Hon. Greg James AM QC.

Frederick Jordan Chambers.
53 Martin Place
Sydney NSW 2000
DX 450 SYDNEY

+61 2 9268 0114
0419 48 76 73

gregjames1944@gmail.com

19 April 2013

Mark Kerr
Berkeley Consultants Pty Limited
Level 2,
90 William Street,
MELBOURNE VICTORIA 3000

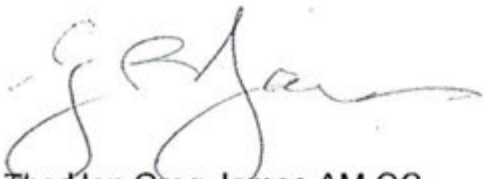
Dear Mark,

I attach a copy of the advice together with my memorandum of fees.

I have had some of the basic review work done by Junior Counsel as I indicated to you and have paid him out of the fee I charge. I confirm that the attitude to a review of the evidence by the Court of Criminal Appeal both under the *Criminal Appeal Act 1912* (NSW) and the *Crimes (Appeal and Review) Act 2001* (NSW) on grounds of unreasonable (unsafe and unsatisfactory) tends to ebb and flow from time to time and with different benches. But I have taken that into account.

As I said to Mr Edelstein in conference, generally speaking the Court of Criminal Appeal appears less and less reluctant (with encouragement of the High Court of Australia) to review the evidence itself to assess the reasonableness of the verdict.

Yours faithfully,



The Hon Greg James AM QC

Dr Geoffrey Edelsten

Application Pursuant to the
Crimes (Appeal and Review) Act 2001

Memorandum of Advice

1. Introduction

1.1. I was the counsel briefed for Dr Geoffrey Edelsten (as he then was) in the committal proceedings. I was unable to appear at the trial.

1.2. Nevertheless as can be seen from previous advices included with the brief, as I indicated at a conference with my present instructing solicitors, the papers of Shenker & Associates and referred to in the petition which was referred to Findlay J, I have personally always regarded the conviction as affected by doubt and unsafe.

1.3. I have followed the progress of the trial by reviewing the trial transcript and have reviewed the matters raised in the advices of various counsel, the matters raised in the petitions and determinations of them. I remain of that view whilst accepting that it is a view not all others would share.

1.4. I am not persuaded that the Client's discussions with Christopher Dale Flannery amounted to an intentional solicitation to Flannery to assault the former patient.

1.5. I am unable to accept that Dr Edelsten's decision to remove Flannery's tattoos, the timing of the medical procedures to do so, the medical certificate provided in consequence of the medical procedure and the aftermath even if considered in conjunction with the materials said to support the intentional solicitation amounted to a deliberate attempt to pervert the course of justice by ensuring the trial was improperly adjourned or to avoid trial before the Chief Justice of the Criminal Division of the Supreme Court of New South Wales O'Brien J.

1.6. However, as I have noted others do not agree with me. And the fate of various previous attempts to have the conviction reviewed well illustrates this. Nonetheless, following *Eastman v the Queen* (2003) 214 CLR 218, *SKA v the Queen* [2011] HCA 13 and other cases, the prospect of a decision or question concerning guilt such as might see the overturning of the convictions seems to me open and consequently I have drawn this document on that basis.

1.7. In particular *SKA* and more recent decisions of the High Court since the determination of the earlier petition and the advice of the late Peter Connolly QC makes it clear it is for the appellate court to review the whole matter to determine if on the material there is doubt, which the jury should have held and that the jury's position of advantage was not sufficient reason for them not to have held that doubt.

1.8. In applying s77 and 79 of *Crimes (Appeal and Review) Act 2001* it is important to remember that courts have continually held the view of this legislation and its predecessors that they will not allow re-agitation of questions already determined. I have taken that into account and the present advice is given with a view, so far as possible, to avoid that occurring in any consequent application.

2. The Conviction

2.1. The Client was convicted in respect of two charges by a jury on 27 July 1990 in a Trial presided over by Sharpe J:

1. That between one January 1984 and 30 April 1994 he solicited Christopher Dale Flannery to assault Stephen William Evans.

2. That on 31 January 1994 he perverted the course of justice in that he improperly obtained an adjournment of the trial of Flannery that was fixed for that day in the Supreme Court by certifying that Flannery was unfit to stand his trial on that day, and the said Geoffrey Walter Edelsten having rendered medical treatment to the said Christopher Dale Flannery with the intention that the said Christopher Dale Flannery avoid his said trial.

2.2. The Client was sentenced to and has served a period of six months imprisonment for each conviction, served cumulatively.

2.3. It is in respect of these convictions that the reviews are sought.

3. The Appeal

3.1. The Client has already run an appeal to completion *R v Edelsten* (1990) 21 NSWLR 542.

3.2. The appeal ran on limited grounds that related to two issues. The first issue was the admissibility of the tape recordings obtained by Mr Beaver; the Court of Appeal found that the evidence was correctly admitted.

3.3. The second issue arose from the manner in which the Crown ran its case. There was strong evidence Flannery was suffering from septicaemia and the adjournment was obtained on a certificate to that effect. The Crown's case was that it did not matter if Flannery suffered septicaemia or not, they did not need to prove it. The

timing of the tattoo removal and its probably consequences constituted the actus. Legal advisers for our Client at the time argued that his Honour should have directed the jury that they must have been satisfied the medical certificate was false; the Court of Appeal did not agree. Similarly, the Court of Appeal found that the conduct relied upon was sufficient to satisfy the charge.

3.4. The appeal never proceeded on the basis that the verdict and conviction were unsafe or unsatisfactory.

3.5. The appeal was made, heard and determined. While there may be additional grounds upon which an appeal could have been run, there can only be one appeal (*Grierson* (1938) 60 CLR 431) the Client has therefore exhausted his right to appeal.

4. Previous Petitions

4.1. There have been a number of previous petitions to the Governor and applications to the Supreme Court.

4.2. It appears that a petition for a Judicial Inquiry made to the Honourable J Dowd QC in or about 5 February 1991 and was rejected by his letter dated 18 March 1991. I do not have a copy of this petition. From later petitions, it appears that this petition was made without the benefit of Queens Counsel's advice in support.

4.3. On 5 June 1991 a petition was made to the Chief Justice (as he then was) to direct a judicial enquiry into the Client's convictions. That petition was prepared by Shenker & Associates, and relied upon a question of doubt said to arise from fresh evidence of Mr Dennis John Keane, Mr Glenn Alexander, Prof G Crank, Mr Graham Rogers, and Ms Carol Alice Hall (formerly Bolton). The petition was supported by the advices of Mr Marie's Neil QC, Mr Bruce Stratton QC and myself.

4.4. Finlay J rejected the 5 June 1991 petition on 10 July 1991. In providing his opinion, Finlay J simply stated that he did not feel the requisite "sense of unease or disquiet" to order an enquiry. The opinion of Peter Connolly QC is that Finlay J erroneously applied his own standard of what is required to feel a relevant sense of unease or disquiet, I share that view.

4.5. On 29 November 1991, a further petition for Judicial Inquiry was made to the Honourable P Collins QC, the then Attorney General for the State of New South Wales.

4.6. This petition was based on a signed statement of Ian Vandimeer, the unsigned statement of Mick O'Brien, a signed statement of Roger Hodge, a transcript of evidence given by Kathleen May

Flannery during an enquiry before the medical board of Victoria in September 1991, a transcript of evidence of Dennis John Keane in the same enquiry, police run sheets about extortion complaints and medical records relating to Edelsten's treatment of Flannery.

4.7. Finally, a further petition was prepared in about September 1997 that incorporated Peter Connelly QC's advice. I prepare this advice on the basis that this petition was never actually presented. That appears the case in light of the documents produced in response to the Client's previous request pursuant to the *Government Information (Public Access) Act 2009*.

5. Current Options

5.1. There are two possible avenues that the Client may pursue; they are either a petition to the Governor under ss 76-77 of *Crimes (Appeal and Review) Act 2001* (the Act) or an application to the Supreme Court for inquiry under ss78-79 of the Act.

5.2. Section 77 contains the relevant procedure;

> **77 Consideration of petitions**
>
> (1) After the consideration of a petition:
>
> (a) the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
>
> (b) the Minister may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912 , or
>
> (c) the Minister may request the Court of Criminal Appeal to give an opinion on any point arising in the case.
>
> (2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
>
> (3) The Governor or the Minister may refuse to consider or otherwise deal with a petition. Without limiting the foregoing, the Governor or the Minister may refuse to consider or otherwise deal with a petition if:
>
> (a) it appears that the matter:
>
> (i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or
>
> (ii) has previously been dealt with under this Part or under the previous review provisions, or
>
> (iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
>
> (iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and
>
> (b) the Governor or the Minister is not satisfied that there are special facts or special circumstances that justify the taking of further action.

(3A) The Governor or the Minister may defer consideration of a petition if:

(a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or

(b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the petition fails to disclose sufficient information to enable the conviction or sentence to be properly considered.

(4) The Minister must cause a report to be given to the registrar of the Criminal Division of the Supreme Court as to any action taken by the Governor or the Minister under this section (including a refusal to consider or otherwise deal with a petition).

(5) A petition (however described) that does not expressly seek a review of a conviction or sentence or the exercise of the Governor's pardoning power may be dealt with as if it did if the Minister is of the opinion that it should be so dealt with.

5.3. Importantly, special facts or special circumstances justifying further action are essential.

5.4. Section 79 concerns applications for inquiry to the Supreme Court. I set out the relevant portion of that section below and note that ss(2)-(5) mirror the corresponding subsections to s77 above:

(1) After considering an application under section 78 or on its own motion:

(a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

(b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912 .

5.5. The relevant test for whether there is "a doubt or question" as to the Client's guilt is set out in *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 (approved in *Re Rendell* (1987) 32 A Crim R 243) as causing a Judge a sense of "unease" or a "sense of disquiet" in allowing a conviction to stand.

5.6. The more recent decision of *Eastman v the Queen* (2003) 214 CLR 318 has indicated in relation to a predecessor section that the process can be used to refer to doubt as to a finding of guilt arising from procedural issues.

5.7. As noted above, there have been several other petitions made in respect of this matter. The previous petitions will need to be distinguished from the present petition to ensure that the Governor or Minister is satisfied there are special facts or circumstances justifying the taking of further action in this case.

5.8. However, if the material that we put forward as a whole is capable of creating the sense of disquiet or unease referred to in the authorities, that should be a sufficient circumstance that would justify the taking of further action in the case.

5.9. For my part, I agree with the late Mr Connelly QC's and Mr Tehan QC's advice that the preferable course of action is the petition to the Governor.

6. Grounds of Petition

6.1. The petition can proceed relying on the following matters each of which and the combination of them shows the basis for the existence of an unresolved doubt as to guilt or as to the evidence of the case:

a. That the trial Judge erred in that he misdirected the jury as to the circumstantial evidence and the use of competing theories. In particular, his Honour, failed to direct the Jury that if they could not exclude that an innocent explanation as a rational hypothesis of the meaning of the telephone conversation on 15 April 1984 then they ought to acquit the Client;

b. That the trial Judge misdirected the jury that the Client had more than a casual acquaintance with former Detective Sergeant Duff that was not supported by the evidence;

c. That the trial Judge misdirected the jury in that he made certain prejudicial remarks to the jury about the "friendship" between Detective Sergeant Duff and the Client to the effect that "We are not to know what the basis of that friendship was. We do not know why people in our community sometimes try to cultivate senior police officers, but it happens" and "just how that sort of association can sometimes lead to criminal activity."

d. That the trial Judge misdirected the jury to the effect that the jury could convict on the count of soliciting assault if the Client's words of "get him off my back" included persuasion by means other than assault. The offence required an intentional persuasion to commit the assault i.e. the assault must be intended.

e. That there is additional evidence available which is consistent with the innocent explanations not only of the Client's conduct, and in keeping with the misdirection above, moreover the innocent explanations for the contents of the telephone conversations provided by the Client.

f. There is a further ground to those identified by Mr Connelly QC; it was to be expected that the prosecutor as part of the duty to call relevant witnesses would have called Kathleen May Flannery who, it seems from other evidence, would have been able to give evidence concerning her husband's intent. He, of course, was dead. The failure of the prosecutor to call Mrs Flannery without reasonable excuse, presumably because it was though she was in the opposing camp (but see *Kneebone v the Queen* (1999) 47 NSWLR 450), and in any event the failure of consideration being given to the absence of her evidence not only afforded no support for the Crown case but leaves open areas where a lack of support for the Crown case is significant.

7. Misdirection

7.1. Circumstantial Case

7.1.1. The jury would be directed to acquit the Client if the Crown case was based solely on the evidence concerning hospitalisation.

7.1.2. However, the Crown case relied on the alleged admissions in the telephone conversations with the Client and his receptionist and fiancé. Those conversations are set out at pages 5-7 of Connolly QC's advice.

7.1.3. I agree with Connolly QC's analysis that there were a number of interpretations of those conversations some of which would have been consistent with guilt and some consistent with innocence.

7.1.4. What is most important is that the case was circumstantial and hinged upon the alleged admissions. Unless the conversations were only consistent with guilt then the evidence otherwise does not support the offences charged.

7.1.5. In a circumstantial case such as this, the Jury ought to have been directed that if they found a rational explanation for the telephone conversations consistent with the Client's innocence they must acquit. That is, they must be satisfied from their interpretation of the telephone conversations that the Client knew at the time he administered the treatment, that is 26 March 1984, that Flannery was to stand trial for Murder the following week and that he intended the provision of the treatment and the timing of it to produce an adjournment.

7.1.6. Such directions were not given and on a review of the whole of the evidence with such direction in mind it is strongly arguable that the alternative rational hypothesis could not be excluded.

7.1.7. For this alone, the verdict would be unsafe or unsatisfactory.

7.2. *Association with Duff – Cultivating Senior Police Officers*

7.2.1. Simply put, there was no evidence for the learned Trial Judge to state that the Client had more than a casual acquaintance with Duff. The degree of familiarity with Duff was a matter for the Jury to determine in their deliberations.

7.2.2. The Trial Judge's comment was a misstatement of the evidence and a serious one and lays a platform for both convictions to be made by the Jury. Such that, if the jury had found that there was only a mere casual acquaintance between the Client and Duff they would have more difficulty accepting that there was an intention as at 26 January 1984 to pervert the course of justice.

7.2.3. Further, this issue is compounded when the learned Trial Judge made a number of prejudicial statements that: "We are not to know what the basis of that friendship was. We do not know why people in our community sometimes try to cultivate senior police officers, but it happens" and "just how that sort of association can sometimes lead to criminal activity."

7.2.4. That characterisation by the learned Trial Judge gives a flavour to the evidence that simply was not open. While there may have been undertones of this, there was no direct evidence nor basis to infer any such "cultivation" or "criminal activity" other than was the subject of the charges before the jury.

7.2.5. The direction was prejudicial and not supported by the evidence.

7.3. *Solicit Assault Misdirection*

7.3.1. I agree entirely with the analysis of Mr Connelly QC that the direction to the jury regarding the assault amounted to a misdirection.

7.3.2. For the sake of completeness the relevant issue is the sentence: "In light of what the accused's explanation is, that is as a conversation after the certificate was given and Flannery only then telling him of his profession, were the words, "get him off my back" an attempt to induce or incite Flannery to use persuasion, assault, etc, to stop that harassment. That is the basic question you have. If you are convinced beyond reasonable doubt, then he should be convicted." Directly after that sentence there was a short adjournment.

7.3.3. That completely misstates the question for the jury. Persuasion could mean something very innocent, which includes simply talking to a person. The direction given encompasses that innocent

explanation in the question for the jury to decide. Accordingly, a juror armed with this direction may determine that the Client wanted Flannery to talk to Evans and this would satisfy the question put to the juror, but would not be consistent with the Client's guilt for the crime charged.

7.3.4. For that reason, the conviction would be unsatisfactory or unsafe.

8. The New and Fresh Evidence

8.1. There is presently available evidence that, were it led at trial, would have corroborated the Client's innocent contentions for the telephone conversations and accordingly could have assisted a jury to acquit him of the charges.

8.2. Kathleen Flannery

8.2.1. The first piece of evidence is that of Kathleen May Flannery, the wife of Christopher Dale Flannery. Her evidence is contained in a transcript of oral evidence provided to a Victorian Medical Tribunal in or around 1991.

8.2.2. Her evidence was that Flannery could not drive and she often drove him various places including the Client's surgery. She did not recall how many occasions he attended the Client for tattoo removal, but remembered that it was just before his trial for murder. Her understanding was that Flannery attended the Client's surgery for treatment because of advertisements he had read for tattoo removal.

8.2.3. She recalled that after the second or third treatment Flannery's hand had a strong smell "really bad like dead meat" he was nauseous, dizzy and had "lumps under one arm." She also observed that Flannery was vomiting and "really hot."

8.2.4. She denied any knowledge of any plot for Flannery to avoid his trial. In particular, she expressed genuine surprise that the Client had been convicted.

8.2.5. Mrs Flannery recounted an occasion where the Client told Flannery that there was an ex-patient trying to blackmail him. She said that her husband said to the Client that he would call Detective Duff. She then recounted a meeting between Detective Duff and Flannery where Duff stated that he would put the PO Box under surveillance.

8.2.6. In this case the central evidence concerning the perversion of justice charge was the medical certificate. That certificate set out

that Mrs Flannery had reported the symptoms to the Client's receptionist.

8.2.7. The Crown case was run suggesting that it did not matter whether the certificate was true or false. However, the Crown led evidence to strengthen the possibility of securing that finding by indicating that Flannery did not suffer from symptoms as poor as those complained of over the phone by his wife. Surely then, the evidence of Mrs Flannery regarding her observations of Flannery, the genuineness of his treatment and the manner in which he came to know the Client are matters that ought to have been before the Court.

8.2.8. The Jury may have provided their verdict on the basis of the evidence before the Court that Flannery's symptoms were not as serious as reported and that there should have been no hospitalisation. If the jury had accepted Mrs Flannery's evidence the jury may have had more difficulty accepting that proposition and, similarly, more difficulty in accepting the guilty explanation of the telephone calls.

8.2.9. Mr Flannery ought to have been led by the Crown in chief or made available by the Crown as a witness. The failure to call that witness viewed against the conduct of the trial taken as a whole (that is including the evidence led, the other missing evidence, the poor and inflammatory directions given by the trial judge) should be considered a miscarriage of justice.

8.3. Dr Geoffrey Scarlett

8.3.1. In a brief report, Dr Scarlett provided an opinion that lumps under the arms, interpreted as lumps in the armpits, could be an indication of inflamed axillary lymph nodes. Such information could be indicative of an acute inflammatory process in the body i.e an infection.

8.4. Dennis John Keane and Graham Rogers

8.4.1. Keane's evidence is a transcript of oral evidence given before the same medical tribunal as Mrs Flannery did above. He has also given a statement. His evidence is that while he visited his brother-in-law in gaol, the Client's name came up and Keane expressed the opinion that he got a raw deal. Keane was then put in contact with the Client's then solicitor. This evidence is corroborated by Graham Rogers.

8.4.2. Keane was an acquaintance of Flannery who had two relevant conversations with him.

8.4.3. The first was where Flannery, in hospital, discussed the use of the "gunpowder trick" of ingesting gunpowder as a means to increase his heart rate and blood pressure to prevent his discharge from hospital before the hearing. The force of his evidence on this point was that Flannery was worried that the Doctor would get onto his plan and discharge him from hospital before the Trial.

8.4.4. The second was regarding the alleged solicitation. In that conversation Flannery recounted the Client asking Flannery to help him find Evans, which Flannery reportedly responded with "take it to the cops." Keane's evidence was that Flannery, in uttering those words was actually fobbing off the Client, as Flannery did not hold the police in high regard.

8.4.5. Keane indicated that he was not aware of the proceedings against the Client until after the Client had been convicted.

8.5. Ian Vandimeer

8.5.1. In a sworn statement, Ian Vandimeer says that he was telephoned by a mutual friend and Flannery to deliver some gunpowder to Flannery in hospital. Vandimeer did this by giving Flannery shotgun pellets broken open and placed in paper.

8.5.2. Vandimeer the poses that Flannery told him that he was on trial the following week and he wanted to put the trial off. Flannery indicated that the Client might not believe that he was sick, and needed the gunpowder to make sure the Client retained that belief and did not discharge him from hospital.

8.6. Mick O'Brien

8.6.1. O'Brien describes a conversation with Flannery about his upcoming trial in or about December 1983 or January 1984. In that conversation, Flannery told O'Brien that he might have to use the "old trick" and in doing so mentioned the use of gunpowder.

8.6.2. Flannery indicated that the use of gunpowder "blows in your blood pressure right up and you become very unstable." He also stated "I'll have to find a doctor can be put into hospital so I'll have to use the gunpowder trick."

8.6.3. O'Brien recounted a later conversation where Flannery posted about fooling the Client by using the old gunpowder trick where Flannery said words of the effects of "I had that had to removed and I used that for the symptoms." O'Brien stated that Flannery boasted about the trick on several occasions. Those boasts were the only time when Flannery mentioned the Client to O'Brien.

8.6.4. Further, O'Brien recounted further conversations where Flannery described the Client as being aware of his trick but that there was no need to worry because other people were going to "stitch him up."

8.6.5. O'Brian came in contact with the Client as a result of A Current Affair screening a programme regarding the Client.

8.7. *Roger Hodge*

8.7.1. In a signed statement Mr Hodge says he was a security consultant that was engaged by the Client to do certain work. He details enquiries he made regarding the harassment received by the Client. In particular, he said that after the police arrested Evans he sent staff to Parramatta Court to take photos of Evans so that the security staff would be aware of who Evans was.

8.8. *Professor Crank*

8.8.1. Professor Crank provided a useful opinion to the effect that ingestion of the gunpowder can produce the symptoms that were observed in Flannery upon his hospitalisation. That is, "it may cause gastroenteritis with abdominal pain, vomiting, vertigo, muscular weakness, irregular pulse, disturbances in heart rhythm, changes in blood pressure, cyanosis, convulsions and possibly collapse and death."

8.8.2. Accordingly, he opines that body vital signs such as blood pressure, temperature and pulse rate could be affected by consuming gunpowder.

8.9. *Carolyn Alice Hall*

8.9.1. Mrs Hall was a former supervisor and receptionist employed by the Client. She gives a relatively detailed statement regarding her dealings with Flannery.

8.9.2. She firstly recounted a telephone conversation where Flannery first called and asked if the Client did Tattoo removals to which she agreed and he then hung up. He later arrived at the surgery and said words to the effect "I was told by policeman friend that the Doctor did tattoo removals. I would like to see him about getting one removed." Mrs Hall directed him to wait and provided him with the usual literature she provided to patents getting that treatment.

8.9.3. After waiting he eventually saw the Client at his Georges Hall surgery and Mrs Hall heard the Client say to Flannery after explaining the procedure of tattoo removals "go away and think about what I have said."

8.9.4. That afternoon, she says the Client attended to the removal of a tattoo on Flannery's right arm because she heard the laser machine in operation. She next saw Flannery at the Georges Hall surgery on that Saturday morning after the original tattoo removal. She says that appointment was for the wound to be checked and dressed. That was the last time she saw Flannery.

8.9.5. She says she received some of the harassing material namely pornographic material and she was aware the Client received threats commencing sometime in March 1984.

8.9.6. In around March 1984 Mrs Hall remembers the Client requested Flannery's patient card. She heard the Client telephone Flannery and have a conversation where she specifically heard the Client use words the effect of "do you know anything about who is harassing me and why? Why are people doing this?" She then entered the Client's office was told in no uncertain terms to leave

8.9.7. Following this telephone conversation the Client asked Mrs Hall for Duff's patient card and said words the effect of "sorry but I just want to find out who is harassing me." In her observation the Client seemed quite stressed.

8.9.8. She provided some fairly reasonable reasons why she did not give this evidence to the Client's legal advisers previously.

9. Effect of the New and Fresh Evidence

9.1. The evidence described above was new and fresh as distinct from the evidence led at trial.

9.2. The effect of this new evidence is that the innocent explanations provided by the Client for the telephone conversations and of his conduct had more substantial evidentiary weight.

9.3. The evidence regarding the "gunpowder trick" matches up reasonably well. It does provide a reasonable basis for the proposition that Flannery deceived the Client. That is, Flannery went to the Client with the intention of obtaining the treatment to obtain the adjournment without the Client knowing Flannery's intention. The medical evidence supports this proposition as being plausible.

9.4. Had the evidence been provided to the jury, it was capable of lending further weight to the competing innocent interpretation of the telephone conversations.

9.5. While, to some extent, Mrs Flannery's version of events is inconsistent with the "gunpowder trick" theory, it does provide

evidence and support for the proposition that Flannery was genuinely suffering from infection on the Saturday afternoon. It further lends weight to the version of events provided by the Client. That is, Mrs Flannery complaining of symptoms to the receptionist that indicated septicaemia that were directly observed by her, which accord with the observations reported at the time and that formed the basis of the Client's course of action. The medical evidence at trial and in support of the earlier petitions further corroborates this account.

9.6. The inconsistency with the gunpowder theory can be explained by Flannery either not wanting to involve his wife or alternatively wanting to keep his nefarious activities secret from her. It was her evidence that she was unaware of his criminal activities such as murder and the like.

9.7. Further, there are a number of consistent accounts that the telephone conversations with Flannery proceeded in the manner alleged by the Client. Again, lending weight to a competing theory of the intention to solicit assault charge. Particular weight should be given to the Receptionist's evidence in my view.

9.8. I am of the view that the evidence seen as a whole simply does not allow the innocent explanation for the telephone conversation to be excluded. Accordingly, a reasonable jury, properly instructed, could not have found it open to them to be satisfied beyond a reasonable doubt that the Client was guilty (See *SKA*). Alternatively, it at least raises a doubt or disquiet.

9.9. The new and fresh evidence, in conjunction with the evidence given at trial is persuasive that Dr Edelsten is not guilty, i.e. there is a reasonable doubt, it is admissible and the convictions should be overturned. Also, the fresh evidence when taken in conjunction with the other matters referred to in this advice it seems that it also operates so that on a consideration of all the circumstances of the conviction it should be overturned.

10. An inquiry Should be Ordered

10.1. Taken as a whole, the incorrect direction as to circumstantial evidence, the inflammatory and prejudicial directions, the incorrect direction as to the definition of solicit, the new fresh evidence and the absence of the absence of Mrs Flannery's it is strongly arguable that there remains the relevant sense of unease referred to in *Varley*.

10.2. While there have been a number of previous applications, those applications do not cover the substance of the present application nor the more recent judicial authority concerning the breadth of the

section to cover procedural issues such as the failure to call Mrs Flannery (see *Eastman*).

10.3. I advise that a petition to the Governor seeking the exercise of the Governor's pardoning power or in the alternative a referral to the Court of Criminal Appeal under s77(1)(b) of the *Crimes (Appeal and Review) Act 2001* be prepared. I recommend that a brief be sent to my learned junior Mr Petros Macarounas.

I so advise.

11 April 2013

The Hon. Greg James AC QC
Frederick Jordan Chambers
53 Martin Place
Sydney NSW 2000
DX 450 Sydney
P: 9229 7333
E: gregjames1944@gmail.com