before the murder and you were in bed with her until at least 5:00 AM on November 12, 1995.

If we are to accept Isabel Morse’s first statement to police that you were with her the afternoon and evening of November 11, 1995 as well as the morning and early afternoon of November 12, 1995, it would have been impossible for you to have committed the murder.

There has been no contact with Isabel Morse by the CCRG. Your legal counsel recommended that we speak to her.

⁷⁸ Affidavit of Edward Ivany, dated September 4, 2012, Tab 70.

⁷⁹ Affidavit of Isabel Morse, dated December 16, 2011, Tab 71.

Is this information new and significant? Is Isabel Morse's evidence reliable? What is the likelihood that you were with Isabel Morse the night of the murder?

c) Corey Tuma

Corey Tuma provided a new affidavit to your legal counsel, dated June 26, 2012.⁸⁰ He confirmed the first statement he provided to police a few weeks after the murder in 1995. He said he didn't mention you coming to the motel the night before the murder as he didn't remember you being there. However, sometime between 1996 and 1998 he says he was contacted by a detective from the Halifax police. The police officer told him that you were a cold blooded killer and that you killed Brenda Way. The police officer claimed to have solved the murder. Relying on what he had been told, Tuma, all of a sudden, thought that he may have seen you at the motel the night before the murder. Tuma went to the police station in August, 1998 and gave a new statement that talked about seeing you at the motel that night even though he was not sure that was the case.

As previously stated, Tuma testified for the Crown at your trial. Although he was told by the Crown not to drink prior to testifying, he did just that. Tuma is a self-proclaimed alcoholic. He says in his affidavit that he was extremely hung over when he testified at trial. In thinking back to when he gave his evidence, he believed that Brenda was at the motel sometime between 10 P.M. and 1:00 A.M. the night before her murder and that you were not there any time between 9 P.M. and 1:00 A.M. He says he has never been sure that you came by the motel any time prior to the murder.

You acknowledge going to the motel the morning of November the 11th and talking to Tuma who told you he had seen Brenda that morning trying to get into an orange tractor trailer.

There has been no contact with Corey Tuma by the CCRG.

Is this information new and significant? Is it reliable?

d) Margaret Hartrick

Hartrick testified that you told her you killed Brenda. She said this meeting took place after she visited with Linda Grandy and Micky Bates at 109 Albro Lake Road. There appear to be a number of inconsistencies with Hartrick's evidence, including:

- when dealing with police, Hartrick said that some of what she was telling them came from psychic visions, in a dream;
- after hearing this, the police asked her to leave their meeting and she got upset with them and told police about her meeting with you at 4:15 A.M. in front of 109 Albro Lake Road;

⁸⁰ Affidavit of Corey Tuma, dated June 26, 2012, Tab 72.

- she told police you told her that you killed Brenda Way and that this was fact and not a dream;
- the police did not do any follow-up investigation, to verify Hartrick's claims, until taking her KGB statement over a year later (on the voir dire it was learned that some attempts were made to get another statement from her, but she was too impaired at those times);
- it was confirmed through their testimonies that neither Mickey Bates nor Linda Grandy lived at 109 Albro Lake Road at the time of the murder;
- Isabel Morse testified that since you thought that Hartrick had information about the murder, you tried to get Hartrick and the police to meet.

Is Margaret Hartrick's evidence reliable? If what Hartrick says is true, that you told her you killed Brenda Way, why would you suggest that Hartrick meet with police?

THE CASE AGAINST MICHAEL MCGRAY

Michael McGray was born in Collingwood, Ontario on July 11, 1965. He was raised in Yarmouth, Nova Scotia. He claims that his childhood was marred by physical and sexual abuse.

McGray has now been convicted of seven murders – six for first degree and one for second degree. Newspaper articles indicate that McGray claims to have committed a total of 16 murders over a period of thirteen years ranging from Nova Scotia to Seattle, Washington. He says he had accomplices in seven or eight of the murders. One accomplice helped him commit one of the murders whereas another accomplice assisted with six or seven others. With respect to the second accomplice, McGray says he cares very much about him/her. McGray described the accomplice's involvement as helping "set up" victims as well as getting rid of weapons and clothes.

Was McGray referring to his former girlfriend, Tammy MacLean?

a) McGray's Confirmed Murders

The following chart describes the 7 murders for which Michael McGray has been convicted.

	Murder 1: Gail Tucker	Murder 2: Mark Gibbons	Murder 3: Robert Assaly	Murder 4: Gaeten Ethier	Murder 5 & 6: Joan and Nina Hicks	Murder 7: Jeremy Phillips
Name of Victim	Gail Tucker	Mark Gibbons	Robert Assaly	Gaeten Ethier	Joan and Nina Hicks	Jeremy Phillips
Date of Murder/Offen ce	1985 Victim was last seen on May 1, 1985, her	Nov 14, 1987	March 31, 1991	April 1, 1991 (the day after murder of Robert	March 1, 1998	November 21, 2010

	body was found six months later.			Assaly)		
Date of Conviction	May 29, 2001 Pled guilty to first degree murder (16 years after the murder).	June 5, 2000 Pled guilty to second degree murder. (13 years after the murder)	April 25, 2000 Pled guilty to first degree murder. (9 years after the murder)	April 25, 2000 Pled guilty to first degree murder. (9 years after the murder)	March 20, 2000 Pled guilty to murder of Joan Hicks. (2 years after the murder) Denied involvement in murder of Nina Hicks—an 11 year old child whose killing would be highly stigmatized in prison. The Crown stayed that charge upon the plea to the murder of Joan Hicks but later reinstated it. May 25 2001 Pled guilty to the murder of Nina Hicks (3 years after the murder)	November 28, 2011 Pled guilty to murder.
Sentence	Life imprisonment 25 years without parole	Life imprisonment 10 years without parole	Life imprisonment 25 years without	Life imprisonment 25 years without	Life imprisonment 25 years without	Life imprisonment 25 years without

			parole	parole	parole	parole
Description of killing including method and weapon	After sexually assaulting her, <u>McGray stabbed Tucker repeatedly</u> along the side of her body, using a <u>single-edged blade</u> . Her remains were then dragged into the woods.	McGray <u>stabbed</u> Gibbons in the parking lot of the YMCA in St. John. Gibbons then ran from the YMCA to Market Square where he collapsed and died.	McGray hit Assaly over the head with a lamp and then <u>stabbed him repeatedly and cut his throat</u> .	McGray smashed a beer bottle over Ethier's head, and then <u>stabbed him</u> to death with a knife.	McGray beat, strangled, <u>stabbed and slashed the throat</u> of Joan Hicks. He smothered Nina Hicks, and left her in a closet, hanging by the neck.	In their shared prison cell, McGray beat Phillips in the face and strangled him with a cut up bed sheet.
Time of day of murder	Unknown	Unknown	Early morning hours	Early morning hours	Early morning hours	Evening
Description of victim	17 year old woman who left her family in Halifax to hitchhike to western Nova Scotia in hopes of beginning a job.	Victim was an accomplice of McGray and Norman Warren in the attempted robbery of taxi driver Charles Beshara.	59 year old man who met McGray at a bar in Montreal's Gay Village.	45 year old man who met McGray at a bar in Montreal's Gay Village.	Joan Hicks was a 48 year old woman. She was a friend of McGray's partner; Tammy MacLean. Nina Hicks was Joan Hick's 11 year old daughter.	33 year old man who shared a cell with McGray at the medium security Mountain Institution in British Columbia. Phillips was near the end of serving a six year, nine month sentence for aggravated assault.
Alone or with an accomplice	One accomplice	With accomplice Norman Warren	Alone	Alone	No known accomplices	Alone
Circumstances	According to McGray's own	McGray, along with Warren and Gibbons,	On March 29, 1991, while serving a	The day after the murder of Assaly,	On February 28 1998, Tammy	McGray spent the night with Phillip's

	<p>account accepted at his guilty plea, McGray and accomplice offered a ride to Tucker in a pickup truck driven by McGray. McGray asked Tucker to perform oral sex in exchange for money and she refused. The accomplice grabbed her by the throat. McGray pulled over, punched her in the head and began a sexual assault by pulling down her pants and ripping the clothing from her upper body. McGray could not perform sexually. He stabbed her repeatedly. He and his accomplice dragged her</p>	<p>attempted to rob taxi driver Charles Beshara. They got into the taxi, McGray grabbed Beshara around the neck, and Gibbons cut Beshara's hands. McGray loosened his grip and Beshara fled from the car. McGray, Gibbons and Warren also fled. During their flight, McGray stabbed Gibbons.</p>	<p>sentence for the Saint John taxi driver robbery and other offences, McGray received a pass from La Macaza Institution in Québec for the Easter weekend.</p> <p>The following day, on March 30, 1991, he met Assaly in a bar in the Gay Village and went to Assaly's place to talk, drink and watch TV. In the early morning hours of March 31, McGray went to the kitchen and found a knife. He went to Assaly's room and asked him to get on the floor. When Assaly laughed in response to</p>	<p>while still on a three day pass from La Macaza Institution, McGray went back to a bar in Montreal's Gay Village where he met Ethier. They went to Ethier's place, shared a bottle of wine and watched the hockey game. Ethier made a sexual advance which McGray refused. Ethier fell asleep on the couch and McGray spent the night in a chair, watching him. In the early morning hours, McGray smashed a beer bottle on Ethier's head, stabbed him to death and then left.</p>	<p>MacLean was in Moncton at the home of her friend, Joan Hicks. The two were discussing MacLean's desire to end her relationship with McGray. In the early morning hours of March 1, 1998, McGray entered the Hick's home and beat, strangled and cut the throat of Joan Hicks. He smothered 11 year old Nina and left her hanging in the closet by the neck.</p> <p>At 8am that morning, Glen Bennett reported the murder to the police, saying that he witnessed the murder but could not do</p>	<p>dead body in his cell and reported the death to prison staff the next morning.</p> <p>McGray alleged that he and Phillips planned a hostage-taking at the institution so that Phillips could go to infirmary and McGray could return to the maximum security Kent Institution in a single cell. That story was uncorroborated and not easily reconciled with the fact that Phillips was near the end of his six-year, nine-month sentence</p>
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	remains into the woods.		his demand, McGray became enraged and killed him.		anything to stop it. The police found the bodies of the victims and McGray was arrested later that day.	
Denials		<p>McGray initially denied the murder and told police that the murder was committed by Warren. McGray led police to the murder weapon and was a Crown witness in the prosecution of Warren. At trial, Warren was found not guilty of the murder.</p> <p>In 1987, McGray, who denied the murder at that time, pled guilty to only robbery and received a five year sentence (1987-1992).</p> <p>13 years</p>			<p>McGray pled guilty to the murder of Joan Hicks but initially denied involvement in the murder of Nina Hicks.</p> <p>McGray initially blamed Bennett for Nina's murder. Then on May 25, 2001, McGray pled guilty to murdering Nina Hicks.</p>	

		later, on June 5, 2000, McGray pled guilty to the murder of Gibbons.				
Confessions	<p>In 1998, McGray made admissions to fellow inmate Emerie Leblanc, about murders he committed.</p> <p>In a police interview, Leblanc stated that although McGray did not expressly confess to the murder of Gail Tucker, Leblanc thought that McGray was involved in the murder. Leblanc said that McGray expressed particular interest when Tucker's case came up on the news. When Leblanc asked</p>	<p>In March 1998, while incarcerated at the Moncton Detention Centre, McGray confessed the murder of Gibbons to fellow inmate Emerie Leblanc.</p> <p>On April 1 and 6, 1998, LeBlanc disclosed McGray's confession to the police.</p> <p>The details provided by LeBlanc were fairly detailed. He provided the date of the murder, description of the victim, the murder weapon and a summary of the events surrounding the murder.</p>	<p>In March 1998, while incarcerated at the Moncton Detention Centre, McGray confessed the murder of Assaly to fellow inmate Emerie Leblanc.</p> <p>On April 1 and 6, 1998, LeBlanc disclosed McGray's confession to the police.</p> <p>The details provided by LeBlanc were fairly detailed. He provided the date of the murder, description of the victim, the murder weapon and a summary of the events surrounding the murder.</p>	<p>In March 1998, while incarcerated at the Moncton Detention Centre, McGray confessed the murder of Ethier to fellow inmate Emerie Leblanc.</p> <p>On April 1 and 6, 1998, LeBlanc disclosed McGray's confession to the police.</p> <p>The details provided by LeBlanc were fairly detailed. He provided the date of the murder, description of the victim, the murder weapon and a summary of the events surrounding the murder.</p>		

	<p>McGray if he was involved in Tucker's murder, he said "no, I don't want to get into it right now".</p> <p>3 years later, in 2001, McGray pled guilty to the murder of Tucker.</p>					
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b) McGray's Denials

As indicated in the above chart, McGray initially denied some of his killings. This occurred with respect to the murders of Nina Hicks and Mark Gibbons. Hicks was an 11 year old girl and it has been suggested that McGray was concerned about the stigma, in prison, of killing (and possibly sexually assaulting) a young girl. Gibbons was a co-accused in a botched robbery attempt.

(i) Nina Hicks

On March 1, 1998 McGray was arrested for the murders of Joan and her 11 year old daughter Nina. A little more than one month later, on April 21st 1998, McGray contacted Cst. David Morissey of the Codiac RCMP from detention by phone.⁸¹ McGray told Cst. Morissey that he was going to plead guilty to Joan's murder, but that he did not force his accomplice/co-accused Glen Bennett to kill Nina, and that it was Bennett who independently killed her. McGray stated that he was willing to take a polygraph. However, this never occurred. On March 25 of 2001, McGray finally pled guilty to Nina's murder as well.⁸²

(ii) Mark Gibbons

When McGray killed Mark Gibbons, he told police that the murder had been committed by his co-accused in the robbery, Norman Warren. Warren was found not guilty of the murder at the conclusion of his jury trial in New Brunswick in March of 1998. McGray pled guilty to the robbery only on November 20, 1987 and was sentenced to five years' imprisonment.

⁸¹ *R v McGray*, February 28, 2000, NBQB, MI/8/99 (unreported), Tab 73.

⁸² Canadian Press Newswire, "McGray Pleads Guilty Sentenced to Life in Death of 11-year old NB Girl" *The Canadian Press*, dated May 25, 2001, Tab 74.

More than 11 years after the crime, McGray admitted the murder of Mark Gibbons to a fellow inmate, Emerie LeBlanc, and eventually to police investigators. McGray pled guilty to Gibbons murder on June 5, 2000.⁸³

Is McGray's denial of the Way murder also false?

CCRG Review

Materials provided by your legal counsel include an excerpt of an interview by the RCMP with Michael McGray. This portion of the interview deals specifically with McGray's absolute denial of the murder of Brenda Way, it states the following:

“...I had nothing to do with it, absolutely nothing. In my stage in my life right now, like, I am a hard core fucking con. I really am. And there is no way today that I would let somebody doing my time for my crime. There is no way I would do that. I would have years ago. After fifteen years in prison? Like, I am old school and I am a hard core fucking con and I would never allow that. Never.”⁸⁴

c) McGray's Confessions

McGray has told other inmates about the murders he committed. When McGray was charged on March 1, 1998 for the murders of Joan Hicks and her daughter Nina, while in custody at the Moncton Detention Center awaiting trial, he made admissions to fellow inmate Emerie LeBlanc about three other murders he committed - Assaly, Ethier and Gibbons. LeBlanc was awaiting sentencing on a murder charge at the Moncton Detention Center.

LeBlanc subsequently provided two statements to Cst. Gallant of the Codiak RCMP - one dated April 1, 1998⁸⁵ and the other one dated April 6, 1998.⁸⁶ At the time, Cst. Gallant was one of the investigators in the Hicks case and was also involved in “Operation Full Course” (“Full Course”).

d) “Operation Full Course”

As stated above, Cst. Gallant was also a member of Full Course. Full Course, and its relationship to the Brenda Way murder, is described in an RCMP Briefing Note written by Cst. D.L. Southern sometime after 2005⁸⁷

“On 1997-12-23, Andrew Johnson became the subject of a dangerous offender application as a result of him being charged with one count of abduction, two counts of attempted abduction, and a count of impaired driving, which all occurred in British

⁸³ *R v McGray*, June 5 2000, NBQB, Cause No.: S/CR/9/00 (unreported), Tab 75.

⁸⁴ Excerpt of Transcript of Interview with Michael McGray, by RCMP, date is unknown, Tab 76.

⁸⁵ Statement of Emerie LeBlanc, dated April 1, 1998, Tab 77.

⁸⁶ Statement of Emerie LeBlanc, dated April 6, 1998, Tab 78.

⁸⁷ RCMP Briefing Note written by Cst. D.L. Southern, undated, Tab 79.

hoped that after showing this to McGray, he would similarly divulge information about Tammy. According to Sgt. Worrell, no new information was provided by McGray. To date, Sgt. Worrell has been unsuccessful in locating information and/or the tape of the staged media interview.

In August, 2013, Sgt. Jason Withrow of the HRP conducted another interview with Tammy MacLean. Sgt. Worrell stated the purpose of this interview was to obtain MacLean's reaction to the admission by McGray that he had killed Tammy's mother. A copy of Sgt. Withrow's notes was provided by the HRP.⁹²

h) Jailhouse Informants

Your legal counsel provided two new affidavits from inmates Michael Hebert and Michael Smith. They both say that Michael McGray admitted to them that he killed Brenda Way. Michael Hebert and Michael Smith came forward after your legal counsel, and an investigator acting on your behalf, asked another inmate for the names of inmates who may have been in contact with Michael McGray. Hebert and Smith both maintain they have never met you and are receiving nothing in return for providing this information. A review of bed assignments from Correctional Service Canada indicates that you were never in the same institution at the same time as either Hebert or Smith. The information they provided is described below.

(i) Michael Hebert

On November 10, 2010, Hebert met with an investigator working for your legal team at the halfway house he was staying at in St. John, N.B. Hebert provided a written statement and in 2012, Hebert swore an affidavit.⁹³ Hebert has an extensive criminal record dating back to 1995.

Hebert says he was in segregation with McGray at Atlantic Institution (also known as Renous) in range 3-D around 2003-2004. Hebert says he was in cell 4 while McGray was in cell 6. Hebert says he was getting drugs for McGray and that is how their relationship developed.

Hebert says McGray slipped kites (handwritten notes) to Hebert from his cell.⁹⁴ In these kites, McGray told him about killing a cab driver and a girl in a funeral home as she was stealing jewelry from dead bodies. McGray also told him about killing a girl by slicing her throat while another girl watched. He told Hebert that murder is the easiest thing to get away with. McGray said he killed a prostitute and dumped her body in the Kingston Peninsula. McGray gave Hebert a kite that set out his plan to tell police where he had buried that body, in exchange for letting Hebert go and see his wife and kids - if Hebert gave him "a little bit of black" (referring to hash). Hebert provided the original kite to your counsel which is now in the possession of the CCRG.

⁹² Sgt. Withrow's notes, dated August 22, 2013, Tab 84.

⁹³ Affidavit of Michael Hebert, dated August 14, 2012; Exhibit A to Affidavit is "Kite" from Michael McGray to Michael Hebert and Exhibit B is written statement of Michael Hebert, Tab 85.

⁹⁴ Affidavit of Michael Hebert, dated August 14, 2012; Exhibit A to Affidavit is "Kite" from Michael McGray to Michael Hebert and Exhibit B is written statement of Michael Hebert, Tab 85.

McGray told Hebert that he murdered a prostitute that lived close to him in Dartmouth and that he slit her throat. He said he dropped her body at the back of his building and that the police found the body by a dumpster. McGray told Hebert he could not believe how stupid the police were since he lived so close to the girl he killed and they arrested someone else.

Hebert mentioned that McGray always wore socks and sandals at Renous, even outdoors. McGray told Hebert that his toes pointed inward and that he needed special shoes which he was always trying to have the institution provide him with. Hebert says he teased McGray about this and McGray told him that he wore sandals on the street too.

CCRG Review

A review of Correctional Service Canada ("CSC") bed assignments⁹⁵ indicates that Hebert and McGray were not together from 2003-2004. However, McGray was in Atlantic Institution between April 2000 and May 2002 and Hebert was also in Atlantic between December 2000 and February 2002. The bed assignments indicate the following:

- from January 17, 2001 to January 19, 2001 they were both on Unit 3-C, Hebert in cell 3 and McGray in cell 1;
- from March 28, 2001 to May 5, 2001 they were both in Unit 3-A, Hebert in cell 3 and McGray in cell 1;
- from May 15, 2001 to May 28, 2001 they were both in Unit 3-A, Hebert in cell 3 and McGray in cell 1; and
- from October 4, 2001 to October 29, 2001 they were both in Unit 3-C, with Hebert in cell 20 and McGray in cell 19.

This writer met with Michael Hebert, while he was incarcerated at the Saint John Regional Correctional Centre, on March 19, 2014. Hebert agreed to provide a KGB statement.⁹⁶

Hebert recalled most of the information contained in his earlier statement and affidavit. He confirmed the information McGray told him that appears to be an admission respecting the Way murder. The only new piece of information that he provided was that McGray told him the body was close to an industrial park. With respect to McGray's admission to him about killing a woman that had worked in a funeral parlor, Hebert was not sure if McGray told him he killed her or that she was an acquaintance. When asked about the reason for holding on to McGray's hand written note for more than 10 years he said that he thought McGray, a possible serial killer, might be famous one day and the note might prove valuable at some point in time. It is noteworthy that Hebert recalls McGray wearing sandals all year round given the statement by Melissa Gazzard that her attacker was wearing sandals in the winter.

⁹⁵ Correctional Service Canada ("CSC") Bed Assignments of Michael Hebert and Michael McGray, printed on April 11, 2014, Tab 86.

⁹⁶ KGB Statement of Michael Hebert, by the CCRG, dated March 19, 2014, CD 2, Tab 87.

i) Paul McGrattan

Paul McGrattan was the Coordinator of Case Management at Atlantic Institution for approximately 13 years from 1993 to 2006. He retired in 2006. One of the inmates on his caseload was Michael McGray. I spoke with Mr. McGrattan by telephone on March 26, 2014.

Over the years, McGrattan said he became McGray's confidant. McGrattan said that McGray would tell him everything. McGray felt that McGrattan respected him. He said McGray told him he was having nightmares about murders he committed that no one else knew about. McGrattan said McGray gave him details about each and every one of the murders he committed. He also told McGrattan about his urge to kill. Eventually, McGray decided to confess to these murders and McGrattan was instrumental, acting as a link between McGray and the police. McGray insisted that McGrattan sit in on all of his confessions to police.

In talking about the victims of his crimes, McGray told McGrattan that almost all of them were either prostitutes or homosexuals. McGrattan does not believe that McGray had an earring or tattoos (at the time that he knew him) and is not sure if he had any scars. He also said he was not aware of McGray having any foot issues and does not recall McGray wearing sandals.

McGrattan said that McGray told him that he taught Tammy MacLean how to kill. At the same time, McGray was very protective of Tammy and refused to implicate her in any of his murders. McGray told McGrattan that he always kept a souvenir from his murders. When asked about the Melissa Gazzard abduction and rape, McGrattan said that he cannot imagine McGray committing that crime and not killing her.

With respect to the Brenda Way murder, McGrattan said that McGray told him he lived near her but denied killing her. He assured McGrattan that he was telling him the truth on this as well as other murders. However, at one point in time, McGray also assured McGrattan that he did not kill Nina Hicks and we now know that was a lie. McGrattan said he was very disturbed when he learned that McGray had been dishonest with him about this and he cannot, therefore, say for certain what is true and what is false.

Mr. McGrattan told me that due to the stress caused by his association with Michael McGray, he was diagnosed with post traumatic stress disorder, which led to his retirement in 2006. McGrattan said he would do whatever he could to assist with setting up an interview with McGray.

Finally, McGrattan mentioned former RCMP Cst. Steve Maxwell as someone that McGray developed a great deal of trust with. Maxwell was contacted by AIDWYC when preparing your application but he was reluctant to talk to your legal counsel at that time.

j) RCMP Cst. Steve Maxwell

RCMP Cst. Steve Maxwell was involved in Operation Full Course which involved Michael McGray. Maxwell had a particular interest in this operation, and McGray, due to the fact that the

Gail Tucker murder occurred in the area he was responsible for. I spoke with Cst. Maxwell, who retired in 2006, by telephone on March 31, 2014.

As stated previously, Maxwell was involved in providing information about McGray to the Nova Scotia Court of Appeal (in the Hurst memo) during your appeal. Maxwell told me that during his investigation he had the opportunity to look into McGray's family. He learned that McGray's father was abusive and that McGray caught his father in the midst of a romantic affair. McGray apparently told his mother and he was kicked out of the family home at a young age. Maxwell had the opportunity to interview McGray on a few different occasions (with Paul McGrattan sitting in) and for some reason McGray took a liking to Maxwell. On a number of occasions, when McGray was being interviewed by police, in addition to demanding that McGrattan be present, he also insisted that Maxwell be there as well.

Maxwell was involved in interviewing McGray about his two murders in Montreal, the murder of Mark Gibbons as well as the murder of a prostitute in Vancouver. Maxwell said that over time he and McGray developed a sort of "friendship".

Maxwell recalls talking to McGray about the Brenda Way murder. He distinctly remembers McGray telling him that we (the police) got the right guy – meaning you. It is interesting to note that Maxwell recalls McGray always wearing sandals – he referred to them as shower "flip flops". He says McGray wore white socks with them. He recalls the private investigator working on your behalf, Fred Fitzsimmons, calling him about Jackson Road as well as some of McGray's cell mates. He does not recall McGray having a scar and is not sure whether he had any piercings. Maxwell also mentioned that he believes McGray and Tammy MacLean kept a diary prior to 1995.

k) McGray and Sandals

A picture of McGray being interviewed by Maxwell and McGrattan, on April 18, 2000 at the Special Handling Unit, shows McGray wearing sandals.¹⁰² A more recent photograph of McGray in his cell during an interview with the Halifax Regional Police, dated April 17, 2012, also shows him wearing sandals.¹⁰³ A review of McGray's medical file from Correctional Service Canada does not indicate that McGray had ongoing problems with his feet.

What would be the benefit in interviewing Michael McGray?

¹⁰² Photograph of Michael McGray wearing sandals, retrieved from a videotaped interview of McGray with Cst. Maxwell and Paul McGrattan, dated April 18, 2000, Tab 92.

¹⁰³ Photograph of Michael McGray wearing sandals, retrieved from a videotaped interview of McGray with Sgt. Worrell and Sgt. Hart, dated April 17, 2012, Tab 93.

DISCLOSURE ISSUES

CCRG REVIEW

a) The “Mike McGray Time Line” and Jackson Road

As previously indicated, the Hurst Memo dealt with the whereabouts and “Time Line” for Michael McGray. Although McGray’s residence up until June 10, 1995 was apparently known, there was no indication as to his place of residence at or around the time of the murder in November.

During discussions with Sgt. Worrell in Halifax in March 2014, he provided me with a copy of a five page document entitled “Mike McGray Time Line”. It covers the period from 1985 to March 12, 1998.¹⁰⁴ The information found in the Time Line is consistent with the information stated in Detective Hurst’s memo. However, what is stated in the Time Line and not found in Detective Hurst’s memo is that Michael McGray moved to Jackson Road Xmas 1995. Jackson Road is one block from where Brenda Way’s body was found at 109 Albro Lake Road. The back yards of residences on Jackson Road and Albro Lake Road border one another. This writer had an opportunity to visit the location where the body was found along with all other relevant locations (including Jackson Road) in June 2014. McGray’s Jackson Road residence is also potentially relevant given Melissa Gazzard’s recent statements that the person that abducted and raped her (and admitted to killing Pitbull) told her he lived on Jackson Road. Note, however, that the Gazzard assault was thought to have taken place between March, 1996 and November, 1997 with the most likely time being March, 1997. And, there is nothing suggesting that McGray lived on Jackson Road at that time.

Sgt. Worrell emphasized that the Time Line was created in 1999 as part of Operation Full Course and is not an exact statement of events since it is based on various sources of information, some confirmed and some not. Sgt. Worrell stated that the information that McGray lived on Jackson Road in Christmas 1995 came from an unknown source.

Despite the information above, Sgt. Hurst recently stated that he “does not recall knowing or communication to anyone the fact that Mr. McGray resided on Jackson Road at the time of the Way murder.”

Finally, Crown prosecutor Dana Giovannetti stated that he would have disclosed McGray’s Jackson Road residence if he had known or was aware of that. He said that it was a given fact that McGray was living in the general area of the murder and that the specific address made no difference.

¹⁰⁴ Document entitled “Mike McGray Timeline”, provided by Sgt. Worrell to the CCRG in March 2014, Tab 94.

Another Unidentified Source

A witness, whose identity is not being disclosed at this time for security reasons, provided an affidavit which states that Michael McGray and Tammy MacLean lived in a basement apartment at 48 Jackson Road at the time of Brenda Way's murder. The same source stated that McGray and MacLean moved into the apartment two or three weeks prior to the murder. They suddenly moved out of the apartment within a few days of the murder throwing out all of their furniture and leaving their two cats behind. The witness indicated there was no explanation for their sudden departure.

According to Sgt. Worrell, McGray stated in both his 2000 and 2012 interviews that he would usually relocate within days or weeks of a murder.

Why was the Xmas 1995 move to Jackson Road not provided to Sgt. Hurst, the Crown and disclosed to your legal counsel at the time of your appeal? Given the decision of the Court of Appeal, would that information have made any difference in the court's decision?

b) Requests for Disclosure of ViCLAS Information

Prior to your appeal, your counsel, Jerome Kennedy, requested disclosure of Violent Crime Linkage Analysis System information ("ViCLAS") from the Crown. There is no indication that Mr. Kennedy received disclosure of any ViCLAS information.

(i) Description of ViCLAS

ViCLAS is a national database and investigative tool used by police forces across Canada to assist in identifying and tracking violent crimes and criminals that are serial in nature. ViCLAS analyses the victimology, offender/suspect description, modus operandi and forensic and behavioural data of a crime then compares and links this information to other violent crimes in the database. The types of crimes that are entered into ViCLAS include all solved or unsolved homicides and attempts; all solved or unsolved sexual assaults or attempts (other than domestic cases); non-parental abductions and attempts; missing persons where foul play is suspected and; unidentified human remains where foul play is suspected.

When a serious crime occurs, a police investigator completes a ViCLAS questionnaire/booklet which contains various closed-ended, structured questions about the crime and investigation. A standardized booklet is used across Canada. The booklet is then sent to the province's ViCLAS centre, where a ViCLAS specialist begins the analytical process. The ViCLAS specialist begins by analysing and conducting extensive background research on the victim and/or the offender. As stated on the RCMP website

"A typical analysis will involve the specialist reviewing all data that was available on the subject(s) including information from computerized police information retrieval systems,

parolee files and any other reliable information source. They will review all statements, reports, and photographs available and in some cases speak to investigators”¹⁰⁵

Following the background research, the ViCLAS specialist conducts queries on ViCLAS to look for links between crimes that will help reveal the identity of offenders and solve crimes. A potential link is found when the ViCLAS specialist has reason to believe that a specific offender is responsible for a crime(s). The police investigator is provided with the results of this analysis, in which case the investigator can confirm or reject the link based on their investigation.

(ii) The Correspondence Respecting Disclosure

Communication between your counsel and the Crown has been described below. It is not certain if every relevant document was seen. The disclosure of ViCLAS was clearly an issue at the time of your appeal.

In a letter dated September 28, 2004, from Jerome Kennedy to Crown Dana Giovannetti, Q.C., Kennedy asked for the following:

“(1) ViCLAS (Violent Crime Linkage Analysis Section) information on the individuals listed in Section 5 as suspects. In his notes, a copy of which attached, Sgt. Mike Spur, ...completed ViCLAS on one day and reviewed ViCLAS the next day;

(2) any information in the possession of Integrated Crime, MTU (Metro Internal Intelligence Unit) in relation to these individuals listed as suspects;

(3) any Crime Stoppers Tips in relation to these individuals.”¹⁰⁶

A more specific request was made by Kennedy to Giovannetti in a letter dated October 14, 2004 wherein Kennedy asks for information about McGray, his girlfriend Tammy MacLean, and “ViCLAS information relating to Mr. McGray;”¹⁰⁷ In this letter Kennedy refers to the fact that his investigation established that in 1995 McGray lived in Highfield Park, Brule Street and Jackson Road.

Correspondence dated October 5, 2004¹⁰⁸ indicates that Crown Daniel A. MacRury communicated with Halifax Regional Police Chief Frank Beazley regarding Kennedy’s request and correspondence confirms that on November 18, 2004¹⁰⁹ a copy of “a ViCLAS document” was sent by Crown Giovannetti’s assistant to Sgt. Wayne Hurst.

¹⁰⁵ Royal Canadian Mounted Police (RCMP). Violent Crime Linkage System (ViCLAS). Retrieved on May 27, 2014, from <http://www.rcmp-grc.gc.ca/tops-opst/bs-sc/viclas-salvac-eng.htm>, Tab 95.

¹⁰⁶ Letter from Jerome Kennedy to Crown Dana Giovannetti Q.C., dated September 28, 2004, Tab 96.

¹⁰⁷ Letter from Jerome Kennedy to Crown Dana Giovannetti Q.C., dated October 14, 2004, Tab 97.

¹⁰⁸ Letter from Crown Daniel MacRury to Halifax Regional Police Chief Frank Beazley, dated October 5, 2004, Tab 98.

¹⁰⁹ Letter from Connie Cameron, Legal Assistant to Crown Dana Giovannetti Q.C. to Sgt. Wayne Hurst, dated November 18, 2004, Tab 99.

A letter from Kennedy to Giovannetti, dated December 13, 2004,¹¹⁰ recommends a meeting between Fred Fitzsimmons and police about other possible suspects including Michael McGray. In response, in a letter dated January 7, 2005,¹¹¹ Giovannetti suggests that Fitzsimmons contact Det. Wayne Hurst directly in order to determine what is being sought and any areas of disagreement.

From various notes, it appears that meetings between police and the Crown took place over the next number of weeks respecting the disclosure of ViCLAS material to Kennedy.¹¹² One particular note, dated January 27, 2005, refers to a conference call between W. Hurst, Manon Lapointe and Inspector O'Brien of the RCMP ViCLAS unit and states:

“...they would argue 1) no new evidence
2) investigational techniques
disclosure of completed case report would be okay.”¹¹³

The above appears to be suggested responses to Kennedy's request for ViCLAS information. A three and a half hour meeting was held between police and Fitzsimmons on February 3, 2005. A note from Detective Wayne Hurst to Crown MacRury, dated February 17, 2005, describes the issues raised in the meeting by Fitzsimmons. In addition to requests by Fitzsimmons for information about Ashley Herridge, Mike McGray, Avery Greenough, Robert Poole, forensic analysis of Brenda Way's jacket, notes about the knife that was found and the accuracy of Margaret Hartrick's KGB statement, the following request was described by Hurst:

“Mr. Fitzsimmons asked what information if any would Viclas have on McGray and Greenough, and asked if there are any other known or unknown suspects. He asked if Viclas had the capabilities to search forward and backwards for suspects. I was not clear on what exactly it was that Mr. Fitzsimmons was looking for from Viclas, however, I was left with the impression that his request was very broad and that he would like Viclas to search their data-bank, both pre and post offence for any suspects that could match up with this offence, including both listed suspects and other unknown suspects. I informed Mr. Fitzsimmons that from an investigative aspect, the original Viclas Book was completed which did not contain any offender information, then another book was forwarded to Viclas Section which included Assoun as the offender. I stated that I could not speak for Viclas and I would not know what analytical work they would have completed on the file.”¹¹⁴

¹¹⁰ Letter from Jerome Kennedy to Crown Dana Giovannetti Q.C., dated December 13, 2004, Tab 100.

¹¹¹ Letter from Crown Dana Giovannetti to Jerome Kennedy, dated January 7, 2005, Tab 101.

¹¹² Letter from Manon Lapointe to Sgt. Wayne Hurst and Insp. O'Brien, dated January 24, 2005 and Letter from Sgt. Wayne Hurst to Manon Lapointe, dated January 27, 2005, Tab 102.

¹¹³ Note by Sgt. Wayne Hurst, dated Jan 27, 2005, Tab 103.

¹¹⁴ Note from Det. Wayne Hurst to Crown MacRury, dated February 17, 2005, Tab 104

On May 13, 2005, Crown MacRury wrote back to Sgt. Hurst and confirmed that answers to specific questions respecting Michael McGray could be provided.¹¹⁵ The result was the memo from Detective Hurst to Crown MacRury, dated May 19, 2005,¹¹⁶ which was admitted as fresh evidence by the Court of Appeal. The contents of the memo were previously described.

A letter from Giovannetti to Kennedy, dated May 25, 2005,¹¹⁷ accompanies disclosure of the Hurst memo. The letter emphasizes that if any other information is found, it will be disclosed. Finally, a memo from Giovannetti to the Assoun File, also dated May 25, 2005¹¹⁸ confirms a telephone conversation with Kennedy during which Kennedy apparently expresses the view that there is nothing more that can be done regarding his request for disclosure.

Two ViCLAS booklets were located with respect to the Brenda Way murder. The first, which is 36 pages and hand-written has a "Date Entered" of January 16, 1997. Some pages are missing. It identifies the "Analyst Assigned" as Cpl. Don Ash. There is also an 8 page computer generated summary of this booklet. The second report, also handwritten and 40 pages long, has a hand-written note on the front cover that says "submitted June 17/99". It does not identify an analyst but identifies Cst. K.A. Nielsen as the "Name of Person Completing Report".¹¹⁹

(iii) Interview with RCMP Constable David Moore

Constable David Moore is a veteran member with the RCMP. He was recruited by the RCMP in 1991 from his Ottawa software business due to his background with computers. From January 2001 until March 15, 2004 he was a member of the RCMP Criminal Analytical Section. In that role he conducted reviews using various computer programs, including the ViCLAS system described above. On June 24, 2014, this writer interviewed Cst. Moore.¹²⁰

It needs to be said that the work that Moore carried out in relation to the Brenda Way murder took place approximately 11 to 12 years ago. Much of the information that Moore created during his investigation is no longer available. Therefore, much of what he told me during our interview came from memory. Moore acknowledged that some of what he told me may not have been totally accurate. The reasons that Moore's files were not available will be discussed later in this report.

Around 2002-2003, Moore was asked to look at the Michael McGray unsolved murders. Although McGray confessed to a number of murders, they were not officially cleared. As Moore was investigating McGray using the ViCLAS computer system, he came across the murder of Brenda Way. Way's name came up as one of the unknown victims that McGray may have

¹¹⁵ Letter from Crown MacRury to Sgt. Hurst, dated May 13, 2005, Tab 105.

¹¹⁶ Memo from Detective Wayne Hurst to Crown MacRury, dated May 19, 2005, Tab 46.

¹¹⁷ Letter from Crown Dana Giovannetti Q.C., to Jerome Kennedy, dated May 25, 2005, Tab 106.

¹¹⁸ Memo from Crown Dana Giovannetti Q.C., to the Assoun File, dated May 25, 2005, Tab 107.

¹¹⁹ ViCLAS Booklet dated January 16, 1997, Computer Generated Summary of the Booklet, and ViCLAS Booklet dated June 17, 1999, Tab 108.

¹²⁰ Audio recorded interview of RCMP Cst. Moore by the CCRG, dated June 24, 2014, Tab 87.

killed. Brenda Way was identified, despite being a cleared murder (as you had been convicted of the crime), because Moore manually entered data so that the ViCLAS system would search both cleared and unsolved murders. Moore had a practice of doing this manual entry as he had reservations about the ViCLAS system. This led to Moore conducting further analysis into the Brenda Way murder. Moore also said that due to McGray not being consistent in his actions, he had to “spoon feed” information into the system.

Although McGray was very difficult to assess due to the many inconsistencies in the characteristics of his murders, Moore identified McGray as his top suspect in the Way murder for a long time. Moore was able to place McGray in the immediate area where Brenda Way worked and lived by analysing when McGray received, and where he cashed, his welfare cheques. This information placed McGray in very close proximity to the murder scene. Moore indicated surprise at the possibility of McGray committing a murder so close to where he lived given his previous history and that it must have been a mistake of some sort by McGray. Moore stated there was a great deal of information with which to assess McGray including psychiatric reports as well as letters Moore personally wrote to and received from McGray.

During his investigation, Moore also came up with three other strong suspects in the Way murder – Robert Poole, Avery Greenough (aka Reno Hawke) and a third suspect who was subsequently cleared. Poole, another serial killer who was known for being violent with prostitutes, was identified as residing in the same apartment building that Brenda Way lived in at 9 Lawrence Street. And, Greenough became a suspect through the assistance of one of Moore’s colleagues (RCMP Constable Gilles Blinn from ViCLAS “J” Division in New Brunswick). Greenough was known for having committed vicious sexual assaults and Moore had access to two of his psychiatric reports that described his failed release attempts from jail as well as the horrific “fantasies” that Moore believes were based in reality. Moore described Greenough as a sociopath who decapitated animals when he was younger and was a clear manipulator who would stage a murder and blame someone else.

Based on his analysis, Moore now believes that Avery Greenough is the most likely suspect in the Brenda Way murder.

(iv) The Greenough Physical Evidence

1. As determined by Constable Moore

During the original 1995 police investigation respecting the Brenda Way murder, a particular license plate and vehicle were identified as having been seen in the vicinity of the crime scene. The license plate was thought to have been CUH 447 or CUH 449. And, the vehicle was a red SUV. After undertaking a motor vehicle review, it was learned that Avery Greenough had a similar license plate and vehicle. However, after speaking to Greenough and his lawyer, police

determined that Greenough was driving a black Grand Am. As a result, it appears that Greenough was ruled out as a possible suspect.

In the course of his investigation in 2002-2003, Moore said he did a comprehensive review of the motor vehicle records respecting Avery Greenough and his vehicles. Although Greenough did have a black Grand Am, that vehicle was apparently "written off" a few weeks prior to Brenda Way's murder. Moore says he confirmed that Greenough was in possession of and driving a red 1987 Chevrolet S-10 (SUV) at the time of the murder. Moore says the motor vehicle records he found confirmed that Greenough was in possession of this vehicle as of October 29, 1995 – before Brenda Way's murder.

Moore acknowledged that his methods of analysis are somewhat different than most ViCLAS analysts. He said that is because of his computer training as well as his GD (general duty) background. As a result of those things, he does not merely rely on the information in the ViCLAS system but makes a point of carrying out whatever investigation is necessary.

2. The Other Greenough Information

About one month after Brenda Way's murder, the HRP (primarily Constable Grant Veinot) investigated Avery Greenough. The following information was obtained:

- Gerry Townsend, a manager at the Dartmouth Inn, stated that Greenough regularly associated with prostitutes; that Brenda Way regularly frequented the Dartmouth Inn; that Greenough had driven a Grand Am but started driving a red Blazer before Remembrance Day (November 11); and that in late November Townsend said he/she saw a shoemaker's tool and hunting knife in a sheath in the front seat of Greenough's red Blazer.
- Melissa Sinsel, a bartender at the Dartmouth Inn, stated that a few weeks after Brenda Way's murder Greenough told her that Brenda Way was his ex-girlfriend.
- Linda Surette, a prostitute who provided services to Avery Greenough, confirmed that Greenough knew Brenda Way and that Greenough was driving a red Blazer in November 1995.
- it was learned from the Calgary Police that Greenough received a sentence of 17.5 years for a number of sexual assaults, which included an escort as one of the victims.
- taxi driver Allen McMaster, who testified at trial, said he saw Brenda Way go to a red Blazer or Jimmy the night of her murder.¹²¹

The above information reveals that there were multiple witnesses who indicated that Greenough drove a red SUV at the time of Brenda Way's murder.

Fred Fitzsimmons, a retired RCMP officer working as a private investigator on your behalf, also obtained a statement from Stephen Walter Mark. Mark was a newspaper carrier who recalls seeing a dark coloured Bronco SUV in the parking lot of 107 Albro Lake Road, as well as the

¹²¹ Trial Transcript, Evidence of Allen McMaster, Tab 109.

surrounding area, around 5:00 AM the morning of the murder. Fitzsimmons also stated in his own affidavit that Constable Veinot confirmed with Greenough and Greenough's lawyer that Greenough did not own a red SUV Blazer until after the murder; which Constable Moore has now shown to be false.

All of the above information, other than Moore's findings about Greenough's red Blazer, was available to the Court of Appeal.¹²² The Court of Appeal, addressing your nephew's trial testimony respecting your possible link to a red and white Chevrolet Scottsdale (that looked similar to a Chevrolet Blazer), stated that none of the evidence about vehicles was particularly probative of any fact in issue as there was no evidence establishing colour or make of vehicle driven by the murderer.

Finally, a new 2013 affidavit from Lea Kelly says he saw Brenda Way get into a red Bronco or Blazer around 5:00 AM, outside of a rooming house on Braemar Drive on the morning of her murder.¹²³

Crown Giovannetti said your defence counsel never requested information about Greenough's red Blazer and that he and Crown MacRury were never advised of the existence of nor provided with disclosure of such information from HRP. Giovannetti and MacRury both said if they had such information, or knew of its existence, they would have advised Mr. Kennedy.

Why was Moore's ViCLAS information (including the information about Greenough's red Blazer) not provided to the Crown? Why was Avery Greenough eliminated as a suspect during the original police investigation?

(v) Moore's Transfer from ViCLAS

Halifax police Constable Dave MacDonald was the main investigator in the Brenda Way murder. Moore indicated that in 2004 he told MacDonald about his findings respecting Greenough's vehicle but MacDonald was not really interested given that he was retired. At the same time, Moore says his superiors at ViCLAS (Ken Bradley and Dick Hutchings) told him he was wasting his time. They told Moore that the matter had been decided by the Supreme Court and it was not worth pursuing. Despite being told to stop working on the Way murder, Moore felt compelled to carry on as he believed there was a strong possibility that you had been wrongfully convicted of Brenda Way's murder.

Moore said he went to RCMP Inspector Andy Lathem who was head of the major crimes section with the RCMP. Moore said he told Lathem about some of his findings and Moore said Lathem asked him to put together some more information including a Time Line. Moore, who was

¹²² Excerpts of Crown disclosure package submitted as new evidence to the Nova Scotia Court of Appeal, Tab 45.

¹²³ Affidavit of Lea Kelly, dated August 16, 2013, Tab 110.

leaving for a two week vacation, intended to do that but when he returned from his holidays learned he had been transferred out of the ViCLAS section. Moore said he was not given any reason for his transfer from ViCLAS.

(vi) Moore's Work Assessments

Moore provided copies of two of his work evaluations while at ViCLAS. The first, signed in February 2003, is a very positive report respecting his work. Moore was specifically commended for the work he had done on the Michael McGray file and his ability to work independently.¹²⁴ The second, dated May 2004, was a very negative report and led to his transfer. It seems to attribute Moore's decline in work performance to "a devastating fire that completely destroyed his personal business". The evaluation states that after the fire Moore was not the same person as he previously was as he became focused on issues related to the fire at the expense of his ViCLAS work. The evaluation also states that Moore had difficulty with his colleagues and, since the fire, required a great deal of supervision. Both evaluations were completed by Sgt. Hutchings.¹²⁵

(vii) Moore's Attempts to Disclose ViCLAS Information

Moore stated that he attempted to share the information he uncovered about the Brenda Way murder with others who could take some follow-up action. This is clearly articulated in Moore's written response to his 2004 evaluation wherein he states that:

"There was no consideration given to the information or the fact that there was a possibility an innocent man was in prison and had been wrongfully convicted. ...I explained to Sgt. Hutchings that while there may be some sensitivity with HRPS to the case there was a legal responsibility to bring this information forward."¹²⁶

As well, in e-mails Moore sent to Leo O'Brien (head of ViCLAS) in early 2005, Moore asks for assistance in making this information available to police investigators so there can be a proper review of his findings. Moore said that O'Brien's response was that he was not in a position to do anything.

Moore indicated that the general RCMP policy respecting disclosure of ViCLAS information was that it was not necessary to share this information with defence counsel since all of the information that the analysis was based on was otherwise available from other sources. This is consistent with the RCMP policy as well as the *MacDonald* court decision which will be discussed in detail later in this report. Moore expressed his opposition to this policy. It is his

¹²⁴ Cst. Moore's 2003 RCMP Performance Evaluation and Review Report, signed by Cst. Moore on February 11, 2003, Tab 111.

¹²⁵ Cst. Moore's 2004 RCMP Performance Evaluation and Review Report, and Cst. Moore's written response to the evaluation, signed by Cst. Moore on May 5, 2004, Tab 112.

¹²⁶ Cst. Moore's 2004 RCMP Performance Evaluation and Review Report, and Cst. Moore's written response to the evaluation, signed by Cst. Moore on May 5, 2004, Tab 112.

view that since ViCLAS analysts have access to other significant information that would not normally be disclosed in a standard police investigation file (i.e. Interpol, VICAP, various psychiatric reports, correctional files and other voluntary statements) the ViCLAS analysis should be disclosed. Furthermore, given Moore's practice to do more than merely analyze existing file information (i.e. his investigation of the Greenough vehicle; letters he wrote to and received from Michael McGray; and analysis of McGray's welfare cheques and psychiatric reports) Moore believes it is important that ViCLAS information be disclosed.

(viii) Destruction of Moore's Files

After his transfer out of ViCLAS in mid-March 2004, Moore determined that his work in relation to the Brenda Way murder had been erased from the ViCLAS system. This was confirmed to him by RCMP Constable Blinn. Moore said that some of his Work Sheets were missing from the ViCLAS system and that hundreds of documents he kept in banker boxes were gone. Also missing was a large Time Line chart that hung on the wall next to his desk. Moore stated that he first learned of the missing documents when he returned to his ViCLAS office on March 15, 2004 after completing his holidays. Moore inquired into what happened to his files but learned nothing. Moore asked ViCLAS Policy Centre Director Leo O'Brien about policies respecting the deletion and removal of an analysts work, but received no direction from O'Brien. It was learned that the day before Moore was interviewed by this writer, part of his Time Line chart was found and a copy was given to him.¹²⁷ An onion skin overlay, with additional information that Moore said he created, is still missing.

(ix) The Current RCMP Investigation Regarding Constable Moore's ViCLAS Information

1. Interview with and Report by RCMP Inspector Larry Wilson's

Once Constable Moore learned that he may be interviewed in relation to your 696.1 review, he attempted to again locate his file information in order to prepare himself. When none of his file information could be found, he expressed concern to his superiors. Senior RCMP officials were concerned as well and commenced a review of what happened to Moore's files. Inspector Larry Wilson, Officer in Charge of Major Crimes, was tasked with overseeing this review. I met with Inspector Wilson in Halifax on June 24, 2014.¹²⁸ After the personal interview with Wilson, he completed a report, dated July 2, 2014, entitled: **Administrative Review of N.S. ViCLAS Re: 1995 Brenda Way Homicide.**¹²⁹

Inspector Wilson, who has direct experience with ViCLAS and is the architect of the ViCLAS training session, stated that the objectives of his review are to determine:

- If Moore's ViCLAS files were deleted, how that occurred, and if they can be recovered:

¹²⁷ McGray Time Line Chart 1, created by Cst. Moore, Tab 113

¹²⁸ Audio Recorded Interview with Insp. Wilson by the CCRG, dated June 24, 2014, CD 2, Tab 87.

¹²⁹ Administrative Review of N.S. ViCLAS Re: 1995 Brenda Way Homicide, July 2, 2014, Tab 114.

- If Moore's physical evidence was destroyed (or lost), how that occurred, and if it can be recovered; and
- If there is any evidence that you were wrongfully convicted.

Wilson told me that his team of investigators looked at all 233 of Moore's ViCLAS cases, they searched the ViCLAS current and former offices, they examined Brenda Way's police file and they interviewed a number of witnesses. He provided me with the following information based on his investigation as of that date. Inspector Wilson indicated that he would be completing a report at the end of his review and that he would provide me with a copy.

A. Moore's Computer Files

Wilson indicated it was difficult to determine how many of the Moore analysis Work Sheets were missing as the audit logs only started collecting detailed information in 2006. Wilson came to the following conclusions (Note: a ViCLAS Work Sheet is the document that an analyst uses to make queries to determine if there is a link between files based on behavioural profiling):

- two Brenda Way Work Sheets were found (one of those was completed by Moore although Moore says he completed more than one);
- a Gail Tucker/Michael McGray Work Sheet completed by Moore was also found;
- 39 of Moore's cases appeared to be missing Work Sheets, none of them could be recovered, and they were likely deleted. It could not be confirmed if any Brenda Way Work Sheets were missing, however, Moore says he completed more than the one that was found;
- in 95 of Moore's cases, Work Sheets were modified. It could not be confirmed if the Brenda Way Work Sheet was modified; and
- it is probable that Cst. Moore had multiple worksheets on the Brenda Way file that were subsequently deleted.

Wilson indicated that any member of the Nova Scotia ViCLAS Centre, who had been authorized, had the ability to add, modify or delete any of Moore's Work Sheets. As well, employees of the RCMP's National ViCLAS Policy Centre in Ottawa have absolute rights to perform any function within the ViCLAS system on any file in the entire country.

It was learned that after Moore was transferred out of ViCLAS in March 2004, Sgt. Hutchings, not confident in Moore's work, ordered a review of all of his cases. Although Hutchings does not recall ordering this review, Wilson indicated that there are notes on some of the files confirming this was the case. This review of Moore's work was also confirmed by other ViCLAS analysts. The analysts involved in the review of Moore's work in 2004 were interviewed as part of the current investigation and confirmed that Hutchings did not tell them to delete Moore's files. It was noted that there were inconsistencies with the way each analyst conducted their respective

review with some deleting Moore's analyses while others would just start a new Work Sheet. As well, only some reviewer's dated the notes they made.

Wilson identified a number of other procedural errors with respect to the 2004 review of Moore's files. First, this type of review should have been conducted by independent analysts or the ViCLAS National Policy Centre in Ottawa; not the ViCLAS analysts from Moore's office. Secondly, all of Moore's original work should have remained intact and any necessary changes should have been made to duplicate files. Wilson stated that RCMP policy is that Work Sheets should never be deleted. This is distinct from working files that are hard copies of documents that can be destroyed after the information is entered into the computer system. Wilson suggested that a possible explanation for the deletions was an overzealous analyst.

Unfortunately, there is no audit log to identify which analyst conducted file activities on particular Work Sheets. As well, although the National ViCLAS Policy Centre in Ottawa carries out regular periodic back-ups, they only go back 1 year.

Wilson stated that he has a good idea as to who deleted the files based on the file review itself as well as comments by some of the analysts who were interviewed. Wilson was not prepared to say who that was during our interview. The name of the individual suspected of deleting Moore's files has been deleted from Wilson's written report along with the names of the other ViCLAS analysts. The individual that is suspected does not recall the file review and denies deleting any of Moore's Work Sheets. Wilson said that he does not know why the person took the action they did. Some analysts said they were concerned about Work Sheets being deleted and brought this to the attention of Sgt. Hutchings. Hutchings has no recollection of this. Wilson also stated that contrary to Moore's belief, he does not think either Sgt. Hutchings or Sgt. Bradley deleted any of Moore's files.

Wilson maintains that contrary to assertions by Moore, it is his belief that Moore did not learn about his missing ViCLAS Work Sheets until early in 2005. And, although it could not be ruled out, there was no evidence proving that the deletion of Moore's Work Sheets had anything to do with the Assoun matter.

B. Moore's Physical Evidence

Wilson and his investigators searched the current ViCLAS office that had recently moved to a new location. Nothing was found initially. No one had any idea as to what might have happened to Moore's four banker boxes of information or the large Time Line that hung on the wall next to Moore's desk. There was a suggestion in Wilson's report that Moore's information may have been shredded by ViCLAS staff if they were not considered "original" documents (i.e. they were copies) as this was the policy. However, it could not be confirmed that this took place. However, as previously stated, the day before this writer was scheduled to meet with Moore and Wilson, someone found part of Moore's large Time Line behind a filing cabinet in the new

office. This was provided to Moore and a copy was given to this writer. Moore indicated that an onion skin top piece, containing additional information, was missing from the Time Line. A short time later, it was learned that another chart had been found.¹³⁰ It is not clear whether this is Moore's missing onion skin.

C. Information from Sgt. Ken Bradley

During the early part of Inspector Wilson's investigation, he provided this writer with one of his investigators notes from an interview that had taken place with Sgt. Ken Bradley. The notes indicate that Bradley said that Moore's information had been deleted and "shredded". However, upon further discussion with Bradley, Wilson indicated that Bradley only acknowledged that Moore's information had been deleted from the ViCLAS database and that he did not mean to suggest that hard copies of documents had been shredded.

D. Disclosure of ViCLAS

Inspector Wilson indicated that the RCMP has traditionally attempted to resist requests by defence counsel for the disclosure of ViCLAS information. ViCLAS is seen as a sensitive investigative technique that needs to be safeguarded. As such, Wilson said it has been rare to release this information to the courts.

E. Other Conclusions

Wilson took issue with how Moore would manually manipulate the ViCLAS system by, for example, including Avery Greenough in each of his Work Sheet analyses. Wilson saw this as inappropriate whereas Moore said he needed to do this to account for some of the shortcomings of the ViCLAS system.

Wilson confirmed that Moore acted differently than most ViCLAS analysts in terms of his tendency to carry out investigative work at the same time as doing ViCLAS analysis. Wilson does not endorse this approach as he believes that the objectivity associated with ViCLAS is then lost. Wilson also indicated that crossing the line from ViCLAS analyst to investigator can lead to tunnel vision. Wilson did, however, acknowledge Moore's investigative skills evidenced by his ability to confirm the link between Avery Greenough and the red SUV. Wilson subsequently conducted his own review and determined that although Greenough may have had access to a red blazer on the night of the murder it does not appear that he had the license plate in question. It was also confirmed that Greenough's lawyer, after recommending to Greenough that he not be interviewed, told police that Greenough was driving a Trans AM and not a blazer.

Wilson stated that the reason Moore was transferred from ViCLAS was the change in his behaviour after the fire that destroyed Moore's business. It was alleged that after that incident, Moore was not focused on his work and had trouble getting along with his co-workers. Wilson also reported that Inspector Andy Lathem did not view Moore's findings as substantial and,

¹³⁰ McGray Timeline Chart 2, created by Cst. Moore, Tab 115.

therefore, Lathem did not take any action on what Moore told him. As well, Wilson said that neither Dave MacDonald nor Mike Spurr ever remember Moore contacting them about his findings. Moore maintains that he spoke to MacDonald about his Greenough SUV findings and also stated that Sgt. Bradley, who had been seconded to ViCLAS from the Halifax Regional police, was aware of Moore's concerns and should have told HRP about his findings.

(x) Jerome Kennedy' Response

I had an opportunity to communicate with Jereome Kennedy by both telephone and e-mail. He provided me with the following information.

In 2002, Kennedy agreed to represent you on an application for the appointment of counsel on your appeal. Your application was successful and Kennedy was retained in the summer of 2003.

Mr. Kennedy acknowledged his communication with the Crown, described earlier, respecting his requests for information about "other suspects" including Michael McGray. Kennedy stated that his interest with respect to ViCLAS information arose as a result of a reference to ViCLAS in a police officer's note.¹³¹ Kennedy stated that this is a note from Sgt. Mike Spurr. Kennedy's requests for this information, including ViCLAS spanned the period September, 2004 to May, 2005.

It was in May, 2005 that Kennedy filed the Appellant's Factum in the Court of Appeal. The appeal was scheduled to be heard on October 5.

Throughout his requests for disclosure, and consistent with his letter dated May 12, 2005, Kennedy wanted to know if the police had ever considered Michael McGray (or any other suspects) as responsible for the murder of Brenda Way. Kennedy maintains that the only response he received was the May 2005 Hurst memo that clearly indicated that Mike McGray was not considered a suspect. In correspondence dated May 25, 2005, Crown Giovannetti assured Kennedy that any new information would be disclosed.

The Appellant's Fresh Evidence Application was filed in the Court of Appeal on July 7, 2005. In the Crown's Factum on the Fresh Evidence Application, the Crown stated at paragraph 92¹³² that although Fred Fitzsimmons' affidavit was hearsay, the Crown "accepts the facts set out in the Hurst memorandum of May 19, 2005".

The Fresh Evidence Application and the Appeal against conviction were argued in the Court of Appeal on January 17, 2006. The Appeal was dismissed on April 20, 2006.

¹³¹ Notes of an unnamed police officer, dated Jan 1 and Jan 2, 1997, Tab 116.

¹³² Crown's Factum on the Fresh Evidence Application, Nova Scotia Court of Appeal, para 92, Tab 117.

Crown Giovannetti maintains that he made every effort to provide Kennedy with the information being requested. Giovannetti said that he did not want to go forward with the appeal until he was certain that all of Kennedy's disclosure requests had been fully satisfied.

Why was Constable Moore's ViCLAS information not disclosed to your legal counsel when Kennedy made his requests? Had Moore's ViCLAS information already been deleted, destroyed or lost by the time Kennedy made his first request in September, 2004? Is there a correlation between Kennedy's request for McGray/Brenda Way ViCLAS information and the destruction of Moore's ViCLAS files? Would this information have made any difference with respect to the decision of the Court of Appeal?

(xi) The Law Respecting the Disclosure of ViCLAS Information

An RCMP policy document regarding the disclosure of ViCLAS information was attached to correspondence dated November 2, 2004 from Sgt. Kevin Tellenbach of the ViCLAS Unit to HRP Sgt. Wayne Hurst.¹³³ The policy states that the ViCLAS form need not be disclosed as a matter of routine since it contains information that is already documented or contained in the investigative file and is therefore redundant. The policy also provides instructions on what to do if ViCLAS disclosure is requested by defence counsel. The policy document states:

"DISCLOSURE OF ViCLAS INFORMATION

- The content of the ViCLAS form is based on investigative information documented or otherwise contained in the investigative file. Consequently, the matter of the ViCLAS form is redundant and need not be disclosed as a matter of routine.
- If Defense Counsel specifically requests disclosure of ViCLAS information on a case before the court, the attached **FULL CASE REPORT**, after vetting, is used, **NOT** the ViCLAS booklet.
- The responsibility for vetting the **Full Case Report** for exemptions to disclosure under s.37 Canada Evidence Act remains with the original investigation agency, not ViCLAS.
- Information regarding the accused's participation in offences not before the court is exempt from disclosure, as the disclosure of information related to ongoing investigations is not in the public interest, per s.37, Canada Evidence Act.
- In the event you receive a **NOTICE OF MOTION** requiring disclosure of a ViCLAS case that is part of a series (2 or more cases linked) and one of the cases in the series is not before the court, **YOU MUST NOTIFY THE PROVINCIAL ViCLAS CENTRE IMMEDIATELY AT 902-426-5675.**

PLEASE ENSURE THIS IS MADE AVAILABLE TO ALL INVESTIGATORS IN YOUR DETACHMENT. "

¹³³ Correspondence from Kevin Tellenbach to Wayne Hurst and attached RCMP ViCLAS Policy Document, dated November 2, 2004, Tab 118.

The reasoning in the above ViCLAS policy coincides with the decision in the 1999 Ontario court decision *R v MacDonald*.¹³⁴ This case was attached to the police notes and ViCLAS policy. It deals with a motion for an Order that the Crown produce ViCLAS documentation profiling the accused and the offence. In this particular case, it is important to note that the court determined that all of the information contained in the ViCLAS documents had already been disclosed to defence counsel. The court decision states that the ViCLAS Centre conducts no investigation of a case on its own, nor does it develop its own independent information. Because the defence already had the complete primary sources from which the ViCLAS form was derived, the Court held that the ViCLAS documentation was not relevant and the motion was denied. However, in the 2013 Saskatchewan Court of Appeal decision *R v Walker*,¹³⁵ the Crown voluntarily disclosed a ViCLAS letter written by an RCMP officer, who questioned the truthfulness of the complainant in a sexual assault case. The main issue in this case was the delay that was caused by late disclosure of the letter. The letter was disclosed three days before the scheduled preliminary inquiry and defence counsel requested an adjournment to conduct further disclosure inquiries and re-evaluate the defence's strategy. The trial judge found that the ViCLAS letter was sufficiently important to warrant an adjournment. The Court of Appeal also stated that "in this case the Crown obviously determined that the ViCLAS letter was of sufficient relevance to disclose, yet it did not disclose it promptly even after the police had sent it to them". So in this case, which is different than MacDonald, the issue was not whether the ViCLAS information should be disclosed, as it was already deemed to be relevant by the police and the Crown.

Should the ViCLAS information related to other possible suspects in the murder investigation of Brenda Way (including Michael McGray) have been disclosed to you and your legal counsel? If yes, does this failure to disclose amount to a breach of your section 7 right to make full answer and defence?

YOUR POLYGRAPH TESTS

As you are aware, polygraph test results are not admissible in Canadian courts. However, the results may be considered by the CCRG in the course of a review.

a) The First Polygraph Test

On July 17, 1997 you agreed to take a polygraph test in British Columbia. The report indicates that you were co-operative and you said you were nervous throughout the test. The report also states that your behaviour as well as your responses during the pre test portion of the examination were consistent with someone who is innocent. Your answers during the test were scored as Deceptive. When confronted with this finding, the report states that you reacted in the same manner as someone who is innocent. Another polygraph operator, that scored the same test

¹³⁴ *R v MacDonald* [1999] O.J. No. 5443, Tab 119.

¹³⁵ *R v Walker*, 2013 SKCA 95, Tab 120.

results and viewed the video of the examination, also found the charts Deceptive and also confirmed that you displayed behaviour consistent with what is normally seen with innocent subjects.¹³⁶

b) The Second Polygraph Test

As previously stated, Peter Woolridge was retained to do a polygraph examination of Michael Hebert. As a result of discussions with Mr. Woolridge, it was learned that you were tested by him in March, 2010.¹³⁷ Mr. Woolridge advised me that although he did a full polygraph test with you, he did not score the charts since you took a deep breath on every question and the charts would have been useless. Mr. Woolridge stated that during the pre-test you answered the questions like a truthful person would.

YOUR DECISION TO REPRESENT YOURSELF AT TRIAL

The State of the Law

There are inherent challenges and pitfalls when an accused person is self-represented in a serious criminal proceeding. Self-represented litigants are unfamiliar with court procedure and the law, and are often vulnerable in terms of their relative lack of resources.¹³⁸ When an accused is self-represented, the trial is often overly lengthy because the self-represented person does not fully understand court procedures, the law of evidence and the substantive law at issue.¹³⁹ Procedural and substantive legal needs coupled with interpersonal issues such as stress and fear increases the plight of self-represented accused persons. These problems multiply and increase significantly when a jury trial is the forum.

It is commonly accepted by the courts that self-represented accused persons are disadvantaged in the courtroom. In *R v Rowbotham*, the leading case on the appointment of state funded counsel to unrepresented litigants, the Ontario Court of Appeal said

An accused who was too poor to hire a lawyer was disadvantaged. Sir James Stephen, writing over 100 years ago, said: "[w]hen a prisoner is undefended his position is often pitiable, even if he has a good case". (Stephen, *A History of the Criminal Law of England*, vol. 1 (1883), p. 442). In *R. v. Littlejohn and Tirabasso* (1978), 41 C.C.C. (2d) 161, this court accepted as self-evident the proposition that a person charged with a

¹³⁶ Glen Assoun's Polygraph Examination Consent Form dated July 17 1997 and Polygraph Test Report dated July 22, 1997, Tab 121.

¹³⁷ Glen Assoun's Polygraph Examination Consent Form and Polygraph Procedure Notes dated March 25, 2010, Tab 122.

¹³⁸ Trevor C.W. Farrow et al, "Addressing the needs of Self Represented Litigants in the Canadian Justice System" A White Paper Prepared for the Association of Canadian Court Administrators (Toronto and Edmonton: March 27 2012), Tab 123.

¹³⁹ *R v Ryan (D.)*, 2012 NLCA 9, Tab 124.

serious offence is under a grave disadvantage if, for any reason, he is *deprived* of the assistance of competent counsel.¹⁴⁰

In *R v Phillips*, Fruman JA stated, “trials involving unrepresented accused are rarely consistent or simple. Their need for guidance varies depending on the crime, the facts, the defences raised and the accused’s sophistication”.¹⁴¹ This decision was later reaffirmed by the Supreme Court of Canada.

Everyone has the right to a fair trial and judges have a duty to ensure that an accused gets a fair trial. However, it is important to note that a fair trial is not dependent on the presence of defence counsel. For example, in *Phillips*, the accused was charged with attempted murder, and the trial judge determined that his self-representation did not impede on his ability to have a fair trial. On appeal, the Supreme Court of Canada reaffirmed that decision. The trial judge considered the appropriate factors in determining that the accused could receive a fair trial in the absence of counsel, taking into account the accused’s education, experience, and other abilities to conduct his defence, the nature of the charges, the complexity of the case and the length of the trial.¹⁴² *Phillips*, along with numerous other cases, shows that it is entirely accepted that it is possible to have a fair trial when an accused person is self-represented.

Conversely, courts may find that proceeding without defence counsel would infringe an accused persons’ right to a fair trial. In the 2012 case of *R v Ryan*, the Newfoundland and Labrador Court of Appeal ruled that “the [self-represented] accused’s level of advocacy was so grossly deficient that the accused’s fair trial rights were clearly engaged and in fact compromised” and the court declared a mistrial.¹⁴³ The court noted that this was an exceptional remedy however it was necessary to ensure a fair trial and prevent a potential miscarriage of justice.¹⁴⁴ After the preliminary inquiry and before trial, the accused dismissed his legal aid appointed counsel and his application for funding of a private defence lawyer was dismissed, rendering him unrepresented. The trial was 14 weeks long and was extended to that length because of the challenges that the self-represented accused was experiencing. He was unable to understand court procedures and instructions from the judge, the judge commented on his inability to effectively cross-examine key Crown witnesses, and the judge repeatedly noted that the accused seemed confused and suggested that he seek legal advice.¹⁴⁵ The accused’s inability to effectively conduct his trial could have resulted in a miscarriage of justice and the court ordered a new trial.

¹⁴⁰ *R v Rowbotham*, [1998] O.J. No. 271, 41 CCC (3d) 1, Tab 125.

¹⁴¹ *R v Phillips*, 2003 ABCA 4, 2003 SCC 57, Tab 126.

¹⁴² *R v Phillips*, 2003 ABCA 4, 2003 SCC 57, Tab 126.

¹⁴³ *R v Ryan (D.)*, 2012 NLCA 9, Tab 124.

¹⁴⁴ *R v Ryan (D.)*, 2012 NLCA 9, Tab 124.

¹⁴⁵ *R v Ryan (D.)*, 2012 NLCA 9, Tab 124.

Despite the recognized plight of self-representation, the Supreme Court of Canada in *R v Vescio* established that accused persons have the right to self-representation.¹⁴⁶ Furthermore, the court cannot force an accused person to have counsel, even if it is in the interests of justice.¹⁴⁷ When an accused person is self represented, judges have a duty to assist the self-represented accused person in court proceedings while remaining impartial. The level of assistance provided is contextual and discretionary, depending on the particular case and the characteristics of the individual.¹⁴⁸

FRESH EVIDENCE AND TRIAL STRATEGY

The general rule is that a person is not permitted to have evidence considered on appeal that, for tactical reasons, he or she chose not to call at trial.¹⁴⁹ This rule is founded on policy considerations: allowing a person to put forth a new defence because an earlier one has failed would “result in interminable litigation and, in general, would not be in the interests of justice.”¹⁵⁰

However, this general rule is not an absolute bar and a court has discretion in deciding whether to admit fresh evidence on appeal. The question that the court asks is whether, considering all of the circumstances, it is in the interest of justice that the evidence be received.¹⁵¹ Factors that a court considers in exercising its discretion to admit evidence that was readily available at trial but was not lead for tactical reasons include the reason for deciding against using the evidence at trial, the seriousness of the consequences of the conviction, and the cogency of the evidence. It is however important to note that some added degree of cogency, beyond simply meeting the requirements of admissibility (as set out in *Palmer*), is required before it can be said to be in the “interests of justice” to admit the evidence on appeal.¹⁵² If an accused made a calculated decision to not lead certain evidence at trial, it will harm the justice system and undermine the due diligence consideration if new trials are routinely ordered.

JAILHOUSE INFORMANTS AND WRONGFUL CONVICTIONS

Since the Supreme Court decisions in *Vetrovec* and *Bevan*, the extreme dangers of relying on jailhouse informers as witnesses in criminal prosecutions was highlighted in the Commission on Proceedings Involving Guy Paul Morin authored by The Honourable Fred Kaufman (“*the Kaufman Report*”).

¹⁴⁶ *Vescio v The King*, [1949] SCR 139, Tab 127.

¹⁴⁷ *R. v. Cunningham*, 2010 SCC 10, Tab 128.

¹⁴⁸ *R v Rowbotham*, [1998] O.J. No. 271, 41 CCC (3d) 1, Tab 125.

¹⁴⁹ *Reference Re Regina v. Gorecki* (No. 2) (1976), 32 C.C.C. (2d) 135 at 144 (Ont. C.A.), Tab 129.

¹⁵⁰ *Reference Re Regina v. Gorecki* (No. 2) (1976), 32 C.C.C. (2d) 135 at 144 (Ont. C.A.), Tab 129.

¹⁵¹ *R v Maciel*, 2007 ONCA 196, Tab 130.

¹⁵² *R v Maciel*, 2007 ONCA 196, at p534, Tab 130.

The Kaufman Report concluded that in-custody informers are almost always motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove. The Kaufman Report confirmed the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice, and the substantial risks associated with such testimony that may not be fully appreciated by a jury.

At the time of David Carvery's testimony, there were no specific guidelines in place in Nova Scotia with respect to the use of this type of evidence. In May, 2004, Nova Scotia's Public Prosecution Service distributed a policy document entitled "In-Custody Informers."¹⁵³ It was patterned after the Ontario policy and included many of the recommendations from the Guy-Paul Morin Inquiry. The policy states that in-custody informer evidence:

"...should only be adduced at trial where there are sufficient indicia of reliability and a compelling public interest in doing so."

The Nova Scotia policy provides for an In-Custody Informer Committee to determine whether there is compelling public interest to allow the in-custody informant to testify. The policy refers to a number of principles that must be considered when determining whether there is a compelling public interest to rely on the evidence of an in-custody informer. Also included in the policy are a number of factors to consider when assessing the reliability of the in-custody informer as a witness. The policy details the role, composition of, and materials to be submitted, to the Committee. It also reminds prosecutors of their "heavy onus" to provide complete disclosure about the informer. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must be fully documented in writing. As in other provinces, the prosecutor who deals with the informer should not be the prosecutor who conducts the trial in which the informer testifies.

What would the In-Custody Informer Committee think about the testimony of David Carvery? Do the same systemic concerns, raised with respect to David Carvery's evidence, apply to the information provided by Michael Smith and Michael Hebert? Should they be considered "unsavory" witnesses?

OTHER POSSIBLE AVENUES OF INVESTIGATION

There is additional information that has been disclosed that has not yet been reviewed. As well, it may prove useful to pursue the following areas:

¹⁵³ Nova Scotia Public Prosecution Service Policy document entitled "In-Custody Informers", distributed May 24, 2004, Tab 131.

a) Additional Interviews

Your legal counsel suggested that we talk with some other witnesses. For example, it has recommended that we interview Karla Jinkerson. There may be others including possibly Michael McGray or RCMP Constable Gilles Blinn.

b) Forensic Evidence

There are crime scene exhibits that were not fully examined at the time of the initial investigation which may provide further information given recent advances in forensic analysis. These may include the following:

- mitochondrial DNA typing analysis of the two hairs found on the victim's jacket; and
- re-examination of the condom that was found near the victim's body, which had nothing to analyze.

Preliminary discussions have taken place with the RCMP about reviewing this information.

c) McGray's Kite

As previously stated, Michael Hebert provided the original hand-printed kite he says Michael McGray gave him while they were in Atlantic Institution together. To the untrained eye, the printing in the kite does not appear to be consistent with the samples of McGray's printing that were obtained from McGray's prison file. The CCRG plans to ask the Centre for Forensic Science to undertake a forensic assessment of these documents.

d) Disclosure Issues

Given questions respecting the disclosure of ViCLAS as well as other information, it would seem reasonable to interview the prosecutors who were involved in your case.

e) Avery Greenough

Given some of the new information that has been discovered, is there justification for the police to conduct an investigation of Avery Greenough?

CONCLUSIONS

Your legal representatives have made strong arguments that some of the evidence used to convict you has now been discredited, or, at the very least, called into question. There appears to be some validity to these arguments.

Mary Cameron's testimony that you admitted to the murder has been contradicted by both Cathy Valade and Karla Jinkerson. Your confession to Wayne Wise was contradicted by his then girlfriend, Karla Jinkerson, and the Crown acknowledged that Wise was not credible. David Carvery, a jailhouse informant, appears to have had a vested interest in giving the testimony he did and his evidence at trial respecting the benefit he received was misleading. Melissa Gazzard

is no longer certain that you were the person that sexually assaulted her and admitted to killing "Pitbull". As well, there is no evidence to support the Crown's theory that you flew from B.C. to Nova Scotia around the time that Melissa Gazzard was assaulted. Isabelle Morse confirmed her earlier statement that you were with her the night of Brenda Way's murder. And Cory Tuma now says that you never came by his motel, the night before the murder, looking for Brenda Way.

Mary Hartrick's testimony during the Preliminary Inquiry (and read into evidence at trial) that you told her you killed Brenda Way is certainly questionable given that her description of the surrounding events is not supported by the facts (i.e. the individuals she said she was visiting just prior to meeting you no longer lived at the residence where she says she saw you).

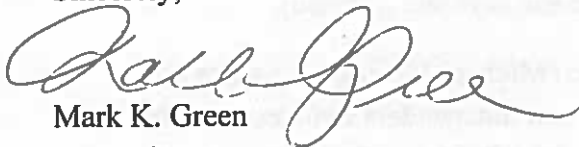
There is a host of new information suggesting links between Michael McGray as well as other suspects, and the murder of Brenda Way. Affidavits from two independent inmates state that McGray admitted to killing Brenda Way. There appears to be a link between McGray and Melissa Gazzard's attacker (who admitted to killing "Pitbull") as Gazzard has now identified McGray as her likely attacker. Gazzard also said that her attacker was wearing sandals during the winter and McGray was described by a number of individuals as wearing sandals all year round. There is ViCLAS information from RCMP Constable David Moore that McGray and others were in close proximity to Brenda Way at the time of her murder. Some of this information was before the Court of Appeal. However, at least one of McGray's addresses known to police, in very close proximity to the murder scene, was not disclosed to defence counsel on appeal. There is additional motor vehicle information from Constable Moore linking Avery Greenough to a suspect vehicle in the murder. This was also not disclosed. Constable Moore certainly considered both McGray and Greenough as strong suspects in the Brenda Way murder. Unfortunately, almost all of Moore's analysis and supporting documents have been destroyed or have gone missing contrary to RCMP retention policy with the destruction of this material taking place around the same time that your appeal counsel, Jerome Kennedy, was asking for the disclosure of ViCLAS information on McGray as well as other possible suspects. Kennedy received no ViCLAS information and during the Court of Appeal fresh evidence application, the Crown, relying on the memo from Sgt. Hurst, maintained that Michael McGray was not a suspect in the Brenda Way murder. This is certainly inconsistent with Constable Moore's view at the time. It appears that the Crown was not aware of any of Constable Moore's findings.

Admittedly, there are issues of credibility and reliability associated with the new information that has been submitted in support of your application. However, after reviewing your application to the Minister, carefully analysing much of the information that has been submitted on your behalf and that has been received from other sources, and reviewing the evidence that was introduced at your trial as well as the decision of the Nova Scotia Court of Appeal, I am of the view that on the basis of all this information, including the new and significant information that has been submitted with your application, there may be a reasonable basis to conclude that a miscarriage

of justice likely occurred in your case. Therefore, your application will advance to the Investigation stage of the criminal conviction review process.

Please note that some of the information that has been received has not yet been reviewed. For the most part, I have ignored the fact that you represented yourself for much of the trial, a trial that could be categorized as reasonably complex which appears to have put you in a significantly disadvantaged position. However, you elected to represent yourself as was your right. Along with the other areas mentioned, this area may be re-visited during the investigation stage of the review process.

Sincerely,



Mark K. Green

Counsel

Criminal Conviction Review Group

Encl.

c.c.: Phil Campbell, Counsel for the Applicant

Marian Fortune-Stone, Nova Scotia Public Prosecution Service