Inquiry into the Crown's prosecution role in certain matters concerning the obtaining and upholding of the conviction of Alan Hall

Report by Nicolette Levy KC

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Preface

1. By terms of reference dated 13 July 2022 the Solicitor-General instructed me to carry out an investigation into the role of Crown lawyers in the miscarriage of justice identified by the Supreme Court as arising out of the non-disclosure of relevant information by the prosecution prior to Alan Hall's convictions for the murder of Arthur Easton and the aggravated wounding of his son, Brendan Easton.

Executive summary

2. Alan Hall was convicted of murder and aggravated wounding in 1986. His defence was that he was not the man who had stabbed Arthur Easton and his son Brendan during an intrusion into their family home in October 1985.

3. Ronald Turner contacted police when news of the homicide was broadcast. He described a man he saw running two blocks from the scene of the homicide. Evidence about timing, and from a dog handler who tracked a person from the Easton home to near the sighting, suggested Mr Turner had seen the intruder. Mr Turner's October 1985 statements indicated confidence in his impression that the man he saw was Māori.

4. Police discounted an early suspect in the homicide on the basis of an alibi from his associates, and their enquiries continued. In December 1985 police learned that Mr Hall was the owner of a hat worn and bayonet used in the homicide. Mr Hall lived near the Easton address, and had been walking in the surrounding area for a lengthy period on the night of the homicide. In February 1986 Mr Turner was asked about his confidence that the man he had seen was Māori, and said he was "100%" sure.

5. Peter Kaye was a prosecutor at Meredith Connell, the Crown Solicitor for Auckland, in 1985. He was involved in the Easton homicide case from early on, and advised police prior to the arrest of Mr Hall in April 1986.

6. In June 1986 police carried out a reconstruction exercise to test the likelihood that Mr Turner's confidence about being able to judge the ethnicity of the man he saw was justified. Using a police inspector in the position of observer, they found that the lack of lighting in the area and the fleeting nature of the view of the man cast doubt on Mr Turner's reliability.

7. Police prepared a statement of evidence for Mr Turner for a preliminary hearing of the case against Mr Hall to be held in June 1986. [redacted] The final statement

police took to Mr Turner for signing (but not reviewing) contained no mention of his belief that the man he saw was Māori. That statement was filed with the Court as Mr Turner's evidence.

8. At the preliminary hearing the defence cross examined one of the sons of Mr Easton about his initial statements that the intruder was Māori. The reply was that this was an assumption only, based on a previous experience of a theft from the property.

9. [redacted] Mr Hall's lawyers, who conducted his defence unaware that Mr Turner had given any statements as to the ethnicity of the man he saw, who was likely to have been the intruder. Mr Turner's evidence as prepared for the preliminary hearing was read to the jury, rather than him being called to give oral evidence.

10. Mr Hall appealed against his conviction. Mr Kaye acted for the Crown leading up to the appeal and at the appeal hearing. [redacted] Mr Kaye's submissions for the Crown at the appeal included most of Mr Turner's evidence as read to the jury, and acknowledged an obligation to supply the details of any evidence known to the Crown which may tend to exculpate an accused from involvement in the crime with which he is charged.

11. The appeal was unsuccessful. The Court of Appeal noted that this was not one of those cases where the prosecution had a statement of a witness that tends to show the appellant to be innocent and had not called that witness nor made his statement available to the defence.

12. Some months after the appeal Mr Hall's lawyers made a specific request to police for Mr Turner's original statements, and upon receipt of them learned what Mr Turner had said about the ethnicity of the man he saw.

13. I have been able to consider parts but not all of the police, Crown, and defence files about events between 1985 and 1987. I have interviewed the lawyers who appeared for the Crown at the preliminary hearing, the trial, and the appeal, and other lawyers who worked for the Crown Solicitor at the relevant times. I have

[1] *R v Wickliffe* [1986] 1 NZLR 4 and *R v Wickliffe* CA104/86, 23 December 1986

considered recent statements by the police officer in charge of the case at the relevant times.

14. [redacted]

15. [redacted]

16. Three applications were made on behalf of Mr Hall to the Governor-General for exercise of the royal prerogative of mercy. Two were made after Mr Hall and his lawyers learned of the original statements made by Mr Turner.

17. No prosecutors or lawyers employed by the Crown Law Office were made aware of these applications, and no input was provided to the Ministry of Justice in respect of them. Nor were the results of the applications made known to the Crown Law Office or the Crown Solicitor responsible for prosecuting Mr Hall.

18. In 2018 and subsequently a journalist, Michael Wesley-Smith, conducted an extensive investigation into the conviction of Mr Hall, with an emphasis on the prosecution failures to include Mr Turner's views on ethnicity in his statement of evidence filed in Court, and to disclose his original statements to the defence. Much of his work was sent to the Crown Law Office, including a statement from the officer in charge of the case saying that [redacted]

19. I have considered the way in which Mr Wesley-Smith's information and queries were handled by the Crown Law Office. My conclusion is that in the circumstances there was no failure by the Crown Law Office lawyers to take appropriate steps to follow up the information provided.

20. Those circumstances include that Crown Law Office lawyers knew that an appeal was being initiated by a lawyer instructed by Mr Hall, that Mr Wesley-Smith had given information which would take considerable time to absorb but was expecting comment from Crown Law within a few days, and that Crown Law Office lawyers did not have access to a complete file which would allow them to make a fully-informed comment.

21. I accept that the Crown Law Office is not expected to investigate alleged miscarriages of justice itself, but I have noted that in some circumstances I consider there would be a clear obligation on Crown Law Office lawyers to attempt to pass on information such as Mr Wesley-Smith's to a convicted person so that person could take steps to use that information within the bounds of the criminal justice system.

Terms of reference

22. The full terms of reference are attached as Appendix One. In summary, this inquiry is to determine the contribution by Crown lawyers to:

    22.1. The non-disclosure of relevant information to Mr Hall's lawyers until months after the Court of Appeal judgment[2]; and

    22.2. The presentation of Mr Turner (at depositions, trial and on appeal) as a witness unable to speak to the ethnicity of a man likely to have been the intruder at the Easton house, when Mr Turner's statements to police included his belief that the man he saw was Māori.

    22.3. Events after the appeal, including in relation to three applications for the Royal Prerogative of Mercy (in 1987, 1988 and 1992) and the investigative work of journalist Mike Wesley-Smith in 2018 and 2020.

[redacted]

Process

23. I have conducted the investigation over the past three and a half months, with the assistance and co-operation of the Crown Law Office, New Zealand Police, Independent Police Conduct Authority, the lawyers involved in events at the time of the convictions and subsequently, and other lawyers who can recall the methods and relationships of the mid 1980s when Mr Hall was convicted. My inquiry is not a Commission of Inquiry, and I had no powers to require people to talk to me, or provide documents.

24. I was instructed to carry out this inquiry at the same time as similar inquiries by police (Acting Detective Superintendent Graham Pitkethley) and the Independent Police Conduct Complaints Authority (Dr Warren Young) were set up, and this inquiry has progressed in parallel with them. Information has been shared between the three inquiries, and several witnesses have been interviewed by, or with input from, more than one of us.

25. The inquiry also follows very significant work on the Hall case by Mr Wesley-Smith between 2017 and 2020, and by private investigators Tim McKinnel and Kayta Pacquin for Mr Hall's defence team (led by barrister Nick Chisnall KC). Both Mr Wesley-Smith and Mr McKinnel have provided access to everything I have asked for, and their previous work in recording and analysing the available documents has been invaluable to me.

26. The following documents were identified as likely to be key evidence of events:

    26.1. The Crown trial file – extensive efforts by Crown Law and law firm Meredith Connell (home of the Crown Solicitor for Auckland in 1986 and today) have failed to find this file, with the likelihood being that it was destroyed sometime after the hearing of the appeal in 1987.

    26.2. The police file – parts of this file have been recovered by the police inquiry into police conduct, and shared with me. Some of what we expected would exist (in particular contemporaneous records of police communications with the Crown Solicitor's office) have not been recovered. Two retired police officers have made notes about some of those communications.

    26.3. The District Court depositions file – this was transferred to the High Court.

    26.4. The High Court file – this has been inspected.

    26.5. The Court of Appeal file – this has been inspected.

26.6. The Crown Law office file in respect of the appeal filed in October 1986 – correspondence from this has been inspected, and it is likely that this is the entire file.

26.7. The defence file – only parts of this are available, and have been inspected.

27. The following witnesses were identified as likely to be able to give direct evidence about key events:

27.1. Peter Kaye – the Crown prosecutor at the District Court depositions hearing, the High Court trial, and Crown counsel in the Court of Appeal. Mr Kaye was interviewed with his counsel, Fletcher Pilditch QC on 8 September 2022, and made written submissions via his counsel and his solicitor Jack Cundy.

27.2. Frank Rose – the junior counsel to Mr Kaye at the District Court depositions hearing. Mr Rose was interviewed by Zoom but had no memories of his involvement in the depositions hearing.

27.3. Kim Hastie – now Judge Saunders – the junior counsel at the High Court trial. Judge Saunders was interviewed on 7 September 2022. Her memory of the Hall trial was very limited.

27.4. Detective Inspector Bryan Rowe – the nominal head of the police investigation. Mr Rowe died in 2011.

27.5. Kelvin McMinn – the officer in charge of the police investigation. Mr McMinn engaged in email correspondence with Mike Wesley-Smith in 2018 and 2019. He responded to questions from me by letter, and then prepared a statement for DI Pitkethley which expanded on some matters.

27.6. Patrick Anthony (Tony) Smith – the second in charge of the police investigation. Mr Smith did not respond to my requests for comment. If he is interviewed by the Independent Police Conduct Complaints Authority his evidence will be confidential to that Authority.[3]

27.7. James (Jim) R White – the officer in charge of suspects.

27.8. Charles Cato KC – counsel for Mr Hall at the depositions hearing in Mr Williams' absence. Mr Cato was interviewed by me by Zoom and made further contributions by email.

27.9. Peter Williams QC – trial counsel and counsel in the Court of Appeal for Mr Hall[4]. Mr Williams died in 2015, but had sworn an affidavit for Mr

[3] Section 25 Independent Police Conduct Complaints Authority Act 1988
[4] Mr Williams was appointed a Queen's Counsel in 1986 after the Hall trial.

Hall in the third application for the exercise of the Royal Prerogative of Mercy.

27.10. Arapeta (Albie) Orme – junior counsel for the defence at the trial. Mr Orme swore an affidavit for Mr Hall in support of the third Governor-General application. He died in 2008.

27.11. Bruce Stainton – the solicitor instructed by the Hall family after the trial but before the appeal. Mr Stainton was the junior counsel to Mr Williams QC at the appeal and prepared the third Governor-General application in 1992. He swore an extensive affidavit in support of the application for leave to appeal to the Supreme Court in 2022. Mr Stainton has answered questions by phone, Zoom, and email, including about conversations he had with Mr Williams during preparation for the appeal and the third Governor-General application.

27.12. Brendan Horsley – the Deputy Solicitor-General (Criminal) between 2017 and 2020 when counsel for Mr Hall and a journalist corresponded with the Crown Law Office.

27.13. Charlotte Brook – Criminal Team Manager between 2017 and 2021, who advised on the Crown Law Office response to the journalist inquiries.

28. I believed that many former Meredith Connell partners and staff solicitors would be able to assist with evidence about the practices and culture of the firm, and that a selection should be consulted for this purpose. I interviewed three former partners from 1986/1987 in person and one later partner by Zoom. I interviewed several staff solicitors from the 1986/1987 period by Zoom and had email exchanges with some others about particular points. There are many Meredith Connell staff from the time whom I have not spoken to, but I believe I have spoken to enough to understand the flavour of the working environment there at the time, and to answer the questions which I had about the factors likely to be relevant to what happened in the Hall trial.

29. I met Alan Hall and his brother Geoff in person, and had a Zoom call with Greg Hall.

30. I examined textbooks on Evidence from the time, and read the Criminal Law Reform Committee Report on discovery in criminal cases (December 1986).

31. I searched for reports of criminal cases in which Mr Kaye had appeared prior to the Hall trial, to understand what other issues he had encountered, and so his knowledge and experience at the time of the Hall trial and appeal.

32. I listened to some of the Mr Wesley-Smith's Grove Road podcast, and watched the Bryan Bruce documentary *True Crime Investigation: Falsely Convicted - the case of Alan Hall*.

Background

33. Arthur Easton suffered fatal injuries during a home invasion on 13 October 1985. His teenage sons, Brendan and Kim, who were also injured during the home invasion, could not usefully describe the intruder, although initially spoke of him as Māori, and about six foot tall.

34. After a lengthy police investigation, Mr Hall, a 5' 8" pakeha, was arrested for the murder in April 1986.

35. A depositions hearing was held in June 1986, and Mr Hall was convicted at a trial in September 1986.

36. Mr Hall's application for leave to appeal was heard and dismissed by the Court of Appeal in 1987.

37. Three applications to the Governor-General for exercise of the Royal Prerogative of Mercy (a referral back to the Court of Appeal) were rejected (two in 1988, and one in 1993).

38. The second and third Governor-General applications included documents disclosed to Mr Hall's lawyer by police in March 1988 which showed that the trial evidence of Ronald Turner, who saw a man likely to have been the offender running near the scene, did not include his consistent belief that the man was Māori. The original statements of Mr Turner had not previously been disclosed to the defence lawyers acting for Mr Hall.

39. At different times after 1993 various lawyers and members of the New Zealand Innocence Project – a group investigating possible miscarriages of justice – worked towards further use of the formal processes to achieve an acquittal for Mr Hall, and many journalists published items about the apparent miscarriage of justice.

40. In September 2018 and January 2020 one journalist contacted the Crown Law Office about the apparent miscarriage of justice.

41. In January 2022 Mr Hall's present lawyers filed an application for leave to appeal to the Supreme Court. Shortly afterwards the Crown accepted that Mr Hall's convictions were unsafe because of non-disclosure of relevant information by the prosecution, at the time of both the trial and the 1987 appeal.

42. On 8 June 2022 the Supreme Court allowed the appeal, and directed acquittals on the two charges.

Information gathered about the Hall case

43. The media has extensively covered the events at 24A Grove Road Papakura on 13 October 1985, the investigation into the murder of Arthur Easton, the trial in September 1986, and the appeal in 1987.

44. The purpose of this inquiry is to answer particular questions, some previously raised by the media and others noted by the Supreme Court as unknown. They are:

    44.1. How a statement, which in material respects was not the complete evidence of Mr Turner, came to be produced as his evidence;

    44.2. Why the statements by Mr Turner which preceded his depositions statement were not disclosed to Mr Hall's lawyers until after the judgment in the Court of Appeal;

    44.3. How Mr Turner's evidence came to be read to the jury; and

    44.4. Whether there was a time before the filing of the application for leave to appeal to the Supreme Court when Crown lawyers could or should have acted to address the miscarriage of justice that resulted from Mr Turner's incomplete evidence being read at the trial, and his earlier statements not being disclosed to Mr Hall's lawyers.

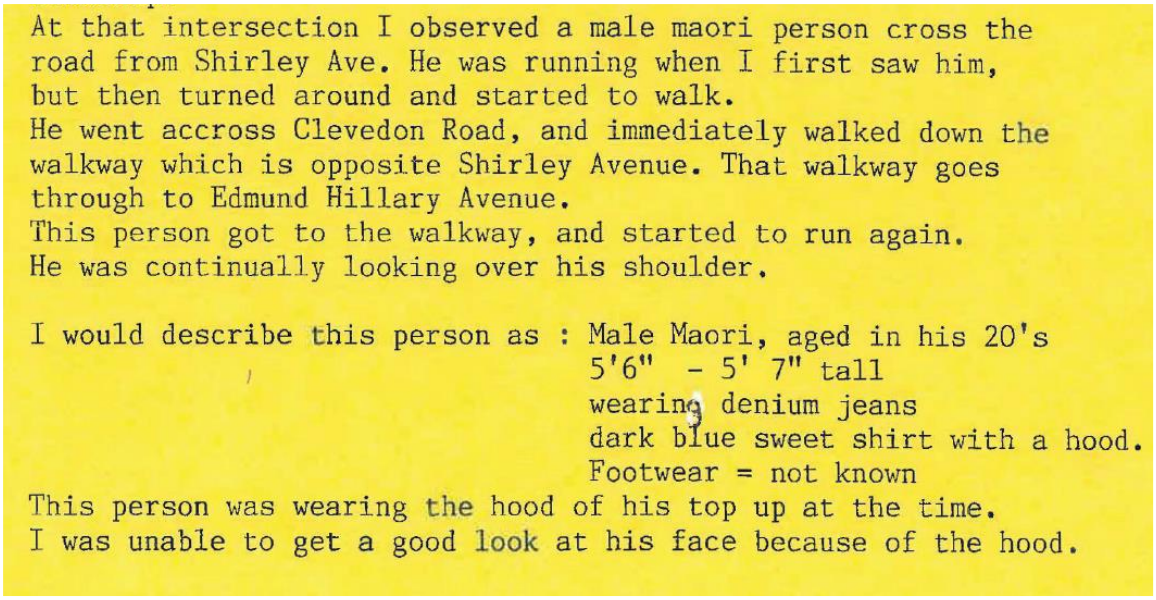
45. In this section I will mention only the facts essential to understanding and answering those questions.

Events before the arrest of Mr Hall in April 1986

46. The intruder entered 24A Grove Road and engaged in a fight with Mr Easton and his sons just before 8 pm on 13 October 1985.

Ronald Turner

47. At 9.45 pm on 13 October 1985 Mr Turner phoned police and described seeing a male Māori running across a main road in Papakura and down a right of way in a suspicious manner, just after 8 pm, when he was driving from his mother's house to an ATM machine in Papakura. The jobsheet recording this call says:



At that intersection I observed a male maori person cross the road from Shirley Ave. He was running when I first saw him, but then turned around and started to walk.
He went accross Clevedon Road, and immediately walked down the walkway which is opposite Shirley Avenue. That walkway goes through to Edmund Hillary Avenue.
This person got to the walkway, and started to run again.
He was continually looking over his shoulder.

I would describe this person as : Male Maori, aged in his 20's
5'6" - 5' 7" tall
wearing denium jeans
dark blue sweet shirt with a hood.
Footwear = not known
This person was wearing the hood of his top up at the time.
I was unable to get a good look at his face because of the hood.

48. In a signed statement the following day, Mr Turner gave details about the man's movements and observations:

> When he got to the right of way, he stopped and looked around behind him. He walked down the right of way a bit and kept looking around and then he ran off down the right of way. It was dark in the right of way and I couldn't see his face when he looked around.
>
> I would describe the guy as being a male Maori and his height would be between 5'7" 6'. I am 5'6". He was definitely taller than me. He was average build by that I would say your build.[5] When he turned around I could see that he was definitely dark skinned, he was not white. I could not see his facial features to recognise him again.

49. Mr Turner also visited a clothing store with Police, where he described a blue sweatshirt as similar in colour to that worn by the man he saw, and with police he repeated the journey he had taken on the night of the homicide so that the time of his observation could be accurately estimated working back from the ATM machine receipt he gave police.

50. Mr Turner's evidence, in combination with other evidence[6], strongly suggested that he had seen the man who had stabbed Mr Easton.

Mr Hall

51. In December 1985 police learned that it was likely that Mr Hall was the owner of a hat and bayonet left at the Easton house by the intruder, and he had been walking alone close to Grove Road at the time of the homicide. Mr Hall admitted that hat and bayonet were his. Over a series of lengthy interviews by police, he

[5] Detective Constable Hesketh who took the statement on 14 October 1985.
[6] About the time a 111 call was made from the Easton house, and the actions of a police dog indicating a fast-moving person leaving the Easton house and traveling to very near where Mr Turner saw the man running across the street.

gave various explanations as to why they were not in his possession in October 1985. Mr Hall lived in Salas Place, so the route taken by the man seen by Mr Turner was in the direction of his house.

52. In February 1986 Detective Sergeant Jim White interviewed Mr Turner about his statement that the man he had seen was a Māori. Mr Turner was confident, and indeed adamant, that his statement on this point was accurate. He said:

> I still feel that the person I saw that night was a Maori. His feature seemed Maori. His stance seemed to be a Maori. When I asked my wife to look at this guy I remember saying to my wife "look at that sneaky guy over there." My wife reckons I said "look at that Maori guy". I can't remember if I said that or not
>
> I'm 100% sure he was a Maori. That was my immediate impression. I do not feel he was a pakeha, not even a dark skinned one

53. In April 1986 Mr Hall was arrested for the murder of Mr Easton. Police had consulted Mr Kaye prior to the arrest. A preliminary hearing (sometimes called a depositions hearing), at which police must show sufficient evidence for the charges, was scheduled for 24 June 1986.

Events before the depositions hearing on 24 June 1986

54. On Tuesday 17 June 1986 DI Rowe and DS McMinn conducted a reconstruction of Mr Turner's sighting of the man running across the road, in which Detective Inspector Ryan attempted to identify the ethnicity of five constables who ran across the road and down the walkway in imitation of the manner and route of the man described by Mr Turner. The experiment showed mixed success, with DI Ryan never confident about ethnicity, but nevertheless sometimes correct in his impressions of it.

55. [redacted]

56. On Monday 23 June 1986 Senior Sergeant Tony Smith visited Mr Turner's home with a witness statement for him to sign which was in accordance with his previous statements, except in four respects:

    56.1. There was no reference to Mr Turner seeing a police car with its lights off traveling slowly in the opposite direction to Mr Turner on Shirley Ave.

56.2. There was no reference to the man Mr Turner saw being Māori, or "definitely dark skinned", or him being 100% sure that the man was Māori - "that was my immediate impression".

56.3. The sentences "I could not see his facial features to recognise him again" and "his features seemed Maori" have been changed to "I did not see his facial features, and I would not be able to recognise him again".

56.4. The statement that the man was wearing a dark blue sweatshirt with a hood is followed by a reference to exhibit 31 (a sweatshirt seized by police from Mr Hall's home).

57. Mr Turner was not home but Senior Sergeant Tony Smith spoke with his wife, Linda Turner. He took a written statement from her which included that while observing the suspicious man on 13 October 1985, Mr Turner had said to her "look at that Maori guy there".

58. On Tuesday 24 June 1986 Senior Sergeant Tony Smith returned to Mr Turner's address and obtained his signature to the statement described in paragraph 56 above. It is likely that no copy was left with Mr Turner, who did not notice that the statement he signed did not include the "Maori" part of his description of the man he saw.

The depositions hearing

59. Also on Tuesday 24 June 1986 the depositions hearing for Mr Hall began at the Papakura District Court.[7] Police were represented by Mr Kaye and Mr Rose, and Mr Hall was represented by Mr Cato and Mr Orme.

60. Four witnesses gave oral evidence before the hearing finished the following day[8], and about 40 statements (including Mr Turner's) were admitted by consent. The defence file has an unsigned copy of Mr Turner's statement with notes in Mr Cato's handwriting, which I infer was provided to the defence before the hearing began.

61. Mr Cato cross-examined Brendan Easton and Kim Easton, the teenage sons of the victim.

62. Kim Easton agreed with Mr Cato that he had told his brother he thought the man was a Māori, and said that Brendan had passed this to Police. In re-examination

[7] The purpose of a depositions hearing (sometimes called a preliminary hearing) was for the Court to decide whether there was sufficient evidence for a defendant to stand trial, after considering the signed statements and exhibits filed by police. The current Criminal Procedure Act 2011 does not provide for depositions hearings.
[8] Kim Easton, Brendan Easton, a forensic scientist about the likely handedness of the intruder based on the wounds to Mr Easton (John Buckleton) and a police officer (Jim White) about one of the statements made by Mr Hall to police.

by Mr Kaye, Kim Easton said he didn't see that the intruder was a Māori but had assumed that he was because of an earlier incident involving the theft of washing from the line, by people described by his father as Māori.

63. [redacted]

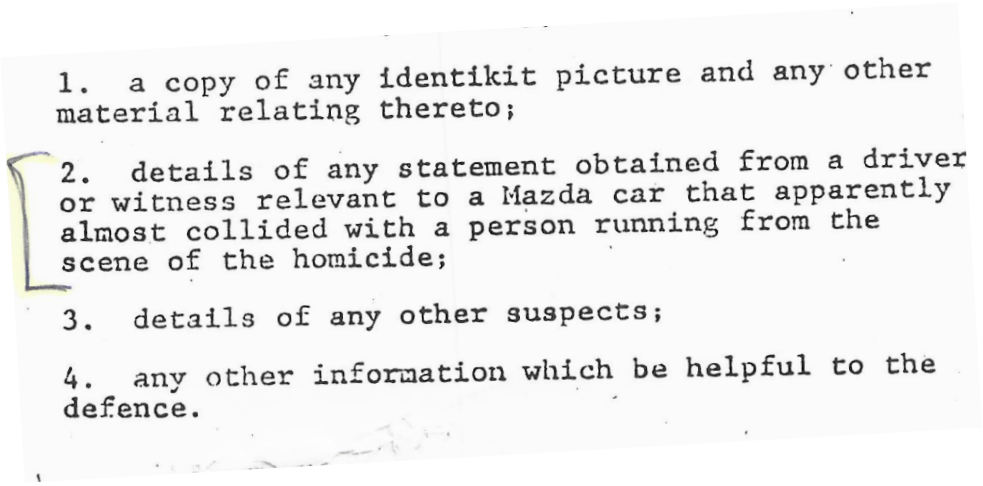
64. The forensic evidence was that the blue sweatshirt taken from Mr Hall's home was **not** the source of the blue fibres found in the hedge between the Easton home and the walkway to Alma Crescent.

Preparation for trial

65. Mr Hall was committed for trial on 25 June 1986, and a trial date set in September 1986.

66. In preparation for the trial Mr Williams and Mr Orme had an independent forensic scientist review the exhibits, and briefed witnesses to show that the blue sweatshirt found by police at Mr Hall's home had been bought by Mr Hall two months after the homicide. The significance of the defence sweatshirt evidence is that it rebuts any inferences the Crown intended to suggest arose from the ambiguous notation following the Turner depositions evidence that the man was wearing a dark blue sweatshirt with a hood: "(Refer Exhibit 31)".

67. On 29 August 1986 Mr Williams wrote to Meredith Connell seeking:



1. a copy of any identikit picture and any other material relating thereto;

2. details of any statement obtained from a driver or witness relevant to a Mazda car that apparently almost collided with a person running from the scene of the homicide;

3. details of any other suspects;

4. any other information which be helpful to the defence.

68. The letter in reply from Mr Kaye cannot be found, but the later Court of Appeal decision records it in this way:

> Mr Kaye replied by letter dated 10 September 1986 supplying the identikit picture and copies of statements made by two persons relevant under para 2 of the request. Replying to paras 3 and 4 Mr Kaye wrote:
>
> "3. I decline to supply you with a list of persons suspected at various times by the Police, because as you will be aware, this would cover a vast number of persons whose names have now been absolutely cleared. I can advise you, however, that all witnesses interviewed by the Police who saw any part of the incident are being called by the prosecution.
> "4. I do not consider there is any other information that may be helpful to you that I can now supply."

69. None of the pre-depositions material relating to Mr Turner was disclosed to the defence. Mr Williams conducted the trial on the basis that all the relevant evidence Mr Turner could give was in his depositions statement, not knowing that Mr Turner had told police in October 1985 that he believed the man he saw was Māori, and had confirmed he was "100% sure" of that in February 1986.

70. [redacted]

71. At the beginning of the trial a typed List of Witnesses (in the order they were to be called) was handed to the Court. Mr Kaye's handwriting indicated with brackets the days on which the witnesses were to be called, and by the notation "RD" if a witness was to be read. Mr Turner was listed as the 16th Crown witness, to be called on the morning of the second day of the trial, and to be read. I infer from this that the arrangement that Mr Turner was to be read was confirmed with defence counsel prior to the start of the trial, and was not the result of Mr Turner unexpectedly becoming unavailable at the last minute.

The trial

72. In cross-examination Kim Easton agreed (without objection from Mr Kaye to the question) that he had first described the intruder as Māori and as being about 6' in height. In re-examination by Mr Kaye, he said that was a guess in the heat of the moment, and he hadn't seen the intruder's face or skin. He explained that he had been told that previous (property) offenders at their house were Māori, and he "presumed that they were Maoris".

73. On the afternoon of day 2 of the trial a police dog handler gave evidence that his dog followed a track from the Easton property down a walkway, and down and across Alma Crescent, losing the scent just before Shirley Avenue. Mr Turner's depositions statement was then read, and exhibits 8 (an ATM receipt from the target of Mr Turner's journey) and 31 (Mr Hall's blue sweat shirt) were produced.

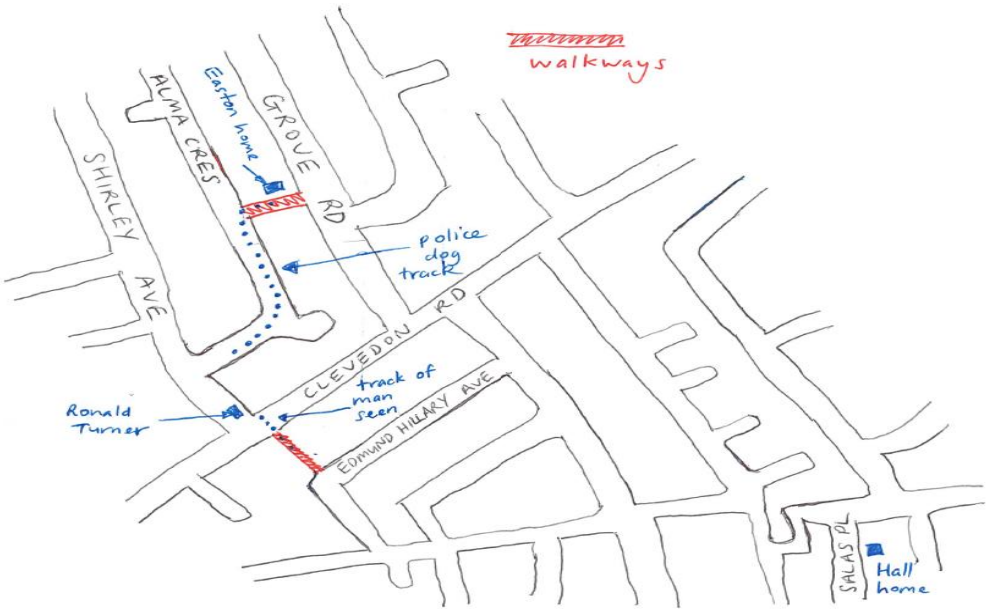
74. Detective Constable Hesketh then gave evidence.

BY CONSENT EVIDENCE OF RONALD BRIAN TURNER READ TO THE JURY, ITEM PRODUCED AS EXHIBIT 31 (blue jacket with hood). RECEIPT PRODUCED AS EXHIBIT 8.

MR KAYE CALLS:

BRUCE HESKETH (sworn)

I am a Detective Constable stationed at Auckland. On 14.10.85, I interviewed the previous witness Ronald Brian Turner and obtained from him a statement relating to an incident which he had witnessed the previous evening on the intersection of Shirley Avenue and Clevedon Road, Papakura. On Sunday 20.10.85, I was present with the witness Turner when we conducted a time trial from his mother's address in Alma Crescent, Papakura, to the Autobank in the Papakura Shopping Centre. I found that it took 3 mins. 20 seconds to travel that distance. I was using a Ford Laser car to measure the distance travelling approx. 50 kms. per hour.



75. [redacted]

[redacted]

76. The defence called evidence that Hugh Wrights menswear shop had sold a sweatshirt like the one found at Mr Hall's home between 5 pm and 7 pm on Friday 6 December 1985, and a friend of Mr Hall's confirmed that he was with Mr Hall when he made that purchase at that shop.

77. Mr Kaye gave a closing address to the jury which (according to the later and uncontradicted grounds of appeal) used emotional expressions such as pointing at the defendant and yelling at the jury "there is the murderer, he sits in this court!", and referring to the Easton brothers who were seated in the back of the court by using such emotional expressions as "those boys that sit in the back of the court, their father has been slaughtered by this man and yet the defence have dared to criticise them even though they told the absolute truth".

78. The trial judge read all of Mr Turner's evidence to the jury in his summing up, noting that counsel had also read some of it to them.[9] The trial judge referred to the initial statements by the Easton brothers that the intruder was 6 foot tall, and to Kim Easton's initial statement that he was Māori. He told the jury that where identification is in issue the defence is always given access to the description first given by the witness to the Police, because this "enables the defence to test the evidence relative to identity which is given later on".

79. Mr Hall was convicted of the murder of Mr Easton and of causing grievous bodily harm to Brendan Easton.

Before the appeal

80. An application for leave to appeal was filed, as was required in 1987 when there was no right to an appeal. However, it seems to have been customary for the application for leave to be determined after hearing the merits of the proposed appeal.

81. The original grounds of appeal were (in summary):

    81.1. that the emotional expressions (physical and verbal) of Mr Kaye undermined Mr Hall's right to a fair trial;

    81.2. that the trial judge's summing up favoured the Crown and prejudiced the defence to an unfair extent; and

    81.3. that new lines of evidence were being investigated.

[9] As is explained below, I find it most likely that it was Mr Kaye who is the counsel referred to.

82. Grounds were later added about the failure to disclose evidence that an earlier suspect ([redacted]) had an association with Mr Easton, and the failure to disclose information about enquiries undertaken into other suspects.

83. [redacted]

84.

85. Mr Kaye [redacted] filed submissions and appeared for the Crown at the appeal hearing (in early 1987 Mr Kaye left Meredith Connell and began practice as a barrister but he continued to act in this matter).

86. [redacted]

87. [redacted]

88. [redacted]

89. [redacted]

[redacted]

90. Mr Stainton recalled that Mr Williams QC was content to leave the issue of Mr Kaye appearing on the appeal when his conduct was being criticised to be resolved on the day of the appeal. He saw its success as likely to be related to whether the Court was satisfied that there had been significant non-disclosure of relevant alibi material to the defence.

The Appeal

91. [redacted]

92. [redacted]

93. [redacted]

94. [redacted]

95. [redacted]

96. [redacted]

97. The application for leave to appeal was dismissed in August 1987. The Court of Appeal said:

> The existence of [redacted] as a suspect had been made known to the defence.
>
> The defence were also aware before the trial that [redacted] was no longer a suspect as the police were satisfied with his alibi. Had the defence wished to make further inquiries of the Crown why [redacted] had been a suspect there were at liberty to do so. This is not a case in which the prosecution has failed to make available to the defence a person who can give material evidence and has decided not to call him, nor is it a case in which the prosecution has a statement of a witness which tends to show the appellant to be innocent and has not called that witness nor made his statement available to the defence (see *R v Mason* [1975] 2 NZLR 289 (SC) and [1976] 2 NZLR 122 (CA). This is not a case in which the crown has not disclosed to the defence that a witness had said something in conflict with evidence given at the trial (see *R v Wickliffe* [1986] 1 NZLR 4 as regards an allegation of that kind).

The Governor-General applications

98. The applications on behalf of Mr Hall to the Governor-General capture the arguments made and evidence gathered in the years very shortly after the trial and the appeal.[10]

99. Three weeks after the appeal result was known, Mr Hall's mother, Shirley Hall, made an eloquent plea to the Governor-General for a retrial, attaching statements

[10] An application to the Governor-General for exercise of the Royal prerogative of mercy is not an appeal. The convention is that the Governor-General responds to such an application in accordance with the advice of the Minister for Justice, given in accordance with advice from the Ministry for Justice (previously Department of Justice). Section 406 of the Crimes Act 1961 allows the Governor-General to refer questions in the case to the Court of Appeal.

from two of her other sons (Greg and Garry) and a friend, about the effects of the prosecutor's emotional statements, and the trial judge's summing up on the jury. The Secretary for Justice considered the application in accordance with s 406 of the Crimes Act 1961[11], and advised the Minister for Justice to advise the Governor-General to reject the application:

> Hall's conviction has been tested in the Court of Appeal. This application revisits the matters which were the subject of the appeal without raising anything that could be considered as fresh evidence. There is, then, no basis on which section 406 of the Crimes Act can be brought into play.

100. Also in March 1988 DS Smith responded to the December 1987 request by Mr Stainton for Mr Turner's statements, and the defence team became aware of Mr Turner's use of the adjective Māori to describe the person he had seen.

101. Mrs Hall immediately sent a second application to the Governor-General, referring to these statements. The advisor to the Governor-General noted:

> The significance of the statements must be that if the witness was correct in describing the man as Maori, and the man was in fact also the intruder, then the intruder was not Alan Hall.
>
> On balance, the written statements probably should have been disclosed to the defence before trial. The common law rule is that previous statements which exhibit a material inconsistency with actual or intended testimony should be made available to the defence. If the defence had this material, it is unlikely that Turner's evidence would have been admitted by consent. Defence counsel could be expected, in these circumstances, to cross-examine the witness as to his earlier descriptions.

102. However, the conclusion leading to the recommendation that the reference be denied was:

> The new information put forward in support of the current application is, in some respects, inconsistent with evidence given at Hall's trial. However, a favourable interpretation of the new material still leaves the essential elements of the Crown case untouched. The evidence does not display the cogency and relevance that could support a referral to the Court of Appeal under section 406 of the Crimes Act 1961.

103. In November 1992 Mr Stainton presented a third Governor-General application with the twin themes that Mr Turner's original statements had been wrongfully withheld by the Crown, and a jury hearing the evidence that Turner saw a Māori man would have had a reasonable doubt about the offender being Mr Hall. Mr Stainton called in aid the December 1985 *Wickliffe* judgment of the Court of Appeal as demonstrating that the Crown were at fault in withholding the

[11] Which allows the Governor-General to refer a question of conviction or sentence, or particular point arising in the case, to the Court of Appeal

statements, and referred to a recent successful Governor-General reference on a very similar issue. Finally, Mr Stainton persuasively criticised the reasoning of the Ministry of Justice in refusing the previous Governor-General reference, noting that the reasoning was contrary to the position taken by the Crown at the trial (which was that Turner had seen the intruder). He noted that the test was whether the Court of Appeal could conclude that it was not satisfied that a jury would have convicted after taking into account the new evidence. Several affidavits were filed in support of this Reference, including from Mr Turner, his wife, and Mr Orme and Mr Williams.

104. Mr Turner's affidavit was sworn in August 1988. He said he had signed his Court statement not realising that the word "Maori" had been omitted, and not intending such an omission. He also said he was never shown exhibit 31 – the sweatshirt referred to in his depositions statement. In late March 1988, he had said to the private investigator then interviewing him that he had been waiting at home expecting to give evidence at the trial, when he received a phone call from police saying that his affidavit would be sufficient.

105. Mr Orme said he had not seen the Turner statements, and they would have been of crucial importance for the defence. He said if he had known of them, Mr Turner would have been called to give evidence at both depositions and the trial.

106. Mr Williams made a short affidavit saying that if proper discovery had been made by the Crown then the chances of an acquittal would have been greatly enhanced. He mentioned a re-enactment not related to the Turner material.

107. I was surprised that Mr Williams did not have more to say about the Turner statements, and the disclosure obligations of the prosecution. Mr Stainton has confirmed to me that in discussions with him, Mr Williams also shared Mr Orme's views about the Turner material. I also note that in the Brian Bruce True Crime Investigation programme[12] there is a clip attributed to a 1989 TVNZ programme Frontline showing Mr Williams saying:

> If that material had been handed over at the right time it would have affected the ability of the defence to cross-examine and it may have tilted the scales so far as Allan Hall was concerned.

108. The advice to the Governor-General in respect of this Reference concluded that:

[12] True Crime Investigation: Falsely Convicted - the case of Alan Hall

> The application proceeds largely on the basis of the significance of the initial statements made by Ronald Turner to the Police. These statements were one of the grounds of Mr Hall's previous application. The new affidavits submitted in support of the latest application add nothing that is material. The essence of the application is that the department's previous assessment of the significance of Mr Turner's statements was wrong. The previous advice has been carefully reviewed in light of the latest submissions. For the reasons given above, it is not considered that the advice given was faulty or unfair.

109. An unusual aspect of the Governor-General's reference process (until relatively recently) is that neither the prosecutor nor the Crown Law Office are notified that an application has been lodged. If the application is refused, neither learn that, nor are they sent the advice given by the Minister of Justice to the Governor-General.

110. I spoke with Mr Stainton about whether Mr Hall had considered instructing him to judicially review the advice to the Governor-General on this third reference. The then recent Court of Appeal judgment of *Burt v Governor-General* [1992] 3 NZLR 672 suggested that review was available when an error of law was alleged. Mr Stainton said he advised Mr Hall's family that a review was likely to succeed, and offered to bring such proceedings "at cost". No instructions were received to proceed with a judicial review application, most likely because the Hall family coffers were completely bare, with all remaining resources having been spent on the very extensive third application to the Governor-General.

Media

111. This case has attracted significant media attention since the 1990s, including a Radio Pacific programme, a TVNZ Frontline episode in September 1989, an Investigator documentary, numerous newspaper articles, a Newshub story in 2010, and a podcast in 2018. A common theme has been the omission from Mr Turner's evidence of the word "Maori" and the failure of the police and/or the Crown to provide Mr Hall's lawyers with the Turner statements, and other related material, including the statement of the ambulance driver who attended the Easton brothers at the house scene and says both boys referred to the intruder as a "black bastard".

112. At least one newspaper article included comment from a former Crown Lawyer, Simon Mount KC. In August 2011 an article in the Weekend Herald by Phil Taylor said that the New Zealand Innocence Project was shortly to file a Royal Prerogative of Mercy petition for Mr Hall, with grounds including the changing of Mr Turner's evidence. The article said:

> Retired High Court judge Sir Thomas Thorp and criminal law specialist Simon Mount said the case warranted further inquiry.

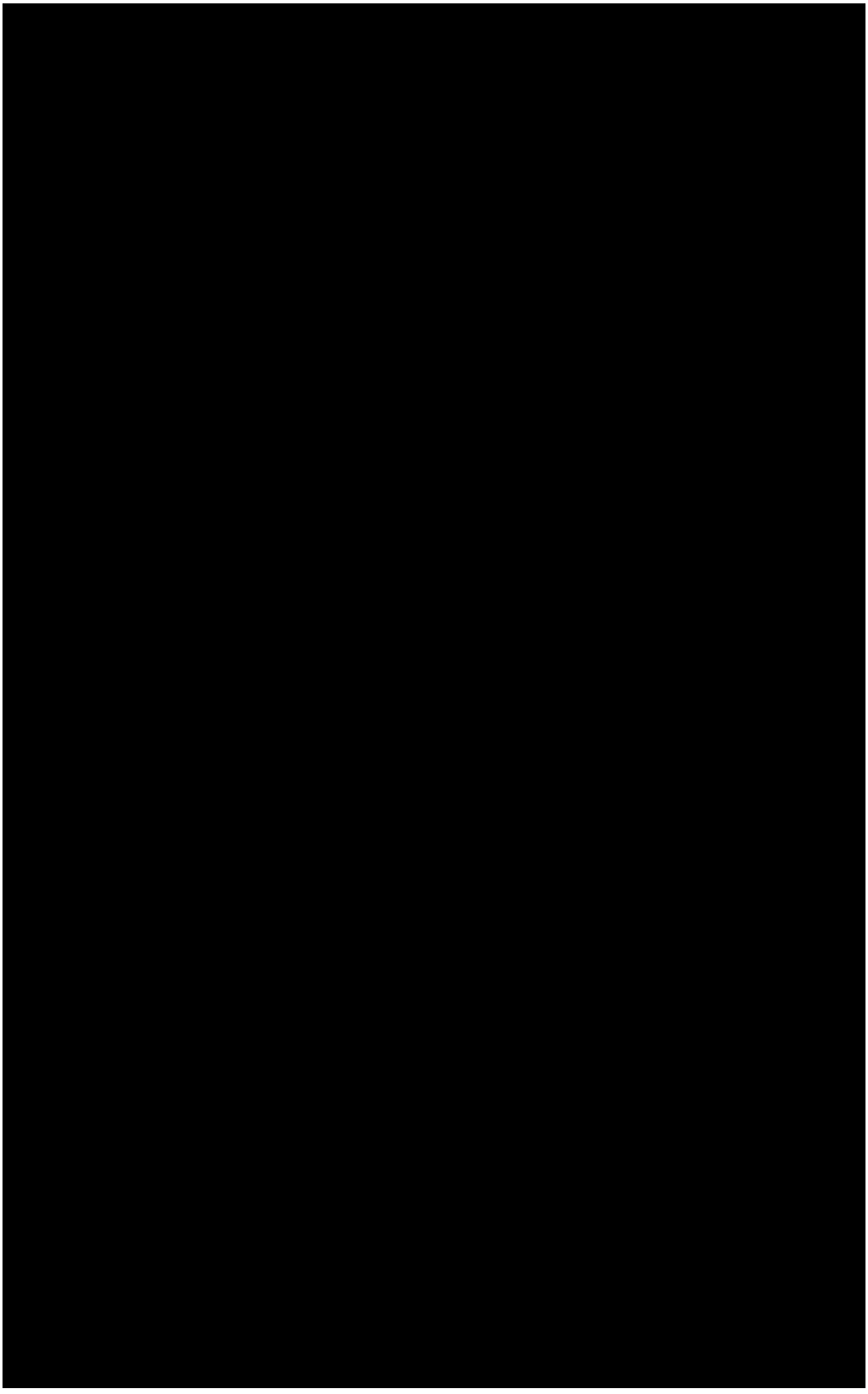
...

Mr Mount said on the information he had seen "there seems to be a good argument that Mr Hall did not receive a fair trial"".

113. While making the Grove Road podcast, journalist Mike Wesley-Smith from Newshub made extensive inquiries of many of the people involved in the arrest and trial of Mr Hall. [redacted]

[redacted]

114. [redacted]



115.

116. [redacted]

[redacted]

117. [redacted]

118. [redacted]

119. [redacted]

[redacted]

120. [redacted]

Crown Law Office

121. I have considered the email correspondence involving Crown lawyers prior to Mr Hall's filing of his application to the Supreme Court this year. There are four tranches of correspondence on relevant matters:

    121.1. May 2017 – then counsel for Mr Hall, Jonathan Krebs, wrote to the Solicitor-General asking if there would be consent to an appeal being considered by the Supreme Court so that the appeal did not have to be filed with the Privy Council. No detail about the proposed grounds of appeal was provided. After discussion with Charlotte Brook and Brendan Horsley, John Pike from Crown Law Office replied asking for some detail as to the basis on which the intended appeal was to be advanced, to inform the response. There was no reply to his letter.

    121.2. September/October 2018 – Mr Wesley-Smith and Mr Kaye correspond with Crown Law about the issues for his podcast and article, with an intended publication date of the Friday following the Monday email from Mr Wesley-Smith to Crown Law. This is discussed below.

    121.3. March 2019 – Police and Crown Law correspond about the podcast and article issues. This is discussed below.

    121.4. January 2020 – Mr Wesley-Smith and Crown Law correspond under the subject heading "Prosecutors as Ministers of Justice". This is discussed below.

122. I have interviewed Brendan Horsley, who was Deputy Solicitor-General (Criminal) at all relevant times. He received or was passed most correspondence about criminal trials, appeals, and other processes. Elizabeth Underhill was the Executive Assistant to Una Jagose, the Solicitor-General, and also the media liaison person for the Crown Law Office. Ms Underhill both passed matters to Mr Horsley and acted as media liaison person for him and Charlotte Brook (then a Criminal Team Manager) collating and sending replies such as those sent to Mr Wesley-Smith in this case.

123. I have also interviewed Ms Brook who undertook the work required to respond to the emails from Mr Wesley-Smith including consulting with Mr Horsley. The other Criminal Team Manager Mark Lillico was copied into the initial correspondence, but the work fell within Ms Brook's sphere of management, and he took no steps in respect of it.

September/October 2018

124. On 19 September 2018 Mr Kaye emailed Crown Law advising them of his correspondence with Mr Wesley-Smith, and attaching the relevant emails – see

171 above. He said "I assure you however that at no stage of my career have I either altered police statements or instructed police to alter them".

125. The emails attached to this letter included Mr Wesley-Smith's recitation of the irregularities discovered with the Hall case, including:

125.1. Mr Turner's affidavit saying he did not get to read his depositions statement, confirming that police knew he was firm that the man he saw was Māori, and saying he never saw exhibit 31 (Mr Hall's sweat shirt).

125.2. That the Court of Appeal was wrong to say that "this is not a case in which the Crown has not disclosed to the defence that a witness has said something in conflict with evidence given at the trial" because the Hall family believed that was exactly what had occurred given the changes made to Mr Turner's statement.

125.3. [redacted]

125.4. The advice of the Secretary for Justice to the Minister of Justice that resulted in the refusal of the third Governor-General's petition.

126. Ms Underhill asked Mr Horsley to "look into this and also keep in touch with Peter Kaye", and Mr Horsley forwarded the email to Ms Brook and Mark Lillico. Ms Brook checked whether a reply had been received from Mr Krebs to the letter sent in May 2017 about a fresh appeal, and the answer was no.

127. Ms Brook checked the Crown Law Office Worksite (a document management system) and archive records. She learned that Meredith Connell had conducted the prosecution of Mr Hall, and Mr Kaye had been instructed to represent the Crown for the appeal, and that no files were held by Crown Law beyond the correspondence showing in respect of these events.

128. On 24 September 2018 Mr Wesley-Smith forwarded Ms Underhill his email to Mr Kaye (being the email that Mr Kaye had already forwarded to Ms Jagose on 19 September 2018).

129. Ms Brook then emailed Mr Kaye attaching the media protocol for prosecutors, and saying it was up to him whether he responded, but to please copy Crown Law in any response. On 24 September 2018 Ms Underhill updated Mr Wesley-Smith that this had occurred, saying that Crown Law could not comment as it had no role in the trial or the appeal.

130. Ms Brook also emailed Ms Underhill and Mr Lillico saying that "We are going to look into it a little more at this end and then likely tell both the media and Peter Kaye that it's nothing to do with us".

131. On 9 October 2018 Mr Wesley-Smith emailed Ms Underhill asking:

> Can Crown Law advise:
>
> - Does it consider it is within its power (as overseas prosecutors routinely do) to advance applications for the quashing of convictions it considers are unsafe?
> - If not why not?
> - On the basis of evidence presented to or gathered by it, Has Crown Law ever initiated its own application to a Court that a conviction is unsafe and/or should be quashed?
> - If so what were these cases?

132. The reply prepared by Ms Brook and sent by Ms Underhill the following day was:

> 1. In New Zealand it is not possible for the prosecutor to appeal against a conviction. The statutory language in the Criminal Procedure Act 2011, and formerly the Crimes Act 1961, is that only a "convicted person" may appeal. An appeal is the only method of having convictions quashed, other than the exercise of the prerogative of mercy which requires appeals to have already been filed and dealt with. However, in practice, it is not uncommon for prosecutors to suggest to convicted persons (or more usually their lawyers) that an appeal be filed if the Crown considers there has been a miscarriage of justice.
> 2. See above.
> 3. As set out above, it is not possible for the Crown to formally initiate the process, although it may do so informally by way of suggesting to a person, or their lawyer, that an appeal should be filed. It is not uncommon when an appeal is filed, whether the Crown has suggested it or not, for the Crown to agree that a conviction should be quashed if it considers there has been a miscarriage of justice, whether on the basis of fresh evidence or because there has been a clear error at trial.
> 4. All Court of Appeal decisions are publicly available and should (but don't always) record somewhere in the decision whether the Crown opposed the appeal or not. We don't keep records of them separately so can't answer this question.

March 2019

133. On 14 March 2019 Detective Inspector Dave Lynch emailed Mr Horsley about the Easton homicide, saying the case was “a bit ugly” and explaining:

> … a witness that was interviewed at the time of the murder gave a description of a person running away from the direction of the scene. This person was described as Maori. The person arrested was European.

> At trial this witness was not called and a brief was read to the Jury which had the description of the person being Maori removed. I understand that this information was not disclosed until after the matter went through the court of appeal.
>
> Mike Wesley-Smith I think has been in contact with Crown Law and also the Trial Prosecutor (Peter Kaye) and the OC case (retired DI Kelvin McMinn) asking questions about why the Jury did not get to hear the full description as originally given by the witness. Peter Kaye and Kelvin McMinn have given contradictory answers with McMinn stating that Peter Kaye made the decision to remove the Maori descriptor. Kaye states that he cannot recall making any such decision and states that he would not do such a thing. Wesley-Smith has gone back to Kaye quoting a section of a Police report to the Crown where the evidence that that witness will give is summarised. That section clearly states the full description the witness provides including the Maori descriptor. Kaye did not respond to Wesley-Smith on this point.
>
> I don't want to get into a public debate over who's right and who's not but we have been asked some questions that we really needed to respond to and below is the statement I have provided for your information.

134. The public statement included that police could not relitigate matters, and that Mr McKinnel (the private investigator for Mr Hall) was to receive all information he was entitled to.

135. The following day Mr Lynch emailed Mr Horsley, referring to their conversation the previous day, and attaching a portfolio of material (including all Mr Turner's statements), and including references to the Wesley-Smith podcasts and articles. He said:

> As discussed, I leave it to your discretion as to whether the Crown needs to conduct a proactive assessment of these issues and consider what if any action should be taken as a result".

136. On 1 April 2019 Ms Brook emailed Mr Lynch saying:

> I've dealt with a few queries from Mike Wesley-Smith about this already in the past year or so, and I had some correspondence with Peter Kaye I think (or I told Mike W-S to approach him). It's all a bit untidy, and we really have no way of knowing what happened after so many years. It would be surprising if the original statements hadn't been disclosed prior to briefs being prepared but you never know, it was the 80s…
>
> I don't think there is anything we can usefully do at this stage. If/when they bring an appeal we will have to deal with it then. If they go down the prerogative of mercy route then MOJ will do a full investigation, and would likely engage a QC to look into it. I think that would be better than us doing it, given the allegation of prosecutorial misconduct.

137. Mr Lynch replied saying they'd wait to see what happened.

138. On 23 January 2020 Mr Wesley-Smith wrote again to Crown Law "in its capacity as the supervisory body for all prosecutions", copying the Crown Solicitor for Manukau in on the stated basis that any formal re-consideration of this case would fall within its jurisdiction. He repeated all the facts of the Hall case previously provided and included a quote from a 2018 Solicitor-General speech in which she described prosecutors' duties:

> The overarching duty of a prosecutor is to act in a manner that is fundamentally fair; fairness of process is critical; Crown prosecutors must perform their obligations in a detached and objective manner, impartially and without delay. They must protect the right to a fair trial. Their role is not to strive for a conviction. While they represent the Crown it is not the same as representing a party in litigation. Representing the Crown in a prosecution must attend to the Crown's interests and obligations in fair criminal trial process and preserving the integrity of the criminal justice system. Crown prosecutors must present the Crown case independently (of any agency from which the matter arose), and dispassionately.

139. Mr Wesley-Smith said he was planning to write a story the following week on the Hall family's contention that the Crown had not adhered to its obligations of fairness to process and to maintain the integrity of the criminal justice system, and wanted to know what the Crown considered its role to be in a case like that of Mr Hall. He asked for a response to the following questions:

> As a matter of Criminal Procedure is it permissible for material witness evidence to be changed by the Crown/Police without the knowledge of the witness, the defence, trial judge or jury or Court of Appeal?
>
> Does the Crown consider this statement made by the Court of Appeal in the Hall case is correct: This is not a case in which the Crown has not disclosed to the defence that a witness has said something in conflict with evidence given at the trial.
>
> What is the Crown's response to the Hall family's claim it was the Crown/Police who caused this incorrect statement to be made by the Court of Appeal.
>
> Does the Crown consider its obligations of fairness to process and maintaining the integrity of the Criminal justice system require it to take *pro-active* steps to address the fair trial concerns identified by the Hall family?
>
> If so what steps will it take?

140. The Crown Law reply prepared by Ms Brook and sent by Ms Underwood on 24 January 2020 was:

> As previously advised, Crown Law does not hold any records in relation to your queries as the trial and appeal were not conducted by this office. Given the age of the case no electronic records were kept. We have referred you to counsel who acted for the Crown, Mr Peter Kaye, who may or may not be able to assist (but of course is under no obligation to do so). We note that this matter has been investigated by the

> Ministry of Justice, in the context of an application for the exercise of the prerogative of mercy, on more than one occasion. That is the appropriate forum to resolve the issues you have raised and Crown Law will not be commenting further.

141. Mr Wesley-Smith replied on 25 January 2020:

> My email was an attempt to see what, if anything, New Zealand Prosecutors felt obligated to do when presented with information of this nature. The idea that a conviction entered in 1986 should be as safe today as it was then.
>
> The response suggests the Crown think it is entirely up to the defendant to advance matters of this nature irrespective of whether that defendant may be intellectually impaired, impecunious or presently incarcerated.
>
> It is an approach that stands in stark contrast to that undertaken by District Attorneys in many US states who on their own initiative will go back to Court if they believe a person has not been given a fair trial. They see this as consistent with their role as a Minister of Justice obligated to ensure justice is done. This includes situations when the trial was prosecuted by a different prosecutor to the district attorney undertaking corrective steps many years later.
>
> As to the suggestion the Ministry of Justice investigated this manner the adequacy of their efforts is self-evident.
>
> All that said it appears there are two equally arguable interpretations available as to Prosecutors duties so I appreciate Crown Law's consideration of this request.

142. Mr Horsley and Ms Brook agreed there was to be no reply to that email.

143. Ms Brook saved the correspondence with Mr Wesley-Smith to a general file containing Official Information Act requests and media requests, rather than the file opened in respect of Mr Hall when the 2017 correspondence had occurred.

144. There was no further response from Crown Law, or activity by it in relation to Mr Hall until receipt of the application for leave in January 2022.

145. When that application was received, Madeleine Laracy and Emma Hoskin searched the Crown Law file system for previous references to the Alan Hall file, and discovered the correspondence between Mr Krebs and Mr Pike in 2017. They did not discover the correspondence between Ms Brook and Ms Underhill with Mr Lynch and Mr Wesley-Smith because that had been filed as correspondence relating to media requests.

This inquiry

The police file

146. The police file included an undated 10-page document titled Summary of Available Evidence, which said it was a paper prepared as a guide for discussion with the Crown Solicitor in relation to a possible prosecution of Mr Hall for the murder of Mr Easton. It contained a proposed list of probable witnesses who would be called in the event of a prosecution. Mr Turner was listed as the 6th witness and the summary notes that he describes a person seen as being a male Māori between five foot seven inches and six feet and of average build.

147. [redacted]

148. [redacted]

149. [redacted]

150. [redacted]

151. [redacted]

152. [redacted]

153. [redacted]

154. [redacted]

155. [redacted]

156. [redacted]

157. [redacted]

158. [redacted]

159. [redacted]

160. [redacted]

[redacted]

161. [redacted]

162. [redacted]

163. [redacted]

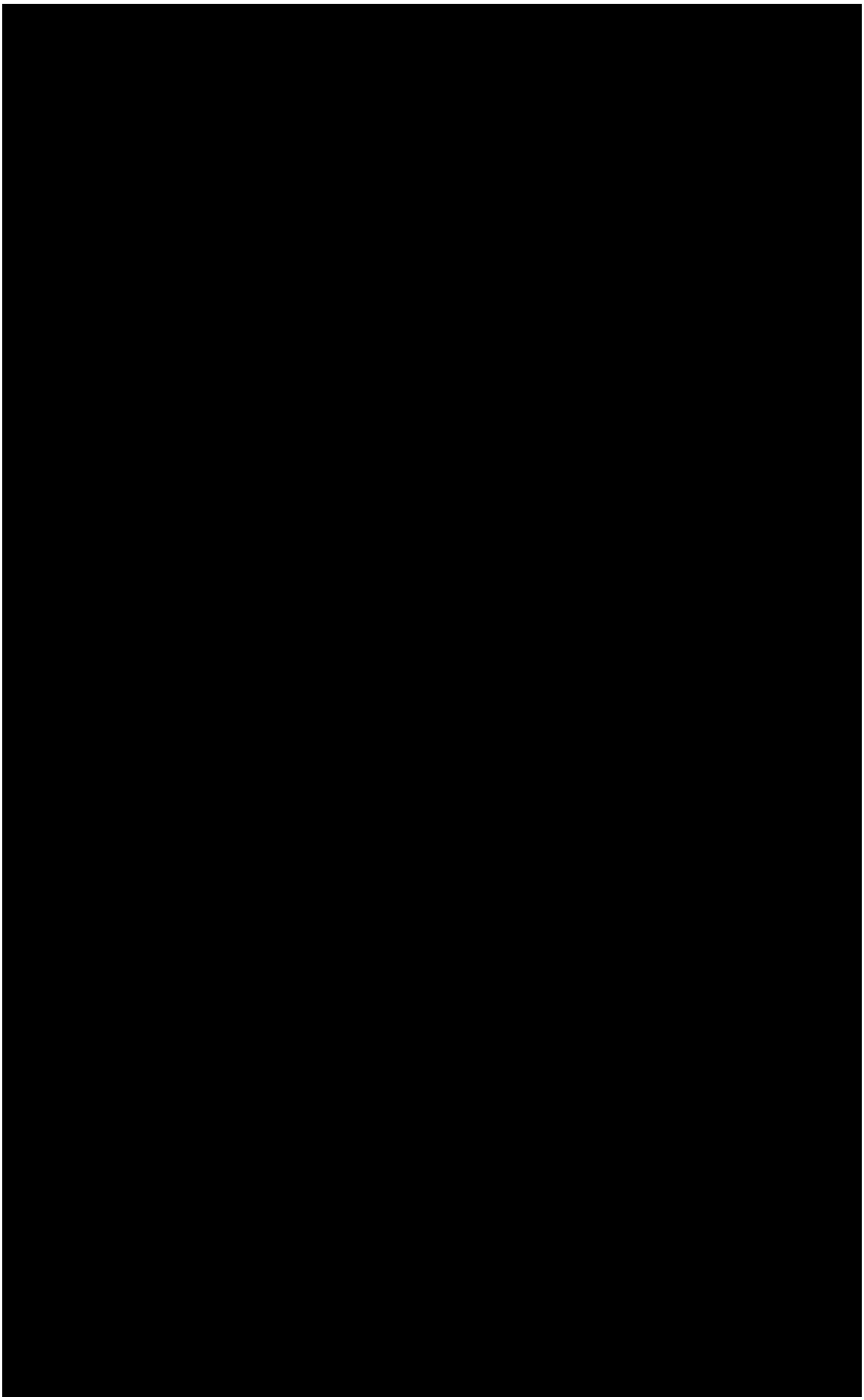
164. [redacted]

165. [redacted]

166. [redacted]

[redacted]

167. [redacted]



168. [redacted]

Mr Kaye

169. I interviewed Mr Kaye with his counsel present. That interview was transcribed and made available to Mr Kaye. I also sent a summary of my understanding of Mr Kaye's position from the interview to Mr Pilditch KC, and comment was made on that in submissions made by Mr Pilditch KC dated 26 September 2022. A draft report was sent to Mr Pilditch KC and a reply received from Mr Kaye's solicitor, Jack Cundy. [redacted]

170. At the time of Mr Hall's trial, Mr Kaye was a salaried partner at Meredith Connell, having been employed as a junior solicitor in about 1980. His role in 1986 was running the Crown Room at the Auckland High Court. He organized Crown counsel for the many trials conducted in the Auckland High Court and District Courts. He prosecuted most high-profile cases himself, including many homicides.[14]

171. [redacted]

172.

[14] A curious feature of the Auckland Crown Solicitor's office at this time is that the Crown Solicitor, David Morris, prosecuted very few matters himself. Almost everyone I spoke to described Mr Morris as hands-off at this period, with a variety of reasons proffered for why this might have been.

173. [redacted]

174. [redacted]

175. [redacted]

176. [redacted]

177. [redacted]

178. [redacted]

[redacted]

179. [redacted]

180. [redacted]

181. [redacted]

182. [redacted]

[redacted]

183. [redacted]

184. [redacted]

185. [redacted]

186. [redacted]

187. [redacted]

188. [redacted]

189. [redacted]

190. [redacted]

191. [redacted]

192. [redacted]

193. [redacted]

194. [redacted]

[redacted]

195. [redacted]

196. [redacted]

197. [redacted]

198. [redacted]

199. [redacted]

[redacted]

200. [redacted]

Mr Horsley

201. Mr Horsley delegated the substance of the work of responding to Mr Kaye's letter and Mr Wesley-Smith's emails to Ms Brook. He did not read the supporting material himself, but he recalls knowing that there was an allegation against Mr Kaye relating to evidence not being led at trial, and a disclosure issue.

202. From his perspective the inquiries from both Mr Wesley-Smith and Mr Lynch were for media purposes. They were not requests that Crown Law begin an investigation into a fresh allegation of miscarriage of justice in a cold case, and they were not part of a live appeal, although one had been signaled by Mr Hall's lawyer in 2017. He presumed that was making slow progress. Once filed, it would receive the resources required to consider the issues raised. He thought it was relevant that there had been three references to the Governor-General, at least one of which considered the facts relating to Mr Turner now stated by Mr Wesley-Smith. He presumed that Mr Wesley-Smith was in touch with Mr Hall's legal team.

Ms Brook

203. Ms Brook dealt with the September/October 2018 correspondence, including the letter from Mr Kaye, as media requests with deadlines. She quickly learned that there was no Crown Law file, and no Meredith Connell file available. Therefore, Crown Law was unable to access the material it would want to see before responding to Mr Wesley-Smith, and so unable to assist him. Mr Kaye was the only possible source of knowledge about the events in 1986, and from her perspective it was up to him whether he engaged with Mr Wesley-Smith.

204. Ms Brook looked at the material provided by Mr Wesley-Smith. She did not fully understand, or retain, from the documents she briefly perused that there was an established failure to disclose Mr Turner's earlier statements, although it is clear from her later comment to Mr Lynch (that she'd be surprised if there was no disclosure but it was the 1980s) that at one point she was aware that this was an issue. Following the 2018 correspondence, her retained interpretation and understanding of the core complaint was that Mr Kaye did not put the ethnicity evidence from Mr Turner before the jury, and the defence had acquiesced in that while knowing of Mr Turner's original statements.

205. It was relevant to Ms Brook in considering the reply to Mr Wesley-Smith that she knew Mr Hall had a lawyer, and an appeal was in the pipeline. Although progress with that was slow, this was not unusual. This was not a wholly fresh matter, with an unrepresented defendant. She did not know whether Mr Wesley-Smith was involved with the defence legal team, and considered that her knowledge of the pending appeal was not for sharing with him. She said that Crown Law would always be reluctant to comment in the media on a matter they knew was ongoing.

206. She had not noted that Mr Hall was still in prison, and assumed he was not, given the length of time since the convictions.

207. The March 2019 correspondence from Mr Lynch came to Ms Brook when Mr Horsley was detained for several weeks dealing with matters arising out of the shootings at the Christchurch mosques. Again, from her perspective police were dealing with a media request, and so she told Mr Lynch that the view being taken by Crown Law was that the issues would be dealt with in an appeal or further Governor-General's reference.

208. The January 2020 correspondence from Mr Wesley-Smith closely followed some generic questions from him about the same topics, but without reference to Mr Hall's case. From Ms Brook's perspective, the matters described above were relevant to her limited response.

209. Ms Brook left her role as Criminal Team Manager in November 2021, and so was not in that role when Mr Hall's application for leave to appeal was filed in January 2022. Her new role as Senior Crown Counsel meant she was unaware the application had been filed, and so had no opportunity to comment to the team that there had been earlier correspondence with Mr Wesley-Smith about Mr Hall's case.

210. It was only in June 2022, after the Crown had conceded Mr Hall's appeal to the Supreme Court and when this inquiry had been announced, that Ms Brook became aware that the failure by the prosecution to disclose Mr Turner's original statements to the defence was a key foundation of the miscarriage of justice. Ms Brook learned this at a Zoom meeting led by Emma Hoskin (Crown counsel with

Madeleine Laracy in the Supreme Court), who was then told by Ms Brook about the earlier correspondence from Mr Wesley-Smith to Crown Law.

211. Ms Brook was very concerned that she had not grasped this important aspect of the situation in 2018 – 2020, and revisited Mr Wesley-Smith's emails to see how this had occurred. She then emailed Ms Hoskin, referring to the Crown submissions, and saying:

> [T]he factual position adopted by the Crown is somewhat different to what we (Brendan [Horsley] and I) thought it was in 2018. We understood the allegation against Mr Kaye to be that he deliberately withheld from the jury (not the defence) the fact that Mr Turner had said the offender was Māori, and specifically that he had actually changed Mr Turner's statement (or directed the Police to do that). That didn't make much sense as we could see the original statements and the brief of evidence that was read at trial – the former included that important fact and the latter did not. A decision not to lead that evidence at trial was technically open to Mr Kaye (on the assumption that it had been disclosed) as the Crown can choose what evidence it leads, although of course very unwise and by today's standards it would possibly amount to prosecutorial misconduct even if the defence had the original statements and could cross examine on them if they chose (what if Mr Hall had been self-represented? The fact of disclosure would be no answer). But it's a different allegation entirely to say that the evidence was not disclosed to the defence as well as not led at trial.
>
> We knew Mr Hall's team had said that Mr Turner's original statements had not been disclosed prior to trial but we thought this was just an allegation and not accepted by the Police/Crown (the s 406 report had proceeded on the basis it hadn't been disclosed but that was just based on what trial counsel had said, it did not appear that the Police/Crown were ever asked – we normally aren't asked to respond to s 406 applications so it's not surprising); and it was impossible to know for certain given that disclosure records were not kept. No one was able to answer that question definitively. Obviously junior counsel for Mr Hall had deposed for the s 406 that he had never seen the original statements, but there remained the possibility that they had been disclosed eg lead counsel may not have passed them on to junior counsel or they may in fact have been seen by counsel who had just forgotten or not appreciated the difference between them – certainly wouldn't be the first time a defence lawyer had been sure a document hadn't been disclosed when in fact it had.
>
> The correspondence we received was all consistent with that ie that the focus was on the "changing" of Mr Turner's statement (which I interpret as being the decision to omit information in the statement from the brief of evidence read to the jury, rather than any document actually being changed – plainly the original statement had not been changed as Mike Wesley-Smith had it and it included the reference to the offender being Māori) rather than any issues of disclosure. Mike didn't ask Mr Kaye about any disclosure issues and his email didn't suggest the original statements hadn't been disclosed, he was just asking about how it came to be that the reference to the offender being Māori never made it into the brief of evidence that was read to the jury. Similarly, the letter from the former Police OC was all about how that brief of evidence came to be drafted in the way it was, it doesn't appear to have been

> suggested to him that the original statements hadn't been disclosed. And of course Peter Kaye, in his letter to [the Solicitor-General], clearly thought the issue was about altering statements – he assured [the Solicitor-General] he had not done so. I thought that was sidestepping the issue, no one had ever suggested that he had altered a document, the question was whether it was his decision, or a Police decision, not to include the reference to the offender being Māori in the brief of evidence and he had not answered it.
>
> Is it now accepted by Police / Peter Kaye that they in fact never disclosed the original statements prior to trial? That's just extraordinary (ie extraordinarily bad!!).

212. In his 2018 emails Mr Wesley-Smith does refer obliquely to the Crown failure to disclose Mr Turner's original statements when he says:

> Of serious concern to Mr Hall's family is the statement by the Court of Appeal in their decision to decline Alan's appeal:
>
> > This is not a case in which the Crown has not disclosed to the defence that a witness has said something in conflict with evidence given at the trial.
>
> Mr Hall's family believe that is exactly what has occurred given the changes made to Mr Turner's statement.

213. Prior to interviewing Ms Brook, my working conclusion was that the non-disclosure issue was clearly stated in Mr Wesley-Smith's correspondence. I accept now that his reference to the non-disclosure is more obvious to a person with a full knowledge of all the facts. A person reading only his correspondence, and perusing only briefly the attachments to it, could miss the significance of the combination of the omission from Mr Turner's deposition statement and the non-disclosure of his original statements. If Mr Wesley-Smith had asked Mr Kaye the obvious questions "do you accept that the defence did not receive Mr Turner's original statements until after the appeal?" and "whose responsibility was it to provide them to the defence?" then the point would have been clearer.

214. Prior to our interview Ms Brook had given serious thought to the role she had at the time of the correspondence with Mr Wesley-Smith, and whether there was an opportunity to accelerate the progress of Mr Hall's case that she had missed.

215. Her conclusion was that the role of engaging from time to time with the media was incidental to the core Crown Law Office roles of responsibility for the prosecution of criminal jury trials and representation of the Crown in appeals in criminal matters. She told me that Crown Law received many media requests about convictions, and regular correspondence from prisoners asserting their innocence.

216. The media requests were referred to Crown counsel who had appeared in the case, for response in accordance with the Crown Law Media Guidelines. When complaints were received about conduct of a prosecutor, they were sent to the

office of the responsible Crown Solicitor for comment, and her team would consider the response.

217. She said that she had no ability to make inquiries that the media could make, and usually no knowledge of the extent to which the media were working with a defendant or their legal team.

218. In respect of Mr Hall's case, Ms Brook referred Mr Kaye to the media guidelines so he could respond himself. She perused the material briefly herself, and could see that the issues Mr Wesley-Smith was raising had been considered by the Ministry of Justice in response to the third Governor-General's reference, albeit she found the conclusions reached there hard to understand. Most importantly, she knew that Mr Hall did have a lawyer preparing for an appeal or a further Governor-General's reference, and so the issues were going to be re-aired in the criminal justice system. She said:

> I knew that the people who needed to know everything knew it. And were taking the appropriate steps, and yes taking the time to consider the appropriate steps, but that's not unusual in these old cases that counsel do take some time.
>
> …
>
> These cases happen all the time, and if they're in hands of competent defence counsel, you know, we're quite hands off, and that would definitely inform our approach to any media queries as well. … I definitely didn't appreciate what the real issue was at the time, but even if I had, I probably wouldn't have done anything differently because I would've known Jonathan Krebs was onto it.

219. Ms Brook said sometimes it would be her task to write to a convicted person or their lawyer to advise that there appeared to be good grounds for an appeal when a prosecuting agency found an irregularity after a conviction. Crown Law could and did concede that some appeals should be allowed, including appeals claiming prosecutorial misconduct.

220. Ms Brook's theme in response to my "what else could have been done in 2018 and 2020" question was that Crown Law required an actual or intimated appeal or other court process to activate their proper attention to a case. A media approach, particularly one seeking a response within a tight deadline was never going to lead to an investigation leading to a substantive response. She said it was possible, but not certain, that if Mr Hall had not had a known lawyer then she may have advised Mr Wesley-Smith to suggest to him that he instruct one if he wished to have matters considered again by the justice system.

Information gathered about practices in 1986

Criminal Disclosure obligations and practices

221. In 1982 the principles in *R v Turnbull* [1976] 3 All ER 549 were given effect with the passing of the amendments to the Crimes Act 1961 resulting in sections 344C (disclosure upon request of all statements by identification witnesses), and 344D (a special warning to be given when a case depends upon identification).

222. As noted by the Supreme Court in *Hall v R*, the legal position in New Zealand as of December 1986 was discussed in the Criminal Law Reform Committee Report on Discovery in Criminal Cases (December 1986). The Report described the Supreme Court decision in *Mason* as the leading New Zealand case: at [16]. The Report also noted the requirement in s 344C of the Crimes Act for the prosecution to supply on request various material about any identification witness including a statement of any description of the offender given by the witness: at [20]. The Report said there was no general rule requiring the prosecution to supply defence counsel with copies of all statements made by witnesses but there were exceptions to that including a requirement to disclose statements "seriously at variance" with the intended trial testimony: at [22].[19]

223. The Criminal Law Reform Committee Report also highlights the variations in disclosure practice throughout the country, and said that for most practical purposes, considerable discretion resides with the prosecutor as to what information shall be disclosed. It notes "where there is a legal requirement to disclose, it is invariably for the prosecutor alone to determine any question of "materiality" or "relevance"".[20]

224. Drawing on a study completed to assist it[21], the Criminal Law Reform Committee was able to note the widely varying extent to which different prosecutors complied with their obligations, and the irrelevant considerations (such as their relationship with defence counsel, the harm which the evidence could do to the Crown case, or the likelihood of reciprocal assistance from the defence) which sometimes influenced those decisions.[22]

225. In the study, most Crown solicitors confirmed that fairness and possible assistance to the defence were the central criteria in determining materiality.[23] Other approaches were more protective of the Crown case. As the Criminal Law Reform Committee noted, the defence rarely has recourse to procedures for

[19] This paragraph taken from footnote 13 of *Hall v R* [2022] NZSC 71
[20] At paragraph 43, page 10
[21] *Disclosure and Criminal Discovery* Michael Stace, Institute of Criminology, VUW, October 1985 – a survey of defence and Crown lawyers about their experiences with criminal disclosure at all stages of the criminal justice process.
[22] At paragraph 54 page 12
[23] At paragraph 57 page 13

challenging the prosecutor's decision not to disclose information, or ascertaining what information the prosecution holds which may be of use.[24]

226. [redacted]

227. Also in December 1986 the Court of Appeal gave its decision in *R v Wickliffe* [1986] 1 NZLR 4, recording the accepted Crown obligation to disclose where there was a material conflict between the (anticipated) evidence of a Crown witness and a prior statement of that witness.

228. [redacted]

229. Although not concerned with disclosure, s 344A is also relevant to this case – it provides that either party to a criminal proceeding may bring an application to determine the admissibility of evidence he wishes to adduce if he believes its admissibility may be challenged.

The law about the admissibility of identification evidence in 1986

230. [redacted]

231. I have consulted three 1980s textbooks,[25] and considered several lines of authority referred to in one or more of them. I have considered the types of identification evidence referred to in *R v Turaki* [2009] NZCA 310, a case [redacted] describing the different kinds of identification evidence for the purposes of a s 344D warning. I have also considered *R v Florence* CA405/00, 11 April 2001, a case in which the Crown called the evidence of a witness who purported to identify the accused, but (if he was correct in doing so) was mistaken in his evidence about the man's height, build and hair colour.

232. [redacted]

[24] At paragraph 89 page 19
[25] Garrow and McGechan's Principles of the Law of Evidence (7th edition 1984), Cross on Evidence (4th edition 1989) and Adams Criminal Law and Practice in New Zealand (updated to 1982, and the 1982 to 1989 supplement)

[redacted]

233. In the Hall case, Kim Easton was asked about his original statement that the intruder was Māori both at depositions and at the trial. Mr Kaye did not object to the questions, or seek to have it determined before the trial that the evidence would be inadmissible. In my view Mr Turner's evidence would have been treated in the same way by the Court – what Mr Turner had said early on was admissible, and counsel for each party could ask questions bearing on its likely reliability. As the trial judge told the jury:

> ln criminal cases where identification is in issue the defence is always given access to the description first given by the witness· to the police. That is because, for obvious reasons, the first description may well be more accurate than later recollections and it enables the defence to test the evidence relative to identity which is given by the witness later on.

234. [redacted]

[redacted]

235. [redacted]

236.

237.

[redacted]

[redacted]

[redacted]

238. [redacted]

239. [redacted]

Involvement of Crown lawyers in Royal Prerogative of Mercy processes

240. The prosecutors including Mr Kaye were unanimous that they were not involved in any Prerogative of Mercy processes, and would not even know that such an application had been made.

[redacted]

Discussion

241. There were three major irregularities in events leading to the conviction of Mr Hall in September 1986. They are:

    241.1. the omission from Mr Turner's deposition statement of the word "Maori".

    241.2. the non-disclosure to the defence of the previous statements of Mr Turner; and

    241.3. The reading of Mr Turner's evidence at trial.

242. I now consider the role of the Crown lawyers in each of these irregularities.

243. In the Supreme Court the Crown took the position that the omission and non-disclosure were such departures from accepted standards that they must either be the result of extreme incompetence or of a deliberate and wrongful strategy to secure conviction.

244. [redacted]

[redacted]

245. [redacted]

246.

247.

[redacted]

248. [redacted]

249. [redacted]

250. [redacted]

251. [redacted]

[redacted]

252. [redacted]

253. [redacted]

254. [redacted]

255. [redacted]

256. [redacted]

257. [redacted]

258. [redacted]

[redacted]

259. [redacted]

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[redacted]

262. [redacted]

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[redacted]

265. [redacted]

[redacted]

266. [redacted]

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[redacted]

270. [redacted]

271. [redacted]

272. [redacted]

273. [redacted]

[redacted]

274. [redacted]

275. [redacted]

276. [redacted]

277. [redacted]

278. [redacted]

279. [redacted]

280. [redacted]

[redacted]

281. [redacted]

282. [redacted]

283. [redacted]

284. [redacted]

285. [redacted]

286. [redacted]

287. [redacted]

288. [redacted]

289. [redacted]

290. [redacted]

[redacted]

[redacted]

[redacted]

291. [redacted]

292. [redacted]

293. [redacted]

294. [redacted]

295. [redacted]

296. [redacted]

[redacted]

297. [redacted]

298. [redacted]

299. [redacted]

300. [redacted]

301. [redacted]

302. [redacted]

[redacted]

303. [redacted]

304. [redacted]

305. [redacted]

306. [redacted]

307. [redacted]

308. [redacted]

[redacted]

[redacted]

[redacted]

309. [redacted]

310.

311.

312.

313.

[redacted]

314. [redacted]

315.

316. [redacted]

317. [redacted]

318. [redacted]

319. [redacted]

320. [redacted]

321. [redacted]

322. [redacted]

323. [redacted]

324. [redacted]

325. [redacted]

326. [redacted]

Crown Law

327. The terms of reference ask what knowledge did any Crown lawyers have about Mr Hall's case over the years since 1988?

328. There have been many media events about this case, and it is highly likely that more than one Crown lawyer, or former Crown lawyer, said to themselves or colleagues what Simon Mount KC (a prosecutor at Meredith Connell from 2000 to 2010 including a year-long secondment to Crown Law Office between 2008 and 2009) is reported to have said to a reporter from the Weekly Herald in about August 2011: "[on the information available] there seems to be a good argument that Mr Hall did not receive a fair trial".

329. I have not seen any evidence that a Crown lawyer learned about Mr Hall's case in the course of acting for the Crown before Mr Kaye and Mr Wesley-Smith approached the Crown Law Office in September 2018.

330. The terms of reference refer to the material sent to Crown Law by Mr Wesley-Smith in 2018 and 2020, and ask how the Crown lawyers handled that information, and what, if any, other steps should have been taken.

331. In September 2018 Mr Wesley-Smith sent Crown Law a persuasive introduction to the irregularities to do with Mr Turner's evidence at Mr Hall's trial. To fully understand his concerns, a reader needed to spend several days considering three aspects of the emails and documents attached to them.

332. In chronological order, the first of these was the advice from the Department of Justice to the Minister of Justice on the third reference to the Governor-General. This advice said that the second and third such references were based on the Turner statements and job sheets obtained from police after Mr Hall's appeal, and that the Department [of Justice] conceded that Mr Turner's statements should probably have been disclosed to the defence pre-trial. The advice said that if the defence had had this material it is unlikely that Mr Turner's evidence would have been admitted by consent.

333. The second document is Mr McMinn's letter of February 2018, which made the allegation that the deletion of "Maori" from Mr Turner's deposition statement occurred [redacted]

334. The final document is Mr Kaye's response to Mr Wesley-Smith, [redacted]

[redacted]

335. Mr Wesley-Smith also provided the Court of Appeal decision to Crown Law, which had stated that Mr Hall's case was not a non-disclosure case.

336. [redacted]

337. While it has taken me considerable time to read all the material that has been collected, to research the legal principles applicable in 1986 and 1987, and to interview people about the practices of the time, in substance I have discovered only a little more than the picture which Mr Wesley-Smith put to Crown Law in 2018. [redacted] Neither of these matters is critical to the facts underpinning the miscarriage of justice conceded by the Crown and accepted by the Supreme Court.

338. One important document which was not sent to Crown Law in 2018 is the submissions prepared by Mr Kaye for the Court of Appeal, which showed the Crown's position was that Mr Turner had seen the intruder. But Mr Wesley-Smith had that document, and had sent it to Mr Kaye earlier, so it was readily available if Crown Law had asked Mr Kaye or Mr Wesley-Smith what was known about the Crown's position at the trial about the man Mr Turner saw.

339. Mr Horsley and Ms Brook confirmed my impression from the emails that the material sent by Mr Wesley-Smith was not perused by a lawyer at Crown Law in more than a cursory way in 2018 or 2019 or 2020. Because of this, the full suite of findings, which later caused the Crown to concede that the appeal should be allowed, was not reached by them.

340. I have some sympathy with Ms Brook's uncertainties about whether (a) there had been a failure to disclose Mr Turner's original statements, and (b) police and/or Mr Kaye accepted that was improper. Mr Wesley-Smith presented these concepts in a way which assumed his reader knew of both the failure and whose fault it was (refer paragraphs 114 to 120 above).

341. Mr Wesley-Smith's questions were about the allegation [redacted] but his focus was on whether Mr Hall's trial had been fair.

342. [redacted]

343. Ms Brook's advice in September 2018 was:

> We are going to look into it a little more at this end and then likely tell both the media and Peter Kaye that it's nothing to do with us"

and then in April 2019 that:

> It's all a bit untidy, and we really have no way of knowing what happened after so many years. It would be surprising if the original statements hadn't been disclosed prior to briefs being prepared but you never know, it was the 80s…

344. If Ms Brook had thoroughly read all the material more than once (which would have required several days of uninterrupted effort), she would have known that Mr McMinn was explaining what had happened in respect of the deposition statement so many years earlier, and that it had been accepted in the Governor-General's references as long ago as 1988 that there had not been the disclosure which the law required.

345. In March 2019 Mr Lynch left it to Crown Law's discretion as to whether the Crown needed to conduct a proactive assessment of these issues and consider what if any action should be taken as a result. [redacted]

346. Ms Brook's last email to DI Lynch says:

> I don't think there is anything we can usefully do at this stage.
>
> If/when they bring an appeal we will have to deal with it then.
>
> If they go down the prerogative of mercy route then MOJ will do a full investigation, and would likely engage a QC to look into it. I think that would be better than us doing it, given the allegation [redacted].

347. Mr Wesley-Smith emailed Crown Law again in 2020, this time asking if the Crown recognises an obligation to take proactive steps to address fair trial concerns, the response was that an application for exercise of the prerogative of mercy was the appropriate forum to resolve the issues raised. There was no response to Mr Wesley-Smith's follow up email in which he contrasted the Crown Law position with the steps undertaken by district attorneys in some U.S. states who on their own initiative will go back to court if they believe a person has not been given a fair trial.

348. The appeal was brought more than three years after Mr Wesley-Smith's first correspondence, and Mr Hall was in custody for all of that period.

349. In considering what steps, if any, should have been taken by Mr Horsley and Ms Brook I have kept in mind four themes from their interviews with me:

    349.1. that Mr Wesley-Smith was making requests for responses to very detailed materials within days, and for media purposes;

    349.2. that Crown Law had no material in respect of the case other than what Mr Wesley-Smith had provided, and no access to a prosecution file or Crown appeal file;

    349.3. that both knew that Mr Hall had previously brought an appeal, and several Governor-General's references, at least one of which had addressed the omission from Mr Turner's depositions statement, and the related non-disclosure issue.

    349.4. that both knew that Mr Hall had instructed a lawyer who was pursuing either an appeal or Governor-General's reference proceedings, although the last contact with the lawyer had been in 2017 and the lawyer had been appointed a District Court Judge in 2019.

350. I also consider it relevant that neither Mr Horsley nor Ms Brook appreciated that Mr Hall was in prison.

351. The roles of lawyers employed by the Crown Law Office are not defined by statute. These lawyers assist the Solicitor-General with the conduct of criminal appeals; and assist the Solicitor-General in the supervision and oversight of public prosecutions. Ms Brook explained that dealing with media requests was incidental to these roles, and they would usually be referred to the Crown Solicitor's office that prosecuted the case. Many media requests are received, and there is frequent correspondence from convicted people asserting their innocence.

352. The relevant role of the Solicitor-General in the criminal justice system in New Zealand is oversight of public prosecutions. In my view this role does not require

the Solicitor-General, through lawyers employed by the Crown Law Office, to investigate alleged miscarriages of justice brought to their attention by the media or members of the public.

353. I do consider that as part of the duty to oversee fair public prosecutions, Crown lawyers should, in some circumstances, make reasonable efforts to alert convicted people when allegations of unfairness, or irregularities, that could affect a conviction are brought to their attention. I understood from Ms Brook that this does happen from time to time. Ms Brook also noted that the Crown will concede that an appeal should be allowed where after investigation there is a plain irregularity resulting in a likely miscarriage of justice. Mr Hall's 2022 appeal is an example of this.

354. In this particular case, I consider that the Crown lawyers could have suggested to Mr Wesley-Smith that his work be shared with Mr Hall or his legal team, so that those with the ability to advance the issues through the system could use it to advance the fair trial concerns raised.

355. My reading of Mr Wesley-Smith's affidavit filed in the Supreme Court is that he was sharing his work with Mr McKinnel and Mr Chisnall, so taking this step would have made no practical difference in this case, but if he had been working independently of the defence team then this suggestion could have assisted Mr Hall.

356. I have said that the Crown lawyers *could* have checked with Mr Wesley-Smith, rather than that they *should* have checked with him, because I accept that in September 2018 the correspondence with Mr Krebs in May 2017 was relatively recent, and so it was a fair inference that there was communication between the defence team and Mr Wesley-Smith.

357. In my view there was no obligation on the Crown lawyers to fully absorb and analyse the material presented by Mr Wesley-Smith, either for the purpose of commenting on it to him, or in pursuit of a remedy for Mr Hall if the material did disclose a miscarriage of justice. The very short deadlines imposed by Mr Wesley-Smith were unreasonable for either purpose, but in any event there was no such obligation.

358. The Crown lawyers did not have a prosecution file. Any "investigation" would have been limited accordingly.

359. The Crown lawyers knew that there had been at least one Governor-General reference considering the substance of the issues raised, albeit nearly 30 years earlier. Even if they considered that Mr Wesley-Smith made a good argument that the advice given on that reference was incorrect, as Mr Wesley-Smith was advised, the path to a further reference or appeal could only be taken by Mr Hall.

360. I note the emphasis in the judgments of the Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 and *Watson v R* [2022] NZCA 204 on the breadth of the Governor-General reference procedure, including (in *Burt*) that in an appropriate case advice relied upon by the Governor-General could be the subject of an application for judicial review. The role of the Crown lawyers when confronted with a miscarriage situation could, at its highest, be to alert the convicted person to the legal paths available to them to resolve the situation.

361. Finally, in this case the Crown lawyers knew that Mr Hall had instructed a lawyer in 2017. For privacy reasons that was not information to be shared with Mr Wesley-Smith, but there was no impediment to passing his material on to Mr Krebs if Mr Wesley-Smith was not in communication with him. Again, I find this is a "could have" step, and not a "should have" step.

362. If the facts had been very different, then in my view the obligations on the Crown lawyers would have been more significant. For example, if there had been no post-appeal disclosure or Governor-General's references, and in 2018 a police officer had contacted Crown Law saying that the management of Mr Turner's evidence was on his conscience because he knew that there had been the omission in Mr Turner's deposition statement, and no disclosure to the defence, then in my view the prosecution oversight obligation of the Solicitor-General would require the Crown lawyers to make reasonable efforts to contact Mr Hall to share this information and advise him to seek legal advice about his appeal rights and other options.

363. [redacted]

[redacted]

Summary of opinions

Non-disclosure

364. Clause 8 of the Terms of Reference ask:

> 8. How did the failure to disclose relevant documents to defence counsel occur? This includes:
>
> 8.1 Mr Turner's original statements to Police,
>
> 8.2 Other Police documentation related to Mr Turner's statements, and
>
> 8.3 Other material non-disclosure.

365. In my opinion the failure to disclose Mr Turner's original statements to police occurred because [redacted]

366. Given the passage of time, and the lack of any available documents or evidence beyond what was presented in the appeal to the Supreme Court, I cannot establish how the failures in 8.2 or 8.3 arose.

Crown knowledge of Mr Turner's several statements

367. Clause 9 of the Terms of Reference asks:

> What did Crown lawyers know, before trial, at trial and at the time of Mr Hall's first appeal, about the content of Mr Turner's several statements?

368. [redacted]

Creation of the deposition statement

369. Clause 10 of the Terms of Reference asks:

> What involvement did Crown Lawyers have in the creation of a statement, then signed by Mr Turner, that omitted reference to the ethnicity of the person Mr Turner saw running near the scene of the murder, and included reference to Exhibit 31?

370. [redacted]

The reading of Mr Turner's evidence

371. Clause 10 of the Terms of Reference asks:

> What were the circumstances in which Mr Turner's evidence came to be read at the depositions hearing and at the trial, rather than Mr Turner appearing as a witness, and what involvement did the Crown prosecutor have in those decisions?

372. I cannot determine the circumstances in which Mr Turner's evidence came to be read at the depositions hearing. It is likely that the unsigned statement was provided to the defence lawyers either at the hearing, or only one or two days before the depositions hearing. Mr Williams was away from Auckland, and it is unlikely that Mr Cato had instructions to test Mr Turner's evidence, because Mr Williams would have been unaware of it. Only 4 witnesses were called to give evidence, out of more than 40 filed statements. [redacted]

373. In respect of the trial, [redacted]

Involvement of Crown Lawyers in miscarriage of justice

374. Clause 10 of the Terms of Reference asks:

> What involvement, if any, did any Crown Lawyers have in matters which the Supreme Court has said constituted a miscarriage of justice?

375. [redacted]

376.

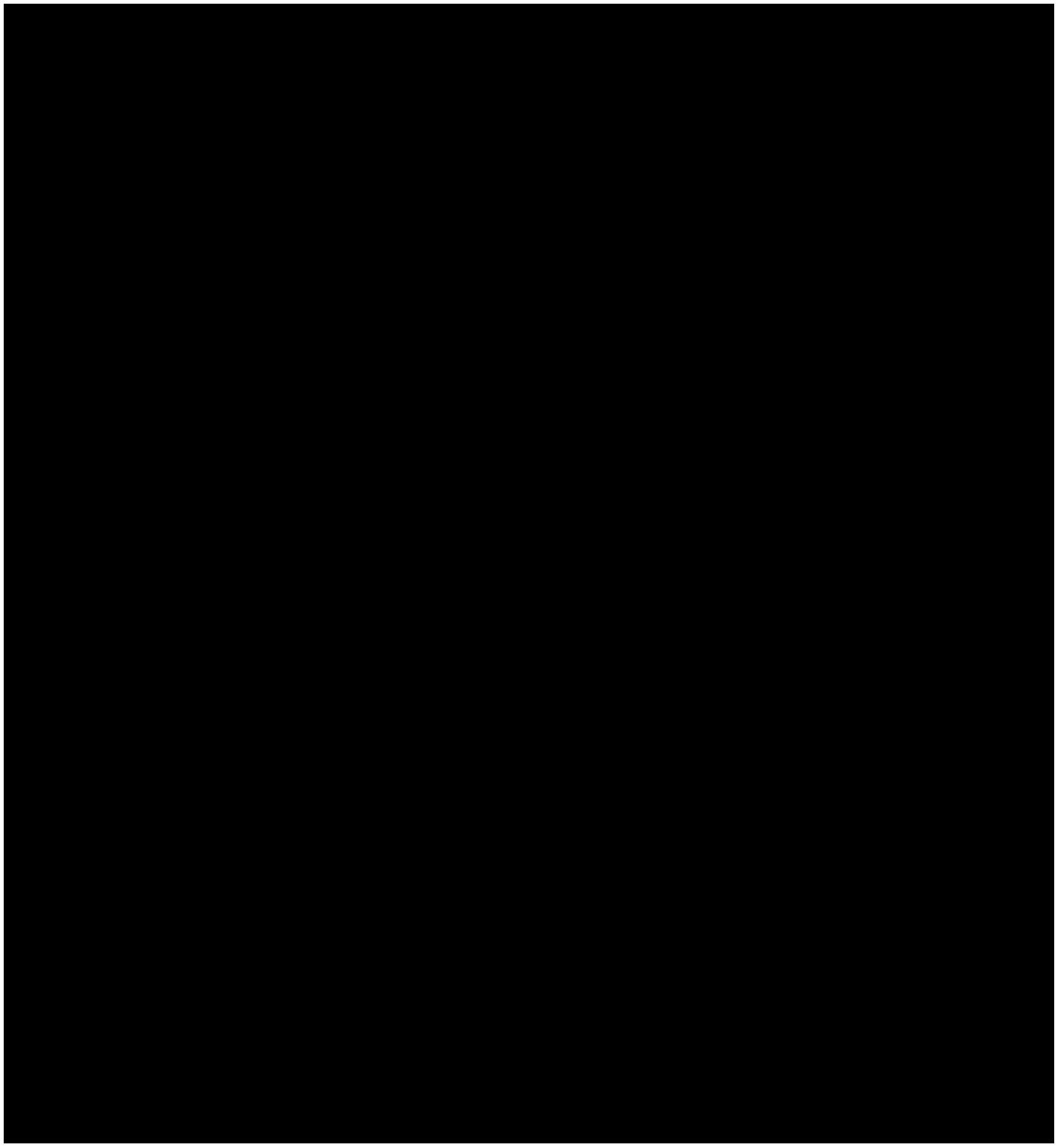
377.

378.

The Appeal

379. The Terms of Reference do not ask for my findings in respect of the conduct of Mr Hall's appeal by Crown lawyers. I consider this a relevant matter, material to the objective stated at 5.3 of the inquiry (to identify the actions or omissions of Crown Lawyers who were involved over the years from 1985 to 2022 in any of the relevant legal events relating to the obtaining and upholding of Mr Hall's conviction).

380.

381. 

382. Clause 13 of the Terms of Reference asks:

> What involvement, if any, did any Crown Lawyer have in the Department of Justice's processes in response to Mr Hall's three applications for the Royal Prerogative of Mercy?

383. The answer is none.

384. Clause 14 of the Terms of Reference asks:

> Important material about the case, establishing the basis for a miscarriage, was disclosed to Mr Hall in 1988 under the Official Information Act 1982. This was after his unsuccessful appeal. What knowledge did any Crown Lawyers have about Mr Hall's case over the years since 1988?

385. I find that no Crown Lawyer in his or her capacity as a Crown Lawyer had any knowledge about the detail of Mr Hall's case until 2018 when Mr Kaye forwarded his correspondence from Mr Wesley-Smith to the Solicitor-General.

SOLICITOR-GENERAL'S TERMS OF REFERENCE

INQUIRY BY NICOLETTE LEVY QC INTO THE CROWN'S PROSECUTION ROLE IN CERTAIN MATTERS CONCERNING THE OBTAINING AND UPHOLDING OF THE CONVICTION OF ALAN HALL

13 July 2022

Objectives of inquiry

1. The Crown submitted in 2022 that Mr Hall's convictions in 1986 for the murder of Mr Easton and the aggravated wounding of his son Brendan Easton were unsafe because of non-disclosure of relevant information by the prosecution. The Supreme Court has quashed those convictions and acquitted Mr Hall.[1] Mr Hall has suffered a significant miscarriage of justice on account of the non-disclosure.

2. In the 1980s, as now, the Solicitor-General was responsible for the prosecution of serious crime in New Zealand. This responsibility included the appointment and high-level supervision of Crown Solicitors[2] and also the employment of lawyers in the Crown Law Office who provided advice to the Solicitor-General and represented the Solicitor-General on criminal appeals in the Court of Appeal.

3. It is critically important that public confidence in the integrity and impartiality of the prosecution process is maintained. Now that Mr Hall is acquitted, this inquiry is established to determine, as swiftly as possible, how the non-disclosure that contributed to this significant miscarriage of justice occurred.

4. Because of the limits of the Solicitor-General's oversight responsibility, this inquiry is restricted to the acts, omissions and conduct of Crown Prosecutors, Panel prosecutors, and lawyers employed at the Crown Law Office (collectively referred to in this Terms of Reference as "Crown Lawyers"). The assessment made by, and actions or omissions of, officials advising the Secretary of Justice in three Royal Prerogative of Mercy applications are outside the scope of this inquiry, except to the extent that any Crown Lawyer, as defined above, played any part in those processes.

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1 *Hall v R* [2022] NZSC 71.

2 Lawyers in private practice, responsible for prosecuting serious crime in their districts.

5. Accordingly, the inquiry will:

   5.1 Identify how the disclosure failings came to occur in Mr Hall's case, thereby leading to a miscarriage of justice;

   5.2 Indicate at what points this miscarriage could have been identified by Crown Lawyers, and what steps should have been taken to correct it;

   5.3 Identify the actions or omissions of Crown Lawyers who were involved over the years from 1985 to 2022 in any of the relevant legal events relating to the obtaining and upholding of Mr Hall's conviction.

6. The result of the inquiry will be two-fold:

   6.1 The Solicitor-General will have an independent, expert report from which she can form a view as to whether any further steps should be taken in relation to anything a Crown Lawyer may have done, or omitted to do, to contribute to this miscarriage, or its delayed resolution, and to identify any lessons from Mr Hall's case for Crown Lawyers.

   6.2 The inquiry will assist the Solicitor-General to identify whether any other processes or inquiries should be undertaken.

Terms of Reference

7. The Terms of Reference for this inquiry seek answers to the following questions:

Part 1: Trial and Appeal

8. How did the failure to disclose relevant documents to defence counsel occur? This includes:

   8.1 Mr Turner's original statements to Police,

   8.2 Other Police documentation related to Mr Turner's statements, and

   8.3 Other material non-disclosure.

9. What did Crown Lawyers know, before trial, at trial and at the time of Mr Hall's first appeal, about the content of Mr Turner's several statements?

10. What involvement did Crown Lawyers have in the creation of a statement, then signed by Mr Turner, that omitted reference to the ethnicity of the person Mr Turner saw running near the scene of the murder, and included reference to Exhibit 31?

11. What were the circumstances in which Mr Turner's evidence came to be read at the depositions hearing and at the trial, rather than Mr Turner appearing as a witness, and what involvement did the Crown prosecutor have in those decisions?

12. What involvement, if any, did any Crown Lawyers have in matters which the Supreme Court has said constituted a miscarriage of justice?

Part 2: Events post-appeal

13. What involvement, if any, did any Crown Lawyer have in the Department of Justice's processes in response to Mr Hall's three applications for the Royal Prerogative of Mercy?

14. Important material about the case, establishing the basis for a miscarriage, was disclosed to Mr Hall in 1988 under the Official Information Act 1982. This was after his unsuccessful appeal. What knowledge did any Crown Lawyers have about Mr Hall's case over the years since 1988?

15. Crown Law received material about Mr Hall's case from a journalist in 2018 and in 2020. How did Crown Lawyers handle that information, and what, if any, other steps should have been taken?

Any other matters

16. The inquiry should report on any other relevant matters considered material to the objectives of the inquiry set out above.

Report

17. The inquiry will result in provision of a written, confidential report to the Solicitor-General.

18. The Solicitor-General will consider whether the report, or a summary of it, may be made available to Mr Hall, the Easton family, or other interested parties including the public.

19. This report is to be provided four months after the date these Terms of Reference are finalised. To the extent this is not possible, a progress report is to be provided at that time, with the final report to be provided no later than 9 December 2022.

Conduct of inquiry

20. You will conduct the inquiry, within the Terms of Reference, as you see fit, subject to the obligation to comply with the principles of natural justice.

21. You may have regard to the findings of any other relevant inquiry and may engage with Police and the Ministry of Justice as you consider necessary and appropriate.

22. Subject to the need for this inquiry to be independent, the Crown Law Office will provide any documents or material it holds, and will provide any other information it reasonably can to support you in this inquiry.

23. These Terms of Reference will be published.

24. If there is occasion to amend these Terms of Reference, this will be done by agreement in writing. Whether any amendment to these Terms of Reference is published will be a decision for the Solicitor-General.