Petition to the Governor for the exercise of the pardoning power pursuant to s76 *Crimes (Appeal and Review) Act 2001* in respect of the convictions of Geoffrey Walter Edelsten

1. Introduction

1.1. Geoffrey Walter Edelsten, (the Petitioner) petitions the Governor for the exercise of the pardoning power pursuant to s76 of the *Crimes (Appeals and Review) Act 2001* or alternatively to review the convictions entered against him in respect of two charges on 27 July 1990, by a jury, in a Trial presided over by Sharpe J:

1. That between 1 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.

1.2. The Petitioner was sentenced to and has served a period of six months imprisonment for each conviction solicit to assault (charge 1) and Pervert the course of justice (charge 2). The sentences were served cumulatively, that is the Petitioner served a term of imprisonment for 12 months.

1.3. The Petitioner has run an appeal to completion (*R v Edelsten* (1990) 21 NSWLR 542) and is not entitled to further appeal (*Grierson v The King* (1938) 60 CLR 431). The appeal did not proceed on the basis that the verdict and convictions were unsafe or unsatisfactory.

1.4. In summary, the petitioner relies on the following grounds:

a. The Trial Judge misdirected the jury on the acceptance of competing theories. That is, the Trial Judge failed to direct the jury that if there was any rational hypothesis consistent with innocence the jury ought to acquit the accused or otherwise provide a direction in accordance with *Knight* and/or *Peacock*;

b. The Trial Judge misdirected the jury as to the use of circumstantial evidence in that he failed to direct that the jury could only convict if the only rational inference of the telephone conversations of 3 March 1984 and 15 April 1984 was consistent with the guilt of the Petitioner;

c. The Trial Judge misdirected the jury that the Petitioner had more than a casual acquaintance with former Detective Sergeant Duff, such direction was not supported by the evidence;

d. The Trial Judge misdirected the jury in that he made prejudicial remarks to the jury about the "*friendship*" between Detective Sergeant Duff and the Petitioner 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*" prior to repeating the Crown's submissions that "*just how that sort of association can sometimes lead to criminal activity*;"

e. The Trial Judge misdirected the jury to the effect that the jury should convict on the count of soliciting assault if the Petitioner'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. To leave what is an essential element of the offence is a grave misdirection;

f. There is additional and fresh evidence that, if it were received by the jury, properly directed, would have provided a rational hypothesis consistent with the innocence of the Petitioner that the jury could not exclude beyond a reasonable doubt. The evidence is provided from the following deponents:

    i. Kathleen Flannery;

    ii. Dr Geoffrey Scarlett;

    iii. Dennis John Keane;

    iv. Graham Rogers;

    v. Ian Vandimeer;

    vi. Mick O'Brien;

    vii. Roger Hodge;

    viii. Professor Crank;

    ix. Caroline Alice Hall.

1.5. An examination of all the above grounds indicates that the convictions were unsafe or unsatisfactory leading to a miscarriage of justice at worst and, at best, a sense of disquiet or unease in allowing the convictions to remain.

1.6. The petition has the support of the advices several members of the inner bar with significant repute namely, former NSW Supreme Court Justice the Hon. Mr Greg James AM QC, former Queensland Supreme Court Justice, the late, Mr Peter Connolly QC, Mr Patrick Tehan QC, Mr B T Stratton QC and Mr Maurice Neil QC.

2. Crimes (Appeals and Review) Act 2001

2.1. Under s76 of the Crimes (Appeals and Review) Act 2001 a petition may be made to the Governor for the exercise of the pardoning power or for a review of a conviction. s77 contains the relevant considerations for a petition under s76;

> **77 Consideration of petitions**
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> (1) After the consideration of a petition:
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> (a) the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
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> (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
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> (ii) has previously been dealt with under this Part or under the previous review provisions, or
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> (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
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> (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
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> (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:
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> (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

2.2. The relevant test for whether there is "a doubt or question" as to the Petitioner'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. This is stated more fully by Hope JA (with whom Samuels JA agreed):

> *"To initiate an inquiry in the present case, a doubt must arise as to the guilt of the plaintiff. This doubt need not be shown to the satisfaction of the Governor or the Court to be well-founded; that is a matter for the enquiry. To adopt the language of Nagle CJ at CL in* Varley v Attorney-General in and for the State of New South Wales *(at 12)* "The section envisages the placing of any material before a Judge of the Supreme Court (Supreme Court Act 1970, s40) ... or, in a petition, before the Governor ... which might cause him, for want of a better word 'unease' in allowing a conviction to stand." *The court or Governor will then, upon this material, decide (in the case of the Governor presumably upon advice) whether the discretion to direct and inquiry which the section confers should be exercised or not. If an inquiry is directed, the question for consideration and report by the justice is, in the words of Lee J in his report on the conviction of Alexander McLeod Lindsay (at 9),* "whether the doubt predicated is well founded or not."

2.3. This also informs the test for how the evidence is to be considered. A stringent application of the rules of evidence is not required and should not be pursued. It is submitted that the petition should be considered on the view of the evidence most favourable to the 3 Petitioner.

2.4. The test is not as stringent as a the requirement in the proviso for an appeal under s6(1) of the *Criminal Appeal Act 1912* as it does not require a substantial miscarriage of justice (*Application of Robert Minniti* [2011] NSWSC 835 at [54]). However, it is submitted that this Petition, taken as a whole, demonstrates that a substantial miscarriage of justice has in fact occurred.

2.5. A 'miscarriage of justice' is said to occur according to Barwick CJ (with whom McTeirnan, Stephen and Jacobs JJ agreed) in *Ratten v the Queen* (1974) 131 CLR 501 at 516 where: "*...the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor.*"

2.6. The more recent decision of *Eastman v the Queen* (2003) 214 CLR 318 has indicated in relation to a predecessor section that the equivalent s76 process can be used to refer to doubt underlying a finding of guilt arising from procedural issues as well as from the evidence itself. The rationale behind this decision is evidence in the statement of Heydon J in *Eastman* at 363:

> *"To put it another way a s475(1) enquiry could have been ordered where there was a question or doubt about an element in procedure at the trial which the law insists on as a means of ensuring that convictions are soundly based in substance. If the function of a particular element in criminal procedure is to ensure that a conviction is soundly based, in the sense that the accused in fact carried out the conduct charged, a doubt or question as to whether that element operated properly is capable of being a doubt or question as to guilt in fact... the question arises: "How can we be sure that the accused was guilty on the basis of the jury finding of guilt if there is a doubt of question as to whether that element, seen as important to efficient jury fact finding, operated properly in this case?"*

2.7. The conviction has been the subject of a previous inquiry by Findlay J under a predecessor section. However, the previous inquiry did not consider issues of misdirection that are elucidated in the present petition, Findlay J misapplied the test relating to the further evidence in that application in particular in considering admissibility of evidence and, finally, there is further fresh evidence in this petition that was not considered previously.

3. The Crown Case

3.1. The crown case can be extracted from the summary of facts provided in the Court of Appeal judgment of *R v Edelsten* (1990) 21 NSWLR 542 at 545-546:

> *The appellant was a medical practitioner whose activities included the conduct of a clinic for removal of tattoos by laser. He, allegedly, became the victim of a vicious and sustained nuisance campaign which included abusive telephone calls, the delivery of unsolicited goods, the attendance of unwanted tradesmen and servicemen and the publication of advertisements that he was ceasing to practice. The campaign, it was alleged, culminated in a death threat. The appellant*

suspected that Mr Evans was behind the campaign against him and reported that suspicion to the police. The police, at that stage, according to the appellant, were unconvinced as to Evans' involvement. The Crown case, the subject of the first count in the indictment, was that the appellant contacted Flannery, a former patient, and solicited him to assault Evans to persuade him to discontinue the nuisance campaign. In his statement to the jury the appellant acknowledged that he did speak to Flannery about the nuisance campaign but claimed that all that he asked Flannery to do was to find out who indeed it was who was behind the campaign so that he, the appellant, could take proper steps to have it stopped. The appellant stated to the jury that when he approached Flannery he was aware that Flannery was a professional killer and standover man. He had learned that, he said, from Flannery himself, when Flannery had thanked him for furnishing a medical certificate which resulted in the adjournment of the trial which Flannery faced on a murder charge. But, the appellant stated, all that he wanted Flannery to do was to use his contacts to verify who it was who was behind the nuisance campaign.

Critical to the Crown case in respect of the first count, the charge that the appellant solicited Flannery to assault Evans, were tapes which were received in evidence, despite objection, of two telephone conversations which the appellant had over his car telephone. The first took place on 3 March 1984. In that conversation the appellant said that he had telephone a "hit man" whom he recently had "helped out" and that he had said to the hit man "I want this guy and found and got off my back". The second conversation took place on 15 April 1984. In that conversation the appellant said that, at the request of certain police, he had helped a professional killer who would "bash people for $10,000". He continued:

> "He's got a chance of beating the rap. But if he had faced a particular judge... the judge has got a reputation of er, er, accepting evidence blindly and putting people away — and he felt that he's got a better chance if he got in front of another judge. So when he knew he had to go in front of this particular judge he had to be out of action for a few days, to miss that judge, to get into another judge's list. And as it happened, they got it adjourned for a year.

The relevance of the telephone conversations to the first count, namely that the appellant solicited Flannery to assault Evans, is manifest. But the telephone conversations were of critical importance also to the charge of perversion of the course of justice. The evidence as to the manner of the obtaining of the adjournment was as follows. The trial was fixed for Tuesday, 31 January 1984. On the Thursday prior thereto, namely on 26 January 1984, the appellant gave laser treatment to Flannery for tattoo removal. He followed that treatment up with further

treatment by laser on Saturday, 28 January 1984. Later on the same day he admitted Flannery to a private hospital. On the next day, the Sunday, he examined Flannery at that hospital and on the Tuesday morning, the day of the trial, he gave a medical certificate at the request of Flannery's solicitor. The certificate was in the following terms:

> "To Whom It May Concern
>
> Re: Christopher Flannery
>
> The above consulted me several weeks ago re removal of tattoos. On Thursday 26/1/84 he had his first treatment with the laser in my Georges Hall surgery, and on Saturday 28 he had a further treatment to completely treat one tattoo on his forearm.
>
> On Saturday evening I received a call at home from the receptionist at my after hours surgery at Liverpool. She stated that Mrs Flannery had rung saying that Mr Flannery was in considerable pain and \ vomiting and shivering and shaking. I considered that he was probably suffering from septicaemia and admitted him to Bigg Street Hospital. He was given pethidine for pain and maxalon for vomiting and commenced on antibiotic therapy.
>
> When I reviewed him on Sunday morning I commenced him on intravenous antibiotics and he has been maintained on them until the present.
>
> His hand and forearm are grossly swollen and he remains in a good deal of pain. I consider that he will be in hospital for at least the next week and will require a convalescent period of 1-2 weeks thereafter before he would be fit to undertake daily court appearances."

The certificate was placed before the trial judge on that day and the trial was adjourned. Flannery was discharged from the hospital on Thursday, 2 February 1984 — that is two days after the certificate was given.

3.2. Much of the hearing itself concerned a fair deal of testimony from various medical experts concerning whether Flannery, in fact, suffered from Septicaemia or not. As noted elsewhere, the crown case was that it did not matter whether Flannery suffered from the symptoms alleged, but rather that the treatment was rendered for the purposes of avoiding the 31 January 1984 hearing date.

3.3. The

4. Misdirection as to Circumstantial Evidence and the use of Competing Theories

4.1. The jury would be directed to acquit the Petitioner on charge 2 if the Crown case was based solely on the evidence concerning hospitalisation.

4.2. However, the Crown case on that charge relied on alleged admissions in the telephone conversations between the Petitioner and then receptionist and fiancé on 3 March 1984 and 15 April 2984 respectively. An unrelated third party, perhaps aptly named Beaver, used a scanner to listen to various mobile telephone conversations using electronic equipment and recorded these conversations. The admissibility of telephone recordings was strongly contested at the hearing and on appeal. Ultimately, the issue was determined against the Petitioner and the tapes were admitted over objection and that decision was confirmed on appeal.

4.3. Similarly, and perhaps more strongly, there was no crown case on solicit to assault without the telephone conversations.

4.4. It is worth reviewing the text of the telephone conversations. The first conversation occurred on 3 March 1984 between the petitioner and his then receptionist Ms Kristine Bissaker:

R: *What else are they what are they going to do about it, nothing?*

E: *Oh well I don't know, I've just had some homicide squad ah squad detectives two pretty heavy guys that ah both have killed men in the last few weeks ah and the police you know that hostage drama at*

R: *Yeah*

E: *Home Homebush?*

R: *Yeah.*

E: *That guy that killed him, he's a patient of mine a Georges Hall. Ah, oh, quite a few of them actually and ah, I rang a guy who I helped out recently, who's a hit-man and I said I want this guy found and got off my back and ah, he said, oh, ah, if he could find him he would, but he said I'll get in touch with these two detectives who are friends, ah, in the homicide squad and they both happen to be patients of mine at George's Hall and ah, I do their pilot's medicals. And ah, they both came over to see me and reassured me that ah, they'll get the guy before he does anything*

4.5. The Crown submitted that this conversation supported the inference that the Petitioner said to Flannery words to the effect of *"...and got off my back"* was a request by the Petitioner for Flannery to assault Mr Evans.

4.6. In this particular conversation only 6 seconds of a 10 minute and 7 second conversation that was intercepted was recorded by Mr Beaver.

4.7. The Petitioner in explaining this conversation noted (at p199 of the transcript):

> *"...all I was trying to do was to make my fiancé, Leanne, and my dear friend Kristine Bissaker feel better when they were concerned for my welfare and safety.*
>
> *I never asked Flannery to harm Evans nor did I seek to persuade him to harm Evans."*

4.8. The Petitioner continued on at page 209:

> *"As you've been told by the Crown, the harassment by a person I later knew was Steven Evans, commenced on 1 March 1984. It is important for you to know that Evans was never a patient of mine, personally. He never attended me. Certainly he had attended a clinic that I had an involvement with, at Bankstown, but he was never a personal patient of mine. The first time I ever saw him was later in 1984 when I gave evidence for the Crown at his committal proceedings where he was committed for trial on charges of demanding money with menaces from me.*
>
> *When this harassment started on 1 March, I reported it immediately to the police. As I told Kristine Bissaker in my conversation of 3 March the police told me that they were unsure who it was. They told me it couldn't be Evans because he was overseas. It was only then that I remembered the patient that I had treated at Bigge Street, namely Flannery and the suggestion that he may have had some connection with the underworld and so, I rang him. I asked him if he could find out who it was that was harassing me at the time. I used an expression,* 'get him off my back', *the same as I think we all do when we want an annoyance to stop, to get him off me, that was the only way. If I could find out who was behind the harassment, then I could get the police to stop it.*
>
> *I did not ask him to do anything else except to find out who it was. I specifically never asked him to harm Evans as it is obvious, on the tape recording, as you will hear, that I did not know it was Evans.*

Flannery told me that he didn't know anything but that he would get in touch with the police. As I have mentioned in sworn evidence that is before you that the police he mentioned were McNamara and Duff. If may well be that McNamara's name was parroted back to me and I would have said that I was speaking to McNamara at Castle Hill police station when I reported the harassment. The evidence reads that the mention of McNamara's name may have been unsolicited but on reflection this may be incorrect.

I was astonished that the revelation of the connection between Flannery and the police, that they would have such a relationship that would enable him to just pick up a phone and ring the police. I told him Detective Sergeant Duff I already knew, he was a patient at Georges Hall. As I said 'don't you bother calling Duff, I will ring him directly'.

I had absolutely no idea of the relationship between Flannery and Duff prior to 3 March. I never spoke to Flannery after the phone call on 3 March and the last time I saw him, as I just mentioned, was on 4 February, when he attended the Georges Hall surgery.

I was still stunned at hearing about the relationship between Flannery and Duff but I rang Duff, who was at Wollongong. He then said to me that he would catch up with me later and it turned out that he did come to the Georges Hall surgery later in that day on Saturday, 3 March. When he came he told me that Flannery had rung him, as well as me. He then said to me that he was pretty glad that I had given Flannery the certificate and he felt that Flannery was not guilty of the charges and he wasn't looking forward to giving evidence against Flannery at the adjourned trial.

At that time I was absolutely dumbfounded and shocked at the relationship between Duff and Flannery. Flannery had already told me, on 31 January, well before the harassment started, that he was glad his trial had been adjourned because he didn't want to face a particular judge who, in his words, would accept evidence blindly and had a reputation of putting people away. He said he regarded my treatment of him and the certificate as a favour."

4.9. And at page 212, the Petitioner continued on regarding the above conversation:

"On the illegally taped conversations with Kristine Bissaker I was big-noting myself. When I told her that there two police officers that came and seen me, in fact there was only one. But once I started using the plurals in this conversation I continued with it

and Kristine was a close friend, she was worried about me and I was just trying to lesson her worry by making it sound that there were more substantial defences on me than there were at the time.

I exaggerated when I said 'quite a few of them are patients of mine' *referring to detectives when, in fact, there were only two and the two that I did pilot medicals for. I exaggerated again when I said they had both killed men recently when, in fact, it was only one that had.*

When I told Kristine that I'd helped Flannery, that was true. I did. I helped him with his tattoo removal, helped him get better in hospital, helped him with his certificate, which was justified, because he was sick. All of this of course was long before the harassment with Steven Evans' started.

The actual words on the tape with Kristine Bissaker surmises certain things that transpired between Flannery and myself. They were not the actual words used. My overall aim was to get Flannery to find out who it was harassing me. I then wanted the police to stop the harassment, to get him off my back.

It is quite clear on the tape that at the time I spoke to Flannery, on 3 March, I didn't know who it was. All I told the Tribunal in relation to these matters is true and correct. I was only asking Flannery's help in identifying who it was who was trying to harass me. I didn't actually want him to find the person, just to identify him.

I also, when speaking to Kristine Bissaker in this casual conversation, told her Flannery's response but I concentrated on the part that had got me concerned, was the relationship between Flannery and the police, that he had suggested that he would call the police. The bit about if he could find him he would was my shorthand for saying if he could find out who it was, who was harassing me he would."

4.10. At first blush, the difficulty with the Petitioner's explanation is the evidence that as early as 1981 the Petitioner had provided a statement in respect of harassment received by Evans. That was relied upon by the Crown to suggest that the Petitioner knew who was harassing Mr Edelsten and it did not commence as at 1 March 1984.

4.11. Of course it is correct to say that the first time the Petitioner was harassed was prior to 1 March 1984. However, the harassment re-commenced on that day with, inter alia, receipt of some pornographic material and most alarmingly a telephone death threat. Moreover, while there may have been a history of bizarre

harassment including the sending of unsolicited pornographic material and the like, the telephone death threat is a very different circumstance. It is plausible that the Petitioner did not know who was the man on the other end of the phone threatening the Petitioner's life. It is also plausible, and even understandable that someone who had their life threatened may wish to confirm who was making such threats in order to prevent further threats. The telephone conversation with Flannery as recounted by the Petitioner is therefore rational and ought to have been accepted by the jury.

4.12. The inference that the Petitioner did not know who was behind the threat or his location and that the Petitioner was referred to the police by Flannery is amplified by the contemporaneous record of the actual threat itself to the Police by the Petitioner. According to the statement of the Petitioner to the Police, the threat went as follows:

> *"My name is Graves, I am from the Police Public Relations, No. 20966 ext 31, get a pen, I have an important message for you. In relation to Steven Evans, he wishes to have the legal matter settled out of Court. You are to send compensation for payment of damages, sustained to him at Bankstown to Box 76, Redfern Post Office. If it is not received in 30 days your business will be ruined and you will be killed and I will repeat, you will die."*

4.13. The statement referred in the second paragraph to an investigation into the abovementioned post office box number as being registered to Steven Evans. and continues on in the third paragraph to indicate that the street address for Evans. That street address was the residential address for Evans and in fact contained a further threat to the Petitioner being a .38 calibre bullet with the word *"Edelsten"* taped on the case.

4.14. It is clear that there needed to be some investigations into who exactly was responsible for the threats. Whilst Evans is a candidate, it was not clear where he was located or if it was him or someone else (possibly on his behalf) that conducted the threat. It was not clear if the Petitioner would be able to have the harassment stopped. The logical way to do this would be to have the police arrest Mr Evans for his criminal conduct in harassing the Petitioner. Again, this in fact occurred. (This is also discussed below in the "fresh evidence" section of the Petition).

4.15. When one considers the text of the 3 March 1984 conversation there are several meanings that may be inferred. Firstly, the words *"I said I want this guy found and got off my back"* could mean that both requests were made in the same sentence. Alternatively, the sentence is a summary of that conversation wherein the Petitioner asks for assistance in finding his harasser in order to get the

harasser off his back. Flannery's alleged response clarifies the position. The fact that Flannery referred Dr Edelsten to the police is inconsistent with his known profession of being a contract hitman and contract basher of people (this reputation was so much that Flannery was also know by the moniker "Mr.Rent-a-kill"). It is submitted that it is unlikely that a man of Flannery's background would have responded to a request for him to assault someone, which would entail Flannery being paid, with a response that Flannery would get in contact with police officers. The fact that no harm came to the alleged harasser Evans and that Evans was eventually charged by police supports this contention.

4.16. In particular, in this conversation the words *"but he said I'll get in touch with these two detectives who are friends, ah, in the homicide squad and they both happen to be patients of mine at Georges Hall and ah, I do their pilot medicals"* are indicative of the Petitioner's state of knowledge at that time. One of the central tenants of the Crown case was that the police officers at *"introduced"* (as noted in the below conversation) Flannery to the Petitioner. That introduction, so the argument ran, was to facilitate this treatment that would have the effect of perverting the course of justice. The quoted section in this paragraph of the 3 March conversation indicates that the Petitioner only recently discovered the associate between Flannery and the police officers. The words *"happen to be patients of mine"* suggest that upon being told by Flannery to contact the police officers that the Petitioner registered that these police officers were also patients of his at Georges Hall. It is inconsistent, entirely, with the suggestion and submission by the Crown that the Petitioner was introduced to Flannery by Duff and/or McNamara prior to the tattoo removal on 26 January 1984.

4.17. As will be discussed below, the word *"introduction"* is equivocal and may refer to knowledge subsequently acquired by the Petitioner in relation to how Flannery came into contact with his surgery. That does not impugn the conduct of the Petitioner in administering treatment to Flannery in January 1984, nor does it suggest any impropriety in contacting Flannery regarding the harassment.

4.18. The Crown also relied on the words *"I rang a guy who I helped out recently"* being words in reference to Flannery as supporting the pervert the course of justice charge. It was suggested that the word *"helped"* indicated that the Petitioner had provided the treatment and medical certificate to Flannery for the purpose of Flannery avoiding his trial on 31 January 1984. The word *"helped"* is certainly equivocal and the Petitioner's explanation of what he meant by *"helped"* is a rational hypothesis consistent with innocence that should not, necessarily, be excluded. Particularly when one considers the new and fresh evidence, to be discussed below, regarding the use of the *"gunpowder trick"*, the innocent explanation provided by the Petitioner must certainly be accepted.

Further, the reference to *"helped"* is also consistent with the explanation that Flannery spoke to the Petitioner after the 31 January 1984 trial was adjourned and told the Petitioner that he considered the providing of the certificate a *"favour"*. Again, combined with the gunpowder trick evidence and the Petitioner's explanation, the innocent interpretation of that conversation is rational and ought to have been accepted by a jury properly instructed.

4.19. Further, as is noted in the advice of PD Connolly QC at page 7 the phrase *"got off my back"* is equivocal and could mean persuaded by any means including calling the police and as far as the inflicting of injury and/or death. As I have noted above, the response of Flannery as noted in those conversations does not indicate that Edelsten requested his *"services"*. Again, it is unlikely that a request for services would be met with a response that utilises legitimate means of dissuading someone from a course of harassment, in particular, in this case, death threats, that is by contacting certain police officers. This is further supported as no harm ever came to Evans and Evans was prosecuted in respect of the harassing conduct he committed upon the Petitioner.

4.20. Taken as a whole, the evidence is consistent with the explanation that the Petitioner contacted Flannery for assistance in finding out who was responsible for the threat and identifying him for the purpose of *"getting him off my back."* That interpretation is consistent with the Petitioner's unsworn statement and is a rational hypothesis consistent with innocence. As it is clear that the precise manner and order in which words were put to Flannery by the Petitioner is important in determining the intended meaning and, relevantly to the present purposes, whether the Petitioner intended to solicit Flannery to assault Evans.

4.21. The other telephone conversation relied upon by the Crown occurred on 15 April 1984 between the Petitioner and his then fiancé Leanne. The following text appears after a conversation that seems to refer to Flannery:

E: *Yeah, I helped him and, he just said he doesn't drop his price for anybody and that's it. He said I'm a professional – it's my livelihood*

L: *Beats people up...? Is that all he does?*

E: *He kills people.*

L: *Does he!*

E: *Yeah. Nice young fella.*

L: *Yeah.*

E: *But, um, I think he's a professional killer.*

L: *Has he got a nice house?*

E: *Pardon?*

L: *Has he got a nice house?*

E: *I don't know, I've never been to his house... he was just a patient and the police introduced him to me*

L: *When?*

E: *Oh, a few months ago.*

L: *Over this guy?*

E: *No, No. No ... they needed a favour. He was on a murder charge and they wanted him not to face...*

L: *Who did he kill?*

E: *Pardon. I can't hear you.*

L: *Who did he kill?*

E: *A standover man. Someone who was standing over a restaurant owner, trying to extort money from him and um.*

L: *You're kidding?*

E: *He was hired to com up from Melbourne and kill him.*

L: *Oh, that's all right ... (laughs) What and the coppers wanted to let him go?*

E: *No, the coppers just didn't want, you know he got a good chance of beating the rap ... but if he had faced a particular judge ... the judge has got a reputation for er, er accepting evidence blindly and putting people away – and he felt that he's got a better chance if he got in front of another judge, so when he knew that he had to go in front of this particular judge he had to be out of action for a few days ... to miss that judge to get onto another*

judge's list. And as it happened they got it adjourned for another year.

4.22. In respect of the above conversation, in addition to the matters quoted above, the Petitioner provided this explanation:

> *"In my conversation with my then fiancé Leanne, I said Flannery was just a patient. This was true. Certainly I exaggerated and I admit embellished the story a little bit. In fact, I had told her I had bought the Cronulla Sharks Rugby League team. I am embarrassed to say that this was an exaggeration.*
>
> *In my conversation with Leanne on 15 April, you hear me talk of an introduction to Flannery. On 3 March Duff informed me that he referred Flannery to me for tattoo removal and I used the term* 'introduction' *in that sense when speaking to Leanne in that conversation. We hadn't been formally introduced, but he had been referred. When I said on the tape again that he was professional and doesn't drop his price for anyone I was just extrapolating from the punch line in the joke that I put paid to any idea, remote as it might be, that Leanne would contact him directly. I didn't want her to contact him, so I said that was the end of the conversation.*
>
> *When I told her also that the police wanted a favour I was just telling her in more dramatic terms exactly what Duff had told me on 3 March when he told me he was pleased that I had given the certificate to Flannery, that he was pleased that the trial was adjourned and he thought Flannery was innocent.*
>
> *Again, when I said that he needed to be out of action for a little while, I was just paraphrasing the words that Flannery had used to me in hospital. One doesn't have to be an Einstein to do that.*
>
> *One has to take all of this into account, that I was really stunned by finding out that this close relationship between Flannery and the police. It is very easy then, using a poetic licence, to relate this story the way I did to Leanne on this private conversation."*

4.23. Firstly, certainly the word *"introduced"*, as noted above, is equivocal. It is not specifically referred to an introduction by the police in person of Flannery to the Petitioner. Whilst it certainly encompasses such an introduction, it also encompasses an interpretation that the police referred Flannery to the Petitioner. As noted above, the *"introduction"* is critical to the pervert the course of justice charge. If the latter interpretation is accepted by a jury, it is a rational hypothesis consistent with innocence and would lead to the acquittal of the Petitioner to a jury **properly instructed**.

4.24. The final portion of the conversation that is quoted is quite clearly incriminating information had the Petitioner known of this information before administering the treatment to Flannery on 26 January 1984. It is of critical importance that this knowledge could easily have been obtained by the Petitioner at the conversation he alleges to have had with Detective Sergeant Duff on 3 March 1984 when discussing potential action as against Evans rather than the sinister interpretation advanced by the Crown. This knowledge could also have been obtained by the Petitioner in the conversation he says he had with Flannery after Flannery's trial was adjourned on 31 January 1984. This is echoed in the opinion of Connolly QC at page 3.

4.25. Further, the text used appears to be an amalgamation of knowledge obtained from various sources. While at the beginning of the last statement he referred to the *"coppers just didn't want,"* the statement further referred to *"and he felt that he's got a better chance if he got in front of another judge, so when he knew he had to go in front of this particular judge he had to be out of action for a few days...to miss that judge to get onto another judge's list"*. In this part of the conversation who was *"he"*? Was the Petitioner referring to the Police officers, or was it Flannery? If it is a reference to the police officers then there is a change in who the word *"he"* refers to in the conversation. If it is Flannery alone it makes more sense. It is submitted that the words are indicative of the type of conversation the Petitioner had with Flannery at the hospital on 31 January 1984 as indicated in the abovementioned unsworn statement. That is to say, the contents of the conversation with the Petitioner's then fiancé is an amalgamation of the knowledge he has obtained since 31 January 1984, that is his conversation with Flannery on 31 January 1984 and his conversation with Duff on 3 March 1984. The combination of these two conversations appears melded into one in this statement and is a plausible and rational interpretation consistent with the innocence of the Petitioner.

4.26. Leaving aside any issues of misdirection, or, the new and fresh evidence stated below, it is submitted there were rational inferences consistent with innocence that could have been drawn from the two telephone conversations, viewed in light of all the surrounding evidence, that, we submit, a jury ought to have acquitted the Petitioner upon and which, alone, ought to raise the relevant sense of unease in allowing the convictions to stand.

4.27. Notwithstanding this, it is now of critical importance to consider the direction given by the Trial Judge on the interpretation of the tapes. The Trial Judge gave the following direction at p22/23 of the transcript:

> *"There is a further direction of law that I have to give you and that is that if there are two competing theories, one of which is*

consistent with the accused's innocence, then you must give him the benefit of doubt. That does not mean to say that just because you've heard some explanation or two other explanations you have to weigh the effect of those explanations. Is it a valid theory? Is it one that is plausible in all the circumstances because it is all the evidence that you have to consider before you in deciding whether you find one way or the other."

4.28. As is noted above, there are several interpretations of the conversations of 3 March and 15 April 1984. The availability of such interpretations calls for a proper direction for the jury as to the use of such competing theories and the manner in which the jury ought to determine which theory to accept. The above direction indicates, in effect, that the benefit of the doubt should only be applied where the two inferences are equally open. That is not the correct manner such a direction should be given as stated by the High Court in *Knight v The Queen* [1992] 1975 CLR 495 at 503.

4.29. Simply put, the direction that ought to be given to the jury was that they should only convict if they are satisfied that the only rational explanation for the conduct and evidence is one that is consistent with guilt. This is a similar direction to that in *Peacock v The King* [1911] 13CLR619 at 634 to the effect that:

> *"...that the case was made up in circumstances entirely; and that, before they could find the prisoner guilty they must be satisfied, 'not only that those circumstances were consistent with his having committed the act, but also they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person'".*

4.30. Clearly the whole direction falls shy of both the direction in *Peacock* and, moreover, the law as stated in *Knight*. The Trial Judge has misdirected the jury in this regard and, in combination with the matters detailed below, has led to a miscarriage of justice that ought to give rise to a sense of disquiet or unease about allowing the conviction to stand.

4.31. Further, the comments of Dixon J in *Martin v Osborne* [1936] 55 CLR 367 at p375 as approved in Knight at 502-503 are particularly apposite:

> *"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main issue must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must be no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability of the occurrence of*

their facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

4.32. This moves on to a similar but equally important issue that is that the jury ought to have been directed as to the specific inferences available for each charge and that, in particular, the Trial Judge ought to have directed the jury that they must not convict the Petitioner unless they were satisfied that the only rational inference and interpretation of the telephone conversations of 3 March 1984 and 15 April 1984 together were consistent with the guilt of the Petitioner. That is to say, they must be satisfied on each charge from their review of the telephone conversation that:

a. On charge 2, the Petitioner knew before 26 January 1984 or 31 January 1984 that Flannery was to stand trial for murder on 31 January 1984 and conducted the treatment in order to allow Flannery to adjourn the hearing of his murder trial; and

b. On charge 1, the Petitioner asked Flannery to find his intimidator and "get him off my back" as a request for Flannery to assault Evans to dissuade him from conducting any further harassment, threats or extortion.

4.33. The Trial Judge did not make any such direction to the jury and in fact, as will be seen below, made a number of inflammatory remarks that, it is submitted, were prejudicial to the Petitioner. On a review of the whole of the evidence (including the new and fresh evidence referred to below) with such direction in mind it is strongly arguable that the alternative rational hypothesis could not be excluded.

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

5. Prejudicial Remarks Concerning Senior Police Officers and Misdirection on Association Between Petitioner and Former Detective Sergeant Duff

5.1. Simply put, there was no evidence for the learned Trial Judge to state that the Petitioner 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.

5.2. The Trial Judge's comment was a misstatement of the evidence and a serious one and laid 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 Petitioner and Duff the jury would have more difficulty accepting that there was an intention of the Petitioner as at 26 January 1984 to pervert the course of justice.

5.3. 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.*"

5.4. In addition, the learned Trial Judge continued on with the above quote to say *"however, what the Crown asserts in this case, there has been demonstrated just how that sort of association can sometimes lead to criminal activity"*.

5.5. By adding the first statement directly from the Trial Judge as a prelude to the Trial Judge's reference to the Crown case, it is submitted, gives a level of legitimacy to the Crown's submission by way of prejudicial slur, which would clearly taint the mind of any juror listening to that summary.

5.6. 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.

5.7. Further, it is submitted that the Trial Judge's summation at page 7 in reference to the Crown's case that *"so the Crown has sought to establish each case by reference to a great deal of circumstantial evidence and, as I say, to what amounts to the accused's own admissions."* It is that final sentence of the accused's own admissions which gives a flavour to the evidence which, it is submitted, is prejudicial. The Trial Judge need not make reference to the evidence being an admission or not, it is for the jury to give the Petitioner's evidence that interpretation. The negative tone of this statement indicated a consciousness of guilt by the Petitioner which, we submit, was not apparent on the evidence and is not available to this day. Further, the reference to a *"great deal"* of evidence is also suggestive of a strong Crown case which may lead a potential juror to consider that the Trial Judge believed the Crown case against the Petitioner to be a strong case. Again, this would taint the mind of a juror when considering the guilt of the Petitioner.

5.8. The directions were prejudicial, not supported by the evidence and render the verdict unsafe or unsatisfactory.

6. Solicit Assault Misdirection

6.1. On this point, 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 direction there was a short adjournment.

6.2. The adjournment following those words amplifies the importance and significance of same to the jury. The jury is left pondering those precise words before an adjournment where, one would suspect, the jury considers the evidence in light of His Honour's summation.

6.3. The direction given 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 Petitioner wanted Flannery to talk to Evans and this would satisfy the question put to the juror as to the Petitioner's guilt, but would not be consistent with the Petitioner's guilt for the crime charged.

6.4. In effect, the direction gives the jury scope to have convicted the Petitioner without the essential element of intention being satisfied. That is to say, the jury may have convicted the Petitioner without the jury being satisfied that one of the elements the Crown was required to prove to convict the Petitioner being satisfied beyond a reasonable doubt.

6.5. For this reason, the conviction for solicit to assault is unsatisfactory and/or unsafe, and may also have improperly coloured the juries' mind in considering the related charge of pervert the course of justice.

7. The New and Fresh Evidence

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

7.2. Kathleen Flannery

7.2.1. 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.

7.2.2. Her evidence was that Flannery could not drive and she often drove him various places including the Petitioner's surgery. She did

not recall how many occasions he attended the Petitioner for tattoo removal, but remembered that it was just before his trial for murder. Her understanding was that Flannery attended the Petitioner's surgery for treatment because of advertisements he had read for tattoo removal.

7.2.3. 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.*"

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

7.2.5. Mrs Flannery recounted an occasion where the Petitioner told Flannery that there was an ex-patient trying to blackmail him. She said that her husband said to the Petitioner 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.

7.2.6. 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 Petitioner's receptionist.

7.2.7. Further, the Trial Judge in his directions to the jury as page 15 stated after describing the alleged symptoms of Flannery before admission: *"despite all the criticism of the Crown witnesses there is that medical evidence which said: if you had all this history, if it part of the conspiracy and no one sees Flannery vomiting at home, collapsing at home, shaking, the only objective evidence being some swelling of the wrist after some burns which he had elected to have that very day, well that is quite a different thing, is it not?"*

7.2.8. 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 such that he did not require hospitalisation or a certificate stating that he would require over a week in hospital after 31 January 1984 before Flannery was ready for daily Court appearances. 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 Petitioner are matters that ought to have been before the Court.

7.2.9. The Jury may have provided their verdict on the above direction and 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 the suggestion contained in the above direction to the jury by the Trial Judge and, similarly, more difficulty in accepting the guilty explanation of the telephone calls.

7.2.10. The recount of Mrs Flannery of the actions taken by Flannery himself regarding the extortion attempt are consistent with the Petitioner's explanation of his contact with Flannery. That is, it is consistent with his explanation that he spoke to Flannery and asked him whether he could assist in finding the person responsible for the blackmail. It is inconsistent with the guilty explanation that the Petitioner asked Flannery to assault Evans. ##In speaking to Detective Sergeant Duff taken by Flannery are further consistent with the innocent explanation. There is some inconsistency with the Petitioner's explanation as the story continues in that Mrs Flannery recalls that Detective Sergeant Duff and Flannery attended together upon the Petitioner's surgery to discuss the issue with him. It is submitted that that inconsistency is not determinative, nor is it inconsistent with the innocent explanation of the 3 March 1984 and 15 April 1984 telephone conversations.

7.3. Dr Geoffrey Scarlett

7.3.1. 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, that is, an infection.

7.3.2. This evidence supports the view that Flannery's symptoms upon hospitalisation were consistent with septicaemia which is, in effect, a form of bodily infection. The symptoms Scarlett describes are consistent with the observations of Mrs Flannery of her husband's condition prior to his hospitalisation in January 1984.

7.3.3. This evidence tends to suggest that Flannery's symptoms were genuine and further contradicts the Crown case run on Flannery's symptoms or lack thereof.

7.4. Dennis John Keane, Glen Alexander and Graham Rogers

7.4.1. Keane's evidence is a transcript of oral evidence given before the Victorian Medical Tribunal in or about 1991. He has also given a written statement.

7.4.2. Keane was an acquaintance of Flannery. There are two relevant conversations between Keane and Flannery. The statements of Graham Rogers and Glen Alexander simply corroborate how Keane's evidence came to the knowledge of the Petitioner.

7.4.3. 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.

7.4.4. Significant for the purposes of the current case is that Flannery expressed concern that the doctor (meaning the Petitioner) would discover the plan and discharge Flannery from hospital before the scheduled trial date. It is that concern, which is inconsistent with the guilt of the Petitioner.

7.4.5. Further, if Flannery had in fact been *"introduced"* to the Petitioner as suggested above, then this conversation is totally inconsistent with that. Flannery could not be concerned with being discovered by the doctor if he had prearranged with the doctor to obtain the treatment and receive the medical certificate. This is important because the Crown case was run on the basis that it did not matter whether Flannery was in fact unfit to stand trial on the particular date that the Petitioner provided the certificate but that the treatment was rendered to Flannery to *"put him out of action"*. Clearly, this evidence supports an inference consistent with the Petitioner's innocence.

7.4.6. The second conversation was regarding the solicit to assault charge. In that conversation Flannery recounted the Petitioner asking Flannery to help him find *"someone...giving him a hard time"*, which Flannery reportedly responded with *"take it to the cops."* Keane's evidence was that Flannery, in uttering those words insulting the Petitioner, as Flannery did not hold the police in high regard.

7.4.7. This conversation, and in particular the words used by Flannery, support the construction advanced by the Petitioner in respect of the 3 March 1984 telephone conversation with Ms Bissaker. That is to say, that it is consistent with the Petitioner asking for help in locating the trouble maker and with Flannery responding to the effect of taking it to the cops. It is further consistent that the police officers Flannery referred to were police officers with whom Flannery was associated.

7.4.8. The only potential inconsistency is with the evidence of Mrs Flannery, that is to say her recount of Flannery and Duff attending the Petitioner's offices.

7.4.9. Whilst the portion of the evidence dealing with a reference to cops being an insult is not necessarily inconsistent with Flannery in fact assisting with such a reference. Moreover, it is entirely consistent with the Petitioner's innocent explanation for why he contacted Flannery. As a whole, the evidence favours the innocent explanations provided by the Petitioner and would support a rational hypothesis consistent with his innocence that a jury properly instructed would be unable to exclude. Again, as a whole these two conversations tend to support inferences of innocence in respect of both charges that were before the jury. With this evidence, and other evidence, a jury, properly directed, ought to have acquitted the Petitioner of both charges.

7.5. Mick O'Brien

7.5.1. 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.

7.5.2. 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*", the Petitioner was not mentioned during this conversation at all.

7.5.3. O'Brien recounted a later conversation where Flannery posted about fooling the Petitioner by using the old gunpowder trick where Flannery said words of the effects *of "I had the tattoo 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 Petitioner to O'Brien.

7.5.4. Further, O'Brien recounted further conversations where Flannery described the Petitioner as being aware of his trick but that there was no need to worry because other people were going to "*stitch him up*", as a reference to the Petitioner becoming an embarrassment to various people around town.

7.5.5. The evidence here is more or less consistent with the evidence of Keane referred to above. There is a critical difference in that O'Brien refers to the awareness of the Petitioner in terms of *"Edelsten has woken up or someone has told him that I've fooled him with the gun powder trick"*. This is of course not consistent with the Petitioner's explanation that Flannery explained to him 31 January 1984 that he (Flannery) considered the certificate a favour.

This can be explained as the context in which that conversation is brought up is Flannery boasting about fooling the Petitioner. It of course does not assist the *"story"* that Flannery recalls, jovially, about fooling the Petitioner. It would seem quite silly to brag about fooling someone and then say in the same breath *"I actually told him about fooling him"*.

7.5.6. Again, as is the case with Keane's evidence, O'Brien's evidence capable of supporting an inference consistent with innocence in respect of the charge in perverting the course of justice. Again, while this does not necessarily impact upon the solicit to assault charge, both charges are inter-related and quite clearly, conviction in one matter will lead more readily to conviction in another. That is, if the Petitioner was accepted in his evidence regarding the pervert the course of justice circumstance, the jury will, more likely, accept the Petitioner's evidence regarding the solicit to assault charge. Accordingly, this evidence is capable of assisting a jury to find a rational inference for the telephone calls consistent with the innocence of the Petitioner.

7.6. Ian Vandimeer

7.6.1. 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.

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

7.6.3. This evidence supports and corroborates the evidence of Keane and Rogers detailed above. In particular, it supports the inference that Flannery, and whoever assisted him, had not disclosed to the Petitioner their intentions for obtaining the tattoo removal treatment on 26 January 1984 and for Flannery's ongoing hospitalisation thereafter. This is direct evidence of actions taken by Flannery to avoid detection by his doctor (the Petitioner) of his plan to avoid the trial date of 31 January 1984.

7.6.4. This evidence is reliable. By providing this very evidence Mr Vandimeer admitted to conduct that could find him charged for the very offence the Petitioner has been convicted. There is little reason for some person to falsely admit to an offence and, on that basis, his evidence ought to be accepted by any Jury properly instructed.

7.6.5. Most importantly, it is evidence that is consistent with the innocence of the Petitioner in respect of the pervert the course of justice charge, and it is similarly consistent with the Petitioner's explanation as to when he discovered that Flannery did not wish to face trial on 31 January 1984. Even without the other fresh evidence, this evidence alone would have enabled a jury to acquit the Petitioner of that charge, and may have inserted some doubt in the jury's mind about the second charge as the charges were closely interrelated and heard together for that reason.

7.7. *Roger Hodge*

7.7.1. In a signed statement Mr Hodge says he was a security consultant engaged by the Petitioner to do certain surveillance work. He details enquiries he made regarding the harassment received by the Petitioner. 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 could identify Evans in the future.

7.7.2. In relation to the solicit to assault charge, this is consistent with the Petitioner's explanation for the 3 March 1984 conversation. In particular, Hodge's recollection that the Petitioner relayed the possibility that his harasser may be Evans but without being certain, is consistent with the abovementioned explanation. It is also consistent with the Petitioner's report to the police. The taking of photographs of Evans upon an appearance at Court is also consistent with trying to fully ascertain the identity, including appearance, of someone who is responsible for a number of harassing acts including death threats. Moreover the use of a private inquiry agent to discover these details is not consistent with the use of an underworld hitman, such as Flannery, to assault Evans. It is also difficult to accept that the Petitioner asked someone such as Flannery to assault Evans when, when he is unsure that Evans in fact was the culprit.

7.7.3. Again, this evidence supports an inference of innocence in respect of the solicit to assault charge and accordingly, would have enabled a jury to acquit the Petitioner of that charge and assisted the Petitioner in being acquitted for the pervert the course of justice charge.

7.8. *Professor Crank*

7.8.1. Professor Crank provided a useful, but brief, 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."

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

7.8.3. Again, the Crown case was not put on the basis that Flannery did not have the symptoms reported. However, a significant challenge was put on that medical evidence by the Crown. That is to say, the Crown challenged whether Flannery in fact had symptoms as bad as was reported.

7.8.4. The evidence of Professor Crank regarding the ingestion of gun powder is consistent with symptoms of Flannery upon admission and beyond. Coupled with the evidence of Vandimeer, Keane and O'Brien above, it provides compelling support for the inference that the Petitioner was not aware at all of any need to certify Flannery unfit for trial prior to the request for that certificate by Flannery either the day before or the morning of Flannery's aborted hearing.

7.8.5. The evidence combined adds an almost irresistible inference that the Petitioner is being truthful in his version of events and the interpretation of the telephone calls of 3 March 1984 and 15 April 1984.

7.9. Carolyn Alice Hall

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

7.9.2. She firstly recounted a telephone conversation where Flannery first called and asked if the Petitioner 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.

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

7.9.4. That afternoon, she says the Petitioner 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.

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

7.9.6. In around March 1984 Mrs Hall remembers the Petitioner requested Flannery's patient card. She heard the Petitioner telephone Flannery and have a conversation where she specifically heard the Petitioner 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 Petitioner's office was told in no uncertain terms to leave

7.9.7. Following this telephone conversation the Petitioner 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 Petitioner seemed quite stressed.

7.9.8. In respect of the overheard March conversation with Flannery, this is direct evidence, not available at the trial, of the conversation in question. The report by the Petitioner to Ms Hall following the telephone conversation is further consistent with the interpretation of the 3 March 1984 conversation given by the Petitioner. It suggests that the Petitioner only wanted to find out who it was and why. Again, while several factors point to the harassment being directed by Evans, it is not certain and it was only until further investigations by the police lead to the discovery that the PO Box, the subject of this harassment was in fact linked to Evans. However, what is consistent is that the Petitioner was unsure precisely who was responsible for the harassment and took steps to try and discover the identity of the person harassing him.

7.9.9. Further, the recount of how Flannery first contacted the surgery that is being told by a policeman, is entirely consistent with the reference to *"introduction"* in the 1 April 1984 telephone conversation. It is clear that the introduction is by the police officer telling Flannery to visit the Petitioner. It is, therefore, consistent with the innocence of the Petitioner on the pervert the course of justice charge.

7.9.10. The notation of more than one visit on the one day by Flannery is not consistent with the guilty inference for the telephone conversations. It indicates that the Petitioner told him to think about tattoo removal and left him to leave the surgery rather than administer the treatment straight away. By so doing, the Petitioner enabled Flannery to leave and potentially not to obtain treatment that day. Flannery, of his own accord, is the one who returned to the Petitioner.

7.9.11. It is again submitted that this is consistent with the innocence of the Petitioner of the pervert the course of justice charge.

7.9.12. However, since providing her statement Ms Hall has passed away and cannot be cross-examined. Notwithstanding this, her statement ought to be considered together with the totality of the other available evidence concerning the convictions in a manner called for pursuant to section 77 of the *Crimes (Appeal and Review) Act 2001 (NSW)*.

8. Effect of the New and Fresh Evidence

8.1. The evidence described above was new and fresh as distinct from the evidence led at trial. Further, it is evidence that was not available to the Petitioner at the trail and, as is explained in each statement, only came to the attention of the Petitioner following his convictions.

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

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

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

8.5. 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 Petitioner. 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 Petitioner's course of action. The medical evidence at trial and in support of the earlier petitions further corroborates this account.

8.6. 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. Keeping this aspect of his treatment secret from his wife is understandable.

8.7. Further, there are a number of consistent accounts that the telephone conversations with Flannery proceeded in the manner alleged by the Petitioner. Again, lending weight to a competing theory of the intention to solicit assault charge. Particular weight should be given to the Receptionist's evidence as it is direct evidence of the telephone conversation that is the subject of the solicit to assault charge.

8.8. 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 Petitioner was guilty. Alternatively, it at least raises a doubt or disquiet as in *Varley*.

8.9. 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 (as discussed below) and the convictions should be overturned. Also, the fresh evidence when taken in conjunction with the other matters referred to in this petition create a strong sense of unease or doubt about the convictions.

9. The Admissibility of the New and Fresh Evidence

9.1. Despite the opinion of Mr Justice Finlay in an earlier petition and despite there being no need for the evidence to be admissible for the purposes of the petition, nevertheless, the evidence described above is relevant and would be admissible at the hearing were it available and conducted today.

9.2. Clearly, the medical evidence is admissible and would satisfy s79 of the *Evidence Act 1995* (NSW). The relevant credentials of each deponent could easily be provided to substantiate any requirements under the *Evidence Act 1995*.

9.3. The direct evidence, that is the perception of Mrs Flannery of Flanery's symptoms is relevant and admissible. Similarly, Vandimeer's description of providing to Flannery the gunpowder is also admissible.

9.4. In respect of the conversations with Flannery deposed to by Vandimeer, Hodge, O'Brien, Keane and Mrs Flannery are arguably admissible under the exception to the hearsay rule embodied in s65 the *Evidence Act 1995* (NSW). That section relevantly states:

> **65 Exception: criminal proceedings if maker not available**
>
> (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

...

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation, or

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages.

...

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

9.5. The presumed death of Flannery renders him "unavailable" for the purposes of the section and enlivens its operation (s65(1)). The evidence would be adduced by the defendant (that is the Petitioner) through persons who heard saw or otherwise perceived the representations being made by Flannery thereby enlivening ss65(8)(b). Accordingly, subject to any discretion to exclude the evidence, the evidence is *prima facie* relevant and admissible and no such discretion should be applied given that the statements were very much against the interests of Flannery and could otherwise have been admissible under s65(2)(d).

9.6. The evidence of Ms Hall, given that she has passed away is arguably admissible under s65(8) or s65(2).

10. An Inquiry Should be Ordered

10.1. Taken as a whole, the incorrect direction as to circumstantial evidence, the incorrect directions as to competing theories, the inflammatory and prejudicial directions, the incorrect direction as to

the definition of solicit and the new evidence it is clear that there remains the relevant sense of disquiet or unease referred to in *Varley* in respect of both convictions and, a fortiori, represents a substantial miscarriage of justice.

10.2. It is finally submitted that for the above reasons the Governor ought to exercise her pardoning power as embodied in s76 of the *Crimes (Appeal and Review) Act 2001* (NSW) or alternatively direct a review of the Petitioner's convictions under that Act.

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1. Petition
2. Advices of Senior Counsel:
    a. the Hon. Mr Greg James AM QC;
    b. Peter Connelly QC;
    c. Patrick Tehan QC;
    d. BT Stratten QC;
    e. Maurice Neil QC.
3. Opinion of Mr Justice Finlay dated 10 July 1991
4. Trial Judge's direction
5. Fresh Evidence:
    a. Kathleen Flannery;
    b. Dr Geoffrey Scarlett;
    c. Dennis John Keane;
    d. Glen Alexander;
    e. Graham Rogers;
    f. Ian Vandimeer;
    g. Mick O'Brien;
    h. Roger Hodge;
    i. Professor Crank;
    j. Caroline Alice Hall.
    k. Statement of the Petitioner concerning extortion demand
    l. Clinical notes in respect of Christopher Dale Flannery's admission to hospital
6. Transcript of proceedings at trial.