PETITION

OF

HENRY VINCENT KEOGH

TO

HIS EXCELLENCY REAR ADMIRAL KEVIN SCARCE

AC CSC RANR

Governor of South Australia

January 2009

CONTENTS

Petition of Henry Vincent KEOGH

PETITION

OF

HENRY VINCENT KEOGH

TO

HIS EXCELLENCY REAR ADMIRAL KEVIN SCARCE, AC CSC RANR

Governor of South Australia

The Petitioner, Henry Vincent Keogh, care of Mobilong Prison, Maurice Road, Murray Bridge, in the state of South Australia, makes this Petition seeking a reference by the Attorney-General of his whole case to the Full Court of the Supreme Court pursuant to section 369 of the *Criminal Law Consolidation Act 1935* in order that the Petitioner's whole case can be judicially considered.

1. **Background**

In the High Court of Australia, *Keogh v The Queen* [2007] -- Special Leave Application, HCATrans 693 (16 November 2007)

1.1 The Petitioner has pursued and exhausted all rights of appeal.[1, 2] The judges at the High Court hearing referred to two options open to the Petitioner.

1.2 The first option was by way of a further Petition. This is the only avenue for relief pursuant to the *Criminal Law Consolidation Act* under Section 369 of that

[1] *R v Keogh* [2007] SASC 226.
[2] *Keogh v The Queen* [2007] HCATrans 693. "…we are of the view that there are insufficient prospects of success of overturning the *legal* basis of the decision of the Court of Criminal Appeal of South Australia to warrant a grant of special leave to appeal in this matter." per Gleeson CJ. (emphasis added)

Act.[3] It provides a mechanism for the case to be referred to the Court of Criminal Appeal.[4]

1.3 The second option (Civil proceedings) is under consideration but because that type of proceeding has never been attempted so far in this country the Petitioner is proceeding with this Petition first.

2. This Petition

2.1 This is the Fourth Petition submitted by the Petitioner.

2.2 The Third Petition was, on the advice of the former Solicitor-General, rejected on 10 August 2006. Since the Third Petition significant new facts have emerged.

2.3 How those facts came to light is described in this Petition.

2.4 The Petitioner now demonstrates his conviction was obtained by fraud based on a combination of the following elements:

2.4.1 Admitted or proven non-disclosure by principal prosecution witnesses of materially relevant facts

2.4.2 Dishonesty

2.4.3 Manifest error

2.4.4 Incompetence

---

[3] *Keogh v The Queen* [2007] HCATrans 693. "There are provisions in the legislation of South Australia and of other States for other forms of review of matters involving alleged miscarriages of justice which cover cases where rights of appeal have been pursued and exhausted. The existence of those provisions was a matter taken into account in the case of *Grierson*, to which reference will shortly be made. The South Australian provisions have been invoked by the applicant, but we are told that that has so far been without success. The case has been argued here on the basis that it is irrelevant to the question we have to decide." per Gleeson CJ.

[4] *Keogh v The Queen* [2007] HCATrans 693.

> "GLEESON CJ: So that is a power in the Attorney-General to refer the matter to the Full Court and when it is so referred it then becomes another appeal? Is that right?
> MR HINTON: Yes, your Honour.
> GUMMOW J: Which would strike at a conviction.
> MR HINTON: Yes, your Honour. It is a discretion in the Attorney-General. As your Honours may have picked up from the papers, there have been three petitions made in this matter to date. I will be corrected if I am wrong, but none of the three have been referred to the court as yet. That does not mean, of course, that there cannot be a fourth, fifth or sixth petition, should the applicant so choose. There is no limitation upon the number of petitions that can be made."

2.5 It is asserted that the juries in both trials, the Judge in both trials, and the Petitioner, his legal advisers, the Appellate Courts and the Medical Board of South Australia were misled.

2.6 It is further asserted that the new facts are relevant to an exchange which occurred between Bench and Bar on 23 May 2007.[5] A summary of the issues raised by the Petitioner in his earlier Petitions and the responses by the then Director of Public Prosecutions is attached.[6] With reference to the query raised by Bleby J the summary includes matters not referred to in the Third petition but now included in this Petition. Some of those matters are matters either relied on or foreshadowed by Counsel for the Applicant (Mr T Game SC) and other matters which are identified as having occurred since the Third Petition.

2.7 The discovery of new facts since August 2008 has occasioned a delay in the presentation of this Petition -- those advising the Petitioner had to re-examine in detail the evidence of Dr Manock and of Dr James in the light of the new facts.

2.8 At the High Court hearing referred to above, apart from the views expressed by the judges a comment was made by counsel for the respondent to the effect that the Petitioner may be drawing "a long bow" in relation to proving fraud. At the time that comment was made counsel for the respondent was not aware of the facts discovered subsequent to 16 November 2007. It is not necessary in the petition procedure to prove fraud, but the Petitioner contends that given the facts as they are now known fraud has been established.

---

[5] *Keogh v R*, Nr 420/1995, Court of Criminal Appeal proceedings, 23 May 2007, pp61-2.

Sulan J (addressing Martin Hinton QC, counsel for the respondent): "Before you commence, can I just ask; have all avenues of a Governor's reference been exhausted? Is there any chance this matter might come back to us on the merits they want to argue rather than having an argument about whether we can reopen an appeal?"

…

Doyle CJ: I suppose if these matters had been the subject of a petition that her Excellency has rejected, well then there is no particular reason, I suppose, to think that a petition on the same matters would succeed, is there?

…

Bleby J: "… if there were matters which Mr Game has relied on today or foreshadow relies on today which have occurred since the last petition, there may be some substance in what Sulan J suggested." See Annexure 'Z'.

[6] Annexure '2A'. 'The Petitions of Keogh.'

3. This Document

3.1 A Schedule of the documentary material is attached.

3.2 The documentary material is divided into two parts. The first part (Book 1 of 2) contains primary documents such as the original reports/statements and transcripts of proceedings. It begins with a résumé of the background circumstances and a chronology of events and proceedings from 1994 to the present date. The second part (Book 2 of 2) contains new material discovered by or developed by the Petitioner. It includes the documents the Petitioner relies on in order to prove the elements of fraud referred to.

3.3 The Petitioner requests that his legal and other expert advisers be provided with the opportunity to confer with the lawyers advising the Government, with the purpose of facilitating ease of reference to the documentary material, to explain in more detail the new evidence discovered, with particular reference to the tissue slide levels and to the Henneberg affidavits (Annexures '2D' and '2E').

4. PREAMBLE – The law

4.1 A Fair Trial

4.1.1 It is a basic principle of the Australian Criminal Justice System that every individual has the right to a fair trial.

4.1.2 A fair trial is "understood as a trial resulting in a verdict worthy of confidence". (*Mallard v The Queen* [2005] HCA 68 at [70] per Kirby J)

4.1.3 Every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. (*Mraz v R* [1955] HCA 59 at [9] per Fullagar J.)

4.2 The Duty of Disclosure

4.2.1 Access to required information is essential to a fair trial. "In conformity with this conception of fair trial, if an accused person can show that he has been prevented by *surprise, fraud, malpractice or misfortune* from

presenting at his trial evidence of substantial importance which he desired to present, or which he would have desired to present had he not been prevented by such causes from being aware of its existence or its significance, then ordinarily the fact that he has been tried and convicted without such evidence having been called involves that he has been deprived of his right to a fair trial and that there has, in that respect, been a miscarriage of justice." (*Re Rattan* [1974] VR 201 at 214, emphasis added)

4.2.2 Whether or not a trial is fair is essentially a matter for judicial determination. It is not a political decision.

4.2.3 If an accused person can demonstrate they have been denied access to relevant information, for whatever reason, the issue as to whether or not the trial was fair should be judicially determined. "And, if difficulties arise in a particular case, the court must be the final judge." (*Ward* (1993) Cr App R 1 at 53 per Glidewell LJ)

4.2.4 The duty of disclosure begins in the pre-trial period and continues to the present day. "The Court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed is an 'irregularity in the course of the trial.' Why there was no disclosure is an irrelevant question, and if it be asked how the irregularity was 'in the course of the trial' it can be answered that the duty of disclosure is a continuing one." (*Ward* (1993) Cr App R 1 at 22 per Glidewell LJ, citing *Maguire and Others* (1992) 94 Cr App R 133 at 146)

4.2.4.1. "An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of the scientific evidence is made by the defence. Moreover, this duty is continuous; it applies not only in the pre-trial period but also throughout the trial." (*Ward* (1993) Cr App R 1 at 50 per Glidewell LJ)

4.2.4.2. "Errors or omissions discovered prior to, during or after any hearing should be disclosed." (The Australian and New Zealand Forensic Science Society Inc, *Code of Ethics*, 1995, 2008 – Annexure 'Z')

4.2.5 The duty to disclose all relevant information extends to all those involved in the investigation and preparation of the prosecution case. In particular it extends to scientists and other expert witnesses utilized by the prosecution. An expert who has carried out or knows of experiments or tests which tend to cast doubt on the opinion they are expressing is under a clear obligation to bring the records of such experiments and tests to the attention of the prosecuting authority, to defence counsel and to the Court. (*Ward* (1993) Cr App R 1 at 56)

4.2.6 "[A forensic pathologist's] own subjective opinion as to relevance or significance (whether or not he thought it would be shared by others) could not be a sufficient reason for not disclosing results which others (including the defence experts) would reasonably wish to consider. If the results are not referred to at all, then the PM Report will not contain information which others need to consider. If a forensic pathologist were to be entitled not to disclose such information just because he or she had concluded that it was not relevant or potentially relevant, then the underlying reasons for requiring disclosure would be liable to be defeated. This is not just commonsense and good medical practice, it is also good law – see Glidewell LJ's judgment in the *Judith Ward case sup cit* at p22 and *R v Sally Clark* [2003] EWCA Crim 1020 at paragraphs 166 and 167." (Judgment of the Tribunal, Policy Advisory Board for Forensic Pathology [UK], re Dr AR Williams, 28 March 2006)

4.2.7 The defence should not have had to "fossick" for information it was entitled to. (*Grey v The Queen* [2001] HCA 65 at [23])

4.3 <u>False and distorted scientific picture</u>

4.3.1 If it can be established that a scientist or scientists knowingly facilitated the presentation of a "false and distorted scientific picture" to the jury then

it will necessarily follow that the accused had been deprived of a fair trial. (*Ward* (1993) Cr App R 1 at 51)

4.4 In this Petition

4.4.1 The prosecution did not disclose all relevant evidence. The defence should not have had to "fossick" for the information it was entitled to in the way it eventually had to.

4.4.2 The Petitioner can establish that in his case two expert witnesses called by the prosecution, forensic pathologists Dr Colin Manock and Dr Ross James, have admitted that in some instances they failed to disclose significant information and in other instances it can be proven by objective evidence they failed to disclose relevant information.

4.4.3 As a result the two experts knowingly facilitated the presentation of a "false and distorted scientific picture" to the jury. They deliberately and knowingly misled the prosecuting authority, the defence and the jury.

4.4.4 The admitted existence of relevant evidence which should have been made available to the defence and which might have cast doubt about the evidence of two expert witnesses called by the prosecution must lead to the conclusion the conviction was unsafe and a miscarriage of justice occurred. (*Grey v The Queen* [2001] HCA 65 at [71], [83])

4.4.5 It is not a miscarriage to which the fresh evidence rule would apply. (*Grey v The Queen* [2001] HCA 65 at [23])

4.4.6 In such a case the proviso has no application. It follows that any consideration of other alleged circumstantial evidence relied on by the prosecution is irrelevant. (*Grey v The Queen* [2001] HCA 65 at [53])

4.4.7 As with *Mallard*, the important issue of legal principle is whether non-disclosures deprived the appellant of a fair trial. (*Mallard v The Queen* [2005] HCA 68 at [58]. See also *Grey v The Queen* [2001] HCA 65)

4.5 The history of his case demonstrates the Petitioner has never had his whole case judicially considered.

4.6 The Petitioner is entitled to have his case heard "on the merits".

4.7 Conclusions

The history of this case demonstrates:

4.7.1 There was a non-disclosure of relevant material;

4.7.2 As a result neither the prosecution case nor the defence case was properly presented to the jury (*Simic v The Queen* [1980] HCA 25);

4.7.3 There was material which should have been made available to the defence which might have cast doubt about the evidence of at least two witnesses and the fact that evidence was not available at the trial because of surprise, fraud, malpractice or misfortune (*Rattan*) must lead to the conclusion that the conviction was unsafe (*Grey*) and a miscarriage of justice has occurred.

4.7.4 The authorities referred to establish that even if fraud is pleaded, as it is in this case, it is not necessary to actually establish fraud in order to show the conviction was unsafe.

5. **The Case at Trial**

5.1 In August 1995 the Petitioner was convicted of the murder of his fiancée, Anna Jane Cheney. The prosecution case was that when she was taking a bath he gripped one of her legs, raising it up and by pressing down on her head forced her head underwater, causing her to drown. The case included his alleged relationship with two other women at the time, alleged forged insurance policies, and statements he made subsequent to her death in relation to those policies. The motive, it was said, was to cash in her insurance policies and to acquire the benefit of those proceeds. The critical feature of the prosecution case was an observation by the pathologist who performed the autopsy that four alleged bruises on the lower left leg of the deceased constituted a grip pattern of a hand.

5.2 There were two trials – the first jury was unable to agree on a verdict.

5.3 The Petitioner appealed his conviction and in his judgment of 22 December 1995 Matheson J identified the "strands" of the evidence at trial as follows:[7]]

(1) "It was not disputed by the pathologists, nor by one's common experiences of life, that it would be unusual, if not extraordinary, for a fit, healthy, 29 year old used to drinking alcohol to drown in her bath after drinking several glasses of wine."

(2) "The appellant clearly had the opportunity to drown her deliberately, either before he visited his mother (if he did) or after, and was the last person to see her alive."

(3) "He had a motive, namely to obtain his freedom, and the means to enjoy it."

(4) "The evidence of Georgiou and Manzitti pointed to the drowning being deliberate."

(5) "Bruising found on the deceased, and in particular on the left shin, pointed to the modus operandi demonstrated by Dr Manock."

(6) "The opinions of Drs Manock and James supported such a modus operandi, and neither Dr Ansford nor Professor Cordner rejected it."

(7) "Epilepsy and myocarditis appear unlikely."

(8) "A faint, whether or not due to postural hypotension, would be unlikely to cause the number and situation of bruises on the deceased."

(9) "Falling to sleep would probably have led to her coughing and awakening."

(10) "The accused has clearly told some lies."

5.4 Matheson J concluded:

5.4.1 The jury saw him [the Petitioner] cross-examined in the witness box. Their verdict indicates they did not believe him, and I am not surprised. <u>On the whole of the evidence</u> it was open to the jury to be satisfied beyond reasonable doubt

[7] *R v HV Keogh*, No. SCCRM 95/420 Judgment No. 5397, per Matheson J at [56] (emphasis added).

that he deliberately drowned his fiancée. I think their verdict was correct. I would dismiss the appeal.

6. The new information revealed

6.1 The first discovery -- 2000

6.1.1 At both trials both Dr Manock and Dr James claimed, or at the very least implied, that their examination of the tissue slides under the microscope (the histological examination) supported the evidence of the existence of the four alleged bruises on the lower left leg of the deceased which taken together formed a hand grip pattern and further that the alleged bruises were all caused at or about the same time which was shortly before death.

6.1.2 A report written by Professor AC (Tony) Thomas following his examination of the original histology slides in July 2000 stated that at least one of the slides showed no evidence of bruising.[8] However, it was not completely understood at that time by the lawyers advising the Petitioner that there were in fact two slides which showed no evidence of bruising.

6.1.3 As a result, when Dr James and Dr Manock presented their evidence to the Medical Board during 2004, they were only asked about one slide. Dr Manock said that at the time of the trial he did not disclose the fact one slide showed no evidence of bruising because "It wasn't part of the conversation" with the prosecutor.[9] Dr James said that he did not make disclosure of that fact because he "didn't think it was particularly relevant".[10] Neither Dr Manock nor Dr James volunteered or mentioned the existence of the second slide.

6.1.4 It is important to note that not only did the tissue slides referred to above reveal no evidence of bruising but as a result it was impossible to use the information on the slides to make any assessment of the age of the bruises.

[8] Affidavits of Professor Anthony Charles Thomas, 2 February 2004 and 12 February 2004. Annexure 'R'.
[9] Manock; Medical Board hearing, November 2004, p388. Annexure 'S'.
[10] James; Medical Board hearing, November 2004, p305. Annexure 'T'.

6.1.5 The above information was passed on to the former Solicitor-General by the Petitioner for consideration as part of the Petitioner's Third Petition. What follows is material discovered by the Petitioner since the refusal of his Third Petition in 2006.

6.2 Discovery of further material

PART 1: 2005-2008

6.2.1 Competency of autopsy

6.2.1.1. By letter of 19 December 2005 the Medical Board of South Australia disclosed to the Petitioner the contents of their files concerning the complaints made by the Petitioner against Dr Manock and against Dr James. That disclosure produced *inter alia* (on or about 21 March 2006) memoranda prepared by the three pathologists on the Board that in November 2004 heard the complaint by the Petitioner against Dr Manock.[11] The memoranda contain comments critical of the work of Dr Manock and opinions that the procedure by which Dr Manock conducted the autopsy was inadequate and substandard.

6.2.1.2. On 21 January 2008 the Medical Board of South Australia laid a complaint with the Medical Professional Conduct Tribunal that Dr Manock's conduct of the autopsy was incompetent.[12]

6.2.2 Differential staining

6.2.2.1. It can be demonstrated now that the 'differential staining' phenomenon described to the jury by Dr Manock as a "classical sign of fresh water drowning" had, at the time Dr Manock gave this evidence, no scientific basis.[13]

6.2.2.2. Attempts which have been made by Professor Roger Byard of the Forensic Science Centre, Adelaide, to establish that haemolytic staining of

[11] See Memoranda of Professor Ian Maddocks, Professor Peter McDonald and Dr Mark Coleman – Annexure '2B'.
[12] In the Medical Professional Conduct Tribunal, No. 7 of 2008 (21 January 2008); Medical Board of South Australia and Dr Colin Henry Manock. Annexure '2H'.
[13] See: "Differential staining." – Annexure '2U'.

the aorta with no staining of the pulmonary artery as described by Dr Manock is diagnostic of fresh water drowning have failed.[14]

6.2.2.3. Further, the phenomenon of 'differential staining' has been demonstrated to occur in cases of natural death other than drowning.[15]

6.2.3 Re-enactment

6.2.3.1. An expert in photogrammetry has provided an opinion on the level of water in the bath at the scene. [16] It shows that the bath was about half full, not up to three quarters full as Dr Manock was asked at the trial to assume when he put his scenario of the manner of death to the jury.

6.2.3.2. A subsequent re-enactment of the scenario proposed by Dr Manock has found that it was not possible to re-create a situation which was consistent with or explained the alleged bruising. It has been found that with the calculated amount of water in the bath the nose and mouth of a person would not have been covered by the water when their legs were raised and then folded over. It has been further found that the arms would not be trapped by the side of the bath as stated and it would not be possible for the right leg (shin) to make contact with the end of the bath.[17]

PART 2: 2008

6.2.4 7 August 2008 at the Forensic Science Centre

6.2.4.1. On 7 August 2008 Professor Thomas was provided with the opportunity to again examine the relevant tissue slides held at the Forensic Science Centre, Adelaide, and did so with Dr Harry Harding.

6.2.4.2. The fronts of the slides were labelled with stick-on labels. However Dr Harding observed marks on the front of the slides which caused him to examine the reverse sides of the slides. For the first time it became apparent that there were other notations on the slides, obscured by the

[14] The published articles on differential staining are Annexure '2V'.
[15] Affidavit of Associate Professor Anthony Charles Thomas, 22 November 2007. Annexure '2G'.
[16] Statement of Emeritus Professor John Graham Fryer in the matter of Henry Keogh and bath depth, 15 May 2007. Annexure '2C'.
[17] Affidavits 1 and 2 of Professor Maciej Henneberg, 18 December 2008. Annexures '2D', '2E'.

labels, which provided further information relating to the sites from which the tissue contained in the slides was taken.[18]

6.2.4.3. Subsequent analysis alerted the Petitioner's legal advisers that there were in fact two slides from the medial side of the left leg which revealed no evidence of bruising and not just one slide as the Medical Board had previously been told by Dr James and by Dr Manock.

6.2.4.4. These two slides are referred to as being 'levels'. It can be inferred from the existence of the second slide that the second slide was a section cut at a deeper level of the tissue because there was concern about the result of the initial section which had been taken. To take a simple analogy -- if a scientist was asked to test the ingredients in a loaf of bread, it would be appropriate to test one of the first slices from near the top (level 1). If that gave rise to concern, it might be appropriate to take another slice from further down the packet (level 2) in order to confirm the original finding.

6.2.4.5. Accordingly, on 7 August 2008 the Petitioner became aware for the first time that there were in fact five slides relating to bruising, not four as he had been led to believe, and that two of those five slides showed no evidence of bruising, not just the one that had previously been discovered. This means that there were three slides from the left leg which were relied on by the prosecution to establish the alleged grip pattern and two of those slides do not show evidence of bruising.

6.2.4.6. The recognition of the second left leg medial slide together with its labelling allowed the Petitioner's advisers for the first time to gain a proper understanding and interpretation of the reference to 'levels' by Dr James in his evidence.

6.2.4.7. This meant that for the first time it was possible to establish definitely that when Dr James told the jury that both of these slides showed "skin with bruising" he was wrong for both of them.[19]

---

[18] "Further examination and re-assessment of the histology slides in the matter of Anna Jane CHENEY (deceased)." Report by Dr Harry WJ Harding, 30 September 2008 – Annexure '2S'.
"Attendance at Forensic Science Centre 7th August 2008." Report by Professor AC Thomas, 7 September 2008 – Annexure '2Q'. See also Annexure '2T" – "Histology – description and discussion".

6.2.4.8. The recognition of these two slides also established for the first time that in his evidence Dr James did not tell the jury a histology result for the slide from the lateral (outer) side of the left leg. This non-disclosure is of significance in that it has always been understood by the Petitioner and those advising him, and it would have been so understood by the jury, that at least by implication one of the slides Dr James described in his evidence was from the lateral side of the leg.

6.2.4.9. The identification of the second slide coupled with the non-disclosure by Dr Manock and Dr James of its existence notwithstanding their knowledge of it and its significance demonstrates the presentation to the jury by them of a "false and distorted scientific picture" and confirms the extent of their dishonesty and deception.

6.2.5 <u>17 September 2008 at the Forensic Science Centre</u>

6.2.5.1. On 17 September 2008 a copy of the hand-written notes made by Dr James at the time he reviewed the work of Dr Manock in 1994 were disclosed to the Petitioner.[20] This was the first time the Petitioner had access to these notes despite previous repeated requests.
These notes show *inter alia* that Dr James not only saw but he also examined during his review the photograph of the medial side of the left leg of the deceased which became Exhibit P53. This was contrary to his evidence at the trial.[21, 22]

6.2.5.2. On 17 September 2008 a report by Dr James to the Director of Forensic Science dated 6 November 2000 was disclosed to the Petitioner. In this report Dr James admitted that his view at the time of the trial was that the post mortem findings by themselves do not prove homicide and

---

[19] James; second trial, p222 XXN. "Clearly the slide labelled 'Head' shows skin with bruising and the one labelled 'Skin' shows bruising and I have also a note of levels 2 and 3 which are also of skin with bruising." Annexure 'L'.
[20] Annexure '2N'.
[21] See: "Dr James and photograph Exhibit P53 in 1994". Report by Dr HWJ Harding, 28 August 2008. Annexure '2R'. See also affidavit of RD Sheehan, 23 April 2008 – Annexure '2J'.
[22] James; first trial, p519 XN; second trial, p207 XN. "I haven't seen a photograph of the bruise on the medial side." – Annexures 'I' and 'L' respectively

that in this regard his views differed from those of Dr Manock.[23] This was contrary to his evidence at the trial.

6.2.5.2.1. The reality therefore is that Dr James agreed with the views expressed by the defence experts whereas the only inference that could be drawn from his evidence is that he agreed with Dr Manock. The jury was misled, as was the Court of Criminal Appeal.

6.2.5.3. On 17 September 2008 a report by Dr James headed "Review of histology slide re: Anna Jane CHENEY (dec'd 18/3/94)" and dated 9 November 2000 was disclosed to the Petitioner. This revealed that in 2000 Dr James had re-examined the original post mortem tissue slides that had been the subject of his evidence at the trial. In that re-examination he had found that only three of those slides in fact showed evidence of bruising. This was contrary to his evidence to the jury that there were four slides of bruising.[24] This finding by Dr James has not been revealed at any hearing or proceedings.

6.3 Summary of the new evidence

The following constitutes new evidence:

1. The respective and unequivocal conclusions drawn by three medical experts who were members of the Medical Board that heard the complaint by the Petitioner concerning Dr Manock in November 2004 was that Dr Manock's conduct of the autopsy was incompetent.
2. The Medical Board has asserted that Dr Manock's conduct of the autopsy was so incompetent that no conclusion can safely be drawn as to both the cause and manner of death.

[23] Report of Dr James to Dr Hilton Kobus, Director, Forensic Science Centre, re "The Cheney case", 6 November 2000, para 6f. "I don't think that the postmortem findings by themselves prove homicide. … I held these views at the time of the trial …" Annexure '2O'
[24] James; "Review of histology slide re: Anna Jane CHENEY (dec'd 18/3/94)" dated 9 November 2000. Annexure '2P'.

3. The Medical Board found that Dr James was guilty of unprofessional conduct in that he failed to disclose relevant information to the Court concerning the histology of one mark on Ms Cheney's body.[25]

4. Dr James has admitted that it was always his opinion that the pathology evidence does not prove homicide.

5. Prior to 7 August 2008 those advising the Petitioner were only aware that there were four slides relating to bruising, one of which showed no evidence of bruising. As previously understood, there was one slide from the head, one slide from the right leg and two slides from the left leg. It has now been established that there are five slides relating to bruising, two of which show no evidence of bruising. It is known now that these two slides are from the medial side of the left leg. Thus there are in fact three slides which relate to the alleged grip pattern on the left leg, and two of those slides do not show bruising and therefore do not support the mark on the medial side of the left leg as being a bruise.

6. Attempts which have been made to establish that haemolytic staining of the aorta with no staining of the pulmonary artery ('differential staining') described by Dr Manock as diagnostic of fresh water drowning have failed.

7. The phenomenon of 'differential staining' has been demonstrated to occur in cases of natural deaths which do not involve drowning.

8. Dr James did see Exhibit P53, the photograph of the medial side of the left leg of the deceased and which was said to show the alleged bruise on that side of the leg, contrary to his evidence at both trials that he had not seen such a photograph.

9. It can be shown now that the bath was only about half full, not up to the three quarters full that Dr Manock was asked to assume in his evidence.

10. A subsequent re-enactment of the manner of death scenario proposed by Dr Manock has found that it was not possible to re-create a situation that could re-produce either the alleged bruising or the alleged drowning.

[25] The Medical Board of South Australia; HV Keogh, complainant, RA James, respondent, *Reasons for decision*, 2 April 2008. Annexure '2I'.

6.4 Incorrect Evidence

6.4.1 A significant implication of the new evidence is that it can now be shown that when Dr James told the jury that histology slides "levels 2 and 3" were "of skin with bruising" he was wrong. It is known now that neither of these slides show skin and neither show bruising.[26] Dr James in 2000 has himself confirmed this error (although this was not revealed to the Petitioner until 17 September 2008).[27]

6.4.2 The Petitioner contends that this incorrect evidence by Dr James led the jury to believe that the four histology slides that he had described all showed bruising and therefore confirmed the mark on the medial side of the left leg as a bruise, when this was not so, and thereby supported Dr James's evidence that the marks were a grip. The Petitioner pleads that this error by Dr James is sufficient of itself to have his conviction set aside.[28]

6.5 Relationship of fresh or new evidence and fraud

6.5.1 In the consideration of the new evidence outlined above the Petitioner asserts the rules relating to fresh or new evidence have no application when fraud and deceit are established.[29]

6.5.2 In the alternative the Petitioner asserts the facts pleaded are properly categorized as fresh or new evidence.

---

[26] Report of Dr AC Thomas, "Attendance at Forensic Science Centre 7th August 2008", 7 September 2008. Annexure '2Q'.
[27] James; "Review of histology slide re: Anna Jane CHENEY (dec'd18/3/94)" dated 9 November 2000. Annexure '2P'. See Annexure '2S' for discussion of this report.
[28] "… on discovering the untruth *the decision should be set aside* - without embarking on an enquiry whether he was fraudulent or not." *R v West Sussex Quarter Sessions; Ex parte Albert and Maud Johnson Trust Ltd* [1973] 3 All ER 289 at 296 per Lord Denning. (emphasis added)
[29] "Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the court." *Farley (Aust) Pty Ltd v JR Alexander & Sons (Q) Pty Ltd* (1946) 75 CLR 487 at 493, cited in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 at [15].

6.6 Significance of the new evidence

6.6.1 Because of the non-disclosure and dishonesty none of the information that became available to the Petitioner on and after 7 August 2008 has been presented to any Board, Tribunal or Court or to the former Solicitor-General who advised on the Third Petition.

6.6.2 The Petitioner submits that the material discovered on and since 7 August 2008 (after the rejection of the Third Petition) compels the referral of his case to the Court of Criminal Appeal. The material discovered is an essential part of the "whole case" which the Court is required to consider. (See *Mallard v The Queen* [2005] HCA 68) The cumulative effect of the discovery of the failures now referred to amount to a material irregularity. (*Ward* (1993) Cr App R 1 at 51) The Petitioner should not have had to "fossick" for this information. (*Grey v The Queen* [2001] HCA 65 at [23])

7. Fraud: non-disclosure, dishonesty, manifest error and incompetence

In describing the elements of fraud it is assumed those advising the Government have an awareness of the participation of the various individuals involved in the case as well as the background circumstances[30] and the chronology of events.[31]

7.1 Non-disclosure by the prosecution of relevant facts

7.1.1 Dr Manock did not disclose to the jury that his opinion as to cause of death based on his alleged observation of differential staining[32] had no

[30] Resume of the background circumstances. Annexure 'A'.
[31] Chronology of events and proceedings – 1994 to present. Annexure 'B'. The Chronology shows that this Petition represents the tenth attempt by the Petitioner to have his case heard and decided on the merits. To date he has not been successful in that endeavour. The Petitioner has also been engaged in complex litigation arising out of various complaints he has made to the Medical Board of South Australia concerning the professional conduct of Dr Manock and of Dr James. These complaints have yet to be finally determined. The Chronology also reveals his endeavour has occupied over thirteen years. Given those circumstances the Petitioner pleads that the interests of justice demand finality.
[32] See: 'Differential staining" – Annexure '2U'.

scientific validity or peer support and that he was advancing a novel theory.[33]

7.1.2 Dr James did not disclose to the jury that his opinion as to cause of death based on observations said to have been made by Dr Manock had no scientific validity or peer support and that he was advancing a novel theory.[34]

7.1.3 Dr Manock did not disclose to the jury that there were in fact five microscope slides of the bruises, two of which related to the medial side of the left leg.[35]

7.1.4 Dr James did not disclose to the jury that there were in fact five microscope slides of the bruises, two of which related to the medial side of the left leg.[36]

7.1.5 Dr Manock did not disclose to the jury the true result of his histological examination of the various tissue slides.[37]

7.1.6 Dr James did not disclose to the jury the true result of his histological examination of the various tissue slides.[38]

7.1.7 Dr Manock did not disclose to the jury that he did not know the depth of water in the bath.[39]

7.1.8 Dr James did not disclose to the jury that he did not know the depth of water in the bath.[40]

---

[33] Manock: Medical Board hearing, November 2004, pp339-40 XXN. "… the rest of the world hadn't caught up." Annexure 'T'. See also Annexure '2U' – "differential staining" and *Makita*, footnote 102.
[34] James; Medical Board hearing, November 2004, p316 XXN. "… it's personal observation in cases … I've noticed it in a number of cases." Annexure 'U'. See also Annexure '2U' – "differential staining".
[35] Manock; second trial, p182 XXN. "Of the bruises, four." Annexure 'K'. See also Annexures '2S' (report by HWJ Harding), '2Q' (report by AC Thomas) and '2T' ("histology").
[36] James; second trial, p216 XXN. "Q. We have got four slides from 14 bruises. A. Yes." Annexure 'L'. See also Annexures '2S' (report by HWJ Harding), '2Q' (report by AC Thomas) and '2T' ("histology").
[37] Manock; Medical Board hearing, November 2004, p388 XXN. "It wasn't part of the conversation." Annexure 'T'.
[38] James; Medical Board hearing, November 2004, p305 XXN. "I didn't think it was particularly relevant." Annexure 'U'. This can not be "a sufficient reason for not disclosing results" – see section 4.2.6.
[39] Manock; Medical Board hearing, November 2004, p 361XXN. "It all depends on the depth of the water, and we don't know what it is." Annexure 'T'.
[40] James; Medical Board hearing, November 2004, p323 XXN. "I've got no idea. I wasn't privy to the issues about the volume of water in the bath; …" Annexure 'U'.

7.1.9 Dr Manock did not disclose to the jury that his scenario as to manner of death which he presented in Court was but one of a number of scenarios which he believed could provide an explanation for the manner of death.[41]

7.1.10 Dr Manock did not disclose to the jury that in his autopsy report he said that he found that the airway of the deceased was packed with gastric contents and that this could have occurred ante-mortem.[42] That being the case, then Dr Manock failed to inform the jury that death may have been due to asphyxiation resulting from the inhalation of gastric contents, that is, death by an accidental cause.

7.2 Dishonesty

7.2.1 Dr Manock deceived the jury when he told them that he observed all the bruising on the body at the autopsy on the Sunday,[43] when to his knowledge that was not true.

Explanation

It is known now that Dr Manock did not see any of the alleged bruising on the left leg of the deceased until sometime on the following day (Monday, 21 March 1994) when he re-examined the body. None of the marks on the left leg are recorded in Dr Manock's initial report of his examination performed on the Sunday.[44]

Significance at the trial

If Dr Manock had told the truth the jury would have been alerted to the possibility that the alleged bruises on the left leg were not in existence until some time after the initial autopsy, that is, the possibility that they had been caused after death. If Dr Manock had recorded in his autopsy report the fact that he did not see the marks on the left leg when he first examined the body on the Sunday both the prosecutor and defence counsel would also have been

[41] Manock; Medical Board hearing, November 2004, pp366-72,420-7 XXN. "… it's not necessarily the right hand that causes the grip." (p367) Annexure 'T'.
[42] Statement of Colin Henry Manock, 29 April 1994 at pp3-4. "Larynx, trachea and main bronchi were packed with fluid and gastric contents but it was difficult to ascertain whether this was an antemortem phenomenon or resulted from external cardiac massage and artificial respiration." Annexure 'D'.
[43] Manock; second trial, pp164-5 XN. "I didn't see it until Sunday, mid morning." Annexure 'K'.
[44] Annexure 'C'. The crossed out date at the end of the report shows that it was typed on 22 March 1994.

made aware of the possibility that the marks were caused after death. They may have been artifactual (caused by the autopsy process) or they may have been caused in removing the body from the premises. As it was, the jury was knowingly presented with a "false and distorted scientific picture" of the situation. (See also paragraph 7.2.7 below.)

7.2.2 Dr Manock deceived the jury when he demonstrated to them his proposed manner of death. He knew at that time that it was his opinion that the alleged grip mark on the left leg of the deceased was from a left hand.[45] However, he demonstrated to the jury with his right hand how the left leg had been gripped[46] and told them:

> It was possible to cover the bruises by putting a hand over the leg and a thumb approximating to the bruise on the inner aspects of the left leg and the three forefingers would encompass the bruises on the right aspect. That is if the right hand is placed beneath the calf and the thumb then comes on the inside of the calf.[47]

Explanation

The jury was deceived by Dr Manock when he said that the right hand of the assailant was placed beneath the calf of the left leg of the deceased when he knew that was not his opinion as to how the alleged marks were caused. Further, Dr Manock did not know if the left leg had been gripped, and if it had, which hand was used and nor did he know whether if the leg was supposedly gripped it was from below the leg or from above the leg.[48]

Significance at the trial

This evidence was directly relevant to Dr Manock's theory as to the manner in which the deceased was killed. If Dr Manock had told the truth concerning his real opinion he could not have advanced his theory in the manner in which he

[45] Manock; Medical Board hearing, November 2004, pp368, 420 XXN. "It was my opinion that the mark left on the left leg of the deceased was a grip from the left hand." Annexure 'T'.
[46] Manock; second trial, pp166-8 (includes demonstration). Annexure 'K'.
[47] Manock; second trial, p155 XN. Annexure 'K'.
[48] Manock; Medical Board, November 2004, pp367-70, 422-4. Annexure 'T'. At the committal, Manock said that it was 'a grip by a right-hand' (Annexure 'F', p25); at the first trial he said his own left hand fitted and then told the jury that from the position and shape of the bruises "it would appear to be a right hand" that was used (Annexure 'H', p457).

did (a direct demonstration using his right hand, carefully noted by the trial judge), which must have had a considerable impact on the jury and looked feasible to them. If Dr Manock had used his left hand it would have been clear to the jury that it would have been either impossible or at least very difficult for the alleged drowning to have occurred in that way as the left hand could not be holding the head under the water if it was gripping the leg.

The trial judge would not have permitted the demonstration if he had known Dr Manock's true opinion. Further, Dr Manock's proposed manner of death was a classical example of speculation based on a possibility, a practice which the law specifically prohibits.[49]

7.2.3 Dr Manock lied to the jury when he said:

> I have actually written on the chart that the bruises on the right shin were well-established and I have written on the left leg that they were faint. My view as to the difference between those after microscopic examination was that it was simply because of the thickness of the skin that they appeared different. The bruising over the bone and the blood is trapped between the solid surface and thin skin, whereas that on the calf is separated by subcutaneous fat.[50]

Explanation

Dr Manock explained the difference referred to on the basis that when he examined the relevant tissue slides under the microscope he observed skin. It is known now that there is no skin at all on the relevant tissue slides.[51] *Neither is there any bruising.*[52] *His explanation was untrue.*

Significance at the trial

The message conveyed to the jury by Dr Manock's answer was that his microscopic examination showed that there was a bruise on the medial side of the left leg. This was to his knowledge untrue.

---

[49] It is inappropriate for expert witnesses to engage in speculation in the sense of conjectures which are not based on established scientific research. *Straker v The Queen,* High Court of Australia [1977], 15 ALR 103
[50] Manock, second trial, pp189-90 XXN (emphasis added). Annexure 'K'.
[51] Report of Dr AC Thomas, "Attendance at Forensic Science Centre 7th August 2008", 7 September 2008. Annexure '2Q'.
[52] Affidavit of Dr Anthony Charles Thomas, dated 2 February 2004. Annexure 'R'.

The prosecutor in his final address told the jury that the appearance and the relative positions of the bruises (the 'grip' mark) on the left leg was the "one positive indication of murder".[53] *He could not have made that submission if Dr Manock had told the truth.*

7.2.4 Dr Manock deceived the jury when he told them that the photograph Exhibit P53 showed a bruise on the medial side of the left leg of the deceased[54] when he knew from his own observations that the histology did not support the mark as being a bruise.[55]

Significance at the trial

At the request of the prosecutor, Dr Manock drew a circle on the photograph around the area he said showed a bruise on the medial side of the left leg before the photograph was shown to the jury.[56] *When he drew the red circle on the photograph in the presence of the jury he knew that the mark he purported to circle was not a bruise. He conveyed the impression the mark was a bruise when he knew that was not true.*

7.2.5 Dr Manock deceived the jury when he told them that from his microscopic examination of the histology slides the bruising on the legs of the deceased occurred "close to the time of death"[57] when he knew from his own observations that two of the slides did not even show evidence of bruising.

Explanation

Dr Manock said that he based his opinion as to when the bruising on the legs had occurred on the absence of white cells migrating to the site of the bruising. He further told the jury that "all the bruises appeared to be the

[53] Paul Rofe QC, Crown address, second trial, p1022. Annexure 'N'.
[54] Manock; second trial, p170 XN. "Q. Is the bruise visible in the photograph? A. Yes." Annexure 'K'.
[55] Manock; Medical Board hearing, November 2004, pp376-8. "That the histology doesn't support the fact that it's a bruise; …" Annexure 'T'.
[56] Manock; second trial, p170 XN. Annexure 'K'.
[57] Manock; second trial, p156 XN. Annexure 'K'.

same".[58] *But in two of the slides there was no bruising and therefore no red blood cells to potentially attract the white cells, and his answer was wrong and misleading.*[59]

Significance at the trial

In his final address the prosecutor told the jury:

> *If those four bruises on her lower left leg were inflicted at the same time, and that time was just before she died in the bath, there is no other explanation for them, other than a grip. If it was a grip, it must have been the grip of the accused. If it was the grip of the accused, it must have been part of the act of murder.*[60]

He could not have made that submission if Dr Manock had told the truth.

7.2.6 Dr James deceived the jury when he told them that the circumstances under which the deceased was found supported the conclusion that her death was by fresh water drowning,[61] when he did not know how much water was in the bath.

Explanation

Dr James has told the Medical Board that in 2004 he still had "no idea" of the volume of water in the bath and did not know what the circumstances were concerning the bath. [62]

Significance at the trial

Dr James led the jury to believe that there were no issues of concern surrounding the circumstances at the scene of the death.

7.2.7 Dr James deceived the jury when he told them that all the bruises on the head and on the legs seemed to have occurred at or about the same time[63]

[58] Manock; second trial, p186 XXN. Annexure 'K'.
[59] See Annexure '2T' – histology – for explanation of the process.
[60] *R v Keogh*, second trial, Crown address, p1062 (emphasis added)
[61] James; second trial, p200 XN. "… and the described circumstances under which the deceased was allegedly found, all support fresh water drowning …" Annexure 'L'.
[62] James; Medical Board hearing, November 2004, p323. "I've got no idea. I wasn't privy to the issues about the volume of water in the bath; …" Annexure 'U'.

but did not tell them that in his view the alleged bruises on the left leg could reasonably be postmortem in occurrence.

Explanation

It is known now that at the time of the trial Dr James's view was that bruises not seen on the body of the deceased at the scene but subsequently seen at the autopsy could reasonably be considered as being postmortem in origin.[64] *In this case this view applied to the alleged bruises on the left lower leg. (See paragraph 7.2.1 above.)*

Significance at the trial

By not telling the jury his view Dr James deprived them of the opportunity to consider the possibility that some of the alleged bruises had been caused after death -- the possibility, for example, of persons handling the body in a manner which could have produced some bruising.

The significance of Dr James's failure to tell of his view is increased when it is combined with Dr Manock's failure to tell the jury that the alleged bruises on the left leg were not seen until the day of the second autopsy procedure. (See paragraph 7.2.1 above.)

7.2.8 The following statement made by Dr James to the jury was untrue:

I haven't seen a photograph of the bruise on the medial side.[65]

Explanation

It is known now that Dr James's notes of his review of the work of Dr Manock describe the photograph that became Exhibit P53 when it was tendered at the second trial, and which was said by Dr Manock to show a bruise on the medial side of the left leg. It is also known now that this is the only such

---

[63] James; second trial, p214. "The section of the bruise apparently from the top of the head looks much like the bruising appearance from the sections from the legs. They all seemed to have occurred at or about the same time." Annexure 'L'.

[64] James; report to Kobus, 6 November 2000, para 6d. "Had the leg bruises been seen at the postmortem examination and not when the body was removed from the bath then the issue of postmortem bruising could reasonably be raised. … I held these views at the time of the trial …" Annexure '2O'.

[65] James: second trial, p207 XN. Annexure 'L'.

photograph that was taken at the autopsy. It is further known now that Dr James's notes of his examination of that photograph do not describe the presence of any mark on the medial side of the left leg.[66] *He should have told the jury that he had seen the photograph of the medial side of the left leg but did not see in that photograph a bruise at that location.*

Significance at the trial

The jury at the first trial was unable to agree upon a verdict. A significant difference between the evidence led at the first trial by the prosecution and the evidence led at the second trial was the production at the second trial of the photograph Exhibit P53 which was said by Dr Manock to demonstrate that there was a bruise on the medial side of the left leg. The first jury was not aware of the existence of this photograph.

The second jury had been shown the photograph P53 shortly before Dr James gave his evidence. Dr James, by his answer here, inferred there was a bruise on the medial side of the left leg ("the bruise") but said he had not seen a photograph of it, effectively giving the jury the impression that Dr Manock's evidence that photograph P53 showed a bruise was correct when it was to his (Dr James's) knowledge untrue. It is known now (see paragraph 7.2.9 below) that when Dr James told the jury this he also knew that there was no histological evidence for there being a bruise on the medial side of the left leg. The jury was deceived.

7.2.9 Dr James lied to the jury when he said:

> Mr David: From that you could say you have seen four slides of bruising.
> **Dr James: Yes.**[67]

Explanation

Dr James could not possibly have seen four slides of bruising. It is known now that there are only three slides which could be said to show bruising.[68] *His*

[66] See document: *Dr James and photograph Exhibit P53 in 1994*, Dr HWJ Harding, 28 August 2008. Annexure '2R'.
[67] James, second trial, p223 XXN. Annexure 'L'.

answer was, to his knowledge, untrue. He has subsequently told the Medical Board that he knew at the time of the trials, and it was clear in his mind when he gave his evidence at the second trial, that one of the four slides he was referring to at that trial did not show bruising.[69] *He has admitted that he did not tell the jury this.*[70] See also point 5 of paragraph 6.3 (Summary of the new evidence) above.

Significance at the trial

At the second trial the jury had a copy of Dr Manock's body chart, Exhibit P52. (This had not been made available to the first jury.) The chart showed the jury that there were four locations on the deceased's body marked as being the sources of the tissue samples taken for histology. One of those locations was the alleged bruise on the medial side of the left leg. Dr James told the jury that he had examined all the available slides. His agreement that he had seen four slides of bruising was a clear indication to the jury that the tissue from all four locations tested showed bruising when this was in fact not true for the tissue from medial side of the left leg.

7.2.10 Dr James deceived the jury by not disclosing that it was his opinion that the autopsy findings did not prove homicide.[71]

Explanation

It is known now that at the time of the trial Dr James held this opinion. It is further known now that Dr James was aware at the time that his views with

---

[68] Affidavit of Dr Anthony Charles Thomas, dated 2 February 2004. Annexure 'R'. See also report of Dr Thomas, 7 September 2008 (Annexure '2Q') and report of Dr HWJ Harding, 30 September 2008 (Annexure '2S').

[69] James; Medical Board hearing, November 2004, p302 XXN. Annexure 'U'.

> "Mr Borick: When you gave that evidence [at the second trial] you were aware that you had looked down the microscope, looked at what was supposed to be a bruise on the medial side of the left ankle and decided that it was not a bruise.
> Dr James: Yes.
> Mr Borick You knew that was clear in your mind.
> Dr James: Yes."

[70] James; Medical Board hearing, November 2004, p305 XXN. "I don't think it was something that was particularly asked of me … I didn't think it was particularly relevant." Annexure 'U'.

[71] Report of Dr James to Dr Hilton Kobus, Director, Forensic Science Centre, re "The Cheney case", 6 November 2000, para 6f. "I don't think that the postmortem findings by themselves prove homicide. … I held these views at the time of the trial …" Annexure '2O'.

regard to homicide differed from those of Dr Manock, yet other than his evidence regarding unconsciousness and bruising of the brain he did not make his opinion clear to the jury. He supported Dr Manock's opinion as to cause of death and also as to manner of death to the extent that he promoted the view that the marks on the legs should be considered to be grip marks until shown to be something else.

Significance at the trial

Dr James was presented to the jury by the prosecution as having reviewed Dr Manock's findings. He had a duty to make it clear to the court any different views that he held to those of Dr Manock.

7.2.11 Dr James was always aware the jury was misinformed.

Explanation

Dr James has admitted since the second trial that he knew before the trials that he differed from Dr Manock with regard to the histological proof of bruising in the tissue from the medial side of the left leg. [72] *He has admitted that he did not tell the jury his opinion.* [73] *But he has told the Director of Forensic Science that his differing views were presented to the jury and he has told the prosecutor (the then Director of Public Prosecutions) that the jury was a well informed jury as they should have been given the different views of the various pathologists concerning the medical evidence.*[74]

Significance at the trial

By not telling the jury his true opinion concerning the nature of the mark on the medial side of the left leg Dr James allowed the jury to believe the evidence of Dr Manock. If Dr James had told the truth concerning his view of

[72] Affidavit, Dr Ross Alexander James, 23 June 2004, para 7. "I recall that one area that Dr Manock and I differed was that the body chart he had drawn showed that there was bruise [sic] on the inside left ankle. When I looked at the histological section purported to have been taken from this area, I would not have described what I saw in the sample as a bruise." Annexure 'S'.
[73] James; Medical Board hearing, November 2004, p305 XXN. Annexure 'U'.
[74] Report of Dr James to Dr Hilton Kobus, Director, Forensic Science Centre, re "The Cheney case", 6 November 2000, para 3 –Annexure '2O';
Letter of Dr James to Paul Rofe QC, Director of Public Prosecutions, 30 October 2001, para 2 –Annexure 'P'.

the histology and the nature of the mark on the medial side of the left leg it should have resulted in Dr Manock also having to reveal to the jury his true result for the histology (as subsequently happened in the Medical Board hearing concerning Dr Manock in November 2004 in which Dr James did make his view known).[75] *It certainly would have had an effect on the evidence of Professor Ansford, who told the jury that in forming his opinion he relied on the evidence of Dr James, amongst others, concerning the examination of the histology slides.*[76]

7.3 Manifest error

7.3.1 Dr Manock was aware of his duties and obligations but deliberately or incompetently disregarded them.

7.3.2 Dr James was aware of his duties and obligations but deliberately or incompetently disregarded them.

7.3.3 The decision made by defence counsel not to challenge the admissibility of the expert evidence led by the prosecution was deficient and constituted a material irregularity in the conduct of the trial.

7.4 Incompetence

7.4.1 Dr Manock's conduct of the autopsy was incompetent.[77]

7.4.2 Dr Manock had a long history of incompetence.[78]

---

[75] Manock; Medical Board hearing, November 2004, p376 XXN. Annexure 'T'. James did not make his view known because he did not think it was particularly relevant: James; Medical Board hearing, November 2004, p305 XXN. "I don't think it was something that was particularly asked of me … I didn't think it was particularly relevant." Annexure 'U'.

[76] Ansford; second trial, pp946-7 XXN. Annexure 'M'.

"Rofe: Have you seen the slides taken in this matter.
Ansford: No, I read the evidence of various people with respect to the slides, and as far as I could see they were all in agreement, at least on the microscopic appearances, and I didn't think it would assist at all, that my view would be any different given the people that had looked at them.
Rofe: That is people of the calibre of Dr James and Professor Cordner and Dr Manock.
Ansford: Yes."

[77] See Memoranda of Professor Ian Maddocks, Professor Peter McDonald and Dr Mark Coleman – Annexure '2B'. See also report of Professor Cordner – Annexure 'V'.

[78] See Moles RN, *A state of injustice,* Lothian Books, Melbourne, 2004;

7.4.3 Dr James's review of Manock's autopsy procedure was incompetent.[79]

7.4.4 The prosecutor was aware of obvious discrepancies in the evidence given by Dr James and Professor Cordner as to the number of slides they examined. [80] He made no attempt to resolve those discrepancies at the second trial. That was incompetent.

7.4.5 Both prosecuting counsel and defence counsel were aware of the existence of the photograph Exhibit P53 said to show a bruise on the medial side of the left leg of the deceased. It was tendered at the second trial but not tendered at the first trial. When Dr James gave his evidence at the second trial neither counsel referred him to Exhibit P53.[81] It is not known what Dr James would have said if he had been shown P53 when he was in the witness box given that contrary to his evidence his notes of his review reveal he had seen that photograph and by inference he did not believe it showed a bruise.[82] It was a "fertile area of cross-examination that could have been tilled" by the Petitioner.[83] The failure by counsel to put P53 to Dr James was incompetent.

7.5 Significance of Exhibit P53

7.5.1 Aspects of Exhibit P53 have been discussed above but it is appropriate to collate those various points to understand and appreciate the significance of P53 and its effect on the trial process.

Moles RN & Sangha BM, Comparative experience with pediatric pathology and miscarriages of justice: South Australia, in Roach K, *Pediatric forensic pathology and the justice system*, Volume 2, Ontario Ministry of the Attorney General, Canada, 2008, pp283-324.
Both of these references discuss the *Finding of Inquest into the Deaths of Storm Don Ernie Deane, William Anthony Barnard, Joshua Clive Nottle* , 25 August 1995, by the Coroner for South Australia (Mr Wayne Chivell) referred to in the first application to re-open the appeal.
See also 'Expert witness', ABCTV, http://www.abc.net.au/4corners/stories/s397448.htm.

[79] See report: "Further examination and re-assessment of the histology slides in the matter of Anna Jane CHENEY (deceased). Report by Dr Harry WJ Harding, 30 September 2008." Annexure '2S'.

[80] Cordner; first trial, p1026 XXN. Annexure 'J'.

> "Rofe: … You cannot help, except that you had an additional slide marked 'leg'.
> Cordner: There were clearly four different bruises represented in the material I saw."

[81] See evidence of James, second trial, pp194-223 – Annexure 'L'. See also Annexure '2K', pp6-7; "… it has always been Dr James' position that that photograph, A, was not produced to him when he gave evidence at either trial …"

[82] See Annexure '2R'. "Dr James and photograph Exhibit P53 in 1994" – report by HWJ Harding.

[83] *Grey v The Queen* [2001] HCA 65 at [18]

7.5.2 P53 was not tendered at the first trial. There can be little doubt its tender at the second trial, along with the tender of the body chart P52, were significant factors in the transition from indecision at the first trial to a verdict of guilty at the second trial. (P52 was also tendered only at the second trial.)

(1) When this exhibit was tendered at the second trial it was described (by the trial judge) as "Photograph of the inner aspect of left leg".[84]

(2) It was tendered late in Dr Manock's evidence at second trial. The defence were apparently not given any forewarning of its introduction into evidence. This does not comply with proper procedure.

(3) Defence counsel did not object to the tender. This indicates incompetence of counsel/failure of procedure.

(4) The prosecutor asked Dr Manock to draw a circle on the photograph around the alleged bruise. If the mark had been obvious this would not have been necessary. Dr Manock marked the exhibit. The jury therefore did not get to see the photograph without the circle and were thereby deprived of the opportunity to decide for themselves whether they were satisfied the photograph showed a mark. At the very least this action by the prosecutor was unfair.

(5) It is known now that when Dr Manock drew the circle he knew from his examination of two histology slides that the mark was not a bruise.[85] But by marking the photograph he conveyed to the jury that it <u>was</u> a bruise. Dr Manock misled the jury.

(6) Dr James told the jury: "I haven't seen a photograph of the bruise on the medial side".[86] It is known now that was a lie by Dr James – he had in fact seen and studied the photograph that became P53, the photograph that the jury had just been told showed a bruise on the medial side of the left leg. The

[84] Manock; second trial, p170 XN. Annexure 'K'.
[85] Manock; Medical Board hearing, November 2004, pp376-8 XXN. Annexure 'S'.
[86] James; second trial, p207 XN. Annexure 'L'.

jury would have taken Dr James's statement to mean that he had not seen P53.

(7) Dr James then told the jury: "But if it [the bruise] was present as he [Dr Manock] suggests, then a grip mark is the obvious explanation." This indicated clearly to the jury that his opinion concerning a grip relied on this mark being a bruise. They would have taken Dr Manock's circling the mark on the photograph to confirm the presence of a bruise and thus confirm Dr James's opinion that the mark was part of a grip mark. Dr James deceived the jury.

(8) Exhibit P53 was not shown to Dr James by either counsel, nor was he questioned about it. This is incompetence of counsel. Their failure to do so meant that Dr James's lie was not uncovered.

Fully understood the tender of P53 has the potential to become a significant factor in the eventual outcome of this Petition.

8. 'Of no consequence'

8.1 It has been claimed that the alleged incompetence and non-disclosure are of no consequence because the prosecution case at trial depended on other circumstantial evidence in order to establish the Petitioner was guilty of murder.[87] The effect of this claim is that the pathology evidence was of only minor significance in the overall scheme of the case.

8.2 The Petitioner asserts the claim of no consequence is manifestly wrong for the following reasons:

8.2.1 Dishonesty and manifest error have been established and accordingly the trial was unfair and a miscarriage of justice has occurred.

8.2.2 The evidence presented as to cause of death was of critical importance to the prosecution case.

87 *James v Keogh* [2008] SASC 156 at [83], [84]. Judgment of Debelle J, 13 June 2008. Annexure '2L'.

8.2.3 The evidence presented as to manner of death, in particular the grip pattern which depended on the histology evidence, was critical to the prosecution case. This is clearly demonstrated in the Crown address to the jury:

> So my own submission is that there really are no positive indications pointing you to accident. Whereas to murder I suggest the bruising on the lower left leg, if that is a grip mark, *is almost in itself conclusive*, providing you accept that it was applied at or about the time of death.[88]
>
> … *the one positive indication of murder, namely the grip mark* on the bottom left leg.[89]
>
> *Pathology* really can be dismissed, as I opened, in the sense it can't solve it for us. … It *does square it down to murder or accident*.[90]
>
> But there are two things, you might think, that are *crucial to this case*. If those four bruises on her lower left leg were inflicted at the same time, and that time was just before she died in the bath, there is no other explanation for them, other than a grip. *If it was a grip, it must have been the grip of the accused*. If it was the grip of the accused, it must have been part of the act of murder.[91]

8.2.4 The prosecutor later told the Court of Criminal Appeal:

> The critical piece of medical evidence were the bruises on the lower left leg. If they were inflicted at or about the time of death, *that was almost the solution to the case*.[92]

8.2.5 This position was acknowledged by the Court of Criminal Appeal in 1995:

> When summing up, His Honour told the jury that the pathology evidence would not solve the case for them. However, *I consider it substantially advanced the Crown case* when considered with other circumstantial evidence ...[93]

8.2.6 It can be noted though that what Mr Rofe told the jury contrasts with a submission made by him to the same Court of Criminal Appeal in May 1997 during argument on an application to re-open:

> It was a circumstantial case in which the pathology was one feature.[94]

---

[88] *R v Keogh*, second trial, Crown address, p1019 (emphasis added).
[89] Ibid, p1022 (emphasis added).
[90] Ibid, p1044 (emphasis added).
[91] Ibid, p1062 (emphasis added)
[92] Paul Rofe QC, Respondent address, *Keogh v R*, No. 420/95, Court of Criminal Appeal proceedings, 14 December 1995, p89 (emphasis added). Annexure 'O'.
[93] *R v Keogh*, SCCRM-95-420, Court of Criminal Appeal, judgment S5397.1, 22 December 1995 at p20 per Matheson J (the other members of the Court concurring) (emphasis added).
[94] *Keogh v DPP*, No. 420/1995, Court of Criminal Appeal, transcript of proceedings, 1 May 1997 at p17.

Likewise with his submission to the High Court in October 1997:

> … the pathology evidence was just one part of the circumstantial case … But the pathology in itself was – it was always the Crown contention could not prove the case in isolation.[95]

8.2.7 If the prosecution evidence as to the cause and manner of death was found to be inadmissible or (in the alternative) unreliable the trial judge would have to direct there was no case to answer or in the alternative to give a *Prasad* direction.[96]

8.2.8 The jury at the first trial was unable to agree on a verdict. There were three highly significant differences with regard to the pathology evidence between the evidence led by the prosecution at the first trial and the evidence led by the prosecution at the second trial. The first was the tender at the second trial of the body chart Exhibit P52.[97] The second was the production at the second trial of Exhibit P53, a photograph said to show the alleged bruise on the medial side of the left leg, the bruise which was said to be the thumb mark of a grip. The third was the evidence given by Dr James that he saw four slides of bruising, which effectively indicated to the jury that the mark on the medial side of the left leg was a bruise.

8.2.9 The jury was not aware that Dr James agreed with the defence experts, Professors Cordner and Ansford, that the pathology evidence could not prove homicide.[98]

9. <u>Failure to follow rules of procedure and evidence</u>

In addition to the elements of fraud referred to above the Petitioner submits that there was a failure to afford him a trial to which he was entitled in that at his trial the rules of procedure and evidence were not strictly followed with regard to the following matters:[99]

---

[95] *Keogh v The Queen* A5/1996 HCAT (3 October 1997).
[96] *.The Queen v Prasad,* SASR 161 (11 December 1979).
[97] There were 51 exhibits tendered at the first trial. Exhibits P52 and P53 were the first two of the extra exhibits tendered at the second trial.
[98] See 'The new information revealed', paragraphs 6.2.5.2 and 6.2.5.2.1 above.
[99] *Mraz v R* [1955] HCA 59 at [9] per Fullagar J.

9.1 Expert witness

9.1.1 Dr Manock should not have been accepted as an expert witness at the trial because of his incompetent conduct of the autopsy combined with his proven record of manifest incompetence.[100]

9.2 Admissibility

9.2.1 Dr Manock's opinion as to the cause of death should have been held to be inadmissible in that there was no evidence (for example a coloured photograph and/or histology slides) to prove the existence of staining of the aorta with no staining of the pulmonary artery.[101] For an expert opinion to be admissible, the facts upon which it is based must be proved by admissible evidence.

9.2.2 Dr Manock's opinion as to the cause of death should further have been held to be inadmissible on the basis that he did not and still cannot demonstrate any scientific or other intellectual basis for the conclusion that he reached.[102]

9.2.3 Dr Manock's opinion as to forced drowning should have been held to have been inadmissible in that it was speculation.[103]

---

[100] See Moles RN, *A state of injustice,* Lothian Books, Melbourne, 2004;
Moles RN & Sangha BM, Comparative experience with pediatric pathology and miscarriages of justice: South Australia, in Roach K, *Pediatric forensic pathology and the justice system*, Volume 2, Ontario Ministry of the Attorney General, Canada, 2008, pp283-324.
Both of these references discuss the *Finding of Inquest into the Deaths of Storm Don Ernie Deane, William Anthony Barnard, Joshua Clive Nottle* , 25 August 1995, by the Coroner for South Australia (Mr Wayne Chivell) referred to in the first application to re-open the appeal.
See also 'Expert witness', ABCTV, http://www.abc.net.au/4corners/stories/s397448.htm

[101] *Christie v The Queen* [2005] WASCA 55 at [112] per McKechnie J (emphasis added): "In a case of circumstantial evidence, the circumstances from which an inference of guilt may be drawn can only be drawn from *proven* facts. It is not necessary for the prosecution to establish every fact beyond reasonable doubt. However, before an inference adverse to an accused can be drawn from a material fact *that fact* must be proved beyond reasonable doubt."

[102] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 - 14 September 2001 per Heydon JA. Although a civil case, the judgment makes it clear that the principles set out have common application to both civil and criminal cases. "Where the evidence is of a comparatively novel kind, the duty resting on the Crown is even higher; it should demonstrate its scientific reliability." *Lewis v R* (1987) 88 FLR 104 at 123-4, per Maurice J as cited in *Makita*.

[103] See *Straker v The Queen,* High Court of Australia [1977], 15 ALR 103, where it was said that the real complaint of Straker was that Dr James was permitted to speculate on a *possibility* of which there was no evidence of *probability*. The court said, "But he is not entitled to speculate on a possibility directly relevant to the issue or to a fact in issue when the speculation is adverse to the accused person and when there is no evidence which would support a conclusion that the fact was established" per Jacobs J.

9.2.4 Dr James's evidence should have been held to be inadmissible. He had not seen or examined the body and Dr Manock had failed to obtain sufficient evidence to support his opinions. Dr James's opinions amounted to speculation based on possibilities.[104]

9.2.5 In particular Dr James's evidence concerning the alleged grip mark should have been held to be inadmissible in that he said it was based on the inference that the mark on the medial side of the left leg was a bruise and there was no proof that it was so.[105]

9.2.6 It is generally accepted that in criminal trials involving the participation of a jury the standards required of professional witnesses expressing expert opinion evidence should be more rigidly enforced than in civil trials presided over by a judge. The reasons provided are that judges, as distinct to jurors, are expected to know what those standards are and in any event they would be aware of the evidence and are required to explain their resolution of any issue in the judgment. There is no second chance in a criminal trial. If the judge is not satisfied that professional standards have been adhered to then the evidence is inadmissible irrespective of whatever probative value it may have.

9.3 <u>Procedure</u>

9.3.1 Photograph Exhibit P53 was not tendered at the first trial but was of critical importance in the presentation of the prosecution case at the second trial. It is therefore crucial to understand the circumstances leading up to the tender of P53.[106]

9.3.1.1. Dr Manock had almost completed his evidence in chief at the end of the day. The following morning and without any notice to the defence the photograph was put in front of Dr Manock and he was asked by the

[104] *Straker v The Queen,* High Court of Australia [1977], 15 ALR 103
[105] *Perry v The Queen* (1982) 150 CLR 580 (judgment dated 16 December 1982) at 612. Where a particular fact constitutes an 'indispensable link in a chain of reasoning towards an inference of guilt', then that fact must also be proven beyond a reasonable doubt.
[106] For a more detailed analysis of the tender of P53 see Annexure '2Y'. See also section "Significance of Exhibit P53" at paragraph 7.5 above.

prosecutor to put a (red) circle around the area on the photograph which he said represented a bruise. Without objection Dr Manock did so, the photograph was tendered and shown to the jury.[107]

9.3.1.2. With hindsight there should have been an immediate objection by defence counsel and an application for an adjournment to enable counsel to take advice from the experts who were advising him, including Dr James. Counsel would also have needed to take advice from a photographic expert. The trial judge would have had to grant the application. In the event, however, the damage had been done.

9.3.1.3. It is not known what advice counsel would have received from those advising him including Dr James. None of them (except Dr James) would have seen P53 without the red circle on it. Nor is it known whether counsel would have received the same advice from a photographic expert that the Petitioner's advisers subsequently received. This advice was to the effect that the photograph did not depict a bruise in the circled area.[108]

9.3.1.4. In the alternative counsel, taken by surprise, recognizing that the damage had been done and without the benefit of advice, should have sought a mis-trial. It is not possible to surmise what the trial judge would have done.

9.3.1.5. The fact is that established rules of evidence and procedure were not followed in relation to the tender of Exhibit P53. The Petitioner pleads that fact alone is sufficient to establish that the trial miscarried and as a result the verdict must be regarded as unsafe. (*Mraz v R* [1955] HCA 59 at [9] per Fullagar J.)

9.3.1.6. It is to be noted that this point has not been raised in any of the first three Petitions of the Petitioner or in the appellate process.

[107] Manock; second trial, p170 XN. Annexure 'K'.
[108] Advice given by Associate Professor Gale E Spring, Associate Professor of Scientific Photography, RMIT University of Melbourne – see reference to this by Dr James in his letter to Mr Rofe of 30 October 2001 (Annexure 'P').

10. Sudden unexpected death – cause of death

10.1 A fundamental scientific issue to be considered in relation to the Petitioner's case is whether it is either likely or possible that a fit and healthy person could drown in a domestic bath.

10.2 The prosecution case at trial was that fit and healthy young people do not suddenly die.[109]

10.3 This was an attractive and powerful argument in the context of this case. It was met with approval by the Court of Criminal Appeal.[110]

10.4 It accords with the commonly held view and, by definition, with the view the jury must have held.

10.5 It is a fact, however, that sudden unexpected deaths do occur in young adults.[111]

10.6 Sudden death has been defined as "a natural, unexpected fatal event occurring within one hour from the onset of symptoms in an apparently healthy subject or

---

[109] "It is most unusual that a fit, healthy 29 year old female would drown in the bath." Paul Rofe QC, Crown address, *R v Keogh*, second trial, at p1013. Mr Rofe told the Court of Criminal Appeal that the quote came from Professor Cordner – the actual evidence is:

> Rofe: Because there is no doubt, is there, that a fit, healthy 29 year old drowning in a bath is a most unusual experience.
>
> Cordner: Put like that, yes.(second trial at p981)

[110] "It was not disputed by the pathologists, nor by one's common experiences of life, that it would be unusual, if not extraordinary, for a fit, healthy, 29 year old used to drinking alcohol to drown in her bath after drinking several glasses of wine." *R v Keogh*, SCCRM-95-420, Court of Criminal Appeal, judgment S5397.1, 22 December 1995, at p24 per Matheson J.

[111] Mystery disease kills three young people a week -- News release, 7 October 2003. http://www.carolinelucasmep.org.uk/news/SADS_07102003.html;
L Hoffman. ***The Australian*** - Running on borrowed time. 27 November 2004;
C Semsarian. ABC Radio National, **The Health Report**: 5 July 2004 - Sudden Cardiac Death. [http://www.abc.net.au/rn/talks/8.30/helthrpt/stories/s1145435.htm];
C Semarian & BJ Maron. Sudden cardiac death in the young. **Medical Journal of Australia** 176 (2002) 148-9;
Bowker TJ *et al*. "Sudden, unexpected cardiac or unexplained death in England: a national survey." **Queensland Journal of Medicine**. 96 (2003) 269-79.

whose disease was not so severe as to predict an abrupt outcome."[112] Most such deaths occur over a few seconds or minutes.[113]

10.7 It is not a new phenomenon. Instances of this nature in young adults have been reported since at least 1958.[114]

10.8 Since the trial in 1995, more evidence has become available to show that sudden unexpected death in supposedly fit and healthy adults is more common than is often realized.

10.9 It is now believed that some deaths previously attributed to drowning and motor-vehicle accidents may have been directly precipitated by such events.[115] They are reported as having occurred in the bath.[116, 117]

10.10 It has been estimated that the annual incidence of sudden natural deaths in 1-40-year-olds in Australia is about 20 per million – that is, about 400 deaths per year.[118]

10.11 If the information now known had been available at trial and to the Appeal Courts the prosecution argument could not have been put, or if put, it could have been successfully rebutted.[119]

10.12 The possibility of sudden unexpected death was not considered by Dr Manock at the time of the autopsy.[120] It is possible that this was because he diagnosed

---

[112] Goldstein S. The necessity of a uniform definition of sudden coronary death: witnessed death within 1 hour of the onset of acute symptoms. **American Heart Journal** 103 (1982) 156-159, cited in Basso C *et al,* Guidelines for autopsy investigation of sudden cardiac death (on behalf of the Association for European Cardivascular Pathology). **Virchows Arch** 452 (2008) 11-18. (See Annexure '2Z'.)

[113] Post-mortem in sudden unexpected death in the young: guidelines on autopsy practice. Prepared by the members of Trans-Tasman Response AGAinst sudden Death in the Young (TRAGADY) – endorsed by the Royal College of Pathologists of Australasia, May 2008. Annexure '2Z'.

[114] D Teare. Asymmetrical hypertrophy of the heart in the young adults. **British Heart Journal** 20 (1958) 1-8.

[115] Doolan A, Langlois N, Semsarian C. Causes of sudden cardiac death in young Australians. **Medical Journal of Australia** 180 (2004) 110-112. Annexure '2Z'.

[116] Kouno A, Matoba R, Shikata I. 'A statistical study of sudden cardiac death for past five years in Osaka medical, investigated at the Osaka Medical Examiner's Office.' **Acta Med Leg Soc** (Liege). 1989,39(1):205-15

[117] A case from New South Wales has been reported: 'Woman Drowns Taking Bath', *The Advertiser*, 18 June 1996. (This case was referred to in the Third Petition.)

[118] See: Skinner J, Duflou JA, Semsarian C. Reducing sudden death in young people in Australia and New Zealand: the TRAGADY initiative. **Medical Journal of Australia** 189 (2008) 539-540. Annexure '2Z'.

[119] "*On land, if you suffer from one of these genetic glitches that cause your heart to spin electrically out of control and you faint, you might wake up with bruises, but if this occurs in water, even if the heart regains control quickly, it may be too late; you've probably drowned.*" Dr M Ackerman, director of Sudden Death Genomics Laboratory at Mayo Clinic, Rochester, Minnesota, in: 'Defects in gene called RyR2 cause malfunctions in the heart's electrical system.' **Medical Research News**, 2 May 2005. Annexure '2Z'.

drowning based on his belief in the hemolytic staining of the aorta with no staining of the pulmonary artery ('differential staining', see Annexure '2U') as a "classical sign" of fresh water drowning. This belief is now been shown to be discredited.

10.13 Protocols for the investigation of sudden unexpected deaths require a full and detailed autopsy. They involve a detailed medical history and the examination of multiple samples from the heart, preferably by a skilled specialist.[121]

10.14 Dr Manock has never examined the full medical records of the deceased and has stated that he does not believe he should do so.[122] This is incompetent. There thus was no basis for his evidence in the committal proceedings that there was no previous medical history which would suggest that the deceased was likely to lose consciousness.[123] Indeed the implication was that he had examined the medical history, which is now known to be untrue.

10.15 As previously described, the autopsy process by Dr Manock was grossly incompetent, even by 1994 standards, let alone by the minimum requirements of the present protocols. The paucity of evidence in the autopsy report by Dr Manock and the inadequate histology samples taken by him means that the true cause of death in this case can not now be determined.[124]

10.16 Because of Dr Manock's (and subsequently Dr James's) reliance on the now discredited 'differential staining' for the diagnosis of drowning, the cause of death was not properly explored at the trial and death by natural causes or accident was barely considered as a possibility by the prosecutor and defence counsel and therefore by the jury.

---

[120] Manock; Medical Board hearing, November 2004 at p336. "The cause of death was quite obvious as drowning. What I focussed on rather than finding another cause was to find evidence that would suggest the manner of death." Annexure 'S'.
[121] Basso C *et al.* Guidelines for autopsy investigation of sudden cardiac death (on behalf of the Association for European Cardivascular Pathology). **Virchows Arch** 452 (2008) 11-18 -- Annexure '2Z';
Post-mortem in sudden unexpected death in the young: guidelines on autopsy practice. Prepared by the members of Trans-Tasman Response AGAinst sudden Death in the Young (TRAGADY) – endorsed by the Royal College of Pathologists of Australasia, May 2008. Annexure '2Z'.
[122] Manock; Medical Board hearing, November 2004 at p338. Annexure 'S'.
[123] Manock; committal proceedings re HV Keogh, at p24. Annexure 'F'.
[124] Affidavit of Dr Anthony Charles Thomas, dated 2 February 2004. Annexure 'R'.

11. Circumstantial Evidence

11.1 The Third petition

11.1.1 In rejecting the Petitioner's Third Petition, the Acting Attorney-General said:[125]

> It is important to understand that the case against Mr Keogh was never dependent on the pathology evidence alone.

and:

> Rather it was the overwhelming strength of the whole of the circumstantial evidence against Mr Keogh that led, and still leads, to a conclusion of guilt.

11.1.2 The Petitioner pleads that this statement does not show an appreciation of the meaning of circumstantial evidence. It can be demonstrated that there was no circumstantial evidence in this case other than motive.[126]

11.2 Motive – Presumption of innocence

11.2.1 In every criminal trial the jury is informed of the presumption of innocence. The direction in this State is always given in a standard form used by all judges.

11.2.2 In a way this standard approach not only undermines the significance of the presumption but it also fails to explain how it applies in the evaluation of circumstantial evidence and in particular evidence of motive.

11.2.3 Motive is generally referred to as an item of circumstantial evidence. By itself it can never prove the commission of a crime. Because it relates to the state of mind of the accused it is different to most other items of circumstantial evidence.

11.2.4 Juries should be directed that they can never use evidence of motive to displace the presumption of innocence. This is because if they evaluate the other evidence which points to the commission of a crime by the accused

[125] Hon Kevin Foley, Acting Attorney-General, News release, 10 August 2006. Annexure 'X'.
[126] Annexure '2X' – "Circumstantial evidence".

against the background of a "guilty mind" there exists a real danger the presumption becomes displaced.

11.3 Motive -- The insurance policies

11.3.1 In 1992 the Petitioner worked for the State Bank which had lost 4 billion dollars and was on the brink of collapse. Many staff faced uncertain employment futures as redundancies or termination were inevitable.

11.3.2 As a hedge against unemployment, and with the possibility of becoming self-employed, the Petitioner set up agencies with five different insurance companies. As was the nature of the insurance business these agencies would lapse if insurance wasn't written for each one on a regular basis. It was a common practice for agents to write more or less bogus policies to keep agencies alive.

11.3.3 The Petitioner signed up a number of policies for genuine customers, and some others covering his own life as well as the five policies which were those presented in the two trials. Of the five, three covered both the deceased and himself, and two were on the deceased's life alone.

11.3.4 At trial it was acknowledged by the prosecution that the deceased knew of the existence of three of the five policies and by clear implication that the deceased knew that the Petitioner had signed the policies in such a way as to indicate to the insurance companies that the deceased had in fact placed her signature on the policies. In other proceedings the family of the deceased has acknowledged the policies were valid and enforceable and arranged by the Petitioner in good faith.[127]

11.3.5 In all of the proceedings subsequent to the trial only one Court, the Court of Criminal Appeal which heard the first appeal, has considered the issue of the insurance policies in relation to motive. Matheson J accepted the existence of the policies was relevant to the issue of motive[128], Millhouse J

[127] Sam Weir, 'Former fiancé cut from will in body-in-bath murder case', and 'Anna-Jane's estate seeks $1m payout', *The Advertiser*, 8 April 2000.
[128] *R v Henry Vincent Keogh*, no. SCCRM 95/420 Judgment No. 5397 per Matheson J at [56].

specifically rejected that proposition[129] and Mullighan J did not specifically deal with the issue although it may be inferred he agreed with Matheson J.

11.3.6 As a consequence the public has never been informed of the true facts relating to the insurance policies. On the contrary the public was deliberately misled by the Attorney-General:

> … you've misquoted me repeatedly and you have obscured from the public of South Australia, the evidence regarding Henry Keogh lying in the aftermath of the death of Anna-Jane Cheney, and you've obscured deliberately from the public of South Australia the evidence regarding the insurance policies and for the last few years you've refused to run in your program that Henry Keogh falsified and *admitted* falsifying the signature of the deceased on life insurance policies running into millions of dollars.[130]

The Attorney-General knew that statement was untrue[131] and demonstrates bias.

11.4 The relationship evidence

11.4.1 At trial the prosecution argued that the fact the Petitioner was engaging in sexual relationships with other women at the time he was engaged to the deceased was admissible for the following reason:

> The evidence of these witnesses was admissible to enable the jury to form a view of the true relationship between the accused and the deceased. In particular the evidence was relevant to the accused's attitude to the deceased in terms of commitment to the relationship, marriage and future involvement.
>
> In the absence of this evidence the jury would have been left with an impression of complete devotion and commitment to the forthcoming marriage. The prosecution would be confronted with the proposition "Why would I kill the woman I loved and was about to marry". Although the financial motive was present the evidence of Ms Georgiou and Ms Manzitti was critical to a full and complete picture of the relationship.[132]

11.4.2 The trial judge admitted the evidence on that basis and on that basis alone.

---

[129] Ibid, per Millhouse J at [10].
[130] Attorney-General Michael Atkinson on *Today Tonight* (Channel 7), 2 April 2008. (emphasis added)
[131] At most it was $400,000.
[132] Respondent's Outline of Submissions, *HV Keogh v The Queen*, No. 420 of 1995 at [1].

11.4.3 Subsequent to the trial it has been argued this evidence was also relevant to the issue of whether the death was deliberate or accidental. In this context there is no authority so far as the Petitioner is aware that relationship evidence, absent animosity, is admissible to prove both cause and manner of death when neither cause nor manner of death can be established by objective scientific evidence based on clearly established facts.

11.4.4 In any event the jury and the appellate courts have not been provided with "full and complete picture of the relationship". The Court was not informed of a pregnancy test undertaken by the deceased because of Dr Manock's failure to review the medical history of the deceased as he was obliged to. It is entirely speculative to form any opinion as to what use could have been made of this evidence if it had been discovered at the relevant time which was prior to the trial, although it should be noted that the Petitioner had had a vasectomy[133] and was therefore unable to father a child.

12. Dr James

12.1 Dr James became involved in this matter when after the committal hearing he was requested by prosecuting counsel to review the work of Dr Manock in this case.[134] Both prosecuting and defence counsel put their trust in Dr James. In particular he became an advisor to the defence and assisted counsel in the preparation of the defence case.[135]

12.1.1 As the information provided in this Petition demonstrates, Dr James betrayed that trust. It was that abuse of trust which led to an abuse of process and a consequential miscarriage of justice.

[133] In about 1985,1986 – evidence of Susan Betsy Keogh, second trial, p332 XN.
[134] James; second trial, pp199-200 XN. Annexure 'L'. See also affidavit, Annexure 'R', para 4.
[135] James; Medical Board hearing, November 2004, pp302-3. Annexure 'T'.

12.2 The Court of Criminal Appeal

12.2.1 In the course of the proceedings before the first Court of Criminal Appeal hearing Mullighan J stated his view that it was important that Dr James supported the grip pattern, and by inference, the manner of death scenario put by Dr Manock:

> MULLIGHAN J: An important matter is that Dr James supported the finger mark theory, didn't he?
>
> MR ROFE: That's right. Because the absence of a physical mark and the opinion that there was no loss of consciousness, whatever my friend says, wasn't, in my submission – and certainly in my address – the critical piece of medical evidence. *The critical piece of medical evidence*[136] were the bruises on the lower left leg. If they were inflicted at or about the time of death, that was almost the solution to the case: Because it meant there had to be some other person present at the time of death. And the only other person it could have been was the accused.
>
> MULLIGHAN J: The spread of those marks was significant, wasn't it?
>
> MR ROFE: Absolutely.[137]

12.2.2 In his judgment Matheson J made the following observations in relation to the evidence of Dr James:

> He was asked to comment on Dr Manock's opinion about the bruising on the left lower leg. He said that gripping by a hand was the most likely explanation. He said that bruising on the right shin was easily caused because there is no soft tissue underneath it. He said the row of seven bruises down the front of the right shin could represent grip marks from individual fingers. He also thought the bruises were caused at or about the time of death and that three to four hours was probably the outer limit. He did not think that the bruising on the top of the head and the back of the neck could be caused by one blow. Nor did he think that all the bruising could be caused by a simple fall in a confined bathroom. He said if drowning were to result from a fall in a confined bathroom causing loss of consciousness, the body would have to be submerged in such a way as to cause drowning. In cross-examination, he reiterated that he did not think a simple fall in the bath could accommodate the pattern of bruising that was seen. He said that there would have to be "a rather complex choreography" to accommodate the bruising to the top of the head and the bruising on each side of the neck being sustained at or about the same time. He could not exclude the possibility of unconsciousness before drowning by itself as a medical opinion. He reiterated his opinion that if the bruises on the left ankle resulted from grip marks, then an assumption that the bruising on the right shin was caused in the same way was logical. He said that the absence of a fourth finger bruise did not cause him any concern. He said "it may be that the nature of the grip was such that the thumb applies pressure, anchoring the pressure

[136] For "medical evidence" read 'pathology'.
[137] Court of Criminal Appeal, *Keogh v R*, No. 420/95, transcript of proceedings, 14 December 1995, p89. (emphasis added)

> from the main three fingers, and the small finger, for instance, might apply minimal pressure, or insufficient to leave a resultant bruise".[138]

12.3 No matter what explanation Dr James may advance, that is the view the Court of Criminal Appeal held of his evidence. It is obvious that both the trial Court and the Court of Criminal Appeal were seriously misled. If the true result of the histological analyses had been disclosed Matheson J would have been obliged to observe Dr James's opinions as to the age of the bruises and the nature of the grip ("the thumb applies pressure") were wrong.

12.4 If Dr James's view depended on the thumb applying pressure then his opinion as to the grip pattern is not consistent with the failure to find the bruise. If the thumb had to provide significant pressure, why was there no bruise?

12.5 <u>The Decision of Justice Debelle</u>

12.5.1 Reference has been made to the finding made by the Medical Board that Dr James was guilty of unprofessional conduct. Dr James appealed that finding. Debelle J upheld the appeal and set aside the finding.[139] The Petitioner has appealed the decision of Debelle J. The grounds of appeal are extensive but they are self explanatory.[140] If the appeal is rejected the Petitioner will lodge a further complaint to the Medical Board based on the new facts.

12.5.2 The Petitioner now refers to various exchanges which occurred between Debelle J and senior counsel for Dr James, Mr David Edwardson QC. These exchanges are reflected in the judgment but not specifically referred to. Their significance lies in the fact that presumably Mr Edwardson in making the submissions that he did was acting on the instructions of his client, Dr James.

12.5.3 Mr Edwardson submitted that up to and including the date on which he made the submission (which was 2 May 2008) that Dr James had never

---

[138] *R v Keogh*, SCCRM-95-420, Court of Criminal Appeal, judgment S5397.1, 22 December 1995 at p18 per Matheson J.
[139] *James v Keogh* [2008] SASC 156. Judgment of Debelle J, 13 June 2008. Annexure '2L'.
[140] *Keogh v James*, No. SCCIV – 431 of 2008, Notice of Appeal, 3 July 2008. Annexure '2M'.

seen the photograph Exhibit P53.[141] As has been pointed out that was, as Dr James well knew, not true. Dr James's own notes make it clear that he saw the photograph that became P53 when he conducted his initial review.[142] What he should have told the Court was that he had seen that photograph but that in the photograph he saw no bruise on the medial side of the left leg of the deceased.

12.5.4 Mr Edwardson submitted that up to and including the date on which he made the submission (which was 13 May 2008) that Dr James did not know from which site on the body of the deceased the tissue sections on the relevant slides came.[143] For the following reasons it can be demonstrated that was not correct:

12.5.4.1. Prior to that submission Mr Edwardson had earlier submitted to the Medical Board that Dr James acknowledged that one of the slides contained tissue from the medial side of the left leg of the deceased and he further acknowledged that the tissue on that slide showed no indication of bruising.[144]

12.5.4.2. In his evidence on oath to the Medical Board at the Dr Manock Inquiry in November 2004, Dr James said that when he conducted his review (in December 1994) he knew there was a slide containing a section of tissue taken from the medial side of the left leg and that his microscopical examination of that slide revealed no evidence of bruising.[145]

---

[141] David Edwardson QC; *James v Keogh*, No. 431/2008, transcript of proceedings, 2 May 2008, pp6-7. "… it is important to bear in mind, firstly, we have never seen P53; secondly, it has always been Dr James' position that that photograph, A, was not produced to him when he gave his evidence at either trial, nor has he sighted it or been asked to consider it in the context of any opinion which he has expressed." Annexure '2K'.

[142] See report: *Dr James and photograph Exhibit P53 in 1994*; Dr HWJ Harding, 28 September 2008. Annexure '2R'.

[143] *James v Keogh*, No. 431/2008, transcript of proceedings, 13 May 2008, pp128-31.
"Debelle J: Four slides of bruising from what sites? It could be the head or whatever.
Edwardson QC: Precisely." (p131) Annexure '2K'.

[144] David Edwardson QC; Medical Board of South Australia re *Keogh v James*, transcript of proceedings, 16 August 2007, p99. 'We concede for present purposes in paragraph 34 that, on the particular impugned slide tissue in question, on microscopic analysis it didn't reveal histology consistent with a bruise." Annexure '2F'.

[145] James; Medical Board hearing, November 2004, p295 XXN.
"Mr Borick: You looked down the microscope at this slide that was supposed to represent the bruise on the inside left ankle, as you call it, and you decided that it was not a bruise. Is that correct.
Dr James: That's right." Annexure 'R'.
See also affidavit of James, 23 June 2004 (Annexure 'U').

12.6 Dr James should not have permitted his counsel to make the submissions referred to. In relation to the second of the two submissions it is not known why counsel for Dr James made the submission that he did when he knew it contradicted his earlier submission to the Medical Board. Nor is it known why the judge made no reference to that contradiction.

12.7 The Petitioner asserts that those advising the Governor, when conducting their own independent inquiry, should, for the reasons referred to in this segment and for the reasons advanced in support of the pleas made by the Petitioner, disregard any explanations proffered by Dr James in order to explain his conduct.[146] The Petitioner asserts, based on the known facts, the explanations so far advanced by Dr James are demonstrably unreliable and no weight can be attached to them.

13. Dr Manock

13.1 The Petitioner asserts that the documented history of incompetence of Dr Manock is a significant factor to be borne in mind when deciding the fate of this Petition. He was presented by the prosecutor to the jury as "the most experienced pathologist who was called at this trial quite clearly: 30 odd years, 10,000 autopsies."[147]

13.2 The Petitioner asserts that it is significant to his petition that the body of the deceased was cremated about 10 days after the autopsy. This meant that Dr Manock was the only pathologist to examine the body of the deceased. All of the other pathologists have had to base their opinions and comments on the inadequate records that exist of the autopsy, the inadequate histology slides, and some inadequate black and white photographic prints.

[146] For example, the responses by James to the Medical Board, 7 December 2004 and 7 March 2005 -- Annexure 'V'. Also Annexure 'W' – "Dr RA James – his explanations."
[147] Paul Rofe QC, Crown address, second trial, p1031. Annexure 'N'.

13.3 The Petitioner also asserts that it is significant that Dr Manock did not and has not examined the full medical records of the deceased.[148] As described in the section on sudden unexpected death (section 10) above, the protocols indicate the necessity to obtain a full and detailed medical history. This did not happen in this case. The potential effect this failure had on the relationship evidence at the trial has also been discussed above. (Section 11.4 above.)

14. Evaluation of the prosecution case at trial in the light of the new evidence

The Petitioner now examines in turn each of the matters the Court of Criminal Appeal identified as "strands" of the evidence at his trial. These are the strands of the "whole of the evidence" on which Matheson J decided that in his opinion the "verdict was correct". (See section 5 above.)

14.1 The first strand

"It was not disputed by the pathologists, nor by one's common experiences of life, that it would be unusual, if not extraordinary, for a fit, healthy, 29 year old used to drinking alcohol to drown in her bath after drinking several glasses of wine."

None of the pathologists said it was "extraordinary". Nor could they have if they had been aware of Teare's paper published in 1958. Professor Cordner was obviously aware of it but failed to make the point clear.

Cordner, second trial, p991 XXN

> Rofe: You would agree, would you not, that there was no underlying medical cause in the sense of heart attack or stroke or anything of that nature, no evidence of that.
>
> Cordner: With the one proviso, that there are conditions that you can't detect but, you know, I'm not here to say that those conditions were there, but that proviso always has to be made. So, subject to that, I am satisfied that Dr Manock would have picked up any other observable natural disease.

More recent research demonstrates that there was nothing unusual, let alone extraordinary, about this death. (See section 10 – sudden unexpected death.)

[148] Medical Board hearing, November 2004 at p338. Annexure 'S'.
Mr Borick QC: Don't you believe that even now you should find out what's in those medical reports.
Dr Manock: No, I don't.

14.2 The second strand

"The appellant clearly had the opportunity to drown her deliberately, either before he visited his mother (if he did) or after, and was the last person to see her alive."

The exact time of death is unknown and will never be known other that on known facts it was between 8.15 pm and 9.30 pm. If the Petitioner did visit his mother (and despite Matheson J's qualification he obviously did because his mother's evidence was not in dispute) then he could have only killed her between 8.10 pm when the deceased arrived home after dropping her sister off (again a fact not in dispute) and approximately 8.15 pm when the Petitioner left to go to his mother's house. The Petitioner arrived home after visiting his mother at about 9.20 pm. He called the ambulance at 9.32 pm. So there was a small window of opportunity between 9.20 pm and 9.30 pm. If one now accepts the prosecution case that the deceased was a fit, healthy, sober young woman and further accepts that the cause of death is unknown, that there was not enough water in the bath for her to be drowned in (see Professor Henneberg's affidavit – Annexure '2D'), and Dr Manock's scenario as to manner of death was inadmissible speculation, then how did the Petitioner kill her?

Any answer to that question can only be based on unknown facts (because of the incompetent autopsy), conjecture and speculation. Nor is a deliberate killing consistent with the Petitioner immediately calling for an ambulance. His actions suggest that he did not know that she was in fact dead.

14.3 The third strand

"He had a motive, namely to obtain his freedom, and the means to enjoy it."

To describe the Petitioner's motive in that way simply begs the question. Why, as an intelligent man, should he seek his "freedom" (whatever that word means in this context) by killing her when all he had to do was tell her he had changed his mind?

14.4 The fourth strand

"The evidence of Georgiou and Manzitti pointed to the drowning being deliberate."

That was a clear error for two reasons:

(1) The evidence of Georgiou and Manzitti was solely related to motive.

(2) Simply to allege the existence of motive could not alter the fact that the pathological evidence was, to say the least, unreliable.

There is obviously no possible way the evidence of Georgiou and Manzitti could impact on the pathology evidence. What the judge should have observed is that if other evidence proved the cause of death was deliberate drowning then this evidence may be relevant to motive. (See section 11.4.)

14.5 The fifth strand

"Bruising found on the deceased, and in particular on the left shin, pointed to the modus operandi demonstrated by Dr Manock."

Apart from the fact there were no bruises on the left shin (and in something as important as this the judge was obliged to get the facts right) this strand more than anything else demonstrates the importance Matheson J placed on Dr Manock's inadmissible demonstration and by implication the importance the jury must have placed on it.

14.6 The sixth strand

"The opinions of Drs Manock and James supported such a modus operandi, and neither Dr Ansford nor Professor Cordner rejected it."

The reference to Dr Ansford and Professor Cordner does not accurately reflect their evidence on the issue of modus operandi. Dr Ansford said he found the suggested mechanism "hard to accept" and Professor Cordner referred to it as "speculation".

Cordner

p975 XN

> … I regard a lot of that material [the Manock scenario read out to him] as speculative, and not really material that's got such a firm basis that, you know, I anyway would feel comfortable talking like that in a place like this. Having said that, I think that one could talk for as long as that and in as much detail about how accidental explanations could produce the same findings that are present in this case.

p975 XN

> David: Is it consistent with accident.
> Cordner: Yes.

p976 XN

> … I would simply say that there are some difficulties internally within his scenario in fitting them with the findings …

Ansford

p940 XN

> David: What about the question of seven lateral bruises. Have you an opinion as to that in relation to this theory Dr Manock put.
> Ansford: I find it hard to accept the suggested mechanism. …

p944 XXN

> Rofe: Similarly, you can't exclude accident.
> Ansford: That's correct.

14.7 The seventh strand

"Epilepsy and myocarditis appear unlikely."

The evidence of Professors Cordner and Ansford demonstrates neither epilepsy nor myocarditis were eliminated as a cause of death. Accordingly both remain as a possible cause of death.

Cordner

pp979-980 XN

> … The other possibilities, I mean, again, I suppose, one is obliged to mention them, but, for example, epilepsy can obviously – is a dangerous thing to have while you are having a bath. In the absence of a history of epilepsy it's not something that you could say is a likelihood, but obviously at sometime somewhere someone is going to have their first epileptic fit in a bath, but you wouldn't, I suppose, want to put too much on that.

Ansford

pp940-941 XN

> David: Are there other, what I might call, natural causes medically speaking might have caused the drowning of the deceased in this case.
> Ansford: Probably the most likely in that sort of scenario would be an epileptic attack. Epileptic attacks are associated, in my experience, and in the experience of others, with drowning in bathtubs. …
>
> … Another possibility is a heart condition known as myocarditis; that is inflammation of the heart muscle. … This is an inflammation of the heart which may only be detectable after you have taken multiple microscopic slides from the heart. You could miss it if you only had one or two microscopic slides from the heart, but you might not see anything at all with the naked eye. …

pp943-944 XXN

> Rofe: Any normal post mortem would pick up evidence of heart attack or stroke would it not.

> Ansford: As I said, it depends, on, for example, with myocarditis, which is a common – not common source of death, we rarely get cases of it, in Queensland five to 10 cases, that may only be detected on microscopic examination of several pieces of tissue from the heart, but I personally would look for that and I understand Dr James would too.
> …
> Rofe: You can't exclude, on what you have read, natural causes in the sense there could have been epilepsy or myocarditis.
> Ansford: That is correct.

14.8 The eighth strand

"A faint, whether or not due to postural hypotension, would be unlikely to cause the number and situation of bruises on the deceased."

Assuming this is true no one can ever say that a 'faint" was the cause of death. This observation is irrelevant.

14.9 The ninth strand

"Falling to sleep would probably have led to her coughing and awakening."

This again was speculation.

14.10 The tenth strand

"The accused has clearly told some lies."

That observation can only be based on the fact that the jury found the Petitioner guilty and therefore he must have lied. More importantly the so-called lies which are "clear" have not been identified.

15. Evaluation of the case in the light of the whole of the evidence as it now stands.

It is necessary to now draw together the strands of evidence in the Petitioner's case in the light of the new evidence discovered and described in this Petition. Comparison of the new information with the strands of evidence which existed at the time of the Petitioner's trial and drawn together by Matheson J when delivering his judgment on the Petitioner's appeal (sections 5 and 14 above) show clearly that the jury was misled, prosecuting counsel was misled, defence counsel was misled, the trial judge was misled and the Court of Criminal Appeal was misled.

15.1 The conduct of the autopsy was incompetent.

15.2 It is impossible to establish the cause of death.

15.3 The jury was misled when they were informed the appearance of differential staining (as described by Dr Manock) established that the cause of death was drowning. There is no scientific or any other proper basis for this opinion.

15.4 Dr Manock did not disclose to the Court, to counsel or the other expert witnesses the true result of his microscopic examination of the tissue samples. This is in direct breach of his professional obligation. The jury was misled.

15.5 Dr James did not disclose to the Court, to counsel or the other expert witnesses the true result of his microscopic examination of the tissue samples. This is in direct breach of his professional obligation. The jury was misled.

15.6 The scenario advanced by Dr Manock and which he demonstrated to the jury had no scientific basis or any factual basis. If the true facts had been revealed he would never have been permitted to advance his scenario or to provide the demonstration that he did. The jury was misled.

15.7 If the true facts had been revealed the photograph P53 would not have been admitted into evidence. The jury was misled.

15.8 Dr Manock lied to the jury.

15.9 Dr James lied to the jury.

15.10 The basic issue for the appeal court is whether or not the Petitioner had a fair trial, understood as a trial resulting in a verdict worthy of confidence.

15.11 Whether or not the Petitioner had a fair trial is not a political issue. It is a matter for judicial determination.

15.12 As a result of the discovery of new material and information the fact that the Petitioner's first three Petitions were rejected is irrelevant. The Fourth Petition contains important and relevant information not referred to in any of the previous Petitions.

15.13 The whole of the facts relating to the insurance policies have never been made public. In fact the public have been misled by the combination of this non-disclosure and misleading public statements made by the Attorney-General.

15.14 The jury was never made aware of the fact the deceased at a relevant time had a pregnancy test. The Petitioner at all times in his relationship with the deceased was unable to father a child, a fact which was made known to the jury.[149] These facts were relevant to the issue of motive. The jury was misled.

16. Summing up – why the Petition should be referred

16.1 Although the Petitioner has not been given any formal advice as to why the Third Petition was rejected it was stated that one of the reasons was that the prosecution had made full disclosure of the relevant facts.[150] It is now clear that is manifestly wrong. There was in fact serious deficiency in the prosecution's disclosure.

16.2 On any view of the facts, two senior forensic pathologists, for whatever reason, did not disclose the true result of their examination of the tissue samples referred to. The facts also establish the two pathologists in combination presented a "false and distorted scientific picture" to the jury. That situation is without precedent in this country.

16.3 Irrespective of what motivated their individual and combined unprofessional conduct, irrespective of any reference to the other so-called circumstantial evidence and irrespective of the view advanced by Debelle J that one of the defence pathologists may have become aware of the truth at some unstated time the basic facts remain that the jury was misled, prosecuting counsel were misled, defence counsel were misled, the trial judge was misled, at least one expert witness was misled, the Court of Criminal Appeal was misled, the High Court of Australia was misled and the Medical Board of South Australia was misled. That is why the situation is without precedent.

16.4 As in *Grey* and *Mallard*, the prosecution must at common law disclose all relevant evidence to an accused, and that a failure to do so may, in some

[149] The Petitioner had a vasectomy in about 1985, 1986: evidence of Susan Betsy Keogh, second trial, p332 XN.
[150] Hon Kevin Foley, Acting Attorney-General, News release, 10 August 2006. "There was no deficiency in the prosecution's disclosure. Nor is there any feature of the way in which the trial was conducted that shows any real risk that there was a miscarriage of justice on this ground." Annexure 'X'.

circumstances, require the quashing of a verdict of guilty.[151] Further, in a case where the non-disclosure could have undermined the effective presentation of the defence case, a verdict reached in the absence of the material evidence (and the use that the defence might have made of it) cannot stand. [152]

16.5 The Petitioner contends that the relevant facts and material not disclosed in his case are in the circumstances more significant than the non-disclosure referred to in *Mallard* and *Grey*.

16.6 As in *Simic*, since an accused person has a fundamental right to a fair trial, conducted in accordance with law, the fact that the case has not been properly presented to the jury will in some circumstances be enough to show that a miscarriage has occurred.[153]

16.7 The Petitioner contends that the non-disclosure by Dr Manock and by Dr James of their true results together with the deficiencies of counsel at the trial prevented his case from being properly presented to the jury such that he has not had a fair trial and a miscarriage has occurred.

16.8 As in *Ward*, it is the cumulative effect of the failures and errors that have occurred which amount to a material irregularity in the trial.[154]

16.9 The Petitioner further contends that the elements of fraud pleaded clearly establish that a miscarriage of justice has occurred.[155]

16.10 The Petitioner pleads that at the very least he is entitled to have his Petition heard "on the merits".[156]

16.11 If the jury had been informed, as they should have been, that the conduct of the autopsy, including the failure to adequately record such findings and observations that were made, was so incompetent as to make it impossible to draw any conclusions as to cause and manner of death and further that the

---

[151] *Mallard v The Queen* [2005] HCA 68 at [17] per Gummow, Hayne, Callinan, Heydon JJ, referring to *Grey v The Queen* (2001) 75 ALJR 1708.
[152] *Mallard v The Queen* [2005] HCA 68 at [84] per Kirby J.
[153] *Simic v The Queen* [1980] HCA 25; (1980) 144 CLR 319 at 331, cited in *Cesan v The Queen*; *Mas Rivadavia v The Queen* [2008] HCA 52 at [82] per French CJ.
[154] *Ward* (1993) Cr App R 1 at 51.
[155] The trial was not a fair trial, as defined by Kirby J, "understood as a trial resulting in a verdict worthy of confidence". *Mallard v The Queen* [2005] HCA 68 at [70]
[156] *Keogh v R*, Nr 420/1995, Court of Criminal Appeal, 23 May 2007, p61 per Sulan J. Annexure 'Z'.

sudden and unexpected death of the deceased was neither unusual nor extraordinary, it must follow that the fairness of the trial and the safety of the verdict must, in the interests of justice, be subjected to judicial determination. Given those circumstances it would be manifestly unreasonable to deny the Petitioner the only right of review now available to him. The rejection of this the Fourth Petition in the light of all the facts as they are now known would effectively deny the Petitioner his only right of review and render the petition process nugatory.

17. <u>The Petitioner</u>

The Petitioner has pursued and exhausted all rights of appeal. The only avenue for relief pursuant to the *Criminal Law Consolidation Act* is by way of a reference under Section 369 of that Act.

The matters which the Petitioner now seeks to put before the Court of Criminal Appeal have not previously been put to that Court on behalf of the Petitioner.

On the grounds that in the interests of justice and to address a justifiable sense of grievance, the Petitioner seeks that this petition be granted.

THE PETITIONER THEREFORE ASKS that on the consideration of this Petition for the exercise of Her Majesty's mercy having reference to the conviction of the Petitioner on information, the Attorney-General refer the whole case to the Full Court pursuant to Section 369 of the *Criminal Law Consolidation Act, 1935*.

DATED this …… day of January 2009.

……

HENRY VINCENT KEOGH

Petitioner

List of Authorities

Farley (Aust) Pty Ltd v JR Alexander & Sons (Q) Pty Ltd (1946) 75 CLR 487

SZFDE v Minister for Immigration and Citizenship [2007] HCA 35

> Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the court.

Mraz v R [1955] HCA 59

> Every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed.

R v West Sussex Quarter Sessions; Ex parte Albert and Maud Johnson Trust Ltd [1973] 3 All ER 289

> A witness may say something which is entirely wrong – fraudulently knowing it is false – or incorrectly believing it to be true. If the court believes the witness and bases its decision upon that evidence, then on discovering the untruth the decision should be set aside - without embarking on an enquiry whether the witness was fraudulent or not.

Re Rattan [1974] VR 201

> If an accused person can show that they have been prevented by surprise, fraud, malpractice or misfortune from presenting at their trial evidence of substantial importance, or would have desired to present if they had not been prevented by such causes of being aware of its existence or its significance, then that person has been deprived of their right to a fair trial.

Straker v The Queen, High Court of Australia, 1977, 15 ALR 103

> Speculation on possibilities which have no basis of probability is not admissible. An expert witness is not entitled to speculate on a possibility directly relevant to the issue or to a fact in issue when the speculation is adverse to the accused person and when there is no evidence which would support a conclusion that the fact was established.

Simic v The Queen [1980] HCA 25; (1980) 144 CLR 319

Cesan v The Queen; *Mas Rivadavia v The Queen* [2008] HCA 52

> An accused has a fundamental right to a fair trial conducted in accordance with law. The fact that their case has not been properly presented to the jury will in some circumstances be enough to show that a miscarriage has occurred.

Perry v The Queen (1982) 150 CLR 580.

Where a particular fact constitutes an 'indispensable link in a chain of reasoning towards an inference of guilt', then that fact must also be proven beyond a reasonable doubt.

Lewis v R (1987) 88 FLR 104

Where the evidence is of a comparatively novel kind the Crown should demonstrate its scientific reliability.

Maguire and Others (1992) 94 Cr App R 133

Failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is an irregularity in the course of the trial.

Ward (1993) Cr App R 1

The duty of disclosure is continuous – it extends to anything which may arguably assist the defence. The record of all relevant experiments and tests are to be disclosed. Cumulatively the failures amount to a material irregularity.

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 - 14 September 2001

The duty of an expert is to furnish the jury with the necessary scientific criteria for testing the accuracy of their conclusions.

Grey v The Queen, [2001] HCA 65

A conviction is unsafe if it is established that the jury was misled on a relevant issue.
A conviction is unsafe if non disclosure of relevant information has deprived an accused (and his advisers) of material relevant to the defence.
If there is material that ought to have been available to the defence which might have caused doubt to be cast about the evidence of a witness, then the fact that evidence was not available at the trial must lead to the conclusion that the conviction was unsafe.

Mallard v The Queen [2005] HCA 68

The prosecution must at common law disclose all relevant evidence to an accused.
An essential question is whether if the jury had known about the additional material it would have cast doubt on the essential features of the prosecution case.
The central question is whether, in the absence of material evidence, the accused received a fair trial, understood as a trial resulting in a verdict worthy of confidence.
The fundamental question is whether non disclosure to the jury, for whatever reason, including facts ignored by the defence, undermine public confidence in the safety of the verdict.

Christie v The Queen [2005] WASCA 55

> In a case of circumstantial evidence, the circumstances from which an inference of guilt may be drawn can only be drawn from proven facts. It is not necessary for the prosecution to establish every fact beyond reasonable doubt. However, before an inference adverse to an accused can be drawn from a material fact that fact must be proved beyond reasonable doubt.

Williams – Judgment of Tribunal, Policy Advisory Board for Forensic Pathology (UK), March 2006

> If a forensic pathologist were to be entitled not to disclose such information just because he or she had concluded that it was not relevant or potentially relevant, then the underlying reasons for requiring disclosure would be liable to be defeated. This is not just commonsense and good medical practice, it is also good law.

SCHEDULE OF DOCUMENTS

2F	Medical Board of South Australia (re James): *Keogh v James*, transcript of proceedings, 16 August 2007. (pp75, 99 only)	567
2G	Affidavit of Associate Professor AC Thomas (re differential staining), 22 November 2007.	569
2H	Medical Board of South Australia: Complaint to the Medical Professional Conduct Tribunal re Dr Manock, 21 January 2008	575
2I	Medical Board of South Australia: *Reasons for Decision* (re James), 16 August 2007, 2 April 2008	577
2J	Affidavit of Robert Douglas Sheehan (re P53), 23 April 2008	599
2K	*James v Keogh*, Appeal to Supreme Court, No 431/2008: Transcript of proceedings before Debelle J, May/June 2008	603
2L	*James v Keogh*, Appeal to Supreme Court, No 431/2008: Judgment of Debelle J, 13 June 2008	745
2M	*Keogh v James*, No. SCCIV – 431 of 2008, Notice of Appeal, 3 July 2008	805
2N	Dr RA James: Hand-written notes of his review of the work of Dr Manock (December 1994) – discovered 17 September 2008	817
2O	Dr RA James: Report to Kobus: "Re: The Cheney case", 6 November 2000 – discovered 17 September 2008	825
2P	Dr RA James: Report: "Review of histology slide [sic] re: Anna Jane CHENEY (dec'd 18/3/94)", 9 November 2000 – discovered 17 September 2008	827
2Q	Report by Associate Professor AC Thomas: "Attendance at Forensic Science Centre 7th August 2008" (re: examination of slides) – 7 September 2008	829
2R	Report by Dr HWJ Harding: "Dr James and photograph Exhibit P53 in 1994" – 28 September 2008	843

2S	Report by Dr Harry WJ Harding: "Examination and re-assessment of the histology slides in the matter of Anna Jane Cheney (deceased)" (re: examination of the slides on 7 August 2008) – 30 September 2008	849
2T	Histopathology – description and discussion – 2008	1013
2U	Differential staining – description and discussion – 2008	1017
2V	Articles on differential staining: (1) Byard RW, Cains, GE & Gilbert JD, Is haemolytic staining of the aortic root a sign of fresh water drowning? *Pathology* **37** (2005) 551-2; (2) Byard RW, Cains, G & Tsokos M, Haemolytic staining of the intima of the aortic root – A useful pathological marker of fresh water drowning? *Journal of Clinical Forensic Medicine* **13** (2006), 125-8; (3) Tsokos M, Cains G & Byard RW, Hemolytic staining of the intima of the aortic root in fresh water drowning – a retrospective study, *American Journal of Forensic Medicine and Pathology* **29** (2008) 128-30.	1019
2W	File Notes of Michael Sykes, solicitor, 8 August 1996.	1033
2X	Circumstantial evidence in *R v Keogh* – discussion.	1035
2Y	The significance of Exhibit P53 – further analysis.	1039
2Z	Articles relating to sudden unexpected death: (1) Doolan A, Langlois N, Semsarian C. Causes of sudden cardiac death in young Australians. *Medical Journal of Australia* 180 (2004) 110-112. (2) 'Defects in gene called RyR2 cause malfunctions in the heart's electrical system.' *Medical Research News*, 2 May 2005. (3) Skinner J, Duflou JA, Semsarian C. Reducing sudden death in young people in Australia and New Zealand: the TRAGADY initiative. *Medical Journal of Australia* 189 (2008) 539-540. (4) Basso C *et al,* Guidelines for autopsy investigation of sudden cardiac death (on behalf of the Association for European Cardivascular Pathology). *Virchows Arch* 452 (2008) 11-18. (5) Post-mortem in sudden unexpected death in the young: guidelines on autopsy practice. Prepared by the members of Trans-Tasman Response AGAinst sudden Death in the Young (TRAGADY) – endorsed by the Royal College of Pathologists of Australasia, May 2008.	1043