In the Supreme Court of the Australian Capital Territory

No SC 286 of 2011

In the matter of an application by David Harold Eastman under section 424(1) of the *Crimes Act 1900*

Amended Application

Consolidated and additional grounds on behalf of the applicant.

1. The applicant's murder trial should have been adjourned no later than 29 June 1995 when material sufficient to raise the questions of the applicant's fitness to stand trial was raised on the initiative of the trial judge at a time when the applicant was not legally represented. At that time the applicant's trial was required by law to be adjourned to the ACT Mental Health Tribunal and the trial which continued without that adjournment was a nullity.

2. At the time the trial judge raised these matters and the applicant was not legally represented, the prosecution did not assist the court. The prosecution alone was in possession of psychiatric reports from Dr R. Milton submitted between 20 February 1989 and 6 September 1990 commissioned by the Australian Federal Police, the letter of 22 May 1995 to the ACT DPP from solicitor David Lander, raising the applicant's fitness and the prosecution was well aware of earlier approaches by Michael Williams QC and the ACT Public Defender attempting to raise the question of the applicant's fitness.

3. The question of the applicant's fitness to stand trial was not properly and fully before the High Court of Australia when the court considered the applicant's application for

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special leave to appeal, with the only substantial ground being his fitness to plead or stand trial. The High Court of Australia was not assisted with the transcript of the proceedings of 29 June 1995, in particular trial transcript pages 2132-3 and the case *R v Vernell* [1953] VLR 590 and the journal article by Dr A.A Bartholomew, *The Disruptive Defendant* (1985) 9 Crim LJ 327. Trial transcript pages 2132-3 was omitted from 9 volumes of appeal books filed in the High Court of Australia by the ACT DPP.

4. When the applicant's fitness to plead or stand trial was raised pursuant to section 475 Crimes Act 1900 before Miles AJ in 2005 again the court was not assisted by any reference to proceedings in the applicant's trial on 29 June 1995.

5. The prosecution neglected its duty to disclose to the defence, either before or during the applicant's trial, information casting doubt on the veracity and reliability of a key forensic witness, Robert Collins Barnes.

6. The evidence of Robert Collins Barnes concerning the alleged use by the applicant of a firearm with a silencer attached is in direct conflict with the evidence of a witness who heard the sound of two gunshots at the time of the murder. That witness, Cecil Robin Grieve, gave evidence at the coronial inquest from which the applicant was committed for trial but was not called to give evidence at the trial of the applicant. Further, there was police expert evidence given at the coronial inquest regarding the significance of the sounds heard by Mr Grieve. That expert evidence concluded that a silencer was not attached to the murder weapon. That evidence was not elicited from that expert witness at the applicant's trial.

7. A false written assertion that no witness heard the fatal shots was made by the ACT DPP as recently as 2008 in submissions before Besanko J in a previous and unsuccessful application made by the applicant and the "credibility" of an expert witness on the question of whether a silencer was attached to the murder weapon was improperly impugned.

8. New protocols for the evidentiary use which may be made of a finding of "low level" gunshot residues were adopted in Great Britain in 2006 in guidelines on "the assessment, interpretation and reporting of firearms chemistry cases". These protocols were unanimously adopted by the Supreme Court (UK) in *Barry George v R* [2007] EWCA Crim 2722 per Lord Phillips CJ. The new protocols have international acceptance.

9. Secondary or "innocent" contamination of low level gunshot residue of the type referred to in the *Barry George* appeal is likely to have occurred in the applicant's case. There was evidence at the inquest that gunshot residues, including "low level" or "rogue" particles were photographed on the same date and in the same photographic studio. This material was later examined preparatory to scanning electron microscope examination in the same room and at the same time. That room had previously been used to store exhibits in an unrelated murder and was also proximate to the Australian Federal Police weapons test firing range.

10. Forensic scientist, Dr James Smyth Wallace, based in Northern Ireland has recently conducted tests on vintage PMC .22 ammunition and has concluded that it is probable that the murder weapon was a shortened rifle rather than one to which a silencer was attached. This is not inconsistent with the findings of the NSW Government pathologist at the autopsy of the deceased and is consistent with what was heard by the witness Cecil Robin Grieve.

11. Gunshot residue evidence central to the prosecution case at the applicant's trial is now explained by new evidence inconsistent with his guilt. Evidence of gunshot residues of PMC manufacture and additional "low level" residue thought to be of different manufacture and said to be found in the applicant's car may be explained by the new evidence. The new evidence, on affidavit, is that the applicant's car was borrowed and, unknown to the applicant; it was used to go rabbit shooting. A Brno .22 rifle, rifle bag and ammunition was reported to be transported in the boot of the applicant's car. That rifle and rifle bag have been recently secured and safely stored and will be forensically tested.

12. There was evidence provided to the Australia Federal Police by a witness whose name was suppressed at the coronial inquest and who was never called to give evidence at the inquest. The identity of that witness was belatedly disclosed late in 1994 as Robert Buffington. Mr Buffington had provided direct eyewitness evidence that Louis Klarenbeek regularly dealt in illegal firearms, including handguns and shortened rifles, and on an occasion shortly before the murder of Colin Winchester, Louis Klarenbeek had delivered a rifle at a suburban shopping centre in Canberra to a defendant charged with an offence arising out of Australian Federal Police "Operation Seville".

13. There is a clear hypothesis contained in the evidence given to the coronial inquest and in available contemporaneous police intelligence consistent with the guilt of others who are in no way connected to the applicant. This material includes the previously considered material in inquest documents MFI 23 and MFI 130 which must be analysed in the context of other evidence led at the inquest, in particular inquest "also-ran" briefs 20 and 32. The sequence of events disclosed in evidence at the inquest and in MFI 23 relating to the informer, Guiseppe Verduci, raises cogent evidence of a conspiracy to murder Colin Winchester by a number of those directly linked to AFP Operation Seville.

14. The evidence given at the trial of the applicant of a threat made by the applicant to Dr Dennis Roantree on 6 January 1989 was inconsistent with a taped interview with Dr Roantree made on 13 January 1989 and transcribed as inquest document MFI 6. That transcript was suppressed by the coroner on the application of the Australia Federal Police on 2 September 1993. Dr Roantree's evidence at the applicant's trial given at a time when the applicant was not legally represented is inconsistent with the previously suppressed document. The conversation between Dr Roantree and the applicant when the alleged threat was said to have been made was in the presence of Dr Roantree's unnamed teenage daughter. A statement from her was never obtained or, if a statement was obtained, it was not provided to the defence. A note of the conversation, claimed to be a contemporaneous note was made approximately ten days after Dr Roantree's initial conversation with the police on 13 January 1989 and is inconsistent with that initial account.

15. Evidence was not led at the applicant's trial of the circumstances of the first corroborated meeting between the applicant and the crucial identification Raymond Webb. The statements of persons with Webb at the time of that meeting support the argument that Webb's later evidence was recent invention.

16. Evidence of surveillance tapes of the applicant talking to himself in his home at night was opened by the prosecution and later led as some evidence of a voluntary and reliable confession. The prosecution was, at all relevant times, in possession of the psychiatric reports of Dr R. Milton, commissioned by the Australia Federal Police, reporting that the applicant should be regarded as psychotic and at the time he was being surveilled was possibly on medication for a severe mental disorder.

17. Evidence which is not factually correct or which was substantially misleading was led by the prosecution at the applicant's trial and which went unchallenged, was accepted by the Federal Court of Australia as a strong circumstantial case of murder. This evidence was often presented when the applicant was not legally represented and declined to cross-examine. This evidence included inter alia:

    a) Evidence about electoral rolls which was factually incorrect and which could be shown to be so on the face of the roll.
    b) Identification evidence was led from a witness who had been hypnotised.
    c) Evidence that the applicant was seen shortly before the murder acting suspiciously in a "police car park". That place was in fact a Commonwealth car park and was a public thoroughfare.
    d) The prosecution alleged that the applicant's fear of Andrew Russo was a concoction, however there was evidence given at the inquest that the applicant had complained to police about Russo's possession of a pump action shotgun and Russo's intention to import a pistol.

18. A review of controversial and now disputed evidence called at the applicant's trial and relevant evidence which was not called at the trial has never been made in the context of the applicant's mental state during his trial, his fitness to stand trial and his fragmented legal representation. It is in the interests of justice that these matters are reviewed in context rather than in isolation.

19. As a consequence of:

e) The conduct of the prosecution;

f) Misconduct by investigating police;

g) The inadequacy of the applicant's defence;

h) The failure of the trial judge to grant appropriate adjournments and oversee the interests of the applicant when he was not legally represented and;

i) The applicant's mental illness,

the applicant did not receive a satisfactory trial. His conviction is unlawful and the finding of guilt is unsafe.

Date: 10 August 2012

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