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SUBMISSION OF COMMISSION COUNSEL

From the time this Commission commenced public hearings in May, 1987, it has been the stated mandate of the Commission to fully investigate the administration of criminal justice in the Province of Nova Scotia, using the tragic example of the Donald Marshall, Jr., case as a focus.

ROLE OF COMMISSION COUNSEL

As Commission Counsel, it has been our responsibility to seek out all evidence relevant to the mandate of the Commission and to present that material at the public hearings. We have sought to present it in a manner which would bring out all relevant facts and present them in an impartial fashion. We have a unique perspective in that we are carrying a brief for no particular interest. Our role has been to attempt to ensure that all relevant evidence has come before the Commission. Except for evidence from Cabinet Ministers concerning discussions in Cabinet and from Judges concerning the Reference, we are satisfied that we have fulfilled our responsibility.

All other counsel who have participated in the Hearings represent a client and perform the tradit-

ional counsel role of advocating, and protecting their client's position. In the submissions to be made by these various counsel we expect that they will highlight those portions of the evidence which support their client's position, and attempt to discredit evidence which may tend to cast their clients in a less favourable light. No counsel, other than Commission counsel, can reasonably be expected to review the totality of the evidence objectively, and suggest to Your Lordships what findings of fact are supported by the preponderance of evidence, or to comment on the areas or parts of the system of administration of justice which require change. In summary, it is the role of Commission Counsel to present a balanced view of all the evidence for the benefit of the Commission.

It is also our responsibility to present to you what we consider to be the conclusions which flow from the evidence presented. We will indicate in this Submission the facts upon which we ground our conclusions and, in addition, will comment why we think particular conclusions are warranted.

It is important also that Commission Counsel publicly state any views, or conclusions on facts, which we hold, or support, in order that counsel for other parties, who may be affected if Commission Counsel

submissions are accepted, be afforded the opportunity to challenge our conclusions. Traditionally, Commission Counsel are involved with Commissioners to provide assistance and advice as a final report is being prepared. It would not be fair for Commission Counsel to keep secret our views on the evidence, and then take the opportunity at a later date to urge views in private on the Commissioners. Accordingly, on those occasions where we consider the preponderance of evidence supports particular findings of fact, we will make this known and point to the evidence which we consider supports our submission. For ease of reference, where we articulate a view, this is underlined. If we do not hold a particular view with respect to any necessary finding of fact, we will merely present an analysis of the evidence supporting the various possible findings.

At this stage our submissions will be restricted to comments on the factual issues which arise out of the evidence which has been presented. Your Lordships have commissioned research studies into various facets of the administration of justice, and the reports of the researchers likely will recommend changes and improvements. We will comment on parts of the system which appear to require change, but will not be putting forth actual recommendations for change.

Major Conclusions

We have concluded that if justice is fairness to all, then justice has not prevailed in Nova Scotia. Based on our assessment of the evidence and for the reasons which follow, we have come to three fundamental conclusions:

1. Donald Marshall, Jr., was not responsible for his wrongful conviction and was not the author of his own misfortune;

2. Virtually all the institutions involved in the administration of justice, and their representatives, which touched Donald Marshall, Jr's life, failed him;

3. All individuals have not been treated fairly by the justice system in Nova Scotia.

These are the major conclusions which we urge upon the Commission.

STRUCTURE OF SUBMISSION

The submission will be structured in the following manner. We will briefly review the facts

of the night of May 28, 1971. Then, rather than following the chronology from that point to the present, we will identify the various institutions and persons who were involved with the Donald Marshall case. We will highlight their involvement in the matter and, where appropriate, indicate what our conclusions are with respect to that involvement. In some cases, we will also point to reasons why we consider certain of the institutions and persons responded in the way that they did.

The institutions and persons who were involved with the Donald Marshall matter concerning which we will comment are:

Sydney Police Department

John MacIntyre

William Urquhart

Crown Prosecutor, Donald C. MacNeil, Q.C.

Defence Counsel C.M. Rosenblum, Q.C., and S.J. Khattar, Q.C.

The Trial Judge, Mr. Justice L. Dubinsky

The Jury

The R.C.M.P. in 1971 - Sub-Inspector Al Marshall

The Nova Scotia Court of Appeal - 1972 (The Appeal from Marshall's conviction)

Correctional Services Canada

R.C.M.P. Investigation - 1974 - Corporal

Green

R.C.M.P. Investigation - 1982-1986

The Nova Scotia Court of Appeal - The Decision on the Reference

The Attorney General's Department - 1982-1986

Relationship Between R.C.M.P. and Attorney General's Department

Influence of Racism in Treatment of Donald Marshall, Jr.

Donald Marshall, Jr.

Statement of Facts

On May 28, 1971 a dance was held at St. Joseph's Church Hall in Sydney, Nova Scotia. These dances were very popular with local teenagers and were well attended, and members of the Sydney Police Department, who were off duty at the time, acted as paid chaperones to maintain control and restrict entry to those teenagers who paid the admittance fee.

On the night in question Sandy Seale attended the dance with several friends and on at least two occasions was ejected from the hall because he had not paid the admittance fee. At the time Seale resided at Westmount, a suburb of Sydney, and to reach his home he would have to travel by bus, and specifically he would have to catch the 12:00 o'clock midnight bus

in order to be home at the time required by his parents.

Sometime between 11:40 p.m. and midnight Seale left the dance with a group of teenagers including Keith Beaver, Alana Dixon, and Gail Chernin. The group entered Wentworth Park and then split up, Sandy having told the others he was going to get the bus.

Also in Wentworth Park at that time was Donald Marshall, Jr. He had returned to Sydney that evening from a visit to Halifax. He had met with some of his friends in the north end of Sydney and may have been heading towards St. Joseph's Hall.

James MacNeil and Roy Ebsary were in the Park also. They had spent a portion of the evening at the State Tavern drinking beer, and may have been at the MacNeil home earlier that evening drinking wine.

Seale and Marshall knew each other casually, but were not good friends and did not travel with the same crowd. Seale and Marshall did meet in the Park that evening and while together came in contact with Ebsary and MacNeil. Exactly what took place during the next several minutes is something which Your Lordships will have to decide. What is known is that

Sandy Seale was stabbed in the abdomen by Roy Ebsary, and Donald Marshall, Jr. was stabbed in the arm by Ebsary. As a result of the stab wound inflicted upon him by Ebsary, Sandy Seale died the following night. Donald Marshall was taken to the hospital where his wound was stitched and he went home.

M. D. Mattson, a resident of Byng Avenue, called the Sydney Police at 12:10 a.m, having overheard a conversation between Marshall and Maynard Chant, who were standing in front of Mattson's home, and discussing a stabbing which occurred in the Park. Marshall had run from the scene of the stabbing on Crescent Street, around the ponds, north on Bentinck Street, and east on Byng Avenue until he overtook Chant who had been walking along Byng Avenue. Chant and Marshall flagged down a car which took them back to the place where Seale was lying on the street, and shortly thereafter the police and the ambulance arrived. Seale was transported to the hospital by ambulance, and Marshall by police car. All the police left the scene of the stabbing without having obtained a listing of witnesses who were in the area, without having made any search of the area and without carrying out any investigative work of any kind. The area was not cordoned off, and except for Detective M. R. MacDonald who walked around the area that night, there was no

police search of the area until the following day.

Sergeant Detective John MacIntyre took over the conduct of the investigation on behalf of the Sydney Police on May 29, 1971. On June 4, 1971 Maynard Chant, a Louisbourg teenager, and John Pratico, a Sydney teenager, gave statements to MacIntyre stating that they had witnessed Donald Marshall stab Sandy Seale on May 28, 1971. Marshall was arrested, tried and convicted of the murder, and sentenced to life imprisonment.

On November 15, 1971 James MacNeil attended at the Sydney Police Station and gave a statement to Mr. MacIntyre wherein he told of an altercation taking place in Wentworth Park on May 28, 1971 during which Roy Ebsary stabbed Sandy Seale. MacIntyre arranged for a statement to be taken that day from Roy Ebsary, his wife and son, and Ebsary denied having stabbed Seale, although he did confirm that there had been an altercation taking place with Seale and Marshall.

The R.C.M.P. were requested to carry out a reinvestigation and Inspector Al Marshall was dispatched to Sydney. He arranged for polygraph examinations to be conducted of James MacNeil and Roy Ebsary, and the results of those examinations were

inconclusive with respect to MacNeil and positive for Ebsary when he denied stabbing Seale. Inspector Marshall did not question any of the other persons involved in the incident, or those who gave evidence at trial, and concluded based on the polygraph examinations only that Donald Marshall, Jr. had in fact stabbed Sandy Seale, and thereby committed murder for which he had been convicted.

Donald Marshall, Jr. was jailed at Dorchester Penitentiary, and for part of the time at the Springhill Penitentiary, until 1982. At that time based on additional evidence that Roy Ebsary had in fact stabbed Sandy Seale, a further R.C.M.P. reinvestigation was ordered. During this investigation, conducted mainly by Staff Sergeant Harry Wheaton and Corporal James Carroll, interviews were conducted of Chant and Pratico and both of these people admitted having lied at the Marshall trial. Wheaton and Carroll concluded Marshall had not committed the murder of Seale, and their conclusions were accepted by their superiors and the officials of the Attorney General of Nova Scotia. The Minister of Justice submitted a Reference to the Appeal Division of the Nova Scotia Supreme Court. Evidence was heard at a Reference Hearing and finally, after having been incarcerated for 11 years for a crime he did not commit, Donald Marshall, Jr. was acquitted.

Negotiations were carried out between Marshall and the Province of Nova Scotia and ultimately Marshall was paid the sum of $270,000.00 as compensation for his wrongful conviction. Roy Ebsary was tried and convicted of manslaughter for the stabbing and subsequent death of Sandy Seale. After all Appeals had been exhausted on behalf of Roy Ebsary, the Province of Nova Scotia commissioned this Inquiry specifically to determine why Donald Marshall, Jr. had been wrongfully convicted and to make recommendations, if possible, for changes which may be required in the administration of justice system to prevent a reoccurrence of this tragedy.

THE SYDNEY POLICE DEPARTMENT - 1971

Evidence from members of the Sydney Police Department who were members of the Department in 1971 indicated that people could become members of the Department with a Grade 10 education. Once on the job, to put it in the words of now Chief Walsh, they were given a "flashlight, set of handcuffs and were on the street" (p.1286). Evidence of members of the Sydney Police Department was consistent that the only training received by members of the Department was on-the-job training (Ambrose MacDonald, p.1153; Howard

Dean, p.1472; John Mullowney, p.1550; M. B. MacDonald, pp.1613-1615). Officers were promoted to the Detective ranks at the time, based solely on seniority (M.B. MacDonald, p.1613-1615; Ed MacNeil, p.2604; R. Walsh, p.14264).

As set out in other sections of this Submission dealing with the facts which occurred on the night of May 28, 1971, members of the Sydney Police Department did not take many of the basic steps that one would expect of police officers trained in the investigation of serious crimes. We consider this failure was a direct result of a lack of training.

As indicated by Chief Walsh, the situation in Sydney has now changed (p.14260 and following). In order to be considered as candidates for the Sydney Police Department at the present time, persons must either be graduates of the Atlantic Police Academy or another accredited police college or have had previous police experience. At the present time, promotion to the rank of Detective is based on many factors including seniority. This is intended to result in the most qualified candidate being promoted (14264).

RESPONSE OF THE SYDNEY POLICE IN MARSHALL CASE

In another part of this Submission we refer to the general training, or lack thereof, provided to members of the Sydney Police Force. The response of the Force on the evening of May 28, 1971 when contacted concerning an alleged stabbing in Wentworth Park was prompt, but it appears that none of the basic steps which one would expect to be taken by police when confronted by a serious crime were taken. There was no attempt to cordon off the scene; names of potential witnesses were not obtained; no statements of any kind were taken; no search was conducted of Marshall to determine if he was carrying any weapon; no requests were made of the Hospital officials to obtain samples of the blood of Sandy Seale for analysis; no attempt was made to secure the clothing which was worn by Sandy Seale; no immediate search of the area where the stabbing occurred, or house to house canvass was conducted. Surprisingly, no criticism appears to have been directed to any members of the police force for this failure to follow these most basic investigative steps. These failures vividly illustrate the results which can occur when untrained persons are expected to handle matters which require skill and expertise.

JOHN MacINTYRE

The Sergeant in charge of the Detective Division in 1971 was John MacIntyre. He assumed charge of the investigation of the Seale murder on May 29, 1971. (5929). From the evidence presented to the Commission, including the evidence from senior R.C.M.P. Officers, Mr. MacIntyre was a competent policeman who had experience in investigating crimes, and there is no suggestion that he was a "typical" Sydney policeman. In investigating this particular crime, however, MacIntyre also failed to follow many of the basic steps which would be expected from a competent detective in charge of a murder investigation. Unless one were to conclude that he became incompetent for the time period this investigation was underway, the only reasonable explanation for his failure to follow basic practices in this case is that he concluded immediately upon becoming involved in the case that Donald Marshall, Jr. had stabbed Sandy Seale, and Mr. MacIntyre was interested only in finding evidence which would support his belief.

Your Lordships must analyze in some detail the evidence given to this Commission by Mr. MacIntyre. This is the first time he has given public testimony under oath. Earlier he had been subjected to a Discovery Examination in the course of the civil proceeding wherein he alleged he had been slandered by broadcasts carried

by the Canadian Broadcasting Corporation. That proceeding was settled prior to Trial. In our opinion, it will be necessary for Your Lordships to make findings concerning the credibility of Mr. MacIntyre. There are inumerable instances where he denies statements made by other witnesses to this Commission, and in our opinion it is not possible to reconcile the differences, or to explain them away by suggesting the events occurred many years ago and memories have faded.

Courts have commented frequently that it is not sufficient for a finder of fact to state that a particular witness is not to be believed. Reasons must be stated saying why the testimony of a witness is not acceptable. When assessing credibility, there are many factors to take into account. Some of the best descriptions of such factors are found in Wigmore on Evidence, Chadbourn Revision, Vol. 5 (1974) where the authors when discussing the importance of having a witness appear personally to give evidence state as follows at pp. 153,4:

> "There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. The subordinate advantage has

been expounded in the following passages:

> Putnam, J. in Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 439 (1836): "Even" if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony.

> Ryland, J., in State v. McO'Blenis, 24 Mo. 402, 421 (1857): There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition.

> Campbell, J., in People v. Sligh, 48 Mich. 54, 57 (1882): The production of witnesses in open court is one of the best means of trying their credit; and every one knows how difficult it is to judge from written testimony of the demeanor and appearance which strike those who examined them. Still more difficult must it be to have the testimony reproduced.

> Chief Justice Appleton, Evidence 220 (1860): The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. ... The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control fear, love, hate, envy, or revenge are all open to observation,

noted and weighed by the jury."

It is our submission, having reviewed, on several occasions, the transcript of his evidence, that Mr. MacIntyre was evasive, contradictory, and less than prompt in answering questions. There are instances where he takes apparent firm positions, but when confronted with evidence and documents which contradict the position he then changes his testimony. One of the most vivid examples of this practice occurred when reference was first made to the Affidavit which was sworn to by Mr. MacIntyre and filed in the Appeal Court during the Reference proceedings. After having been questioned on some of the contents of the Affidavit, Mr. MacIntyre said he obtained the Affidavit from Mr. Edwards. (6105). The following questions and answers then appear.

"BY MR. MACDONALD:

Q. Did you not have Mike Whalley available as well as your solicitor or acting on your behalf?

A. We weren't present. We weren't present when those affidavits were made up. We were given them. Mr. Whalley was up there, I believe, on one occasion.

Q. Did you not give instructions to Frank Edwards in order that he could prepare the affidavit?

A. I did not.

Q. Did you not discuss it with him?

A. No. No.

Q. So he just prepared it himself and called you in?

A. That's right.

BY MR. CHAIRMAN:

Q. Can you just take me through that again? Mr. Edwards who prepared the affidavit must have gotten --

A. I don't know. The day I was there Mr. Edwards and Mr. Wheaton was there, the Staff Sergeant of the R.C.M.P., and the Crown Prosecutor.

Q. Yes.

A. And we were given those and they weren't made up in my presence. That's all I have to say, sir - My Lord.

Q. No, but you did meet with them -with Mr. Edwards I understand -I assume?

A. That's right.

Q. Before the affidavits were prepared?

A. Before this was written down?

Q. Yes.

A. No.

Q. Well, would he have gotten the information?

A. They made them up.

BY MR. MacDONALD:

Q. Chief, let me refer you to volume 17.

BY MR. CHAIRMAN:

Q. Well, what do you mean they made them up? They -- They --

A. They made up this so --

Q. You mean they prepared them?

A. Prepared them, yes.

Q. But in preparing them they must have gotten the information contained therein from somewhere and the question is, did they get it from you?

A. They weren't talking to me before that, My Lord.

Q. Well --

BY MR. MacDONALD:

Could I have volume 17?

BY MR. MacDONALD:

Q. Do I understand you to say you didn't meet with Frank Edwards for a period of time in order that he could get the information to prepare that affidavit?

A. The information from me?

Q. Yes.

A. I don't recall meeting with him, no."

It was only after Mr. MacIntyre was referred to the extensive notes prepared by Frank Edwards detailing the process followed in obtaining instructions, and the fact that the draft Affidavit was reviewed by MacIntyre, and all suggested changes made before a final draft was presented for execution, that MacIntyre conceded giving full instructions to Frank Edwards,

and having the opportunity to review the contents of the Affidavit before swearing to the contents. Interestingly, MacIntyre admitted having the Edwards notes before giving evidence to the Commission and says he had reviewed them before taking the stand. (6592,3).

If Mr. MacIntyre's evidence is to be believed in total, Your Lordships must conclude that a large number of witnesses gave untrue evidence to the Commission. There are direct conflicts, for example, between Mr. MacIntyre and John Pratico, Maynard Chant, Mrs. Chant, Patricia Harris, Mrs. Harris, Wayne Magee, Catherine Soltesz (O'Reilly), Mary Csernyik (O'Reilly), Scott MacKay, Barbara Floyd, Mrs. Clemens and Debbie MacPherson. Most of these people would have no possible reason to give other than completely accurate, truthful evidence to the Commission. Their demeanour on the stand certainly did not lead us to conclude that their evidence was suspect.

There is no requirement to make a general finding concerning the credibility of MacIntyre. There are, however, several crucial findings of fact which we consider Your Lordships must make and which will require a determination of credibility. With respect to those particular matters we will refer to the evidence

of various witnesses, including Mr. MacIntyre and state specifically those instances where we conclude that the evidence of Mr. MacIntyre should not be accepted.

Tactics Employed By MacIntyre In Questioning Witnesses

Before dealing with the evidence of particular witnesses, it is useful to review generally the procedures followed by MacIntyre when dealing with witnesses. He testified that his normal practice is to advise witnesses generally of the reason for their presence and the requirement to take a statement from them and then to take down as accurately as possible everything that is said by the witness or MacIntyre. (5991, 6115, 6147, 6155). On numerous occasions MacIntyre testified that he never would suggest to a witness giving a statement, and did not suggest to particular witnesses in this case, that another independent witness had given a story which was inconsistent with that now being told; or that another witness had placed the person being interviewed at the scene of the crime and therefore the person must know something; or that the parents of young witnesses should leave the room to make the questioning of their child easier; or that the person would be in serious trouble if they did not tell the truth and could end up in jail or be charged for perjury. (5892, 5978,

6117, 6118, 6145, 6146, 6148, 6149, 6150, 6151, 6153, 6154, 6222).

Barbara Floyd, John Pratico, Maynard Chant, Mrs. Chant, Wayne Magee, Mrs. Harriss, Patricia Harriss and Robert Patterson all gave evidence to this Inquiry that at some time MacIntyre told persons from whom he was taking statements that he had statements from another witness inconsistent with that now being told or that he had evidence from another witness placing the person being interviewed at the scene of the crime. (855, 866, 868, 872, 943, 944, 961, 962, 964, 2064, 3130, 3534, 3540, 3634, 3647, 3648, 3649, 6226, 6227, 10020).

Mrs. Clemens, John Pratico, Maynard Chant, Mrs. Chant, and Patricia Harriss all testified that at some time MacIntyre threatened witnesses with serious consequences, including jail or juvenile court, if the witnesses did not tell the truth, and that reference was made to perjury. (2064, 2806, 3541, 5892).

Mrs. Chant and Mrs. Harriss both testified they were asked to leave the room where their children were being interrogated by MacIntyre. (2960, 3535, 3538).

While we do not consider it essential that a general finding be made whether MacIntyre employed the type of tactics referred to by these witnesses, it is useful to keep the conflict in evidence on this point in mind when considering the obtaining of evidence by MacIntyre from various key witnesses.

Discussions With M. R. MacDonald

Chronologically speaking, the first finding of fact we consider must be made concerning Mr. MacIntyre and his involvement in the Marshall wrongful conviction is whether MacIntyre met with Detective M. R. MacDonald on the morning of May 29, 1971, was briefed by MacDonald on the events of the previous evening, and taken through the information contained in MacDonald's notebook. (Exhibit 38).

MacIntyre says he was called by MacDonald on the night of the stabbing (Friday) and he told MacDonald to look at the scene; to do his investigation and pick up any evidence; to get the names of anybody he could; and to go as far as he could that night. (5911). MacIntyre said he did not see MacDonald on Saturday, and never discussed what the latter did on the evening of the stabbing, and never saw MacDonald's notes, and could not recall going over them with him.

(5916, 5917, 5922). MacIntyre knew people in his Department kept notes, and he would expect MacDonald would have kept notes of what he did during the night of May 28, 1971. MacIntyre did make it a point to be at the Sydney Police Station at or about midnight on May 29 to talk to the patrolmen who had been on duty, and involved in the initial investigation, the night before. (5949).

On the other hand, Mr. MacDonald said that while he was not scheduled to work on Saturday, he did come out specifically because of the case and worked a full day. The following evidence of MacDonald is found at page 1672:

"Q. And when did you first speak to Sgt. MacIntyre about the case?

A. When he came out in the morning.

Q. Do you know how early that was?

A. It could have been close to 8:30, 9:00 o'clock.

Q. 8:30, 9:00 o'clock and where did you speak to him?

A. In the Detective office.

Q. And what did you tell him?

A. I explained to him what took place. I read my report to him and I read this - this report ... and from there ...

Q. You read over your notes?

A. Yes sir."

Mr. MacIntyre said MacDonald must be mistaken. (5924). We consider it is inconceivable that Mr. MacIntyre would instruct MacDonald on the steps to be taken on the night of the stabbing but, knowing that MacDonald would keep notes, would not have spoken to MacDonald and obtain the details of what was done by MacDonald. MacDonald would have no reason to invent his evidence about working the entire day on Saturday, May 29, 1971. If he worked that day, is it reasonable to conclude that MacIntyre would not discuss with him the details of MacDonald's efforts of the night before? We conclude that Mr. MacIntyre's evidence on this point cannot be accepted.

When Was Donald Marshall, Jr. The Prime Suspect

The next important fact to be determined is whether Sergeant MacIntyre concluded from the first time he became involved in the case on Saturday, May 29, 1971 that Donald Marshall was the person who stabbed Sandy Seale. Mr. MacIntyre consistently testified that he did not consider Marshall to be a suspect until some time during the following week after he had obtained the jacket which Marshall had worn on the night of the stabbing and spoken to Dr. Virick who had stitched Marshall's arm. (6041, 6056). At that time he says he considered the wound to Marshall's arm was self-inflicted. On the other hand, he said he saw Marshall's injury on May 29 at the Police Station when Marshall pulled down the bandage to permit the wound to be seen and, at that time, MacIntyre thought it was a very shallow injury (5942). We consider his explanation of how he could reach this conclusion while viewing a wound which had been stitched closed to be less than convincing. (5943).

There is very telling evidence from other witnesses which would tend to negative the evidence of Mr. MacIntyre that he was keeping an open mind. Exhibit 40 contains notes from the notebook of Constable Wood of the R.C.M.P. The following is the note recorded

of Wood's visit to the Sydney police station on the morning of May 29, 1971.

> "Stabbing in Wentworth Park early A.M. this date two youths, Seale and Marshall.
>
> Conversation with Edward MacNeil & Det. MacIntyre feeling at this time Marshall was responsible and incident happened as a result of argument between Seale and Marshall ...".

Edward MacNeil was a Sydney Police Constable at the time. MacIntyre testified that he does not recall MacNeil saying anything in his presence about a suspect and if he did, MacIntyre would recall it and would have wanted to know where MacNeil obtained his opinion, and why he had made up his mind. (6077, 6078). MacNeil has testified that he would not make any such statement in the presence of MacIntyre who would be in charge of the investigation. (2620). Unless one is to conclude, therefore, that Constable Wood fabricated the note contained in his notebook the only logical conclusion one can draw after assessing all the evidence is that MacIntyre made the statement recorded by Wood.

The fact that MacIntyre believed Marshall was a suspect from the beginning is further corroborated by evidence of events which took place late Saturday night and early Sunday morning. (May 29 and 30). In Volume 16 at page 90 is a telex from the Sydney detachment

of R.C.M.P. to the Halifax Division asking for a search to be carried out of the records of MCIS. The information contained in that telex, which was sent at 3:11 a.m. on Sunday, May 30, 1971, could only have been provided to the R.C.M.P. by someone from the Sydney police. The crucial statement in the telex is as follows:

> "Circumstances presently being investigated by Sydney P.D. Investigation to date reveals Marshall possibly the person responsible however Marshall states he and deceased were assaulted by an unknown male approximately 5'8" and 6' tall, grey hair approx. 50 yrs. who stated he did not like Indians or Negros...".

MacIntyre testified that he was at the Sydney police station after Seale died (approximately 8:00 p.m. Saturday evening) to speak to the policemen who had been on duty the previous night when they reported for work. That shift would commence at midnight on Saturday. (Ambrose MacDonald, 1127-30 and 1135; Walsh, 1290 and 1338; Dean, 1473, 1489; Mullowney, 1558; Michael B. MacDonald, 1623). MacIntyre has testified that he spoke to Junior Marshall several times on the Saturday, and while he did not take a statement from him, the description given of the event by Marshall on Saturday did not differ greatly from the contents of Marshall's statement which was taken on May 30. (5991). The only investigation work MacIntyre did on Saturday was to supervise a search at the Park, and to have a discussion

with Marshall. MacIntyre says he knew the R.C.M.P. had a store of material on crimes through their MCIS network, and that he had used this resource in other cases. (5958).

Having analyzed the contents of the R.C.M.P. telex (Vol. 16, page 90), and considering the evidence given at this Inquiry, we conclude that the information contained in the telex could only have been provided to the R.C.M.P. by MacIntyre. The written statement taken from Marshall on Sunday (May 30, 1971) (Vol. 16, page 17) refers to a man 5'9" to 5'10", weighing 190 lbs., having grey hair, and being 50 years of age. A similar description was given by Marshall to MacIntyre on May 29 and corresponds very much with the description contained in the R.C.M.P. telex. The May 30 written statement from Marshall also contains the only recording of the fact that the person who stabbed Seale said he did not like negros or Indians.

There is no evidence that anyone else in the Police Department spoke to Marshall on Saturday, nor that any other member of the Sydney police force would ask the R.C.M.P. for assistance with an investigation which was under the control of MacIntyre. Indeed, MacIntyre says that when he was in charge of an investigation, he took control of it and no one else took statements or did anything else unless he told

them to. (6076-77).

The evidence is that MacIntyre was at the Sydney Police Station after midnight on the Saturday night and the R.C.M.P. telex was forwarded to Halifax several hours thereafter. In our view the only reasonable conclusion to draw is that MacIntyre passed the information along to the R.C.M.P. seeking their assistance. Further, as noted earlier we conclude that MacIntyre told Constable Wood early in the morning on Saturday, May 29, before Sandy Seale had died, that Marshall was probably responsible, and that the incident happened as a result of an argument between Seale and Marshall. It is significant in our view that there was no reference of any kind from other persons that there had been an argument between Seale and Marshall. The importance of the alleged argument having occurred will be evident later in this Submission.

In our opinion the evidence establishes that MacIntyre concluded early on May 29, 1971 that Donald Marshall, Jr. stabbed Sandy Seale. From that point forward it appears MacIntyre was interested only in obtaining evidence which would support his theory, and lead to the conviction of Marshall.

Robert Patterson

During the investigation carried out by MacIntyre the name of Robert Patterson came up on several occasions. He is referred to in the May 30 statements of Donald Marshall, Jr. and John Pratico. Marshall stated that he and Seale had spoken to Patterson who recognized them. Pratico said Patterson told him that the two persons Pratico allegedly saw stabbing Seale were from a particular Toronto gang. Patterson was also named in the statements taken from Patricia Harriss and Terence Gushue on June 17. It appears obvious that a competent detective in carrying out his investigation would speak to Patterson. In his evidence, however, MacIntyre on numerous occasions said he never spoke to Patterson, and even went so far as to say he did not know Robert Patterson, or know where he lived. (6010, 6013, 6014, 6020, 6216 and 6230).

After Mr. MacIntyre concluded giving his evidence we were able to locate Robert Patterson who now resides in Toronto. In addition, we obtained copies of Mr. Patterson's criminal record and these were introduced as Exhibit 120.

These records reveal that on February 1, 1971 John MacIntyre prosecuted Robert Patterson in the Police Court in Sydney. Further, records taken from the Sydney

police files (included with Exhibit 120) indicate that Robert Patterson and others were arrested and charged on March 17, 1971 with break and enter and MacIntyre, and others, prosecuted that matter in Police Court on March 18, 1971. Further, Patterson was sentenced to four months in County jail on September 1, 1971 and this is the same time that Donald Marshall, Jr. was in jail awaiting trial on the murder charge.

William Urquhart, who was MacIntyre's principal assistant in the conduct of the investigation arising out of the Seale murder, testified that he knew Bobby Patterson and his mother, whose name he gave without difficulty, and that he knew where Patterson lived (9549, 50).

Mr. Urquhart was referred to the documents showing the various charges against Patterson and following those references these questions and answers appear on page 9556:

"Q. Can I take it from that, Mr. Urquhart, that Robert Patterson was well known to the Sydney police?

A. Yes.

Q. And if he was well known to the Sydney police to your knowledge would he be well known to John MacIntyre?

A. I would believe that he'd be well known to John MacIntyre.

Urquhart also said that Patterson was never interviewed by him or by him and MacIntyre. (9558). Patterson, on the other hand, says he was interviewed by MacIntyre and Urquhart. (10018). Patterson paints a rather bizarre scene and says he was handcuffed to a chair and treated very roughly. He was told that the police had two statements from other witnesess saying that Patterson was in the Park on the night of the stabbing, and saw what happened, and he was presented with a statement which had already been typed which he was told to sign. In response to his question he was told the statement said that he had seen Junior Marshall stabbing Seale. (10020-22). Donald Marshall, Jr. said Patterson told him that he had been interviewed by the Sydney Police. This conversation occurred when Marshall and Patterson were both in the County Jail in the fall of 1971. (14383). No details of the interview were given by Patterson to Marshall.

It is our view that MacIntyre cannot be believed when he says he did not know Patterson, nor know where Patterson lived. The evidence of Urquhart that Patterson would be well known to the Sydney police, including MacIntyre, is compelling given the record of Patterson, and the fact that MacIntyre himself was involved in arresting Patterson several months prior to the Seale

stabbing. Douglas Wright, retired Assistant Commissioner of the R.C.M.P., was called, at the request of MacIntyre, to give character evidence for MacIntyre. Wright knew MacIntyre well and said if the R.C.M.P. wanted to know anything about what was on the move in the criminal circles of Sydney MacIntyre was a good person to contact. (5254). We must conclude that MacIntyre would know Patterson, and would know where he lived.

To reach this conclusion, however, does not necessarily mean that MacIntyre and Urquhart must have interviewed Patterson. If, as we believe, MacIntyre was of the view that Marshall stabbed Seale and was interested only in obtaining evidence to support that conclusion, it could be argued that MacIntyre would not be interested in finding Patterson and interviewing him. The documentary evidence, however, shows that Patterson was "wanted", (Vol. 16, p.135) and given his previous involvement with the Police we cannot accept that he could not be found.

If Your Lordships accept our conclusion that MacIntyre did know Patterson, and knew where he lived, you must ask why MacIntyre would consistently deny such knowledge before the Inquiry. One obvious answer is that MacIntyre hoped Patterson would not be found and be able to tell his story of an interview wherein attempts

were made to force him to admit seeing Donald Marshall, Jr. commit murder.

The evidence of Patterson obviously is suspect. While other witnesses refer to the alleged tactic employed by MacIntyre of telling witnesses the police had statements from other persons who placed them at the scene of the crime, there is no evidence to suggest that MacIntyre applied physical force to any witness other than Patterson. Further, the evidence of Patterson that he had been roughly treated by police in other jurisdictions, and even thrown from speeding cars, certainly reflects on his credibility. On the other hand, Patterson did not seek us out, and never over the course of the years told his story to anyone else, even given the high public profile the Marshall case has enjoyed since 1982.

Given the fact that Patterson's name kept appearing in statements from various witnesses, the fact that MacIntyre wanted to interview him, and the recent dealings Patterson had with the Sydney Police, we consider it more probable than not that Patterson would be found and must have been interviewed. This conclusion leaves us with only the evidence of Patterson concerning the details of the interview. To accept his evidence on the substance of the interview, however, requires that a finding of credibility be made and we

leave that matter to you.

Evidence Of John Pratico, Maynard Chant, Patricia Harriss

It is generally conceded that Donald Marshall, Jr. was convicted of the murder of Sandy Seale because of the evidence of these three witnesses. All of these witnesses now say the evidence they gave at Trial was untrue and they have admitted committing perjury. Virtually everyone now believes that Sandy Seale was stabbed by Roy Ebsary. Two exceptions are Michael Whalley who openly admitted his view that Marshall had stabbed Seale, (11186) and John MacIntyre, who we suggest also continues to hold that view.

On several occasions Mr. MacIntyre was asked who he believed killed Sandy Seale. On most occasions he avoided the question and merely stated his willingness to accept the decision of the Appeal Division. (5903, 5997, and 6399). The evidence of Ambrose MacDonald and Richard Walsh was that MacIntyre still believed Donald Marshall, Jr. to be guilty. (1188, 1362, 1363). MacIntyre told Frank Edwards he "would go to his grave believing that Marshall had inflicted the wound to his left arm himself". (Vol. 17, page 16). Whether MacIntyre believes Marshall is innocent is not of fundamental importance to this Commission. However, the inability

of MacIntyre to publicly state that he believes Marshall did not stab Seale, or that he believes Roy Ebsary stabbed Seale, is illustrative of the mind set of MacIntyre, and perhaps is useful in explaining some of the actions he took over the years.

In his address to the jury, the Crown Prosecutor on several occasions referred to the fact that two independent witnesses who had no opportunity to colloborate came up with the same story; that is that Junior Marshall stabbed Seale. (Vol. 1, page 58, 59, 63). The evidence of Patricia Harriss was used with devastating effect by the Crown Prosecutor in the cross-examination of Donald Marshall, Jr. The Assistant Crown Prosecutor, Lewis Matheson, testified he could not conceive of the three witnesses not telling the truth since there was no connection between the three and they could not have the same story unless there was truth to it. (4946). In his charge to the jury, the Trial Judge noted that the Crown's case was based principally upon the evidence of Chant and Pratico, and he instructed the jurors to ask themselves what possible motive those two witnesses would have in implicating Donald Marshall, Jr. Further Mr. Justice Dubinsky told the jury he did not think there was the slightest suggestion that Chant and Pratico had acted in cahoots to concoct a story. (Vol. 1, pages 88, 94,

95, 99). The Trial Judge also referred to the evidence of Patricia Harriss and the importance of her evidence in colloboration with that of Chant and Pratico. (Vol. 1, pages 100 and 101).

The Nova Scotia Supreme Court, Appeal Division, heard an appeal from the conviction of Donald Marshall, and in its Decision the Court noted as well that two very important independent eyewitnesses, with no apparent motive for collusion, and no evidence to give the slightest support to any suggestion of collusion, had given mutually corroborative testimony having a direct bearing on the issue to be decided by the jury. (Vol. 1, pages 125, 126, 131).

In the evidence given by John MacIntyre during the Discovery Examination in the C.B.C. proceeding, which was given in September, 1984, the following evidence appears:

> "... I never knew the boy ▮Chant▮ until I, you know, interviewed him the first time, and he was a clean cut young chap and he didn't know Pratico and Pratico didn't know him and they weren't together in the same place. They lived 31 miles apart, and what I'd like to ask is how they could pinpoint Marshall and this other chap on Crescent Street at that time of night on that particular date in the same spot along with Harriss and Gushue and not be there. I know I couldn't do it."
> (Vol. 15, p. 133).

"... They ▮Pratico, Chant, Harriss▮ all point out that driveway there as to where they were standing. Now what I say is if they weren't there how could they have picked this location, you know, at that time." (Vol. 15, p. 171).

"He ▮Pratico▮ was a nervous type and the way I looked at that when he - what he said in his second statement was colloborated by somebody else. You have to take notice of it, of what he said he'd seen and then what the story that Chant gave, and neither one of them are buddies, didn't know one another, were several hundred feet apart and lived 31 miles apart, and within a 10 - from quarter to 12 to 12 o'clock they have those two on Crescent Street, in one spot, standing, and then the Harriss girl and Gushue, they come along at that time and they verify that, you know." (Vol. 15, p.179, 180).

We know now that Chant and Pratico were not in the Park at the time of the stabbing, and did not see the stabbing take place. We know also Patricia Harriss did see Donald Marshall, Jr. on that night, and with him were two individuals, one of who she described in a way which closely matched the description of Ebsary. Further, we know that Roy Ebsary stabbed Sandy Seale. What has not changed, however, are the facts that Chant and Pratico did not know each other; had no opportunity to collaborate; lived 31 miles apart; and would have no motive to concoct a story implicating Donald Marshall, Jr. in the stabbing of Sandy Seale. How could they independently invent a story which had Junior Marshall stabbing Seale; Marshall and Seale standing in a particular location on Crescent Street; Marshall and Seale participating in an argument? Why

did Patricia Harriss change her story and say that she saw Marshall and Seale alone in the very area where the stabbing occurred? Answers to these questions must be given, and will be of fundamental importance in determining why Donald Marshall, Jr. was wrongfully convicted. It is necessary, therefore, to analyze the evidence in some detail in order to attempt to determine how these individuals obtained the untruthful stories which they told to the jury and which led directly to the conviction of Donald Marshall, Jr. for the murder of Sandy Seale.

John Pratico

In June, 1971 John Pratico was 16 years old and was known to be a heavy drinker. On the night Sandy Seale was stabbed Pratico attended the dance at St. Joseph's Hall after having consumed a large quantity of alcohol. He continued to drink during the course of the evening and at one time during the evening was somewhere in Wentworth Park drinking a beer behind a bush.

According to Barbara Floyd and Sandra Cotie, Pratico was in the parking lot at St. Joseph's Church Hall following the dance when the story of the stabbing of Sandy Seale was being circulated. The day following

the stabbing Pratico asked his mother who had been stabbed in the Park when he learned of the incident. Pratico says he never witnessed the stabbing and the evidence of other witnesses appears to support Pratico's story.

For some reason Pratico was summoned to the Sydney Police Station on Sunday, May 30, to give a statement. Mr. MacIntyre is not able to say exactly why Pratico was called but he believes someone told him Pratico had some knowledge of the events of the night before. On page 127 of Volume 16 there is a handwritten note indicating that Rudy Poirier had seen Marshall at Pratico's home on Sunday morning (May 30, 1971) "re story to tell". A statement was taken from Poirier on July 2, 1971 (Vol. 16, p. 85) wherein Poirier talks about a conversation with Marshall on May 30 where John Pratico was in attendance.

In any event Pratico attended at the Police Station and gave a statement on May 30. The only similarity between the information contained in Pratico's statement, and that given by Poirier approximately one month later, is a reference to a white Volkswagen. The description given by Pratico of the people involved does not compare in any way with that given by Marshall and Chant a short time previous to the Pratico statement. There was no attempt made by MacIntyre to obtain details

of the persons allegedly seen by Pratico and he was not asked, for example, the age of the people or the color of their hair, both of which topics were covered in the statements by Chant and Marshall. Contrary to MacIntyre's usual practice, the time when he commenced taking Pratico's statement is not noted. Given the length of the statement, however, there could not have been a long period of time involved from the start to finish.

MacIntyre says he had difficulty accepting the contents of Pratico's statement and attended at the Park one night at midnight to satisfy himself that Pratico could not be telling the truth and he decided to talk to him again. (6083). By this time MacIntyre had formed the view that the cut on Marshall's arm was self-inflicted (6079), and that Marshall had given Pratico the story which was told to MacIntyre by Pratico on May 30. (6114).

The evidence of MacIntyre with respect to the second statement taken from Pratico on June 4, 1971 deserves careful analysis. He first said that he could not recall who brought Pratico to the police station on June 4 but that when Pratico arrived, he would be told by MacIntyre that the latter thought he wasn't getting the truth in the first statement, that he wanted

the truth and MacIntyre would have taken down everything Pratico said after these initial remarks were made. (6115). MacIntyre also testified that he had not seen Pratico from the time he had taken the May 30 statement until Pratico was brought to his office on June 4. That evidence is found on pages 6115, 6116 as follows:

"Q. Had you seen him since you had taken the statement on May 30 until he was brought to your office on June 4, which was a Friday?

A. No, No.

Q. So this was your first contact with him from the first statement until the second. And you told him, "I don't think you", or words to this effect, "you weren't telling me the truth before, I want the truth"?

A. That's right yes. Some words to that effect."

MacIntyre denied the evidence of Pratico that the latter was threatened with jail, or being in real trouble, if he didn't tell the truth, or that Pratico was told the police had a witness who said Pratico was in the Park the night of the stabbing and saw what happened. (6117, 6118).

Mr. MacIntyre was then referred to the actual statement which he took from Pratico (Vol. 16, p.41). When referring to this statement, it is important to recall that Pratico was not in the Park, and did not

see the stabbing of Seale. One must ask, therefore, where he obtained the details and the information which is contained in the statement.

Mr. MacIntyre was referred to the sentence in the third paragraph of Pratico's statement where it says "on the tracks, I stopped where I showed you" and was asked what Pratico meant. At that time, and for the first time, MacIntyre admitted that he had taken Pratico to the Park prior to bringing him to the Police Station to take the second statement. The following evidence was then given by MacIntyre (6121), after MacIntyre said he had no recollection of being in the Park with Pratico.

"Q. Did you walk about the Park with him?

A. Yes.

Q. Did he take you to the place on the tracks that he "showed" you?

A. I know where he was supposed to be on the tracks.

Q. Where?

A. I think it was the -- the bush in front of the second house.

Q. How do you know where he was supposed to be?

A. I -- he says, "I stopped where I showed you", so --

Q. I know he says that but you just said you knew where he was "supposed" to be. How did you know where he was

supposed to be?

A. I'm saying I have no recollection of it now; but he must have taken me over there. That's as far as I can go on that, Mr. MacDonald."

On several other occasions in his evidence Mr. MacIntyre refers to the place where Pratico was "supposed to be". (6123, 6124, 6128, 6134). In Pratico's Statement it is then recorded that "Donald Marshall and Sandy Seale were up where the incident happened". Here again is evidence that MacIntyre must have been in the Park with Pratico prior to taking the second statement. Since Pratico was not there on the night of the incident, and there is no evidence to support a finding that he knew precisely where "the incident happened", we must conclude that this location must have been pointed out to him by MacIntyre during the visit to the Park.

In the statement Pratico then goes on to refer to an argument between Marshall and Seale. This is the first reference in any statement or report to an argument between Seale and Marshall, with the exception of the note contained in Constable Wood's notebook. Earlier we expressed our view that MacIntyre made the comments which were recorded by Wood.

Pratico's statement contains fairly detailed

information as to how Seale and Marshall were facing each other, the distance between them, how Marshall stabbed Seale and where on Seale's anatomy the knife struck, etc. William Urquhart is noted to be present at the taking of Pratico's June 4 statement, although there is no indication that Urquhart accompanied MacIntyre when he walked through the Park with Pratico. Urquhart has very limited recollection of the taking of the statement from Pratico. MacIntyre says he never took another statement from Pratico after June 4. (6142).

Maynard Chant

After having received the second statement from Pratico, MacIntyre wanted to see Chant because he thought he was not getting all the truth from him either. (6143). MacIntyre and Urquhart proceeded to Louisbourg and arranged for the Louisbourg Chief of Police, Wayne Magee, to bring Chant and his mother to the Louisbourg Town Hall. MacIntyre says he made a preliminary statement that he did not believe he was getting all the truth, and that he wanted the truth, and Chant started to talk and MacIntyre took down everything that was said. MacIntyre says he has a vivid recollection of taking the Chant statement. (6147).

MacIntyre denies he made a remark to Chant that he had someone who saw Chant at the scene or had a statement from someone who saw Chant in the Park on the night of the stabbing. (6148). Chant testified MacIntyre told him he had a witness who saw Chant at the Park. (855, 866, 868, 872, 943, 944, 961, 962, 964). Mrs. Chant gave evidence to the same effect. (3534, 3540). Wayne Magee testified that MacIntyre told Chant the information contained in Chant's first statement did not correspond with other information which was obtained afterwards (3634), and that during the course of taking the June 4 statement, MacIntyre would tell Chant that answers he was giving were not quite correct because of what had been said by another individual. (3647, 3649, 3650). MacIntyre, however, consistently said the statement from Chant contains everything that was said, other than his initial comments.

Once again it is important to remember that Chant was not present in the Park when the stabbing occurred and did not see the incident. It is necessary to ask, therefore, where he obtained the information and detail which is contained in the statement. (Vol. 16, p.46).

The statement starts out with Chant describing

a very circuitous route he took to get to George Street from the bus station. The first statement from Chant (Vol. 16, p. 18) describes a route which was much more reasonable, and which is a route which Chant showed to MacIntyre on May 30 during a visit to the Park prior to Chant giving his first statement. (5993). In the June 4 statement Chant says he was walking down the track when he "noticed a dark haired fellow sort of hiding in the bushes about opp. the second house on Crescent St.". Significantly, Pratico is a dark haired fellow, and even though Pratico's statement refers to his being on the tracks about 30 to 40 feet from where Seale and Marshall were standing on Crescent Street, according to MacIntyre Pratico was "supposed to be" behind a bush opposite the second house on Crescent Street. (6124, 6135).

Chant says in his June 4 statement that he saw Pratico at the Police Station in Sydney on Sunday afternoon. MacIntyre testified he would have made certain that Chant, Pratico and Marshall would not have seen each other at the Police Station on the Sunday. (5992). In Chant's statement there is also reference to an argument between Marshall and Seale and the fact that the stabbing of Seale occurred during the course of the argument.

William Urquhart was present during the taking of this statement as well. He also says he has a vivid recollection of the taking of this statement, although it is one of the few incidents Mr. Urquhart recalled vividly throughout the giving of his evidence. His only explanation for his vivid recollection of the Louisbourg statement taking is that this was the second eyewitness account of a murder in one day and that would be unusual. (9535). We do not consider that explanation to be believable.

Patricia Harriss

On June 17, 1971 Patricia Harriss, who was 14 years old, was at the Sydney Police Station accompanied by her mother. There is a partially completed statement taken from Miss Harriss by William Urquhart at 8:15 p.m. (Vol. 16, p.63). A further written statement was taken from her by Mr. MacIntyre commencing at 12:07 a.m. on June 18 (Vol. 16, p.67).

There are significant differences in the evidence of the various persons who were present when these statements were taken. Miss Harriss and her mother say both Urquhart and MacIntyre were present early in the evening, and many statements were started but when Patricia Harriss mentioned that she saw two persons with Donald Marshall on the night of the stabbing, and described one of those men to be a short person having grey hair and wearing a long coat, the statement would be crumpled up and thrown on the floor. (2954, 2955, 2957, 2798). This procedure was followed on numerous occasions and the police were not prepared to accept her story that there were two people with Marshall in the Park on the night of the stabbing. (2804). Ultimately, after several hours of badgering, threats of perjury and jail (2806), raising of voices, and pounding on the table, during which time Mrs. Harriss was asked to leave the room, (2956, 2960)

Patricia Harriss finally gave a story which the police accepted, namely that Junior Marshall and Sandy Seale were alone on Crescent Street when seen by Patricia Harriss and Terry Gushue on May 28, 1971. Both Mrs. Harriss and Patricia Harriss say MacIntyre and Urquhart were present throughout the entire evening when the questioning occurred. (2954, 2796).

Mr. MacIntyre says he was not present when the first statement was taken from Patricia Harriss early in the evening of June 17, but did recall talking to her later that evening. (6200). He denied that Mrs. Harriss was asked to step outside the room so he and Urquhart could question Patricia. (6206, 6207). He acknowledged he could have told Patricia Harriss that he didn't think he was getting the truth (6220), but denied her evidence that she was told if she did not tell the truth, she was going to be in trouble, might be going to jail and was told about perjury. (6222). To the extent he could remember the details of the interrogation of Patricia Harriss, Urquhart generally agreed with the evidence of MacIntyre.

MacIntyre said he told Harriss that Gushue had been interviewed and MacIntyre was getting two different stories and wanted to see if Harriss was telling the truth. At that time Harriss was <u>quite adamant</u> that there were

two other parties with Marshall, but at no time did he write down what she was saying about the two people. (6223, 6224). MacIntyre says that at some time Patricia Harriss was sent out of the room, after she had been adamant about having seen two people with Donald Marshall, and MacIntyre had been telling her he had a statement from someone else that there was only one person present. (6226, 6227). The only statement the Sydney Police had saying there was one person present with Junior Marshall at the relevant time was the statement taken from Terry Gushue on June 17, 1971 (Vol. 16, p.69).

The statement from Terry Gushue was taken by Mr. MacIntyre commencing at 11:40 p.m. and ending at 12:03 a.m. on June 18. The handwritten statement (Vol. 16, p.72) is in the handwriting of MacIntyre and there is no witness noted to be present. The typewritten copy indicates that the statement had been signed by William Urquhart. The statement of Patricia Harriss taken by MacIntyre (Vol. 16, p.65) commenced at 12:07 a.m. and concluded at 12:25 a.m. on June 18. Here again, the handwritten statement makes no reference to William Urquhart although the typewritten copy indicates that Urquhart was present. Urquhart testified that if his signature was not on the handwritten copies of statements, then he was not present when they were taken. (9583, 9584). MacIntyre would say Urquhart was present when the second

statement was taken from Harriss. (6240).

It is obvious that MacIntyre's evidence on the taking of the second statement from Harriss cannot be correct. We do not consider it would be possible for MacIntyre to conclude taking the statement from Gushue at 12:03, to meet with Harriss for a time when she was being adamant that there were two people present with Marshall, to tell her he had a statement saying there was only one person present, send her out of the room, and then have her come back and give the written statement which he commenced taking at 12:07. Yet this is exactly what he said took place. (6227).

In our opinion, there can be no doubt Mr. MacIntyre questioned Patricia Harriss on several occasions throughout the evening at which time she was being adamant about having seen two people with Donald Marshall, Jr. on Crescent Street on May 28, 1971. The description of one of those persons corresponded very closely to that given to MacIntyre by Marshall on May 30, 1971, and that given by George and Alexander MacNeil on May 31, 1971. (Vol. 16, p. 26). MacIntyre testified that his practice, which he invariably followed, was to make a general statement to witnesses and then take down everything that was said by witnesses and himself. There is no statement, or partial statement, from Patricia Harriss in the handwriting of MacIntyre

where Patricia Harriss is saying there were two men present with Marshall.

Patricia Harriss said it was "not acceptable" for her to have seen two men with Marshall (2804) and both she and Mrs. Harriss said whenever she mentioned two men, the paper would be crumpled up and thrown to the floor. (2798, 2954, 2955, 2957). MacIntyre admits Patricia Harriss was adamant in her story, and one must conclude that this means she was insistent, and that she repeated her story over and over. Why wouldn't MacIntyre follow his usual practice of taking down everything that was said by witnesses, and himself. Is this not concrete evidence of MacIntyre and Urquhart employing a tactic of telling a young, frightened person that the story she is giving cannot be true because they have a witness who is telling them a different story which must be the truth, until finally they obtain the statement which they want? (6220, 6223, 6224, 6225, 6226). It is our view that MacIntyre and Urquhart employed reprehensible techniques and conduct in their questioning of Patricia Harriss and that they coerced her to give a statement which they knew she did not believe, and one that in fact was completely different than she wanted to give.

One cannot conclude an assessment of the Patricia Harriss involvement in this matter without referring to

the O'Reilly twins. On July 26, 1982 MacIntyre swore an Affidavit for use in an Application to have evidence called at the Reference Hearing. (Vol. 15, p. 10). In that Affidavit in paragraphs 16 through 22, MacIntyre refers to the statements given by Patricia Harriss and a statement taken from Mary O'Reilly on June 18, 1971, wherein it is stated that O'Reilly told Patricia Harriss about the grey haired man referred to by Harriss in her first statement, and it was likely he knew what O'Reilly was going to say before he took the second statement from Harriss. Further, he deposed that the questioning of Patricia Harriss continued because he believed she was not truthful in her first statement and his belief was probably based upon his knowledge of what O'Reilly was going to say.

In the second statement taken from Patricia Harriss, there is no reference to Mary O'Reilly and MacIntyre did not ask Patricia Harriss if she had been told by Mary O'Reilly to tell the police about the grey haired man, and did not even ask if she knew Mary O'Reilly. MacIntyre says he did not know Patricia Harriss, or speak to her, before taking the statement on June 17, and that is the only time he met with Patricia Harriss and talked to her about this case. (6238, 6233). MacIntyre could not say why he did not ask Patricia Harriss if she knew Mary O'Reilly. (6232).

On page 129 of Volume 16 there is an undated note in the handwriting of MacIntyre. The note provides as follows:

> "Mary O'Reilly said to Miss Harriss that Sandy Seale ran up to the corner where Polletts is to tell his girlfriend that he was going with Junior. Mary is Margaret O'Reilly's sister
>
> The O'Reilly twins told me to tell the story about the grey haired man
>
> Jr. is a good friend of theirs They hang around with the Indians Mary told me that in school last Thursday she went with Pius Marshall now she goes with Steve ?".

When he was referred to this note, MacIntyre agreed that the phrase "the O'Reilly twins told me" must be a referenceto Patricia Harriss, and agrees that the note can only be a result of something that Patricia Harriss told him. (6235, 6236). He cannot recall, however, any discussion with Patricia Harriss where she told him that the O'Reilly girls told her to tell the story about the grey haired man, and it is difficult to conclude that had Patricia Harriss told him such a story on the only occasion when he met with her (June 17), that he would not have recorded that fact.

The statement from Mary O'Reilly, in its typewritten form, is found in Vol. 16, p. 74. This is another case where the typewritten copy shows William

Urquhart to be present but the handwritten one, in MacIntyre's writing, does not. Mary Csernyik (O'Reilly) testified that she did not tell MacIntyre that she told Patricia Harriss about the old grey haired man and that Harriss should tell the police that such a person was with Marshall on the night of May 28. (3302, 3304). The following evidence of Mrs. Csernyik is important. (3308, 3309).

> "Q. Now the statement that you gave to the police says quite clearly and you did sign it, it says quite clearly that you discussed the matter with Patricia Harriss and that you told her about the grey haired man. I can think of three possibilities of how that got there. The first possibility is that you, in fact, made the statement. The second possibility is that someone perhaps suggested it to you and you agreed. Another possibility is that you didn't make the statement at all and somebody put it there. Are there any other possibilities that you can think of as to how that got on that piece of paper?
>
> A. No. Your third possibility is right. Somebody must have put it there because I didn't."

At the time this statement was taken Mary O'Reilly was 14 years old and she was at the Police Station unaccompanied by her parents. Also there was her sister, Catherine, who was 16 years old at the time. A statement was taken from Catherine (Vol. 16, p. 78) by Sgt. MacIntyre and on this occasion Urquhart did sign the statement as

a witness. Catherine O'Reilly was not asked if she had any discussions with Patricia Harriss, or even if she knew Patricia Harriss. MacIntyre says he did not ask these questions because of his belief it was Mary O'Reilly who had been talking to Patricia Harriss. (6249). MacIntyre was not able to give any explanation why he held that belief.

If MacIntyre's evidence is to be accepted, you must conclude that he was told on June 17, 1971 by Patricia Harriss that the O'Reilly twins, and specifically Mary O'Reilly, told her to tell the story of the grey haired man, and that Mary O'Reilly confirmed the story the following day. You obviously would have to ask yourselves, however, why MacIntyre would not have taken a statement from Patricia Harriss confirming that fact since obviously it would be of great significance in the prosecution of Donald Marshall, Jr.

If Mr. MacIntyre's evidence is rejected, however, and that of Patricia Harriss and Mary Csernyik accepted, you must somehow explain the note on page 129 of Volume 16. Conceivably, MacIntyre could have been recording information being given to him by someone else who was interviewing Patricia Harriss. Urquhart does not recall passing on any such information to MacIntyre, and says if Harriss had told this to him he would have written

it down. (9601, 9602). There is no evidence before this Inquiry that any other members of the Sydney Police were interviewing witnesses or potential witnesses at this time. The only other possible explanation we can suggest is that MacIntyre fabricated the entire story about Mary O'Reilly telling Patricia Harriss to lie to the Sydney Police concerning the grey haired man and was creating documents which could be used to support this theory. We take no firm position on this particular issue.

Conclusions Re John MacIntyre's Securing Evidence Of Key Witnesses

In our opinion, the same factors that were considered compelling by the Crown Prosecutor, the Trial Judge, probably the Jury, and the Appeal Division of the Nova Scotia Supreme Court in 1971 to support the conclusion that Donald Marshall, Jr. had stabbed Sandy Seale are equally compelling today to support the conclusion that John MacIntyre put evidence in the mouths of John Pratico, Maynard Chant and Patricia Harriss. We do not consider any other conclusion can be supported by the evidence before this Inquiry if one begins with the assumption that Donald Marshall, Jr. did not stab Sandy Seale.

Pratico and Chant did not know each other, had no opportunity to collaborate, lived approximately 30 miles apart, and would have no motive to concoct a story to implicate Marshall in the stabbing. They did not see Marshall stab Seale and yet these two independent, unconnected witnesses came up with a story which placed Seale and Marshall on Crescent Street arguing immediately before Marshall allegedly stabbed Seale. Further, Chant placed Pratico in a location viewing the fictional scene, not where Pratico said he was, but where MacIntyre said Pratico was "supposed to be". We do not consider it would be reasonable to find that these independent

witnesses somehow independently invented a story having many key similarities.

We have already urged you to conclude that on the morning of May 29, 1971 MacIntyre formed the view that Marshall had stabbed Seale during the course of an argument. This theory is later supported by the untrue statements of Chant and Pratico. Pratico gave his statement implicating Marshall only after having been taken to the Park by MacIntyre where he allegedly pointed out, (a) where he was when he viewed the event that he did not see; (b) where the event he did not see had happened; (c) where Seale and Marshall were involved in an argument which did not occur; and (d) where he saw Marshall stab Seale, although this did not happen.

The session in Louisbourg occurred only after the statement was obtained from Pratico following his visit to the Park with MacIntyre. MacIntyre's evidence, concurred in by Urquhart, that every word that was uttered at Louisbourg was taken down and is contained in Chant's second statement is not capable of belief, in our view. While one could argue that Chant, and even his mother, may have reason to give untrue evidence, surely even MacIntyre would not suggest the evidence of Wayne Magee is tainted. Magee says that MacIntyre conveyed to Maynard Chant that information Chant had given in his

prior statement did not correspond with other information the Police had obtained afterwards (3634); that MacIntyre may have said we were talking to this individual and they said this (3647); that Maynard was getting confused and was given advice such as "this one in this statement didn't say that" (3649); that some of Maynard's answers MacIntyre knew weren't correct and didn't correspond with other information MacIntyre had so Maynard would then be quizzed more; that at times there would be periods of approximately two minutes of questioning before any answer was written down (3662).

Then there is the evidence of Harriss, which was considered to be of great importance at the time of Marshall's Trial. Obviously her initial statement that two persons were with Marshall on Crescent Street, and that one of those persons fit the description of the old man described by Marshall on May 30 could not be allowed to stand in the face of the evidence of Chant and Pratico. In our view, any objective reading of the evidence of MacIntyre concerning the interrogation of Patricia Harriss must lead one to conclude that she was not going to be permitted to stand by the evidence that she was adamant to give, that she was told her evidence of seeing two men with Marshall could not be the truth and that the Police had a statement from someone else that there was only one person present with Marshall.

Ultimately this 14 year old child bowed to the pressure being exerted by MacIntyre and Urquhart, and told them what they wanted to hear.

We are of the opinion that MacIntyre formed a theory on the morning of May 29, 1971 and then set out to find evidence to support his theory. We believe his actions in obtaining the untrue second statements from Pratico, Chant and Patricia Harriss are to be condemned, and constitute malicious conduct by a senior Police Officer.

We have asked ourselves why MacIntyre would deliberately set out to obtain evidence to convict Marshall but have been unable to reach any conclusion. It would be simple to suggest that he was motivated by malice toward Marshall because of his previous dealings with him, and there is evidence from Mrs. Clemens to support such a conclusion. (5892, 5893, 5894, 5895). To fall into this trap, however, would require us to ignore the fact that, on two occasions, MacIntyre asked for an independent review of his investigation by the R.C.M.P. It also would leave unanswered the question why MacIntyre would not have destroyed the partially completed first statement taken from Patricia Harriss. These are not the actions one would expect from a person who deliberately fabricated evidence, but rather support a conclusion that

MacIntyre honestly believed Marshall was guilty of the stabbing of Sandy Seale, and was not prepared to consider any evidence which would shake that belief.

In the result, we do not consider it necessary to determine whether MacIntyre deliberately set out to convict Marshall, or was acting on a honestly held belief in Marshall's guilt. Whether MacIntyre honestly believed that Marshall had stabbed Seale is, in our view, of no importance. Surely it cannot be correct for a Police Officer to coerce youngsters to give evidence which he believes to be true. No one in authority has yet analyzed MacIntyre's conduct and considered whether it constitutes criminal action which would support laying of charges.

If our conclusions are correct that MacIntyre deliberately coerced witnesses to give evidence which was untrue, we are of the view that a prima facie case would exist to support a charge for obstructing justice contrary to the provisions of Section 127(3)(a) of the Criminal Code, which provides in part that:

> "... everyone shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed, dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence."

In R. v. Walker (1972), 17 C.R.N.S. 374 (Ont. Prov. Ct.) it was held that this subsection covers attempts to dissuade a witness from testifying in a certain way, as well as attempts to dissuade the witness from testifying at all. Furthermore, where "corrupt" means are used, it is immaterial whether the accused believed that the evidence he was suppressing was true or false.

In R. v. Silverman (1908), 14 C.C.C. 79 (Ont. C.A.) in commenting on a predecessor's section of the Code, the Court dealt with an accused who offered a defence that he had only corruptly attempted to persuade the witness to give true evidence. At p. 81 of the Decision it is stated:

> "Whether the accused was honest in his belief or not is immaterial. It would not have been unlawful for him, by argument or explanation, to have attempted to dissuade the witness from giving what the accused may have honestly believed to be an untrue account of the transaction, and to give what may have appeared to him to be the true one. The offence consists in doing it corruptly, whether by threats, bribes, or other corrupt means, which have a direct tendency to influence the witness not to give the true version of the facts, as it may really have appeared to him, but what may be, so far as the knowledge or belief of the witness himself is concerned, a false one, and thus to interfere with or obstruct the administration of justice."

If Your Lordships conclude that the evidence given at Marshall's Trial by Pratico, Chant and Harriss was put

in their mouths in the first instance by MacIntyre, we urge you to go further and to recommend that consideration be given to laying charges against John MacIntyre for obstruction of justice, together with any other charge which may be supported by the conclusion which Your Lordships reach. To do less would be tantamount to acknowledging that our law does not prohibit the deliberate securing of untrue evidence.

WILLIAM URQUHART

As noted elsewhere in this Submission, Mr. Urquhart was the principal assistant to John MacIntyre as this investigation was carried out. For the most part, Mr. Urquhart played a passive role and was a witness to many of the statements taken by MacIntyre from various persons. It is necessary, however, to determine whether he should bear any responsibility or be criticized in any way, for any of the actions of MacIntyre which we have suggested should be condemned.

In the main, Mr. Urquhart supported the evidence of MacIntyre, although on most occasions Urquhart admitted having very limited recollection of the events which took place. We consider it surprising that he did have very good recollection of the Louisbourg statement and noted earlier our dissatisfaction with his explanation for his vivid recollection of those events. We have urged you to conclude that the evidence taken from Maynard Chant at Louisbourg was largely evidence that was put into his mouth by MacIntyre. Mr. Urquhart would have to share equally in any blame to be attached to that conduct since he was present, and must be taken by his silence to have acquiesced in the activity of MacIntyre.

There is no suggestion in the evidence that Urquhart accompanied MacIntyre during the visit to the Park with Pratico before Pratico gave his second statement. Neither is there any suggestion that he would be aware that the details of the event which Pratico described could not be truthful and had to be put into Pratico's mouth by someone else.

We are of the view that Urquhart did participate throughout the evening in the interrogation of Patricia Harriss on June 17, 1971. We consider the activity of Urquhart and MacIntyre on that evening to be reprehensible and that consideration should be given to laying any charges which could be supported as a result of such activity.

CROWN PROSECUTOR

The only substantive allegation of misconduct made with respect to the way in which Donald C. MacNeil, Q.C., handled the prosecution of the Donald Marshall, Jr., case was the suggestion that he had an obligation to disclose the first statements of Chant and Pratico to defence counsel independent of any request being made of him to do so. Gordon Gale's testimony was to the effect that the failure to disclose those statements would constitute "a real injustice". Gale did however say that his comments with respect to the duties of prosecutors in 1971 would now be "on reflection". "I am not sure in 1971 that things were dealt with as fully as they are now" (13369).

Leonard Pace testified with respect to contradictory statements that they should have been disclosed to the defence, that that would have been the appropriate practice (12811), although he was not prepared to go so far as to say that that in fact was department policy in 1971 (12812).

We do not conclude that it was department policy in 1971 for prosecutors to disclose contradictory

statements to the defence in the absence of a request to do so. We are, however, of the view that this was the law at the time and that it should have been department policy to require such disclosure by Crown Prosecutors. This conclusion is based on the authorities referred to in the March 23, 1961, letter from Malachi Jones (Exhibit 81).

DEFENCE COUNSEL

Donald Marshall, Jr., was represented by the late C.M. Rosenblum, Q.C., and S.J. Khattar, Q.C. Those who gave testimony concerning the capabilities of these two counsel were generally of the view that they were both competent and well-respected counsel. In the conduct of the Marshall case, however, we conclude that in preparation for Trial their conduct fell below the standard which one could expect of a reasonably competent practitioner in Sydney at that time.

The evidence given by Mr. Khattar indicates that no investigative work was done on behalf of Marshall by either himself or Mr. Rosenblum. Marshall, in custody from the time of his arrest until the Trial, was asked by Khattar and Rosenblum to give them any information

that he thought might help in his defence. No independent inquiries were made by counsel (4803). Although it seems to have been a practice of certain defence counsel not to talk to the Crown witnesses, it is inexplicable that no attempts whatsoever were made to investigate the background of any of the witnesses. By way of example, Khattar was not aware that John Pratico had been in the Nova Scotia Hospital for a long period of time between the Preliminary and the Trial and when he was advised of this at the Hearings and asked whether he thought it would have been of any use to him in conducting his defence, he responded that it might have helped them (4719). In the defence of a murder case, where as here, there were no financial restraints placed on the conduct of the defence (4693), it is simply unacceptable for no independent inquiries to be made by defence counsel.

During the course of Mr. Khattar's examination, he was asked whether or not defence counsel would have done anything differently if Donald Marshall, Jr., had told them that he and Seale had accosted Ebsary and MacNeil and that it was their intent to take money off them. Khattar indicated that their investigation and conduct of the case would have entirely changed

(4788). Khattar and Rosenblum had the May 30 statement of Donald Marshall, Jr. (4714). This statement contains descriptions of Ebsary and Jimmy MacNeil, and it also refers to Bob Patterson. Consistent with their lack of investigative initiative, there is no evidence to indicate that Khattar and Rosenblum made any efforts whatsoever to follow up on the descriptions and information provided in Marshall's statement. In order for Your Lordships to conclude that Khattar and Rosenblum would have handled this matter differently if they had any information about an altercation in the park, you must be prepared to find that this one fact would have altered what we urge you to find to be an otherwise incompetent handling of Marshall's defence.

According to Khattar, the practice in Sydney in 1971 was that defence counsel would not approach the Crown and request copies of witness statements and that it was not the practice of either himself or Mr. Rosenblum to do so (4783; 4857). As noted above, the only statement that was in the possession of defence counsel was that of Donald Marshall, Jr. (4714). Even where they were aware that a witness had given a written statement, no request was made by Khattar or Rosenblum to get that statement from the Police. By way of

example, the testimony of Patricia Harriss at the Preliminary confirmed that she had given a written statement to the Police but, notwithstanding that knowledge, no request for that statement was forthcoming from Khattar or Rosenblum (4712).

The testimony of other lawyers who practiced in Sydney at about the same time did not generally support the view given by Mr. Khattar. Lou Matheson testified that most defence lawyers would ask for and be shown statements (4924). Upon being referred to Mr. Khattar's testimony, Matheson testified as follows in response to questions from Commission counsel (4926):

> "Q. Mr. Khattar testified, if I remember correctly, to the effect that it was certainly his practise and he believed Mr. Rosenblum's practise not even to request statements because even if you asked for them you wouldn't get them?
>
> A. Well, if it was his practise not to ask for them, then -- well, then probably he didn't get any from me and obviously I didn't go out and volunteer to give him one. But I --
>
> Q. Is he --
>
> A. -- And I'm not saying that what Mr. Khattar is saying is not true. All I'm saying is that I, in my experience, that was not what the general practise of the Cape Breton Bar was."

Arthur J. Mollon who practiced with Legal Aid in Sydney made a regular practice of requesting information from Donald C. MacNeil and, in his experience, he always received it (5420-1). Melinda MacLean, on the other hand, who also practiced with Legal Aid in Sydney, testified that by and large witness statements were not produced by Donald C. MacNeil in response to request (7246).

In the section of this Submission dealing with the errors made by the Trial Judge, we refer to the error made by the Trial Judge in connection with his interpretation of s.11 of the Canada Evidence Act. That error was described by Professor Archibald as having "significantly contributed to the conviction" (Exhibit Volume 30, p. 5521). This matter was not raised or argued by Mr. Rosenblum on the Appeal from Donald Marshall's conviction. In our view, Mr. Justice Dubinsky's misinterpretation of s.11 was so basic that it should have been picked up by defence counsel and argued on Appeal.

The evidence indicates that if defence counsel did less than a competent job in preparation, it may have been due to the fact that at least Mr. Rosenblum

considered that Donald Marshall, Jr., was guilty of the offence (comments of Rosenblum, Exhibit 69 referred to in examination of Khattar at Volume 25, p.4761). Evidence of M. Veniot (Volume 38, p.7043) who spoke to Rosenblum at the Appeal of Marshall's conviction:

> "I had the very clear impression that Mr. Rosenblum thought that Donald Marshall had done what he had been convicted of, no question about that."

In addition, Barbara Floyd testified that she had occasion to read The Cape Breton Post during the course of Donald Marshall, Jr.'s, Trial and to note the evidence of John Pratico. Barbara Floyd's view, which was supported by Sandra Cotie, was that the testimony that Pratico had given could not possibly have been true because Pratico had been at the dance and Barbara Floyd had seen Pratico that night subsequent to the time when she heard that something had happened in the park that night (3139). Ms. Floyd testified that she called Rosenblum's office and asked to speak to Marshall's lawyers. Her testimony as to what occurred then is as follows (3140):

> "A man came back on the phone and didn't -- I don't remember him identifying himself. He just said 'May I help you?' and I told

him that I had just read the paper, and I was calling about John Pratico, that he couldn't possibly be a witness because he was at the dance, and he said, 'You're too late.' And I said 'I beg your pardon.' and he just repeated himself and then hung up.

(3141)

Q. "Do you recollect what the man's attitude was on the other end of the phone? Can you describe what his voice was like?

A. He was just blunt.

Q. Blunt?

A. 'You're too late', he said and I remember thinking 'It's not too late because he's not convicted yet'. It hadn't come over the radio that he was guilty.

In answer to a question from counsel for Donald Marshall, Jr., Ms. Floyd indicated that she "felt" that she was speaking to Mr. Rosenblum (3160). The issue of The Cape Breton Post to which Ms. Floyd referred was that of November 5, 1971 (Exhibit 52). Ms. Floyd thinks that she was looking at this paper abound noon (3137) on her lunch break. The Trial concluded at 3:18 on the afternoon of November 5 and the jury address commenced at 3:30 p.m. (Exhibit Volume 2, pp.36-37). The lunch break on that day was from 12:15 p.m. to 2:00 p.m. (Exhibit Volume 1, p.216 and Volume 2, p.4).