

10 June 2013

Hon Judith Collins, Minister of Justice

ADVICE ON SCOTT WATSON'S APPLICATION FOR THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

PURPOSE

1. On 11 September 1999, Scott Watson was convicted of murdering Ms Olivia Hope and Mr Ben Smart. On 1 November 2008 Mr Watson applied for the exercise of the Royal prerogative of mercy in respect of those convictions. On 19 November 2008, His Excellency the previous Governor-General sought your predecessor's advice on Mr Watson's application.
2. This advice provides an overview of the events giving rise to the murder convictions, and the content and consideration of Mr Watson's application. It also summarises the attached advice of Ms Kristy McDonald QC on the merits of Mr Watson's application.

EXECUTIVE SUMMARY

3. On 31 December 1997, Mr Ben Smart and Ms Olivia Hope attended New Year's Eve celebrations at Furneaux Lodge, a resort in Endeavour Inlet in the Marlborough Sounds. They were last seen boarding a yacht at the Furneaux Lodge anchorage in the early hours of 1 January 1998, in the company of a lone male. Neither their bodies nor any trace of their belongings have ever been found, but it is generally accepted that they met their deaths at the hands of the lone male in circumstances amounting to murder.
4. On 15 June 1998, after five months of intensive Police investigation, Mr Watson was arrested and charged with the murders of Mr Smart and Ms Hope. On 11 September 1999 Mr Watson was found guilty of their murders, and was subsequently sentenced to life imprisonment with a minimum non-parole period of 17 years. Following his convictions, Mr Watson appealed to the Court of Appeal. His appeal was unsuccessful, as was his subsequent application for leave to appeal to the Privy Council.
5. In November 2008, Mr Watson applied for exercise of the Royal prerogative of mercy. In his application he claimed that he is innocent of the murders of Mr Smart and Ms Hope, and that a miscarriage of justice has occurred. He sought his "release either under pardon or at least pending retrial", as well as a broad ranging inquiry looking into all aspects of his case, including the Police investigation, the involvement of the media and the actions of the trial Judge.

6. The original application comprised a 22-page letter, and enclosed copies of a book entitled "*Trial by Trickery*", and a DVD entitled "*Murder on the Blade?*" written and made respectively by journalist Mr Keith Hunter. A significant amount of additional material was provided by and on behalf of Mr Watson in support of his application between December 2008 and December 2012.
7. Mr Watson's application relies on a wide range of grounds, including claims that: the Police investigation lacked integrity; the media coverage compromised his right to a fair trial; the Crown presented its case at trial in an unfair manner; there were matters affecting the trial Judge's objectivity; and the Court of Appeal made a number of errors when considering his appeal.
8. Mr Watson also claimed that new evidence exists that is relevant to and impacts on a number of evidential matters that were considered at trial. He submitted that, were his case to go before a jury now, the evidential picture would be quite different.
9. The evidential matters raised by Mr Watson in his application include allegations concerning the reliability and accuracy of evidence provided by a number of witnesses at trial, and a submission that [...], can now give important evidence. Of particular significance is Mr Watson's claim that there is new evidence undermining the identification evidence provided at trial by two important witnesses – Mr Guy Wallace and Ms Roslyn McNeilly.
10. In April 2009, the Ministry instructed Kristy McDonald QC to provide advice on Mr Watson's application. In accordance with the established principles applicable to the exercise of the Royal prerogative of mercy, Ms McDonald was asked to advise on whether Mr Watson's application contained any fresh evidence, which, if substantiated, might be sufficiently credible and cogent to raise a real doubt about the safety of Mr Watson's convictions. She was also asked to advise on whether any of the alleged errors in the Court of Appeal judgment could justify a referral of the case to the Court of Appeal.
11. Ms McDonald considered all material that was provided in support of Mr Watson's application, as well as suggesting further inquiries and information that would assist her in considering the application. In March 2011, Ms McDonald provided her formal advice, in which she concluded that she did not consider that any of the material submitted in support of Mr Watson's application raised a real doubt about the safety of Mr Watson's convictions.
12. Ms McDonald's advice pays particular attention to the submissions concerning the 'new' identification evidence of Mr Wallace and Ms McNeilly, in recognition that such evidence was of particular significance at trial. She concludes that, when the 'new' evidence of Mr Wallace and Ms McNeilly is assessed in the context of all the evidence given at trial, including their own evidence and the DNA evidence suggesting that two hairs found on Mr Watson's boat came from Ms Hope, it does not meet the test for a referral to the Court of Appeal.
13. Ms McDonald further advised that most of the other grounds of Mr Watson's application did not meet the test for 'fresh evidence'. They had either already been considered at trial by the jury or on appeal by the Court of Appeal, or were

available to be relied on in support of Mr Watson's case had Mr Watson's trial counsel chosen to do so.

14. Ms McDonald considered that, in respect of the remaining grounds of Mr Watson's application, where fresh evidence did arguably exist, such evidence was not cogent and credible enough to suggest there was a real risk that the jury would have come to a different conclusion, had the new evidence been before it.
15. At the request of Mr Watson's legal team, and on the instruction of the then Minister of Justice, Minister Power, a copy of Ms McDonald's advice was provided to Mr Watson's legal team for comment in June 2011.
16. In August 2011, Mr Watson's legal team provided a submission commenting on Ms McDonald's advice. The submission criticised Ms McDonald's assessment of a number of evidential matters, as well as the ambit of her instructions, and her overall approach. It also raised a number of new matters in support of Mr Watson's application, such as a claim that Mr Watson's trial counsel failed to pursue a ground of appeal, contrary to Mr Watson's expectations and instructions. Mr Watson's legal team provided further information in support of this submission between September 2011 and December 2012.
17. In December 2012, the Ministry instructed Ms McDonald to provide supplementary advice addressing the criticisms made of her original advice, and considering the new submissions made by Mr Watson's legal team. In March 2013, Ms McDonald provided supplementary advice, advising that nothing raised by Mr Watson's legal team caused her to alter her earlier conclusion.
18. The Ministry agrees with Ms McDonald's assessment of and conclusions about the evidence and other matters put forward in support of Mr Watson's application. Our advice is that there is, therefore, no basis for referring Mr Watson's convictions back to the Court of Appeal under section 406 of the Crimes Act 1961. We recommend that the application be declined accordingly.

BACKGROUND

19. On New Year's Eve 1997, Mr Smart and Ms Hope attended New Year's Eve celebrations at Furneaux Lodge. At around 4am on 1 January 1998, Mr Smart, Ms Hope and a lone male were delivered by water taxi to a yacht at the Furneaux Lodge anchorage. Mr Smart and Ms Hope were never seen again and no traces of their belongings have ever been found. It is generally accepted that the lone male murdered them.
20. On 15 June 1998, after an extensive Police investigation, Mr Watson was arrested and charged with their murders.

Trial

21. Mr Watson's trial in the High Court at Wellington commenced on 10 June 1999 and concluded when the jury delivered its verdicts on 11 September 1999. A key issue at trial was whether Mr Smart and Ms Hope had accompanied Mr Watson aboard his yacht on the last occasion of their sighting.

22. The Crown case was based on a series of circumstantial elements, which taken together were said to establish beyond reasonable doubt that Mr Watson was the lone man last seen with Mr Smart and Ms Hope, that he had offered them accommodation aboard his yacht on 1 January 1998 and subsequently murdered them. The Crown called approximately 490 witnesses to give evidence at trial.
23. Mr Watson was represented by Messrs Bruce Davidson and Mike Antunovic and Ms Nicolette Levy. They argued that Mr Watson was not the lone man seen with Ms Hope and Mr Smart, and that he returned to his yacht alone in the early hours of 1 January 1998, remaining there until he sailed away from Endeavour Inlet at about 7am. Mr Watson did not give evidence at trial, but the defence called 26 witnesses. (A full summary of the respective cases is located at pages 51 to 61 of Ms McDonald's report).
24. The following overview of the trial evidence is recorded in the judgment of the Court of Appeal (*R v Watson*, CA 384/99 and CA 507/99, 8 May 2000):
 3. *The appellant was the owner of a sloop, a single masted 26' steel yacht named "Blade". He sailed it alone to Furneaux Lodge on 31 December, arriving early afternoon and rafting his vessel up to the port side of another yacht, the "Mina Cornelia". A third yacht, the "Bianco" was rafted up to the starboard side of "Mina Cornelia". A large number of people were present at the Lodge for New Year's Eve, possibly about 1500 in total. The police ascertained there were 176 boats in the vicinity, 105 being in the immediate vicinity of the Lodge. There was evidence of inappropriate behaviour on the part of the appellant during the course of the evening, including approaches with sexual overtones to young women. There was also behaviour of an aggressive nature, particularly in respect of a young man resulting in what was known as the Perkins incident. The appellant had consumed a quantity of liquor, and was adversely affected by it.*
 4. *Olivia Hope had come to the Lodge in the yacht "Tamarack". In the early hours of the morning of 1 January Ben Smart and Olivia Hope were taken back to the "Tamarack", but there was no sleeping accommodation available for them. A water taxi driven by Mr Wallace then called at the "Tamarack", leaving two of its passengers there. Olivia, who was upset because she had paid for a berth on "Tamarack", asked to be taken ashore by the water taxi. As a result, she and Ben both boarded the water taxi, which was then occupied by three other people and the driver Mr Wallace. Olivia enquired about accommodation at the Lodge which brought an offer from one of the occupants of the taxi of a bed on his yacht. This was accepted and Ben and Olivia were then taken to the yacht and the three of them boarded it. The time was approximately 4 am, although time estimates throughout the trial evidence were often conflicting. The man was some time later identified by Mr Wallace from a photograph montage as the appellant, but the reliability of this identification was strongly challenged by the defence, particularly in the light of the description given by Mr Wallace of the person on the taxi. Mr Wallace's evidence was that this person was the same person he had observed on earlier occasions at the Lodge. Mr Wallace also described the yacht the three people boarded as being two masted, a ketch, with distinctive characteristics which did not match the "Blade", but it was in the same area where the "Blade" was moored.*
 5. *The "Blade" left its mooring at Endeavour Inlet probably before 6 am, unnoticed by those aboard the vessels to which it had been rafted up. It was next seen at about 9 am near Marine Head, with one male occupant. There was one other confirmed sighting of the appellant aboard "Blade" at [10.15] am near Kurakura Point, by a person who knew him. There were other possible but unconfirmed sightings. "Blade"*

was later identified as being in Cook Strait near the entrance to Tory Channel at about 4.30 pm. It arrived in Erie Bay probably some time shortly after 5 pm with the appellant as its sole occupant.

6. The "Blade" was seized by police on 12 January 1998, and subjected to forensic examination. This revealed that the vessel had been repainted since 1 January, changing its colour and appearance. The interior had been methodically wiped, removing fingerprints. Radio cassette tape covers had also been wiped, and a recognisable feature, the self steering gear wind vane, had been taken from its usual position on the stern and stowed away. The inside of the hatch cover was found to have some 176 scratch marks, which it was said were likely to have been caused by fingernails. Two of the squabs had recently had pieces cut or ripped out of them. A corresponding hole in the cover of one of the squabs was found, but when first seen the cover had been reversed so as to obscure the hole in the squab. There was nothing left to indicate what may have been on the portion of the cover or squab which had been removed. There were, however, burn marks on the edges of the hole in the squab cover, and some of the foam beneath the burn hole had been slightly affected by the burning. When questioned the appellant gave differing explanations as to how the squab had been burnt.
7. The police took a blanket from the vessel, from which a number of human hairs were later recovered. They included two which were the subject of later positive scientific testing strongly indicative of having come from Olivia Hope.
8. Very extensive, probably better described as exhaustive, police inquiries resulted in the elimination of all identified yachts in the immediate vicinity on 31 December and 1 January as being the vessel boarded by the two victims on delivery by Mr Wallace's water taxi. Extensive enquiries failed to locate a ketch of the description given by Mr Wallace, or any similar ketch which was reported as having been sighted in the area at the relevant time but not excluded from involvement. A distinctive shirt worn by the appellant while at the Lodge has not been recovered. When interviewed by the police, the appellant denied any responsibility or involvement in the disappearance, and said that he had been taken to his yacht by a water taxi at about 2 am and not left it again before departing Endeavour Inlet at about 7 am, and then arriving at Erie Bay about 9.30 to 10 am.
9. There was evidence given by a Naiad water taxi driver, Mr Anderson, of having taken a lone male matching the appellant's description, to a vessel which he eventually agreed probably was "Blade" between 2 and 4 am on 1 January. Some of the occupants of "Mina Cornelia" and "Bianco" told of being woken by the appellant in the early hours of the morning looking for a "party". The Crown conceded that the appellant had returned to his boat at about this time, but contended that he had then returned to Furneaux Lodge. This became known as the two trip theory, the second trip being back to "Blade" on the Wallace water taxi, in company with the two victims. There was evidence that the appellant was involved with other people on shore, probably between 3 am and 3.30 am.
10. Following his arrest, the appellant was in custody at Addington prison. He made statements to two inmates on separate occasions, each of which constituted admissions of responsibility for the killing of both Ben Smart and Olivia Hope. In one instance he gave a graphic description and demonstration of how the young woman met her death. There was also evidence that in the period November 1996 to March 1997 he had expressed a hatred of women in general, referred to killing a woman, and that again in November 1997 he had spoken of killing people."

25. On 11 September 1999, the jury found Mr Watson guilty on two counts of murder. He was subsequently sentenced to life imprisonment and ordered to serve a minimum of 17 years' imprisonment without parole.

Appeal to the Court of Appeal

26. Mr Watson appealed against his convictions and the length of the minimum non-parole period of imprisonment in December 1999. His appeal against conviction was based on one claim of fresh evidence and six alleged trial errors that were said to have led to a miscarriage of justice.
27. The Notice of Appeal had also included a ground of appeal that "the verdicts were unreasonable and could not be supported having regard to the evidence". However, this ground was not pursued at the hearing. In respect of this ground, the Court of Appeal's decision (issued on 8 May 2000) records that Mr Watson's counsel "responsibly accepted that it was open to the jury to conclude on the evidence that [Mr Watson's] guilt had been established beyond reasonable doubt".
28. In addition, an issue regarding the vetting of the jury panel for criminal convictions was not pursued.

Fresh evidence

29. In terms of fresh evidence, it was submitted for Mr Watson that the final report of a Ministerial Inquiry on DNA anomalies in another case would have been of assistance to him. Rejecting this ground of appeal, the Court of Appeal held that the circumstances of the two cases had no common features and there was no new evidence that would tend to throw doubt on the accuracy or reliability of the DNA testing results placed before the jury in Mr Watson's case.

Alleged trial errors

30. The alleged trial errors (excluding the jury vetting issue) related to:
- the admissibility of statements Mr Watson made prior to 31 December 1997 regarding his general hatred of women and his desire or willingness to kill people;
 - identification warnings given or not given by the trial Judge;
 - interruptions of the defence opening by the Judge;
 - the Crown's "two trip theory"; and
 - the Judge's summing up.
31. The Court of Appeal concluded that there had been no wrong decision in law. No miscarriage of justice was demonstrated under any of the separate grounds of appeal, whether taken by themselves or collectively. Mr Watson's appeal against conviction was therefore dismissed.

32. The following findings of the Court of Appeal are of particular relevance to this application.

(a) Identification warnings given or not given by the trial Judge

33. The Court of Appeal held that the trial Judge was right to issue a caution in relation to Mr Wallace's identification of Mr Watson as the man in his water taxi. Although the defence had extracted concessions from Mr Wallace that it argued excluded Mr Watson, Mr Wallace "nevertheless made a positive visual identification of [Mr Watson] as the man in question. This was by selecting his photograph (no. 3) from a montage he was asked to view by the police in April 1998." Despite also making concessions at the earlier depositions hearing, Mr Wallace went on to say at trial that he was "pretty definite" that the No. 3 photograph was the man in the water taxi and gave further confirmatory evidence in re-examination.

34. The Crown case depended substantially on the correctness of Mr Wallace's identifications of Mr Watson and it was incumbent on the Judge to give a direction to the jury in those circumstances. The Court did not consider the identification warning given by the Judge detracted from either the defence criticism of the reliability of the positive identification, or the defence contention that the evidence positively excluded Mr Watson.

(b) The Crown's "two trip theory"

35. The "two trip theory" was the theory that Mr Watson went back to his boat twice on the night in question, the first time with Mr Anderson and the second time being on Mr Wallace's water taxi with Mr Smart and Ms Hope. On appeal, Mr Watson's trial counsel claimed that the Crown introduced this theory in the course of its final address, precluding Mr Watson from defending himself against it through relevant cross-examination.

36. The Court of Appeal held there was nothing unfair about the way the Crown case was finally presented to the jury. It found that it must have always been apparent to the defence that if they hoped to establish that Mr Watson had been returned to his yacht in the early hours of the morning by other means (i.e. other than aboard Mr Wallace's water taxi), the Crown would seek to show that was still consistent with its basic theory.

37. The possibility that Mr Watson had returned to shore after the Anderson trip and before the Wallace trip was not merely theoretical, as there was evidence of sightings of Mr Watson at the Lodge at around 3-4am and of him acquiring a jersey at a late stage of the festivities. The late introduction of the Crown theory had not prevented more extensive cross-examination of witnesses regarding the timing of Mr Watson's return with Mr Anderson, the Perkins incident ashore (which it was accepted Mr Watson was involved in) and the absence of any evidence as to how Mr Watson may have returned to shore between trips, as "an examination of the transcript shows that there was extensive cross-examination on those issues."

38. The defence must also have been aware that the timing evidence would be important if the jury was to be invited to conclude that the possibility of a second trip to shore was excluded. A suggestion that Mr Watson may have made a different decision about giving evidence himself was “without evidential foundation, and in the circumstances of the case [had] the air of unreality”.

Sentence appeal

39. The Court of Appeal dismissed Mr Watson’s appeal against sentence, holding that while the minimum non-parole period of 17 years’ imprisonment was high, it was not excessive.

Application for special leave to appeal to the Privy Council

40. In 2002, Mr Watson filed an application for special leave to appeal his convictions to the Privy Council. His application was based on grounds raised before the Court of Appeal. The Privy Council declined to grant special leave to appeal in November 2003.

Application for exercise of the Royal prerogative of mercy

41. On 1 November 2008, Mr Watson’s application for exercise of the Royal prerogative of mercy was received at Government House. On 19 November 2008, His Excellency the previous Governor-General requested the then Minister’s formal advice on the application.
42. In April 2009, following an initial appraisal of Mr Watson’s original application, the Ministry instructed Kristy McDonald QC to provide advice on the application.
43. Between December 2008 and December 2012, a significant amount of additional material was provided by and on behalf of Mr Watson in support of his application. All material was forwarded to Ms McDonald for her consideration.
44. Ms McDonald provided the Ministry with advice on Mr Watson’s application in March 2011, and supplementary advice in March 2013.

CONTENT OF APPLICATION

Original application

45. Mr Watson’s original application comprised a 22-page letter setting out the grounds on which the application to the Governor-General was made, and enclosed copies of a book entitled “*Trial by Trickery*”, and a DVD entitled “*Murder on the Blade?*” written and made respectively by journalist Mr Keith Hunter. Mr Watson requested his “release either under pardon or at least pending retrial”, as well as a broad-ranging inquiry looking into all aspects of his case, including the Police investigation, the involvement of the media and the actions of the trial Judge.
46. In his letter of application, the grounds on which Mr Watson relied were organised by reference to each chapter of Mr Hunter’s book “*Trial by Trickery*”. The key points referred to by Mr Watson under each heading were:

- (a) *The Police Investigation* – an allegation that (inquiry head) Detective Inspector Pope manipulated the media to enable reporters to identify, attack and malign Mr Watson without risking contempt of court proceedings and resulting in a trial by media; and inaccuracies in an affidavit sworn by Detective Inspector Pope in support of applications to obtain interception and search warrants;
- (b) *Identification of the Mystery Man* – an allegation that the Crown prosecutors misled the jury by quoting selectively and inaccurately from witness statements regarding the identification of Mr Watson; criticisms of the way in which the identification evidence of Mr Guy Wallace and Ms Roslyn McNeilly was procured and dealt with at trial; and subsequent statements from Mr Wallace and Ms McNeilly that are said to confirm that Mr Watson was not the man last seen with Mr Smart and Ms Hope;
- (c) *Identification of the Mystery Yacht* – an allegation that the Police ignored relevant sightings of a ketch at Furneaux Lodge and that the prosecutors misled and confused the jury by stating that there was no ketch when there had in fact been a number of sightings of such a vessel;
- (d) *Circumstantial evidence* – under this heading, Mr Watson argued that the circumstances relied on by the Crown, such as the cleaning of his yacht, changes to its appearance and scratches on the hatch cover leading from the cabin, were all capable of innocent explanation. For example, he had cleaned the interior of his yacht after a storm, had painted his yacht in accordance with a long-held plan to do so and the scratches on the hatch cover had been made by [...]. In terms of the direct evidence, Mr Watson stated that Mr Wallace has now retracted his identification evidence, one of the prison witnesses has retracted his evidence, the other received favourable treatment from Police, and the DNA evidence is not reliable;
- (e) *The Alleged Voyage from Cook Strait to Erie Bay* – allegations that the Police coerced a witness into giving false evidence about Mr Watson's arrival time at Erie Bay on 1 January 1998; that it was physically impossible for Mr Watson's vessel to have been seen at 4.30pm in Cook Strait and to have arrived in Erie Bay at around 5pm; and that the Police should have tested the timing of the trip prior to trial, but did not do so because it would have contradicted the case against Mr Watson;
- (f) *The Two Trip Theory* – Mr Watson asserted that he could not, on the evidence, have returned to his boat until after 3.30am. This was inconsistent with the Crown's "two-trip theory", which theorised that Mr Watson went back to his boat twice on the night in question. However, the late introduction of the Crown theory precluded Mr Watson from defending himself against it through relevant cross-examination;
- (g) *The Judge* – an allegation that the trial Judge was influenced by his earlier involvement in issuing an interception warrant in Mr Watson's case and affected by his state of health at the time of the trial; and

- (h) *The Court of Appeal* – Mr Watson asserted, among other things, that contrary to the Court of Appeal’s finding in relation to the two trip theory, there was no “extensive cross-examination” as to how he may have returned to shore. In fact, there was no cross-examination at all, since the Crown had led no evidence on the matter.

Additional material and submissions in support of Mr Watson’s application

47. Over the period December 2008 to February 2011, Mr Watson’s father, Chris Watson, provided a significant amount of additional material in support of his son’s application.
48. In March 2011, Mr Watson advised the Ministry that he had engaged a number of lawyers to represent him during the last phase of the application. Mr Watson’s legal team, consisting of Greg King, Pip Hall and Kerry Cook, wrote to the Ministry on 7 March 2011 requesting that they be provided with a copy of Ms McDonald’s advice, and the opportunity to comment on it.
49. On the instruction of the then Minister of Justice, Minister Power, a copy of Ms McDonald’s advice was forwarded to Mr Watson’s legal team on 8 June 2011, for comment by 10 August 2011. The Ministry received Mr Watson’s legal team’s submission on 16 August 2011 (attached), after a short extension was agreed upon.
50. The submission raises some new grounds in support of Mr Watson’s application, but primarily focuses on grounds previously raised, and comments on the Ministry’s and Ms McDonald’s assessment of those grounds. Additional material in support of the submission was provided by Mr Watson’s legal team between September 2011 and December 2012.
51. Further details of the submissions provided by and on behalf of Mr Watson and the consideration of evidence in support of Mr Watson’s application are appended to this briefing, as follows:
- (a) Appendix 1: a list of the key material submitted by and on behalf of Mr Watson in support of his application.
- (b) Appendix 2: an overview of Kristy McDonald QC’s consideration of Mr Watson’s application.
52. All significant grounds of Mr Watson’s application, and Ms McDonald’s assessment of them, are also detailed at paragraphs 68 to 113 under the heading *Summary of Ms McDonald’s assessment of Mr Watson’s application*.

CRITERIA FOR EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

53. The Royal prerogative of mercy is an exceptional power that may be used in situations where an applicant, who has exhausted other legal options, alleges that mistakes in the criminal justice process have resulted in a wrongful conviction or sentence. If it appears that a miscarriage of justice may have occurred, the Governor-General may grant a pardon or refer the person’s conviction or sentence back to the courts for further consideration.

Key principles

54. The power to exercise the Royal prerogative of mercy is delegated to the Governor-General by clause XI of the Letters Patent 1983. While the Letters Patent impose no specific limits on the use of the prerogative powers, strong conventions have developed that reflect the respective roles of the Judiciary and the Executive. The key principles of relevance to this application are as follows.

Executive does not overrule the courts

55. The prerogative of mercy does not operate as a further right of appeal or an opportunity to repeat arguments or re-examine evidence that have already been considered by the courts. Applicants should not expect the executive branch of government to substitute its decision for that of the courts.

Referral back to appeal courts the usual remedy

56. The grant of a pardon is extremely rare and is usually contemplated only where there is compelling new evidence that a person could not properly have been convicted. If it appears that a miscarriage of justice may have occurred, the normal course is to refer the person's case back to the appeal courts for reconsideration under section 406(a) of the Crimes Act. It is then dealt with as if it were an appeal.
57. In considering whether to refer a case back to the appeal courts under section 406(a), the Ministry does not endeavour to reach a conclusive opinion on whether the person has been wrongly convicted or sentenced, as this is the role of the courts. However, to justify a referral under section 406(a), the Ministry's view is that the applicant should have a *reasonable prospect of success* in the Court of Appeal.

Fresh evidence normally required

58. As any technical errors with an applicant's trial will usually have been dealt with on appeal, applications for the Royal prerogative of mercy tend to hinge on the availability and significance of fresh evidence. In this respect, the two key criteria applied by the Ministry are whether:
- (a) there is 'fresh' evidence that was not available at the time of trial or appeal; and
 - (b) the new evidence is credible and sufficiently cogent that, if considered alongside all the other evidence that was given at trial and on appeal, there is a reasonable prospect that the Court of Appeal would uphold an appeal.
59. The principles for the admission and consideration of fresh evidence in the context of an appeal were recently reaffirmed by the Supreme Court in *Fairburn v R* [2010] NZSC 159, citing the judgment of the Court of Appeal in *R v Bain* [2004] 1 NZLR 639 at [18]-[27]. In essence, there are three requirements:
- (a) The evidence must be sufficiently 'fresh', in the sense that it was not available at time of trial. Ordinarily, if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh;

- (b) The evidence must be sufficiently credible; and
 - (c) The new evidence must be sufficiently cogent that, when considered alongside the evidence given at the trial, it might reasonably have led the jury to return a verdict of not guilty.
60. In *R v Bain*, the Court of Appeal also acknowledged that if the evidence is strong and demonstrates a real risk of miscarriage of justice, the appeal court may relax the requirement that it be fresh.

INSTRUCTION OF AND ADVICE FROM KRISTY MCDONALD QC

Instruction of Kristy McDonald QC

61. In April 2009, the Ministry sought legal advice from Kristy McDonald QC on whether, if supported by admissible evidence, the documents and submissions provided by and on behalf of Mr Watson contained any information or raised any issues that could potentially justify a referral of his case to the Court of Appeal under section 406(a) of the Crimes Act 1961.
62. Specifically, the Ministry instructed Ms McDonald to provide advice on:
- (a) Whether Mr Watson's application contained any fresh evidence, and if so, whether the apparent fresh evidence, if substantiated, might be sufficiently credible and cogent to raise a real doubt about the safety of Mr Watson's convictions; and
 - (b) Whether any of the alleged errors in the Court of Appeal judgment could justify a referral of the case to the Court of Appeal.

Overview of advice from Kristy McDonald QC

63. In May 2009, Ms McDonald updated the Ministry on her consideration of Mr Watson's application, and identified seven categories of information that were potentially the source of fresh evidence. (These categories of information are outlined in Appendix 2 under the heading 'Preliminary advice from Kristy McDonald QC').
64. In October 2009, Ms McDonald provided interim advice on Mr Watson's application. This advice identified a number of areas where further information or inquiries were needed before the relevant grounds of Mr Watson's application could be properly evaluated.
65. In March 2011, after interviewing key witnesses, Ms McDonald provided formal advice on Mr Watson's application. In the advice, Ms McDonald concluded that none of the material that was submitted in support of Mr Watson's application was fresh, credible and sufficiently cogent that, when considered alongside all of the other evidence given at Mr Watson's trial, there was a real doubt about the safety of Mr Watson's convictions.
66. Ms McDonald also considered the alleged errors in the judgment of the Court of Appeal and advised that none of the criticisms were significant enough to justify the matter being reheard or the issues readdressed.

67. In March 2013, Ms McDonald provided supplementary advice. This advice addressed additional submissions and material submitted by Mr Watson's legal team between August 2011 and December 2012 in support of Mr Watson's application. Ms McDonald concluded that the additional submissions did not justify a change to her earlier conclusion.

Summary of Ms McDonald's assessment of Mr Watson's application

68. The following is a summary of Ms McDonald's assessment of the significant grounds of Mr Watson's application, taking into account all submissions made by and on behalf of Mr Watson between November 2008 and December 2012.

Fresh evidence

(a) Identification evidence of Mr Guy Wallace and Ms Roslyn McNeilly

69. An important focus of Ms McDonald's advice, given its significance at trial, was the evidence of Mr Guy Wallace and (to a lesser extent) Ms Roslyn McNeilly regarding their respective "identifications" of Mr Watson. Both provided fresh affidavits and were interviewed by Ms McDonald.
70. Both told Ms McDonald they would have answered certain questions, if asked at trial, in a particular way. Mr Wallace said that had he been asked he would have stated that the man in the dock (Mr Watson) was not the man in the Furneaux Lodge bar and not the man with whom and onto whose yacht Mr Smart and Ms Hope boarded from his water taxi. Ms McNeilly said that had she been shown a photograph depicting Mr Watson aboard the *Mina Cornelia* on the evening of 31 December 1997 and been asked if the man in the photograph was the man she served in the bar, she would have said no.
71. Having interviewed both witnesses, Ms McDonald advised that while she was impressed with their sincerity, she did not consider that any of the evidence they say they can now give was fresh, or especially cogent. In each instance, their evidence was available at trial had they been requested to provide it. That they were not requested to provide it reflected tactical decisions made by experienced counsel. Even if those decisions were said to amount to counsel error (which Ms McDonald does not accept), they were not material to the outcome of the trial.

(i) Mr Guy Wallace

72. Mr Wallace identified Mr Watson as the man on his water taxi from photograph three in Police Montage B. His identification evidence was qualified on the basis that it was the eyes of the man that had led him to pick Mr Watson's photograph from the montage. The hair of the man in the photograph was too short. The evidence Mr Wallace went on to give at trial, including his concessions under cross-examination that the appearance of Mr Watson in the *Mina Cornelia* photograph and in television footage outside the Blenheim courthouse excluded him as the man, enabled defence counsel to submit to the jury that Mr Wallace had not in fact made a positive identification of Mr Watson as the man on his water taxi with Mr Smart and Ms Hope.

73. Mr Watson's trial counsel advised Ms McDonald that they chose not to seek a dock identification from Mr Wallace after taking into account a range of considerations, including their assessment that he had not positively identified Mr Watson, general concerns about the reliability of dock identifications, conflicting statements provided by Mr Wallace throughout, and their wish to limit the potential for the Crown to re-examine Mr Wallace. In short, asking Mr Wallace to make a dock identification carried significant risk and was not necessary in light of the evidence he had given.

74. Viewed in the context of the evidence Mr Wallace gave at trial, Ms McDonald advised that any failure to invite a dock identification was of limited significance – especially in light of the recognised unreliability of that particular identification technique. Concerns about the reliability of Mr Wallace's identification evidence were squarely before the jury. Further, it was open to the jury to regard the presence on Mr Watson's boat of two hairs connected by DNA analysis to Ms Hope as strongly corroborative of the evidence identifying Mr Watson as the man on Mr Wallace's water taxi with whom Ms Hope and Mr Smart were last seen.

(ii) Ms Roslyn McNeilly

75. Ms McNeilly has consistently stated, including in her evidence at trial, that she chose Mr Watson's photograph from Police Montage B because of the similarities with the eyes of the man in the photograph and the man she served in the bar. Her evidence was always qualified on the basis that the man she served had longer hair. Those factors enabled the defence to maintain that her identification was inconsistent with the man she served being Mr Watson.

76. Ms McDonald advised that Ms McNeilly's evidence did not link the man in the bar and the man in Mr Wallace's water taxi who disembarked with Mr Smart and Ms Hope. Only Mr Wallace could do that. Had Ms McNeilly not given evidence in relation to Mr Watson's photograph in the Police montage, the jury would still have heard evidence of the same nature from Mr Wallace and others present in the bar.

77. Viewed in this context (and alongside the other material presented in support of Mr Watson's application), Ms McDonald did not consider that Ms McNeilly's new evidence would have been likely to persuade the jury to reach a different verdict.

Ms McNeilly's evidence about the man's hands and fingers

78. Ms McDonald also considered Ms McNeilly's evidence that she told Police prior to trial that the man she served at the Furneaux Lodge bar had all of his fingers (Mr Watson is missing the ring finger and little finger on his right hand). No such comment by Ms McNeilly is recorded in her statements on the Police file.

79. Assuming what Ms McNeilly now says is correct, Ms McDonald advised that her evidence is fresh in that it was not available to the defence prior to trial and was not available to be used during cross-examination. But in light of the success the defence had in undermining Ms McNeilly's identification evidence and the fact that her evidence did not make the link between the man in the bar and the man on Mr Wallace's water taxi, Ms McDonald concluded that Ms McNeilly's new

evidence is unlikely to have led the jury to a different conclusion about Mr Watson's guilt.

(b) *Undisclosed identification procedures*

80. Mr Watson's legal team submitted that Mr Wallace and Ms McNeilly underwent a number of identification procedures that were not recorded by the Police or disclosed to trial counsel. They asserted that these improper practises and their non-disclosure to trial counsel increased the risk that the identification evidence heard by the jury was unreliable, and therefore a miscarriage of justice occurred. The following identification procedures were specifically referred to:

- (a) Mr Wallace being shown a single photo of Mr Watson on 9 January 1998;
- (b) Mr Wallace being shown a photo montage containing a photo of Mr Watson on 11 January 1998; and
- (c) Ms McNeilly being shown a photo montage containing a photo of Mr Watson on 11 January 1998.

81. In her supplementary advice, Ms McDonald noted that the Independent Police Conduct Authority (IPCA) considered the identification procedures employed by the Police in this investigation, and found that some of the identification procedures employed by the Police "fell short of best practice". Notwithstanding this, Ms McDonald concluded that, when considered in the context of the evidence that was given at trial by Mr Wallace and Ms McNeilly, there was not "a real possibility a jury would have arrived at a different verdict if the material said to have been withheld (if that is correct) had been disclosed".

(c) *Mr Wallace's description of the location of the boat*

82. Ms McDonald was satisfied that Mr Wallace had no new information about the location of the boat at the time Mr Smart, Ms Hope and the lone man disembarked from his water taxi. As a result of his interview, it became clear that the only new information Mr Wallace could provide related to the location of the boat at a later time in the evening and he was not seeking to alter the evidence he gave at trial.

(d) *Secret witnesses/cellmate confessions*

83. At trial, two prison inmates (secret witnesses A and B) gave evidence that Mr Watson confessed to the murders of Mr Smart and Ms Hope. Ms McDonald considered a submission that secret witness A was said to have retracted the evidence he gave at Mr Watson's trial. She also considered an affidavit which was said to undermine the reliability of the evidence given by secret witness B.

84. As a result of secret witness A twice failing to attend scheduled interviews, Ms McDonald was unable to assess the credibility of his purported retraction of the evidence he gave at trial. She noted that, when interviewed by the then Police Complaints Authority in November 2000, secret witness A confirmed the accuracy of his trial evidence. Attempts by Mr Watson's former trial counsel to interview secret witness A about his purported retraction were also rebuffed. Ms McDonald reported that, as things stand, there is no retraction by secret witness A.

85. She also noted that an affidavit deposed by a former cellmate of secret witness B that is said by Mr Watson Sr to undermine the latter's evidence was not fresh evidence, as his evidence would have been available at trial had appropriate inquiries been made. Ms McDonald noted that the deponent's name was mentioned throughout secret witness B's evidence and it was open to the defence to call him to give evidence had they wanted to do so. While accepting that the deponent's evidence might have further undermined the reliability of secret witness B's evidence, Ms McDonald considered that in the context of the strong warnings given to the jury about the evidence of the prison witnesses it was unlikely to have had a material bearing on the overall result.

86. Further to the above submissions, Mr Watson's legal team criticised the fact that cellmate confessions were used in evidence at all, submitting that such evidence is inherently unreliable. Ms McDonald advised that the issues surrounding the reliability of the cellmate confessions had been appropriately canvassed at trial, in front of the jury.

(e) *Additional ketch sightings*

87. Ms McDonald observed that the evidence of ketch sightings by Mrs Rowe, [...] and [...] was all available to the defence prior to the trial. While a sighting by a [...] of a ketch in the Kaiteriteri area does not appear in the Police records, there was a substantial amount of other evidence relating to ketch sightings before the jury and it could not be said that the admission of [...]s evidence would have affected the overall result. Ms McDonald noted that defence counsel made a deliberate decision not to call every person who had identified a ketch, as it was only their intention to suggest the potential existence of another boat which left the Sounds.

88. Ms McDonald did not accept that an affidavit from former Police officer, [...], regarding the manner in which Police treated reports of ketch sightings in the early days of Operation Tam, is the source of any fresh evidence. Nor was it of sufficient strength or cogency to cause a jury to entertain a reasonable doubt about Mr Watson's guilt.

(f) *Timing of trip from Cook Strait to Erie Bay on 1 January 1998*

89. Ms McDonald did not consider that evidence regarding the timing of the alleged trip by *Blade* from Cook Strait to Erie Bay on 1 January 1998 was fresh. While an affidavit from Mr Hunter was new, the issue of the timing of this voyage was raised by the defence both in evidence and submissions at trial, as well as in the Court of Appeal. Ms McDonald observed that it was the defence case throughout that it was physically impossible for the boat seen in Cook Strait at 4.30pm on 1 January 1998 to be *Blade* because of a "simple reconstruction of the total evidence."

(g) *Evidence of water-taxi driver [...]*

90. The book and DVD provided in support of Mr Watson's application suggested that water-taxi driver [...] could provide evidence that he took a lone man to his boat on his water taxi in the early hours of 1 January 1998. No affidavit evidence was provided from [...] regarding what he recollects about the trip, nor did Mr Watson provide any explanation as to how the suggestion that he was transported to his

yacht by [...] reconciles with the position taken at trial that he had been taken as the only passenger to his yacht by Mr Donald Anderson. In these circumstances, Ms McDonald advised that even if this information were fresh (which she did not accept as [...] had been interviewed about this precise matter prior to trial and stated that he could not remember such a trip), the information lacked credibility and cogency.

(h) *Hatch scratches and squab evidence of [...]*

91. [...] was not called as a witness at trial. In September 2005 she swore two affidavits in support of Mr Watson's application, which were said by Mr Watson Sr to provide the innocent explanation for the presence of scratch marks on the interior lining of the forward hatch of Mr Watson's vessel and the missing squab cover and piece of foam from one of the squabs in the vessel's saloon.
92. port of Mr Watson's application, which were said by Mr Watson Sr to provide the innocent explanation for the presence of scratch marks on the interior lining of the forward hatch of Mr Watson's vessel and the missing squab cover and piece of foam from one of the squabs in the vessel's saloon.
93. In their submission dated 16 August 2011, Mr Watson's legal team argued that while trial counsel were aware of the evidence [...] could have provided at the time of trial and made an informed decision not to call her as a witness, the decision not to call [...] as a witness at the trial was wrong and was not made with Mr Watson's informed consent, resulting in a miscarriage of justice.
94. Ms McDonald considered that [...]s evidence did not meet the test for fresh evidence. It was known by trial counsel at the time of the trial, and trial counsel made a conscious decision not to call [...] as a witness after considering what significance [...]s evidence could have in light of other evidence led at trial, and weighing up what risks there were in calling her. Further, after considering affidavit evidence from Mr Watson and his trial counsel, Ms McDonald found that the decision not to call [...] as a witness was taken with Mr Watson's (and Mr Watson Sr's) informed consent.
95. Ms McDonald also noted that even if [...]s potential evidence was fresh, it lacked the cogency sufficient to raise a doubt as to the safety of Mr Watson's convictions. It was the defence case that the scratch markings could not have been made with the hatch cover closed, and they had scientific evidence to support that. Defence counsel accordingly considered that any evidence that [...] could provide on this issue was not of sufficient significance.

(i) *Underwater Sonar Search*

96. Ms McDonald advised that the fact that the bodies of Mr Smart and Ms Hope were not located during an underwater sonar search of an area in Cook Strait conducted by the Royal New Zealand Navy in August 2000 was not significant. This was because the Crown called no evidence to the effect that incriminating evidence in relation to Ms Hope and Mr Smart would be found in the general area where the search was conducted, or in any other particular area. The jury was merely invited to infer that Mr Watson disposed of the bodies at a time and in a place where he knew it was unlikely they would ever be found.

(j) *DNA evidence*

97. Mr Watson's legal team argued that Ms McDonald overstates the importance of the DNA evidence relating to the two hairs that were said to be from Ms Hope and found on Mr Watson's boat, and that this "unduly and unfairly" influenced her approach to all the other evidence. They further submitted that the DNA evidence requires closer analysis in light of the risk it was contaminated, and it is not conclusive.
98. Ms McDonald's opinion is that no fresh evidence was provided in relation to this issue (submissions relating to the possibility the DNA evidence was contaminated were made to the Court of Appeal and the Privy Council), and as it stands the DNA evidence appears to be "clear and unimpeachable".
- (k) *The "extra" unidentified vessel*
99. Information provided by Mr Watson Sr about the existence of an extra unidentified vessel at the Furneaux Lodge anchorage on the morning of 1 January 1998 was available to the defence at the time of the trial and in Ms McDonald's opinion does not constitute fresh evidence.
- (l) *Late introduction of the two trip theory*
100. The 'two trip theory' was the theory that Mr Watson went back to his boat twice on the night in question, once with Mr Anderson (as argued by the defence) and once with Ms Hope and Mr Smart aboard Mr Wallace's water taxi. Mr Watson argued that the Crown first introduced this theory in its closing address, and this meant trial counsel were unable to properly cross-examine witnesses on this theory, unduly prejudicing the defence case.
101. Ms McDonald advised that this argument was not the source of fresh evidence. It was considered by the Court of Appeal, and the Court of Appeal considered that the fact that Mr Watson had or might have gone to his yacht twice on the relevant night must always have been a scenario that the defence and the Crown anticipated.
- (m) *Other matters raised by Mr Watson and Mr Watson Sr*
102. Among other matters, Ms McDonald also considered submissions from Mr Watson Sr about the reports of the IPCA on complaints made by Mr Watson Sr and Mr Hunter, allegations of "sub-judice reportage" by the media of Mr Watson's case and "unfair and improper conduct" by the Crown. Ms McDonald concluded that none of these submissions were the source of any fresh evidence.
- (n) *Criticism by Mr Watson's legal team of Ms McDonald's assessment of evidential issues*
103. In their August 2011 submission, Mr Watson's legal team criticised Ms McDonald's assessment, as contained in her March 2011 advice, of a number of evidential matters. Many of the assertions relate to the weighting or significance Ms McDonald attributed to aspects of Mr Watson's application, and her understanding and evaluation of evidence put forward by and on behalf of Mr Watson.

104. Ms McDonald addressed these submissions in her supplementary advice dated March 2013. She concluded that none of the submissions gave her cause to alter her earlier assessment of the evidential matters in question, as detailed above.

Alleged errors in the judgment of the Court of Appeal

105. As outlined above, Ms McDonald considered the submission that the defence case was prejudiced by the Crown's late introduction of the 'two-trip theory', and concluded that this was not the source of fresh evidence as it had been considered by the Court of Appeal.
106. Ms McDonald also considered the separate submission that the Court of Appeal erred in the way it dealt with this issue when it was argued on appeal, and that the Court's finding that "an examination of the transcript shows that there was extensive cross-examination on those issues" contains a major error of fact.
107. Mr Watson argued that not only was there no extensive cross-examination as to how he may have returned ashore, but there was neither cross-examination nor direct questioning about this matter.
108. Having examined the transcript, Ms McDonald accepted that the Court of Appeal's reference to "extensive cross-examination" on issues of timing and a return trip ashore was wrong. There was minimal cross-examination of witnesses on issues of timing and there was no direct evidence or questioning about a possible return to shore.
109. However, she did not consider this error affected the validity of the Court's reasoning regarding the two-trip theory and its conclusion that the late formal introduction of this theory did not unduly prejudice the defence. There was supporting evidence for the Crown's theory consistent with the whole nature of its case. In Ms McDonald's view, the jury was entitled to draw an inference that Mr Watson must have returned ashore after being taken to his boat at about 2.30am by Mr Anderson, particularly given the evidence that he was ashore at the time of an incident involving Mr Perkins around 3.00am to 3.30am and about his acquisition of a jersey at a late stage of the festivities.
110. While other factual errors were alleged by Mr Watson, Ms McDonald found that none of those alleged errors were of such significance as to have a bearing on the Court of Appeal's decision.

Failure by trial counsel to pursue ground of appeal

111. Mr Watson's legal team submitted that Mr Watson's trial counsel should have pursued the ground of appeal that 'the verdicts were unreasonable and could not be supported having regard to the evidence' before the Court of Appeal, and their failure to do so prevented the appellate court from comprehensively reviewing the case, resulting in a miscarriage of justice.
112. This ground of appeal was included in Mr Watson's original notice of appeal, but was subsequently abandoned. Mr Watson's legal team submitted that Mr Watson "expected this ground of appeal to be argued strongly" and he did not

instruct his counsel to abandon the ground. Mr Watson swore an affidavit in support of this submission.

113. Mr Watson's trial counsel, Mr Antunovic and Judge Davidson, made an affirmation in response to Mr Watson's affidavit, in which they rejected what Mr Watson said in his affidavit, and stated that the decision not to pursue this ground of appeal was made with Mr Watson's fully informed consent, and on the basis that they considered this ground of appeal to have no prospect of success.
114. Ms McDonald advised that, in light of trial counsel's affirmation, and the other grounds of appeal that were pursued on appeal, she was satisfied that a miscarriage of justice had not occurred following the decision not to pursue this ground of appeal.

Ms McDonald's overall conclusion

115. Ms McDonald considered not only the evidential and other matters outlined above, but also the broader submission made by Mr Watson's legal team that when looked at as a whole, "nearly all of the 'threads' of the Crown's circumstantial case have been undermined *post* trial".
116. Ms McDonald concludes her advice by stating that she "do[es] not consider that any of the new evidence that has been submitted is, taken either singularly or cumulatively, sufficiently fresh, credible and cogent that, when considered alongside all of the other evidence given at Mr Watson's trial, there is a reasonable prospect that the Court of Appeal would uphold an appeal".

MINISTRY COMMENT

Response to criticism of Ms McDonald's approach and the scope of her instructions

117. In their submission dated 16 August 2011, Mr Watson's legal team criticised the ambit of Ms McDonald's instructions, claiming that "a far wider ranging investigation into Mr Watson's case is necessary". They were also critical of Ms McDonald's approach to the matters she did consider, submitting that she confined her analysis to an assessment of 'fresh evidence' instead of considering the wider issue of whether a miscarriage of justice had occurred.
118. The Ministry's instructions to Ms McDonald are discussed at paragraphs 61 and 62 of this advice. They were to:

"consider all material provided (as part of the original application or subsequently) and advise whether any evidence has been produced as part of the application that is fresh, and sufficiently credible and cogent that, if considered alongside all of the other evidence given at trial, it might raise a real doubt about the safety of Mr Watson's convictions. The standard that the Ministry applies is that there is a reasonable prospect that the Court of Appeal would uphold an appeal based on such evidence."

119. These instructions took into account the following:
- (a) In assessing whether a case should be reconsidered by the Court of Appeal, the Ministry must consider the legal principles that the Court of Appeal would apply in an applicant's case;
 - (b) Most prerogative of mercy applications hinge on the availability and significance of fresh evidence because in the vast majority of cases where something else has gone wrong with a trial, the factual or legal basis for an application will have been apparent and should have been addressed on appeal. However, it is open to an applicant to identify any ground on which the Court of Appeal would be likely to uphold an appeal; and
 - (c) The Ministry does not adopt a rigid approach to Royal prerogative of mercy applications. We recognise that the prerogative of mercy operates as a safety net and the criteria for its exercise should be applied flexibly where that is in the interests of justice.
120. The Ministry's instructions followed a conventional approach, consistent with established conventions surrounding, and principles applicable to the exercise of the Royal prerogative of mercy in New Zealand and overseas (discussed at paragraphs 53 to 60 of this advice). They reflect the critical issue being whether, in light of any new material, the Court of Appeal might now consider that, on all the available evidence, the applicant's convictions are unreliable.
121. It is not the function of the Executive branch of government to re-examine the evidence and arguments considered by the courts and substitute its own view. The position is different when there is new evidence that, for a good reason, could not be considered by the courts and raises serious doubts about a person's conviction.
122. It is clear from Ms McDonald's report that her inquiry and subsequent advice are consistent with the Ministry's instructions and properly take into account that the courts will not insist on strict adherence to the "freshness" requirement if the evidence put forward by an applicant is especially cogent.

Conclusion

123. Over the period between November 2008 and December 2012, Mr Watson, Mr Watson Sr and Mr Watson's legal team provided the Ministry with a significant amount of material in support of Mr Watson's application. All material was forwarded to Ms McDonald for her consideration, and all matters of significance have been addressed in her advice.
124. The Ministry's instructions and Ms McDonald's fulfilment of her instructions were in accordance with the principles applicable to all Royal prerogative of mercy applications. Both the Ministry and Ms McDonald followed a fair and transparent process in considering the material submitted in support of Mr Watson's application. The Ministry considers that Ms McDonald's advice evidences her thorough consideration of all material provided in support of Mr Watson's application.

125. An important focus of Ms McDonald's inquiries and her subsequent advice was the submission that there was fresh evidence that undermined the identification evidence given by Mr Wallace and Ms McNeilly at trial. Ms McDonald's focus on this recognised the importance placed on this evidence at trial and the fact that Mr Wallace and Ms McNeilly both now say that, if asked, they would have answered certain questions relating to their identification of Mr Watson, in a particular way.
126. In order to properly consider this submission, Ms McDonald interviewed both Mr Wallace and Ms McNeilly and considered affidavits provided by them, discussed their evidence with Mr Watson's trial counsel, and considered submissions concerning the propriety and reliability of the identification procedures they underwent at the Police station.
127. Ms McDonald then evaluated this submission in the context of the evidence Mr Wallace and Ms McNeilly gave at trial, as well as other evidence supporting the Crown case, such as the DNA evidence relating to the hairs said to be from Ms Hope and found on Mr Watson's boat. She found that the 'new' information was available at the time of Mr Watson's trial, and did not have the significance suggested. It did not represent a significant departure from the identification evidence given at trial, and had to be viewed in the context of the trial evidence concerning other matters, such as the DNA evidence, which provided a strong link between Mr Watson and Ms Hope. She concluded that the 'new' information did not meet the test for a referral to the Court of Appeal based on 'fresh evidence'.
128. In respect of all other material submitted by and on behalf of Mr Watson in support of his application, Ms McDonald concluded that, both individually and cumulatively, none of the new information and submissions created a 'real possibility' that the jury would have changed their verdict, had such information been available to them.
129. The Ministry agrees with Ms McDonald's assessment of and conclusions about the evidence and other matters put forward in support of Mr Watson's application.
130. The Crown case against Mr Watson, as was heard by the jury, relied on a number of circumstantial strands of evidence. In finding Mr Watson guilty of the murders of Ms Hope and Mr Smart, the jury concluded that the combined effect of these strands established beyond reasonable doubt that the evidence was so compelling as to be inconsistent with any rational hypothesis other than Mr Watson's guilt.
131. Mr Watson's legal team argued that nearly all of the strands of the Crown's circumstantial case have been undermined by the evidence and arguments submitted in support of Mr Watson's application. However, as outlined below, the overall picture presented to the jury at Mr Watson's trial has not, to any significant degree, changed.
132. At trial there was evidence that, on the night in question, Mr Watson was affected by alcohol, that he behaved aggressively towards a young man and inappropriately in relation to a number of young women, and that he was onshore probably between 3am and 3.30am. The last sighting of Ms Hope and Mr Smart was on Mr Wallace's water taxi with a lone male shortly after that time, at around

4am. The boat Mr Wallace took the three passengers to was anchored in the vicinity of Mr Watson's boat.

133. At trial, the Crown led evidence from Mr Wallace and Ms McNeilly in an attempt to have them identify Mr Watson as the lone male. However, there was a lack of certainty in the identification evidence given by both witnesses, to the extent that trial counsel was able to submit that Mr Wallace had never positively identified Mr Watson as the lone male. It was also trial counsel's position that Ms McNeilly had never positively identified Mr Watson. Both witnesses remain uncertain surrounding their identification of Mr Watson.
134. The evidence at trial suggested that, following the disappearance of Mr Smart and Ms Hope, Mr Watson acted suspiciously. He left Endeavour Inlet early on the morning of 1 January 1998, probably before 6am. He was identified by someone who knew him as being near Cook Strait later than afternoon, before then sailing to Erie Bay. Between 1 January 1998 and when his boat was seized by the Police on 12 January 1998, he painted his boat, changing its colour and appearance, and methodically wiped the interior of the boat, including radio cassette tape covers.
135. Mr Watson maintained at trial, and continues to maintain, that Ms Hope and Mr Smart were never aboard his boat. However the Police recovered a number of hairs from a blanket on Mr Watson's boat, which a forensic examination indicated were highly likely to have come from Ms Hope.
136. It follows that the Ministry agrees with Ms McDonald's advice that there is nothing sufficiently fresh, credible and cogent to raise a doubt about the safety of Mr Watson's convictions and justify a referral of his case to the Court of Appeal.
137. There is, therefore, no basis for referring Mr Watson's convictions back to the Court of Appeal under section 406 of the Crimes Act 1961. We recommend that the application be declined accordingly.

RECOMMENDATIONS

138. I recommend that you:
 - (a) **advise** the Governor-General to **decline** to exercise the Royal prerogative of mercy in favour of Scott Watson; and
 - (b) **forward** a copy of this report and Ms McDonald's original and supplementary advice to His Excellency the Governor-General, together with the attached draft letter.

Jeff Orr
Chief Legal Counsel, Office of Legal Counsel

Encs

APPENDIX 1

LIST OF DOCUMENTS SUBMITTED IN SUPPORT OF SCOTT WATSON'S APPLICATION

The following key documents were submitted by or on behalf of Mr Watson and considered by the Ministry as part of his application.

Date received	Description
4 December 2008	22-page letter from Mr Watson headed "Petition for the exercise of the royal prerogative of mercy"
	Book - Keith Hunter, <i>Trial by Trickery: Scott Watson, the Sounds Murders and the Game of Law</i> (Hunter Productions, 2006)
	DVD - Keith Hunter, <i>Murder on the Blade?</i> (Hunter Productions, 2003)
	Copy of statutory declaration by Roslyn McNeilly taken at Alice Springs, Northern Territory, Australia, on 27 November 2000
6 April 2009	Letter from Mr Watson dated 2 April 2009 confirming preferred method of communication, lack of legal representation and scope of application
4 June 2009	Letter from Mr Watson (Sr) dated 31 May 2009 regarding the fresh evidence principles, the appointment of Kristy McDonald QC and the possibility of a free pardon
11 September 2009	Letter from Mr Watson (Sr) dated 5 September 2009 regarding identification evidence and the Ministry's request to obtain an affidavit from Mr Guy Wallace
14 December 2009	Letter from Mr Watson (Sr) dated 7 December 2009 regarding the Minister of Justice's request for additional information
	Affidavit of [...] sworn at Christchurch on 2 September 2005 regarding missing squab cover
	Affidavit of [...] sworn at Christchurch on 2 September 2005 regarding hatch scratches
18 February 2010	Letter from Mr Watson (Sr) dated 14 February 2010 updating progress on the provision of additional information and attaching further "fresh evidence"

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Date received	Description
	Affidavit of [...] sworn at Christchurch on 20 January 2010 regarding the evidence of Secret Witness B
	Copy of letter dated 5 February 2010 from [...] regarding the evidence of Secret Witness B
5 May 2010	Affidavit of Roslyn McNeilly sworn at Nelson on 5 May 2010 regarding her "identification" of Mr Watson
6 May 2010	Letter from Mr Watson (Sr) attaching additional material in support of application
	Affidavit of Keith Hunter affirmed at Auckland on 19 April 2010 regarding reconstructed voyage of <i>Blade</i> from Cook Strait to Erie Bay and contents of his publications
	Affidavit of [...] sworn at Invercargill on 13 April 2010 regarding a ketch sighting on the morning of 1 January 1998
	Affidavit of former Police officer [...] sworn at Christchurch on 4 March 2010 regarding the internal workings of Police Operation TAM
31 May 2010	Letter from Mr Watson (Sr) enclosing submission on the evidence of Secret Witness B and supporting documents, including the Manitoba Department of Justice Prosecutions' "Interim In-Custody Informer Policy" dated 12 July 2000
28 June 2010	Letter from Mr Watson (Sr) dated 21 June 2010 attaching additional information in support of the application
	Submission on the evidence of [...] regarding hatch scratches and squabs
	Submission on identification evidence
	New Zealand Police Job Sheet dated 27 April 1998 recording discussions with Guy Wallace
	Affidavit of Guy Wallace affirmed at Blenheim on 1 May 2010 regarding his "identification" of Mr Watson and the location of the boat to which he delivered Mr Smart and Ms Hope

APPENDIX 1

LIST OF DOCUMENTS SUBMITTED IN SUPPORT OF SCOTT WATSON'S APPLICATION

Date received	Description
July 2010	Letter from Mr Watson (Sr) dated 5 July 2010 enclosing a submission and supporting material regarding the alleged Cook Strait – Erie Bay voyage of Mr Watson and <i>Blade</i> on 1 January 1998
13 August 2010	Letter from Mr Watson (Sr) dated 6 August 2010 enclosing additional information in support of his application
	Compact disk containing an interview of Secret Witness B by Police and news items said to illustrate a “trial by media”
	Commentary on the affidavit of [...] and supporting materials
7 September 2010	Letter from Mr Watson (Sr) dated 2 September 2010 regarding the reports of the Independent Police Conduct Authority into complaints about Operation Tam
	Report of the Independent Police Conduct Authority dated 17 May 2010 in response to a complaint by Keith Hunter about Operation Tam
	Mr Hunter's commentary on the Independent Police Conduct Authority's report
	Suspect profile for Mr Watson dated 11 January 1998
19 October 2010	Letter from Mr Watson (Sr) dated 12 October 2010 attaching combined submissions on Mr Watson's application and a compact disk containing Operation Tam related news articles
11 November 2010	Letter from Mr Watson (Sr) dated 7 November 2010 regarding the report of the Independent Police Conduct Authority, Secret Witness A and new information from [...]
	Affidavit of [...] sworn at Auckland on 28 October 2010 regarding a ketch sighting at Westhaven Marina in Auckland
	New Zealand Police Job Sheet dated 3 February 2000 regarding a visit to Secret Witness A in prison

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Date received	Description
	Report of the Independent Police Conduct Authority dated 17 May 2010 in response to a complaint by Mr Watson (Sr) about Operation Tam and associated correspondence
	New Zealand Police reports dated 17 March 2008 and 11 December 2008 regarding Mr Watson Sr's complaint about an affidavit sworn by Deputy Commissioner Pope in 1998
	Correspondence concerning Mr Watson Sr's complaint to Police and the (then) Police Complaints Authority
5 January 2011	Signed waiver of legal professional privilege from Mr Watson to enable Kristy McDonald QC to have a discussion with his former counsel
18 January 2011	Letter from Mr Watson (Sr) dated 12 January 2011 regarding the construction of Guy Wallace's affidavit and the affidavit of Thomas John Fitzgerald
	Letter from Police dated 28 September 2010 in response to a request under the Official Information Act 1982 by Mr Watson (Sr)
	Commentary on the affidavit of Thomas John Fitzgerald
	Correspondence from Keith Hunter to Guy Wallace regarding the preparation of Mr Wallace's affidavit
	Transcript of interview of Guy Wallace by Keith Hunter on 3 December 2009
15 February 2011	Letter from Mr Watson (Sr) dated 8 February 2011 concerning the existence of an extra unidentified vessel at the Furneaux Lodge anchorage on the morning of 1 January 1998
	Submission on "the extra vessel"
	Enlargement of photograph by witness Bamford
2 March 2011	Email from Mr Watson (Sr) attaching a spreadsheet detailing his analysis of the arrival and departure of boats at Furneaux Lodge between 31 December 1997 and 1 January 1998

APPENDIX 1

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Date received	Description
7 March 2011	Facsimile from Mr Watson confirming his instruction of Kerry Cook, Pip Hall and Greg King.
7 March 2011	Letter from Greg King dated 5 March 2011 confirming his instruction and requesting the opportunity to comment on Ms McDonald's report
12 April 2011	Letter from Mr King dated 10 April 2011 requesting the opportunity to comment on Ms McDonald's report
16 August 2011	Submission from Mr Watson's legal team commenting on Ms McDonald's report
22 September 2011	Email from Mr King attaching an affidavit from Mr Watson sworn on 20 September 2011
30 March 2012	Letter from Mr King dated 28 March 2012 attaching affirmation of Mr Watson's trial counsel (Michael Antunovic and Bruce Davidson) dated 24 February 2012
25 May 2012	Letter from Mr Hall dated 17 May 2012 regarding identification evidence and the potential evidence of [...]
6 December 2012	Letter from Mr Hall dated 2 December 2012 regarding identification procedures conducted with Ms McNeilly and Mr Wallace and the potential evidence of [...]

APPENDIX 2

OVERVIEW OF KRISTY McDONALD QC'S CONSIDERATION OF SCOTT WATSON'S APPLICATION

Introduction

1. Mr Watson's original application for exercise of the Royal prerogative of mercy was received at Government House on 1 November 2008. The grounds of that application are outlined in the main briefing. This appendix provides an overview of:
 - (a) the additional submissions and information received from and on behalf of Mr Watson in support of his application;
 - (b) the inquiries and requests for information by Ms McDonald and the Ministry; and
 - (c) the process whereby Ms McDonald considered all submissions.

Instruction of Kristy McDonald QC

2. In April 2009, the Ministry sought legal advice from Kristy McDonald QC on whether, if supported by admissible evidence, the documents and submissions provided by and on behalf of Mr Watson contained any information or raised any issues that could potentially justify a referral of his case to the Court of Appeal under section 406(a) of the Crimes Act 1961.

Preliminary advice from Kristy McDonald QC

Update of 27 May 2009

3. On 27 May 2009, Ms McDonald updated the Ministry on her consideration of Mr Watson's application. She observed that many of the issues raised as grounds in Mr Watson's application, or raised in Mr Hunter's publications, were either the subject of evidence or were otherwise addressed at trial, either directly or indirectly (and later in the Court of Appeal). However, from the material provided, Ms McDonald identified the following seven categories of information that were potentially fresh evidence:
 - (a) Mr Guy Wallace's identification of Mr Watson – a purported qualification of Mr Wallace's "identification" of Mr Watson as the man in the bar at Furneaux Lodge on the evening of 31 December 1997, and the man in his water-taxi early in the morning of 1 January 1998 who was last seen with Mr Smart and Ms Hope. This qualification was said to amount to a retraction;
 - (b) Ms Roslyn McNeilly's identification of Mr Watson – a purported qualification of Ms McNeilly's "identification" of Mr Watson as the man in the bar at Furneaux Lodge on the evening of 31 December 1997. This qualification was said to amount to a retraction;
 - (c) Mr Guy Wallace's description of the location of the boat – a statement by Mr Wallace that he can now identify the exact location of the boat in Endeavour Inlet that he took the lone man and Mr Smart and Ms Hope to in the early hours of 1 January 1998. He did not give this evidence at trial;

- (d) Confession of murders to Secret Witness A – a purported retraction of evidence given by Secret Witness A about Mr Watson’s “confession” to the murders of Mr Smart and Ms Hope during the time they shared a cell in Addington Prison;
- (e) Additional “ketch sightings” – references to numerous sightings of a large two-masted ketch at Furneaux Lodge on 31 December 1997 and at other relevant times matching the description given by some witnesses, including Mr Wallace, and a suggestion that the Police ignored reports of these sightings;
- (f) Timing of trip from Cook Strait to Erie Bay on 1 January 1998 – evidence from Mr Hunter about the timing of Mr Watson’s alleged trip from Cook Strait to Erie Bay, which was said to indicate that Mr Watson could not have been sighted in Cook Strait and in Erie Bay at the times given by Crown witnesses at trial; and
- (g) Statements of water-taxi driver [...] – statements from [...] that he took a person resembling Mr Watson out to his (Mr Watson’s) boat in the early hours of 1 January 1998. [...] gave evidence at trial, but his evidence did not address or in any way touch upon this matter.

Interim advice

- 4. Ms McDonald provided *Interim Advice* on Mr Watson’s application to the Ministry on 28 October 2009. A copy of that advice was provided to the Minister with the Ministry’s briefing dated 30 October 2009.
- 5. The *Interim Advice* analysed the seven categories of possible fresh evidence that were referred to in Ms McDonald’s May 2009 update and advised that further inquiries should be carried out before she could reach any final view about the significance of the evidence.
- 6. Ms McDonald also considered the alleged errors in the Court of Appeal’s judgment and advised that she was not satisfied that any of the criticisms were justified or were significant to the extent that the appeal should be reheard or the issues readdressed.

Further inquiries and information

- 7. Following Ms McDonald’s recommendations, the Minister wrote to Mr Watson in November 2009 setting out the steps that would subsequently be taken by Ms McDonald and the Ministry, and requesting that Mr Watson provide further information in support of his application. The outcome of these inquiries and requests are recorded below.

Further information requested from Mr Watson

- 8. In the Minister’s letter of November 2009, Mr Watson was asked to provide the following additional information in support of his application:
 - Affidavit from Mr Guy Wallace: Mr Watson was asked to arrange for Mr Wallace to be interviewed with any new evidence formally recorded in an

affidavit to the extent that it related to any changes to the identification evidence he gave at trial and to the evidence he gave at trial regarding the location of the boat;

- Affidavits from Mrs Betty Rowe and [...]: Mr Watson was asked to arrange for Mrs Betty Rowe and [...] to make affidavits confirming their alleged sightings of a ketch at the relevant times and the alleged reports of those sightings to the Police, including information as to the timing of those reports to Police;
- Affidavits from other people who allegedly reported sightings of a ketch to Police: Mr Watson was asked to arrange for evidence to be provided by other people who allegedly reported sightings of a ketch to Police to support the criticisms made by Mr Hunter that the Police failed to follow up numerous other sightings of a ketch at the relevant times; and
- Clarification of evidence relating to [...]: Mr Watson was requested to clarify his position regarding the significance of the new evidence from [...] in light of the way his case was presented at trial (defence counsel accepted that a particular person, Mr Donald Anderson, took Mr Watson back to his boat) and if appropriate to provide an affidavit from [...] setting out the new evidence he maintains he is now in a position to give.

Additional information provided in support of Mr Watson's application between November 2009 and March 2011

9. An affidavit sworn by Mr Guy Wallace on 1 May 2010 was provided to the Ministry on 28 June 2010. As mentioned below, Mr Wallace was subsequently interviewed by Ms McDonald on 3 November 2010.
10. Mrs Betty Rowe is now deceased, but an affidavit from [...] was received by the Ministry on 6 May 2010. An affidavit from [...] regarding a ketch sighting at Westhaven Marina in Auckland was submitted by Mr Watson.
11. No affidavit from [...] was received and Mr Watson gave no clear indication of his position regarding this evidence.
12. Mr Watson Sr provided a substantial amount of additional material in support of his son's application. This material included:
 - Affidavits from [...] that are said to provide an innocent explanation for scratches on the hatch of *Blade* and a missing piece of foam from the saloon squab;
 - An affidavit from former Police officer, [...], in support of the allegation that Police failed to investigate ketch sightings;
 - An affidavit from Mr Hunter regarding the timing of the alleged Cook Strait to Erie Bay trip on 1 January 1998;
 - Information relating to an underwater sonar search of an area in Cook Strait by the Royal New Zealand Navy in 2000;

- An affidavit from the cellmate of Secret Witness B at the time of Mr Watson’s alleged confession;
 - Matters arising in the reports of the Independent Police Conduct Authority (“IPCA”) in response to complaints by Mr Watson Sr and Mr Hunter; and
 - Material concerning an “extra vessel” seen at Furneaux Lodge on the morning of 1 January 1998 that is said to undermine the Crown’s submission that all vessels had been identified and eliminated.
13. All material submitted by and on behalf of Mr Watson was forwarded to Ms McDonald for consideration.

Inquiries by Ms McDonald and the Ministry

14. On 26 January 2010, the Ministry instructed Ms McDonald to: seek to interview and obtain formal evidence from Secret Witness A regarding his alleged retraction of the evidence given at trial; and clarify with Ms McNeilly the basis on which she maintains she was “tricked” into identifying Mr Watson in photograph 3 on Montage B produced at trial.
15. Ms McDonald was not able to interview Secret Witness A who, despite being contacted, twice failed to attend scheduled interviews.
16. Ms McNeilly was interviewed by Ms McDonald in Nelson on 5 May 2010. A Ministry official was present throughout the interview and Ms McNeilly was accompanied to the interview by Mr Rob Harrison, Barrister. The interview was tape recorded and a transcript was provided to Ms McNeilly and Mr Watson. Ms McNeilly also provided an affidavit sworn on the day of the interview and a copy was provided to Mr Watson.
17. Mr Wallace was later interviewed by Ms McDonald in Picton on 3 November 2010. A Ministry official was present throughout the interview and Mr Wallace was supported at the interview by Mr Rob Harrison, Barrister. The interview was tape recorded and a transcript was provided to Mr Wallace and Mr Watson.
18. For the Ministry’s part, it inquired of the Police whether: Mr Wallace made a statement to the Police prior to depositions and trial in which he gave a different location of the boat, and if so, what that statement contained; and what records they held of “ketch sightings” made by Mrs Rowe and/or [...].
19. The Ministry subsequently obtained an affidavit deposed by Mr Thomas Fitzgerald, whom Mr Wallace has now identified as the detective to whom he says he gave a different location of the boat prior to Mr Watson’s trial. A copy of this affidavit, in which Mr Fitzgerald denies Mr Wallace’s account, was provided to Mr Watson for comment.

20. The Police also provided telephone information sheets recording “ketch sightings” by Mrs Rowe and [...], together with information regarding their disclosure to the defence and what steps were taken by the Police to follow up these sightings. Again, this material was provided to Mr Watson for comment.

Meeting with defence counsel

21. As a result of her interview of Mr Wallace, Ms McDonald decided that it would be beneficial for her to meet with Mr Watson’s former counsel, (now) Judge Bruce Davidson and Mr Michael Antunovic, to discuss the tactics adopted at trial with respect to the identification evidence of Mr Wallace and Ms McNeilly.
22. In accordance with the terms of a waiver of legal professional privilege provided by Mr Watson and dated 21 December 2010, that meeting took place on 15 February 2011.

Advice from Kristy McDonald QC March 2011

23. In March 2011 Ms McDonald provided a formal report on Mr Watson’s application. Ms McDonald advised that none of the material that was submitted in support of Mr Watson’s application was fresh, credible and sufficiently cogent that, when considered alongside all of the other evidence given at Mr Watson’s trial, there was a real doubt about the safety of Mr Watson’s convictions.

Evidence and submissions provided by Mr Watson’s legal team in their August 2011 submission

Background

24. On 7 March 2011, Mr Watson advised the Ministry that he had instructed a legal team to represent him during the last phase of the application. Mr Watson requested that his application be suspended at that time, to allow his legal team to make further representations in support of his application.
25. Mr Watson’s legal team wrote to the Ministry on 7 March 2011, requesting that they be provided with a copy of Ms McDonald’s advice, and the opportunity to comment on it.
26. On the instruction of the then Minister of Justice, Minister Power, a copy of the report was forwarded to Mr Watson’s legal team on 8 June 2011, for comment by 10 August 2011. The Ministry received Mr Watson’s legal team’s submission on 16 August 2011 (attached), after a short extension was agreed upon.
27. Mr Watson’s legal team challenged Ms McDonald’s assessment of the specific issues she considered and raised some new arguments. They also criticised the Ministry’s and Ms McDonald’s overall approach to Mr Watson’s application. Below is a summary of the main issues raised by Mr Watson’s legal team.

Grounds raised in submission dated 6 August 2011

(i) Overall approach to application

28. Mr Watson's legal team submitted that Ms McDonald's investigation was too narrowly focussed and should have involved a wider and more "comprehensive review of the case against Mr Watson". They submitted that Ms McDonald applied the wrong test when assessing Mr Watson's application by "confin[ing] her analysis to an assessment of 'fresh evidence' and not on the wider perspective of [a] miscarriage of justice".

(ii) Court of Appeal did not consider whether verdicts were unreasonable

29. Mr Watson's notice of appeal originally contained a ground that "the verdict was unreasonable and could not be supported having regard to the evidence". However, this ground was not pursued at the hearing before the Court of Appeal. Mr Watson's legal team submitted that this ground was abandoned as a result of undue pressure from the Court of Appeal, and defence counsel's incorrect view that the remaining grounds of appeal were sufficient. Mr Watson's legal team further asserted that defence counsel acted outside Mr Watson's instructions by abandoning this ground of appeal.

(iii) Criticism of Ms McDonald's assessment of identification evidence

30. Mr Watson's legal team argued that identification evidence was crucial to this trial, and "in critical respects the evidence presented to the jury has been shown to have been incorrect and to have been totally misleading".
31. Mr Watson's legal team submitted that the Crown's identification evidence has been substantially eroded and undermined. They referred specifically to Mr Wallace's and Ms McNeilly's evidence and submitted that Ms McDonald understated the importance of their evidence to the Crown case and how that case would be weakened by the evidence they would now give.
32. More generally, Mr Watson's legal team criticised the identification procedures undergone by Mr Wallace and Ms McNeilly, with reference to the Independent Police Conduct Authority report dated 17 May 2010. They argued that such procedures, and the failure by the Police to record and or disclose them to defence counsel, resulted in flawed and unreliable identification evidence.

(iv) Criticism of Ms McDonald's assessment of other evidential issues

33. Mr Watson's legal team criticised Ms McDonald's assessment of the evidential issues, and claimed that she underestimated the defence case in respect of them. Specific criticisms made in respect of the main issues are set out below.

(a) Guy Wallace on the position of the ketch

34. Mr Watson's legal team submitted that Ms McDonald did not properly consider the new evidence that is now available regarding Mr Watson's memory of the position of the 'mystery ketch'.

(b) Cellmate confessions

35. Mr Watson's legal team criticised the use of cellmate confessions in evidence generally, and also asserted that Ms McDonald "gave insufficient weight to the exposed deficiencies in the 'cellmate confession' evidence". Specifically, they submitted that Witness A's refusal to meet with Ms McDonald, "should in itself provide for a much stronger adverse inference against him".
36. Mr Watson's legal team also submitted that greater significance should have been placed on the "fresh" evidence relating to witness B.

(c) Timing of Cook Strait to Erie Bay Trip

37. Mr Watson's legal team argued that there is now "conclusive evidence" that it is not possible to make the alleged journey between the Cook Strait and Erie Bay in the timeframe alleged by the Crown at trial. They disagreed with Ms McDonald's assessment that the evidence is neither fresh nor cogent.

(d) Evidence of [...] relating to the hatch scratches

38. Mr Watson's legal team submitted that it was inappropriate for Ms McDonald to place weight on defence counsel's tactical decision not to call [...] as a witness at Mr Watson's trial. Her evidence, they claimed, offered an innocent explanation for the presence of the hatch scratches.

(e) Failure to recover bodies as a result of the underwater sonar search

39. Mr Watson's legal team submitted that Ms McDonald placed inadequate weight on the failure of the Police search "Moa Hunt" to recover any bodies from the area where the Crown alleged Mr Watson had disposed of the bodies.

(v) Alleged trial error by the Court of Appeal concerning the "two trip theory"

40. In her formal report, Ms McDonald agreed with Mr Watson's submission that the Court of Appeal was wrong in stating that there was "extensive cross examination" on the "two trip theory", but she considered the error to be insignificant.
41. Mr Watson's legal team submitted that the late formal introduction of the "two trip theory" prejudiced the defence by preventing them from properly testing the theory, and that Ms McDonald was wrong in her assessment that the error was of little significance.

(vi) Failure to recognise erosion of Crown case

42. Mr Watson's legal team concluded by submitting that "nearly all of the 'threads' of the Crown's circumstantial case have been undermined post trial" and that a retrial now would have a very different shape to the first trial. With reference to this argument, Mr Watson's legal team submitted that Ms McDonald overstated the nature and importance of the DNA evidence relating to the two hairs that were said to be from Ms Hope and found on Mr Watson's boat, and that this "unduly and unfairly" influenced her approach to all the other evidence.

Further information requested from and supplied by Mr Watson's legal team

43. The August 2011 submission included a number of new issues not previously raised by or on behalf of Mr Watson or considered by the Ministry. In particular, it included the submissions that:
- (a) The proposed ground of appeal that 'the verdicts were unreasonable and could not be supported having regard to the evidence' was wrongly not pursued before the Court of Appeal, contrary to Mr Watson's expectations and as a result of:
 - (i) defence counsel being "placed under very considerable pressure by the Court of Appeal not to pursue it"; and
 - (ii) defence counsel being of the mistaken view that "the remaining 'specific' grounds ought to have been sufficient for the appeal to have been allowed";
 - (b) The Police failed to record and/or disclose to the defence some of the identification procedures undergone by Mr Wallace and Ms McNeilly. Mr Watson's legal team submitted that had evidence that is available now concerning these procedures been available to counsel at the time of trial, there is a real possibility that a different verdict would have resulted; and
 - (c) Ms McDonald inappropriately placed weight on defence counsel's tactical decision not to call [...] as a witness, when assessing the significance of [...]’s evidence in the context of the application.
44. To enable the Ministry and Ms McDonald to properly consider these new issues, the Ministry wrote to Mr Watson's legal team on 1 September 2011, requesting specified information and evidence, supported by affidavit evidence from defence counsel where appropriate. The following outlines the information that was requested and received over the period September 2011 to December 2012:

- (a) *Relevant submission: failure to pursue the ground of appeal that "the verdicts were unreasonable and could not be supported having regard to the evidence"*

The Ministry sought affidavit evidence from Mr Watson's defence counsel confirming the circumstances relating to the decision not to pursue this ground of appeal, and how the decision not to pursue this ground of appeal squared with the instructions of Mr Watson.

In response, by correspondence dated 22 September 2011 and 28 March 2012, Mr Watson's legal team provided further submissions on this ground, and the following documents:

- an affidavit from Mr Watson dated 20 September 2011; and
- an affirmation from Mr Antunovic and Judge Davidson dated 24 February 2012.

- (b) *Relevant submission: The Police failed to record and/or disclose to the defence some of the identification procedures undergone by Mr Wallace and Ms McNeilly*

The Ministry sought clarification in respect of:

- (i) What information about identification procedures was allegedly not disclosed to defence counsel and not otherwise known by them at trial and on appeal;
- (ii) When the relevant information became available to Mr Watson; and
- (iii) How, in Mr Watson's legal team's submission, the relevant information could have, or should have, been used in support of Mr Watson's defence or in support of his appeal.

Mr Watson's legal team responded by letter dated 17 May 2012 by identifying the following identification procedures, which they claim were not conducted in accordance with proper practices and surrounding which they claimed there was a lack of record-keeping:

- Mr Wallace being shown a single photo of Mr Watson on 9 January 1998;
- Mr Wallace being shown a photo montage containing a photo of Mr Watson on 11 January 1998; and
- Ms McNeilly being shown a photo montage containing a photo of Mr Watson on 11 January in early 1998.

By letter dated 2 December 2012, Mr Watson's legal team also made further submissions concerning the identification procedures that took place.

- (c) *Relevant submission: Ms McDonald did not adequately assess the significance of evidence of [...] and defence counsel's tactical decision not to call her as a witness*

The Ministry requested that Mr Watson's legal team seek affidavit evidence from Mr Watson's defence counsel setting out:

- (i) The reasons behind their decision not to call [...] as a witness; and
- (ii) The involvement of Mr Watson in the decision making process, including what instructions he gave counsel about whether [...] should have been called as a witness.

Mr Watson's team did not provide any affidavit evidence on this point, instead making further submissions about the significance of [...]’s evidence by letters dated 17 May 2012 and 2 December 2012.

Final instructions to Ms McDonald QC

45. In December 2012, the Ministry instructed Ms McDonald to prepare supplementary advice on Mr Watson's application, taking into account the material received from Mr Watson's legal team following her advice of March 2011.

Supplementary advice from Kristy McDonald QC

46. In March 2013, Ms McDonald provided supplementary advice, addressing the additional submissions and material submitted by Mr Watson's legal team post March 2011. Ms McDonald concluded that the additional submissions did not justify a change to her earlier conclusion.