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## **Exacerbating Injustice: Post-Conviction Disclosure in England and Wales.**

*Following years of debate, the creation of the Court of Appeal (Criminal Division) in England and Wales signified official recognition that the criminal process may sometimes result in unsafe convictions. Central to the operation of the appellate system, is the ability of individuals who claim that their conviction is in error, to revisit and re-examine evidence gathered during the investigation, as well as that relied upon at their trial. High-profile miscarriages of justice have often only been remedied when there has been defence access to materials post-conviction (which had often not been disclosed pre-trial). While there has (rightly) been critical attention paid to pre-trial non-disclosure and the risks this poses to justice, such scrutiny has been lacking post-conviction. And yet, it is arguable that the rationale of preventing miscarriages of justice, which underpins the duties of pre-conviction disclosure, subsists post-conviction. This article examines the duties of disclosure post-conviction, arguing that the Supreme Court judgment in *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37 has made it more difficult to gain disclosure post-conviction. It details a worrying picture of inconsistency among police and prosecution authorities, with confusion over what should be retained (and how), and whether disclosure post-conviction should be permitted. It concludes that without significant intervention and reform, miscarriages of justice will continue uncorrected and the appellate system will become inconsequential.*

### **Introduction**

The ultimate aim of a criminal justice process is to ensure the conviction of the guilty, while simultaneously avoiding the conviction of the innocent, achieving this aim lawfully and fairly. Yet there are a multiplicity of ways in which miscarriages of justice may occur, and many will have multiple causes.<sup>1</sup> Most mistakes, oversights or failings (individual or institutional) that lead to the conviction of an innocent person, occur during the criminal investigation or pre-trial processes. In particular, problems around police/prosecution disclosure of evidence, (or more precisely - the lack thereof), are an enduring feature of criminal justice crises, with many famous miscarriages of justice having non-disclosure of evidence at their heart. There have been multiple attempts to address the issue, with the current disclosure regime set out in relatively recent legislation - the Criminal Procedure and Investigations Act 1996 ('CPIA'), as amended by the Criminal Justice Act 2003. However, pre-trial non-disclosure (albeit not always malevolent) can play a significant role in miscarriages of justice, and as the Director of Public Prosecutions admitted to the House of Commons Justice Committee in June 2018, people continue to be wrongly imprisoned as a result of disclosure failings.<sup>2</sup>

It is regarded then as essential that pre-trial disclosure is effective, as confirmed most recently by

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<sup>1</sup> While there remains some residual debate over nomenclature, this article uses the phrase "miscarriage of justice" to indicate the conviction of the factually innocent, while acknowledging that there exists a broader category of injustices that include those who may be factually guilty but were convicted unlawfully or in contravention of principles of justice. This article however is primarily concerned with wrongfully convicted innocent individual(s).

<sup>2</sup> House of Commons Justice Committee, 'Disclosure of evidence in criminal cases', Eleventh Report of Session 2017–19, 17 July 2018. HC 859 page 4.

the Attorney General: “The disclosure to the defence of material obtained during a criminal investigation, that the prosecution has not used as part of its case is fundamentally important to ensuring a fair trial.”<sup>3</sup> Academics and practitioners alike have thus focussed their attention on the failings of pre-trial disclosure, including the most recent reviews and documents, including this most recent Attorney General 2018 report which states its intention as being: “a plan of practical actions to tackle those problems from the point an allegation is considered by the investigator **to the end of the case.**”<sup>4</sup> A question begged by such a claim is surely when ‘the end of the case’ is considered to be? Is this conviction/ acquittal (or no further action being taken), or does a ‘case’ continue post-conviction? If so, while the problems with pre-trial disclosure dominate the discourse, a concurrent contemplation of post-conviction disclosure obligations (after the CPIA regime ceases to have effect), is continuing to be overlooked. Neither the 1993 Runciman Report, nor any subsequent Government consultation papers on disclosure considered post-conviction disclosure. Indeed, in the recent House of Commons Justice Committee inquiry into disclosure, there was barely a mention of post-conviction disclosure in any of the written,<sup>5</sup> or oral submissions, with the final report unsurprisingly then also not mentioning post-conviction disclosure.<sup>6</sup> Similarly, the Attorney General’s December 2018 report has no mention at all of post-conviction disclosure throughout its 72 pages.<sup>7</sup>

It is then widely acknowledged that effective pre-trial disclosure is presently far from assured, making an effective appellate system vital. Created (eventually) in 1907, the Court of Appeals (Criminal Division), the CACD, exists to provide relief to those individuals whose conviction is ‘unsafe’.<sup>8</sup> Central to the operation of the appellate system, is the ability of individuals who claim that their conviction is in error, to revisit and re-examine evidence gathered during the investigation, as well as that relied upon at their trial. So while there is (rightly) critical attention paid to pre-trial non-disclosure and the risks this poses to justice, such scrutiny remains lacking for post-conviction disclosure. And yet, high-profile miscarriages of justice have most often only been remedied when there has been defence access to materials post-conviction (which had often not been disclosed pre-trial). This continuing oversight is unsustainable, particularly because of the certainty that if pre-trial disclosure is not conducted assiduously (as we know increasingly it is not), this should necessarily prompt an increase in appeals. Appeals that will only be possible if there is post-conviction access to retained materials.

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<sup>3</sup> *Review of the efficiency and effectiveness of disclosure in the criminal justice system* Presented to Parliament by the Attorney General by Command of Her Majesty, (November 2018) Cm 9735, p.3.

<sup>4</sup> (emphasis added). *Review of the efficiency and effectiveness of disclosure in the criminal justice system*, Presented to Parliament by the Attorney General by Command of Her Majesty (November 2018) Cm 9735, p.3

<sup>5</sup> Northumbria University Science and Justice Research Interest Group, Inside Justice, and the Centre for Criminal Appeals and Cardiff University Innocence Project submissions were notable exceptions.

<sup>6</sup> House of Commons Justice Committee, ‘*Disclosure of evidence in criminal cases*’, Eleventh Report of Session 2017–19, 17 July 2018. HC 859.

<sup>7</sup> *Review of the efficiency and effectiveness of disclosure in the criminal justice system*, Presented to Parliament by the Attorney General by Command of Her Majesty (November 2018) Cm 9735.

<sup>8</sup> See McCartney, C & Roberts, S. ‘Building Institutions to Address Miscarriages of Justice in England and Wales: Mission Accomplished?’ (2013) 80(4), *University of Cincinnati Law Review*, Article 13 and Roberts, S. ‘Post-Conviction Review in England and Wales: Perpetuating and Rectifying Miscarriages of Justice’, in Lennon G., C. King & C McCartney. (eds) *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (Hart Publishing, 2019).

In an attempt to bring post-conviction disclosure out of the shadows, this article will examine the duties of disclosure post-conviction, arguing that the Supreme Court judgment in *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] has made it more difficult to gain disclosure post-conviction. It details a worrying picture of inconsistency among police and prosecution authorities, with confusion over what should be retained (and how), and whether disclosure post-conviction should be permitted. It concludes that without significant intervention and reform, miscarriages of justice will continue uncorrected and the appellate system will become inconsequential. Before considering these issues in detail, we turn our focus in brief to a particular evidence type that will dominate the discussion around evidence retention, disclosure, miscarriages of justice, and post-conviction disclosure: scientific evidence.<sup>9</sup>

### ***(Non) Disclosure, Scientific Evidence, and Miscarriages of Justice***

High-profile miscarriages of justice provide vital lessons for the importance of effective disclosure of all evidence, but in particular, scientific evidence. Indeed, the particular importance of scientific evidence has been specifically singled because of the central role of scientific evidence in many miscarriages of justice, including the infamous ‘Irish cases’, such as this from the Judith Ward judgement:

“an incident of a defendant’s right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution,... The duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence.”<sup>10</sup>

Whilst occurring in the mid 1970s, the wrongful conviction of Stefan Kiszko still stands to demonstrate the potentially devastating impact of non-disclosure of scientific evidence.<sup>11</sup> Kiszko was convicted of the murder of 11-year-old Lesley Molseed in 1975. A semen sample from Kiszko did not contain sperm but that of Lesley’s killer, who had ejaculated on her underclothes, did contain sperm. These results were kept from the defence. It was not until after 16 years in prison, that the Court of Appeal heard the evidence that Kiszko could not have been the killer.<sup>12</sup> Whomever was ultimately responsible for the non-disclosure of the test results (the scientist denied this, and the criminal proceedings against both the scientist and police officer in charge were halted before any trial<sup>13</sup>), there is a well-recognised danger that scientific evidence adverse to the contentions of the

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<sup>9</sup> Most often referred to as ‘forensic evidence’, although we shall avoid that term as it can encompass a greater multitude of evidence types, not just that we wish to focus upon, which is more specifically, evidence derived from scientific testing undertaken during a criminal investigation, primarily (but not exclusively) on crime scene exhibits.

<sup>10</sup> *R v Ward* [1993] 2 All ER 577.

<sup>11</sup> Kiszko was convicted of the murder of 11-year-old Lesley Molseed in 1975. A semen sample taken from Kiszko during the investigation did not contain sperm but that of Lesley’s killer, who had ejaculated on her underclothes, did contain sperm. These results were kept from the defence. It was not until 1992, after 16 years in prison, that the Court of Appeal heard the evidence that Kiszko could not have been responsible (and subsequent testing of DNA led to the real killer).

<sup>12</sup> It took over 30 years to convict the true killer, using DNA techniques unavailable when Kiszko was convicted, but Ronald Castree was found guilty in 2008 (*R v Castree* 2008).

<sup>13</sup> Heather Mills, ‘Detective’s death halts Kiszko case prosecutions’ *The Independent* (16 June 1995).

prosecution can be disregarded and suppressed. In this case, as in many others, the destruction of material post-conviction could have prevented justice ultimately being done.<sup>14</sup>

With particular reference to scientific evidence then, there is a further impetus for ensuring that all evidence is retained, stored adequately, and fully disclosed. Since the 18<sup>th</sup> century, criminal investigations had become more ‘physically’ evidenced-based. In an early example, John Toms of Lancaster was tried and convicted of murder in 1784, with evidence of a torn newspaper cutting: one part found in the suspect’s pocket and the other in the pistol wad (used to secure powder and balls to the muzzle of the pistol) found in the head wound of the dead man.<sup>15</sup> Resort to such ‘scientific’ evidence during police investigations has increased exponentially since these early experiments in a nascent ‘forensic science’. And as scientific and technological developments have accelerated during the 20<sup>th</sup> century, the knowledge base upon which expert opinion(s) relating to such forensic evidence is built, has inevitably also advanced. The combination of developing science and technology, and a greater understanding of the many techniques that are utilised, including their validity and reliability, means that expert opinions are often revisited and found, using modern techniques, to be flawed, or at least less sophisticated or accurate than can be achieved today. Indeed, a Popperian view of science as built upon “shifting sands”,<sup>16</sup> means that all scientific opinion is open to falsification or refinement of interpretation at a later date, and as such:

“Interpretation and evaluation are as important as re-analysing and using new technology. Retention is part of that because it includes the data and the records and the thinking at the time... We have no clue where we might be in ten or fifteen years. If you test stuff now and it comes up with zero, you can’t think ‘that’s it’”<sup>17</sup>

The *basis* for any expert opinion relied upon during a police investigation, or at trial, is thus key and the retention of material post-conviction in whatever form (a physical item which has undergone examination, scientist’s notes, samples) need also to be preserved. It was a reanalysis of a crime scene swab in the rape and murder of Teresa De Simone in 1979 that led to the wrongful conviction of Sean Hodgson being quashed after serving twenty-seven years in prison.<sup>18</sup> Similar challenges have occurred in connection with explosive testing, with three of the most infamous miscarriage of justice cases: the Birmingham Six, Guildford Four and Maguire Seven including evidence at trial of explosives trace analysis. The safe retention of scientists’ notes, exhibits and trial transcripts ultimately allowed a successful appeal in the case of the Birmingham Six, which included new evidence that traces of explosives could have come from innocent sources.<sup>19</sup> None of these appeals would have been allowed unless investigative materials and trial transcripts had been retained.

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<sup>14</sup> Louise Shorter, *The Post-Conviction Retention of Material and Transcripts in Criminal Investigations: Policy and Practice in England & Wales*, MPhil Thesis, University of Kent, 2018.

<sup>15</sup> McCrery, N *Silent Witnesses: A History of Forensic Science*. (Random House, London, 2013) page 51.

<sup>16</sup> Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge*, (Routledge, 1963), page 34.

<sup>17</sup> Millington, J, Senior Forensic Scientist, Millington Hingley Ltd, interviewed by Louise Shorter May 2018.

<sup>18</sup> Edwards, R (2009). 'Disgraceful' error kept innocent Sean Hodgson suffering for an extra 11 years. The Telegraph, 18 March. <https://www.telegraph.co.uk/news/uknews/law-and-order/5012320/Disgraceful-error-kept-innocent-Sean-Hodgson-suffering-for-an-extra-11-years.html>

<sup>19</sup> Nobles R & Schiff D *Understanding Miscarriages of Justice* (Oxford University Press, Oxford, 2000) page 192.

In the early days of DNA profiling, a scientist needed a fresh sample of blood or semen about the size of a five-pence coin to generate a DNA profile.<sup>20</sup> Today, a profile can be generated from a sample of just a few cells, invisible to the naked eye. This shift in what is detectable by modern forensic techniques alone provides a compelling argument for retaining all material post-conviction. Materials retained from scenes that may not have yielded probative evidence at the original investigation stage, may be re-tested using different/ improved techniques later, with different results. The National DNA Database (NDNAD) is an example of the systematic retention of criminal justice data post-conviction, albeit the rationale for the creation and maintenance of the database is (generally) for future crime control purposes. But whilst the database itself may be properly managed, there may be issues concerning the retention and possible retrieval of vital supporting material in police storage, as one practitioner notes:

“Sometimes we get matches on the database from a case, say a rape that took place in 1998, they got a DNA profile at the time, it was loaded onto the database. Twenty years later, we get a match... they (the Police) haven’t got the paperwork (the original investigation statements, notes and reports). They end up relying on the original forensic file (which had been kept at the FSS because they had lost their own source material), even from cases that were relatively new... The whole point of a DNA database is that you’re putting profiles on there, waiting for there to be a match, and then they don’t keep the papers. There’s no point in having all these materials if you haven’t got the paperwork to see what was done at the time.”<sup>21</sup>

Whilst DNA analysis has become the gold standard of forensic identification, experts are still learning *how* DNA behaves and *why* it might be found at a crime scene. Limited understanding of both these issues may lead to legal challenges post-conviction.<sup>22</sup> From the early belief that ‘DNA fingerprinting’ would lead to infallible identification and conviction, it is now understood that DNA evidence has many limitations:

“It might be undetectable or overlooked, or found in such minute traces as to make interpretation difficult, its analysis is subject to error and bias... DNA profiles can be misinterpreted and their importance can be exaggerated... Even if DNA is detected at a crime scene, this doesn’t establish guilt.”<sup>23</sup>

A 2017 study reported that, of 218 successful applications to the Court of Appeal between 2010 and 2017, thirty two percent were founded upon arguments over scientific evidence, of which eight specifically dealt with DNA evidence.<sup>24</sup> Some may find such reports surprising given the reliance often placed upon DNA evidence. Yet it needs remembering that it is: “Precisely because scientific

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<sup>20</sup> Silverman M & Thompson T *Written in blood*. (1st ed.) (Bantam Press, New York, 2014) page 297.

<sup>21</sup> *Anonymous, Interview conducted with Lousie Shorter in 2018.*

<sup>22</sup> See van Oorschot RAH, Szkuta B, Meakin G E, Kokshoorn B, and Goray M. ‘DNA transfer in forensic science: A review’ *Forensic Science International: Genetics*, (2019) 38:140-166.

<sup>23</sup> EuroForGen Making Sense of Forensic Genetics (2017), <http://senseaboutscience.org/activities/making-sense-of-forensic-genetics/> page 10. [accessed 3 July 2018]

<sup>24</sup> Smit, N M, Morgan, R, and D. A. Lagnado, ‘A systematic analysis of misleading evidence in unsafe rulings in England and Wales’, *Science and Justice*, (2018) 58 (2), 128-137.

evidence often provides the best and most reliable proof of an offender's identity and has won for itself an aura of credibility verging—in some minds—on infallibility, flawed expert evidence can be a potent source of injustice.”<sup>25</sup>

It is then vital to appreciate that scientific opinion presented in court today may be superseded tomorrow, thus making essential the retention of all material which could be subjected to new tests or interpretation in the light of new information. While new scientific breakthroughs may be noted by police and prosecutors (should they be motivated to keep abreast of developments that may impact upon criminal investigations and also keep in mind previous cases which could possibly stand to benefit from reconsideration using new techniques or technologies – perhaps an unrealistic expectation), there will also be instances where the progression of knowledge has led to a different understanding of the significance, or otherwise, of particular types of testing previously undertaken. In such instances, neither the police nor lawyers could be expected to be aware of matters necessary for disclosure. Similarly, experts are not necessarily informed when defendants are convicted, so are unable to highlight where developments of this nature could be relevant to previous cases. Understanding that even beyond the realms of the criminal justice system (where ‘facts’ are often deliberately concealed and contested), science is fallible and provisional (and often partial), requires safeguards be in place so that scientific evidence relied upon to convict individuals, can be later revised. The first essential safeguard must then be that the material(s) upon which any scientific evidence is constructed is retained, and stored adequately. The CACD is unable to perform its role in assessing whether advancement in knowledge or a technique renders a conviction unsafe, if it is not possible to revisit the materials in question because they have been ‘lost’ or destroyed.

### **Police Recording and Retention of Materials**

Obligations on the police regarding materials gathered during an investigation are explained by the Attorney General as arising at the commencement of an investigation:

“When an allegation is made against someone, the investigator will begin an investigation. From the outset the investigator has a duty to record, retain and review material collected during the course of the investigation... Disclosure obligations begin at the start of an investigation, and investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from any suspect.”<sup>26</sup>

The CPIA Code of Practice gives guidance regarding the recording and retention of materials. This stipulates that all materials must be retained (where an accused is convicted) until the individual is released from custody when incarcerated (or hospitalised), or six months from the date of

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<sup>25</sup> Roberts, P, ‘Paradigms of forensic science and legal process: a critical diagnosis’. *Philosophical Transactions of the Royal Society B: Biological Sciences* (2015) 370, page 1.

<sup>26</sup> *Review of the efficiency and effectiveness of disclosure in the criminal justice system* Presented to Parliament by the Attorney General by Command of Her Majesty Published November 2018 Cm 9735, p5.

conviction in all other cases.<sup>27</sup> However, if there is an appeal in progress, all relevant material must be retained until the appeal is determined, in addition: “if the Criminal Cases Review Commission is considering an application at that point in time, all material which may be relevant must be retained at least until the Commission decides not to refer the case to the Court.”<sup>28</sup>

The CPIA also sets out the procedure for the prosecution (acting for the police who are responsible for preparing the relevant paperwork), to ‘serve’ to the defence the evidence upon which they intend to rely during a prosecution. In achieving this, the police complete ‘schedules’ that must list ‘unused material’, i.e. material gathered or generated during an investigation, which they have judged to be irrelevant. This judgment over the scope of ‘unused material’ is often framed as contentious but the Court of Appeal has made it clear that the term applies to virtually all material collected during the investigation of a case, and that: “the term may apply not only to material in possession of the prosecuting authority, but to that in the possession of the police or some other agency, e.g. a forensic science lab.”<sup>29</sup> Since the closure of the Forensic Science Service in 2012, the police are required to retain all exhibits post-trial, pursuant to the Code of Practice under s. 23(1) paras 5.7-5.10 of the CPIA. All materials prior to the FSS closure in 2012 were sent to the Forensic Archive Ltd (FAL) but the long-term viability of the FAL is far from certain, and needs urgent review. The historic practice of returning physical items to police forces (clothing, weapons etc) was expanded post-FSS to include the bulk of material created by scientists, now based at commercial Forensic Science Providers (FSPs). If this is to continue, police forces will need significant funding for this to be achieved. Recent guidance confirms that all case materials are to be returned to police forces by FSPs, and specific mention is made of ‘contingency plans’ for when an FSPs goes into liquidation (as happened in 2018).<sup>30</sup>

Any police officer investigating alleged crimes has a duty to, ‘wherever practicable’, take steps to obtain material, or ensure material is retained, where ‘as a result of developments in the case’ he becomes aware that previously considered ‘irrelevant’ materials may now be relevant.<sup>31</sup> The prosecution, and police, are entrusted to take:

“all proper care to preserve the exhibits safe from loss or damage; to co-operate with the defence in order to allow them reasonable access to the exhibits for the purpose of inspection and examination; and to produce the exhibits at trial.”<sup>32</sup>

Codes of Practice supplementary to the CPIA set out more detailed guidance for serving officers and police civilian staff in the execution of this duty. As these are Codes of Practice, any officer in breach of the Codes cannot face criminal proceedings. Technically they could face disciplinary

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<sup>27</sup> Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, Revised in accordance with section 25(4) of the Criminal Procedure and Investigations Act 1996 (March 2015) para 5.9.

<sup>28</sup> Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, Revised in accordance with section 25(4) of the Criminal Procedure and Investigations Act 1996 (March 2015) para 5.10.

<sup>29</sup> The Royal Commission on Criminal Justice 1993 Cm 2263, page 92.

<sup>30</sup> NPCC Guidance, para. \*

<sup>31</sup> Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, Revised in accordance with section 25(4) of the Criminal Procedure and Investigations Act 1996 (March 2015) para 5.3.

<sup>32</sup> The Code for Crown Prosecutors ‘Exhibits’ (updated 2018) available at: <https://www.cps.gov.uk/legal-guidance/exhibits>; *R v Stipendiary Magistrate at Lambeth and another, ex p McComb* [1983] 1 All ER 321.

proceedings but such actions against officers are as “rare as hen’s teeth,”<sup>33</sup> while there was concern voiced that the CPIA scheme placed too much reliance: “on the skill and fairness of the police, and that it was inappropriate to leave the punishment of officers who breached the code to internal disciplinary procedure.”<sup>34</sup> There is a sanction within the CPIA, which changes the seriousness with which the Codes are taken because it affects the chance of a successful prosecution in court. Evidence disallowed in court due to a breach of the Police and Criminal Evidence Act 1984 (PACE) is not rare and convictions have been quashed for breaches of the Code.<sup>35</sup> When correct disclosure procedures are not followed, such as in 2018 when a series of trials collapsed due to pre-trial disclosure failures, there was widespread condemnation.<sup>36</sup> However, a survey conducted in 2018 found that in the experience of most solicitors and advocates, breaches of the CPIA and Codes of Practice are routine, and also routinely ignored or pass with mild censure if commented upon at all. A third of legal practitioner respondents to the survey said that disclosure failures in the past twelve months had resulted in ‘possible wrongful conviction or miscarriage of justice’.<sup>37</sup> This is a longstanding issue of course, with commentators remarking upon police and prosecutorial failures over the years: “Some investigators are not completing reasonable investigations or recording the information gained.”<sup>38</sup>

The European Court of Human Rights has ruled that Article 6(3)(b) of the European Convention on Human Rights requires the State to provide for the accused to have: ‘at his disposal, for the purposes of exonerating himself, or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities.’<sup>39</sup> Of course, the unavoidable consequence of investigations not being carried out diligently, and a correct record made of materials and evidence collated contemporaneously, it will be nigh on impossible for convicted individuals to rectify failings and oversights post-trial and yet there continue to be “numerous reported examples of the police having lost or overlooked evidence.”<sup>40</sup> Time-sensitive evidence not gathered, or not retained, is forever lost to individuals who wish to appeal their conviction. As such, this part of the process is vital. Yet research conducted by Shorter demonstrates widespread

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<sup>33</sup> Zander, M ‘If PACE codes are not law, why do they have to be followed?’ *Criminal Law & Justice Weekly*. November 30, 2012. <https://www.criminallawandjustice.co.uk/features/If-PACE-Codes-Are-Not-Law-Why-Do-They-Have-Be-Followed> [accessed 3 July 2018].

<sup>34</sup> S. Sharpe, ‘Disclosure, Immunity and Fair Trials’ (1999) 63 *Journal of Criminal Law* 67 at 79.

<sup>35</sup> Professor Zander cites the case of *Canale* [1990] 2 All ER 187 whose sentence of 6 years for Conspiracy to Rob was quashed following “a flagrant, deliberate and cynical” breach by experienced police officers of the Code rules regarding contemporaneous recording of interviews (Zander, 2012).

<sup>36</sup> See BBC (2018). Hundreds of cases dropped over evidence disclosure failings. January 24. <http://www.bbc.co.uk/news/uk-42795058> [accessed 3 July 2018].

<sup>37</sup> BBC survey on disclosure, in conjunction with the CLSA/LCCSA and CBA. Survey results here: <https://www.clsa.co.uk/index.php?q=justice-survey-results> 97 per cent of legal practitioner respondents encountered disclosure of evidence failings during the last 12 months with more than half (55%) encountering these problems every day or every week.

<sup>38</sup> John Arnold Epp, ‘Achieving the aims of the disclosure scheme in England and Wales’, *International Journal of Evidence and Proof*, (2001) 5(3), p.188.

<sup>39</sup> *Jespers v Belgium* (1981) 27 DR 61 at para. 58

<sup>40</sup> See J. Plotnikoff and R. Woolfson. ‘A Fair Balance’? Evaluation of the Operation of Disclosure Law. RDS Occasional Paper No. 76 (2001) 121. available at [www.homeoffice.gov.uk/rds/pdfs/occ76-disclosures.pdf](http://www.homeoffice.gov.uk/rds/pdfs/occ76-disclosures.pdf) at 25

confusion and inconsistency between police forces over what is retained, how, by whom, and for how long.<sup>41</sup>

In light of these problems, the National Police Chiefs Council published national guidance, written in conjunction with the CPS and the Forensic Science Regulator in December 2017.<sup>42</sup> The guidance makes clear that the investigator has duty to ensure relevant material is recorded and retained in a suitable format, and explicitly states: “The purpose of retention of records and other materials is to allow there to be a future review, investigation, prosecution or appeal. It follows that retention must be approached in a manner which meets that aim.”<sup>43</sup> The minimum retention periods are: major and serious crime: 30 years (with ten year reviews advisable); volume crime – 6 years, and less serious crimes (simple possession of drugs cases and alcohol/drugs driving offences – 3 years.<sup>44</sup> The policy however also refers to MoPI guidance,<sup>45</sup> which states that regardless of the severity of an offence, all records must be retained for an initial period of six years, with the new protocol recommending that the periods set out should apply whenever they are longer than the MoPI guidance.

Information supplied by police forces, shows a picture of confusion across England and Wales, with just two police forces from 43 correctly referring to the national policy in response to a Freedom of Information (FOI) request regarding their retention policies and practice.<sup>46</sup> Ten forces reported they seek to comply with the ACPO ‘Management of Police Information’ (MoPI) guidance, designed to create a framework: “to improve the way forces collect, record, evaluate, review and then, most importantly, improve the quality of actions taken as a result of better quality information.”<sup>47</sup> The aim of the MoPI guidance is to affect better policing outcomes through intelligence-gathering and dissemination, and imposes upon forces a significantly longer period of retention, (which will create an unintended archive problem). However, it is not simply a concern with the time burden imposed by MoPI. To apply MoPI to decision-making around the retention of physical material post-conviction, is misguided as the guidance is not intended to address this issue, as the guidance itself makes clear. An additional eight forces responded to say they use a combination of MoPI and the CPIA. Again, this is confusing as different guidance and codes of practices have been written for different purposes, but are being conflated and confused, running the risk of officers being unclear as to their duties and, unwittingly perhaps, destroying materials. Respondents to the FOI may not (yet) have been aware of the new guidance, though the correct reporting that this national guidance was in place by two police forces suggests they should have been.

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<sup>41</sup> Considered in more detail in McCartney and Shorter, forthcoming in 2019.

<sup>42</sup> National Police Chief Council (NPCC) *Guidance Regarding The Storage, Retention And Destruction Of Records And Materials That Have Been Seized For Forensic Examination*, Version: 2.1 December 2017. This guidance was first issued as V2.0, updated to V2.1, and is earmarked for review in accordance with General Data Protection Act 2018.

<sup>43</sup> NPCC Guidance, para 12.1.1.

<sup>44</sup> National Police Chief Council (NPCC). Para 1.1.

<sup>45</sup> ACPO (2010) *Guidance on The Management of Police Information*, 2<sup>nd</sup> Edn. (National Policing Improvement Agency) available at: <https://www.cheshire.police.uk/media/1562/mopi-refreshed-guidance.pdf>

<sup>46</sup> see Louise Shorter, *The Post-Conviction Retention of Material and Transcripts in Criminal Investigations: Policy and Practice in England & Wales*, MPhil Thesis, University of Kent, 2018

<sup>47</sup> Foreword, ACPO (2010) *Guidance on The Management of Police Information*. page 1.

Of course, even if materials have been properly recorded, and retained, access to them may still prove difficult for individuals or their legal representatives, as these guidelines clearly still leave individual police forces as final arbiter of when retained materials can be accessed.

## Post-Conviction Disclosure Guidelines

Under the national guidance, police must work closely with FSPs to ensure materials are retained for at least the minimum periods, and all FSPs must undertake to facilitate access, ‘where a request is appropriate’ to any case records and material retained, adding that:

“Access by any other person/body acting with lawful authority (e.g. the CCRC exercising its powers against public FSPs, any private body, or persons acting on a court order) shall be dealt with on an individual basis. The submitting force should be notified, at the earliest practical opportunity, of the access. Access by any other person/body shall only be permitted on the authority of the submitting law enforcement agency or the CPS.”<sup>48</sup>

Yet if police were to seek guidance on when to permit post-conviction access, while the CPS Disclosure manual states that the ‘duty of disclosure continues as long as proceedings remain, whether at first instance or on appeal’,<sup>49</sup> section 7a of the CPIA makes the statutory duty of continuing disclosure cease upon conviction, acquittal or discontinuance of the prosecution. The CPIA therefore does not provide clear provision for post-conviction disclosure, thus the need for reference to the Attorney-General’s guidelines, and CPS guidance for how post-conviction disclosure should proceed. The former states that, ‘where material comes to light after the conclusion of the proceedings, which might cast doubt upon the safety of the conviction, there is a duty to consider disclosure’.<sup>50</sup> The CPS states:

“The interests of justice will mean that where material comes to light after the conclusion of the proceedings that might cast doubt upon the safety of the conviction, there is a duty to consider disclosure. Any such material should be escalated in accordance with local arrangements. The principle was considered and the importance of finality in criminal proceedings was reaffirmed in *Nunn*.”<sup>51</sup>

In reference to reviewing cases, CPS guidance states that ‘a review may be required as a consequence of a subsequent trigger, which requires the reconsideration... and an assessment whether justice is served by allowing such convictions, or decisions, to stand’.<sup>52</sup> One of the non-

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<sup>48</sup> NPCC Guidance, para 13.1.3

<sup>49</sup> CPS Disclosure Manual, Revised: 26 February 2018 available at: [https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Disclosure%20Manual\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf) page 9.

<sup>50</sup> Attorney-General’s Guidelines on Disclosure 2013, paragraph 72.

<sup>51</sup> CPS Disclosure Manual, Revised: 26 February 2018 available at: [https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Disclosure%20Manual\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf) page 9.

<sup>52</sup> CPS (2015) Reviewing previously finalised cases - CPS policy. Available at: [http://www.cps.gov.uk/legal/p\\_to\\_r/reviewing\\_previously\\_finalised\\_cases\\_-\\_cps\\_policy/](http://www.cps.gov.uk/legal/p_to_r/reviewing_previously_finalised_cases_-_cps_policy/) (accessed 15 January 2019)

exhaustive, indicative list of ‘broadly-defined triggers’ includes: ‘Where a new scientific breakthrough raises questions over the safety of earlier convictions.’<sup>53</sup>

The Attorney-General's guidelines thus create a duty to consider disclosure when material emerges that might cast doubt on the safety of a conviction, and this duty should not be time-restricted, given that provisions state that material should be kept for future testing in light of scientific advancements, as expressly provided for by the CPS ‘trigger’. However, such ‘guidance’ inevitably leaves room for inconsistent interpretation and application across 43 police forces. While some forces may be forthcoming and readily disclose materials, others will take a diametrically opposed approach. As such, unfairness arises and the courts have been called upon to remedy perceived injustice where disclosure has been refused, providing an opportunity for the courts to clarify post-conviction disclosure obligations, an opportunity that may have been squandered.

### *‘Nunn’ at the Supreme Court*

In 2006, Kevin Nunn was convicted of the murder of his former girlfriend. Sperm cells were found on the victim’s body but these did not yield any DNA profiles. Nunn was refused leave to appeal his conviction in 2007 and he was thus required to make an application to the Criminal Cases Review Commission (CCRC) for a further appeal. Inside Justice looked into Nunn’s case and approached a former Forensic Science Service (FSS) expert seeking to discover whether any further testing on the retained sperm cells could be undertaken and the forensic files released. The FSS refused disclosure without the consent of the Crown Prosecution Service (CPS). The CPS stated that the Suffolk Constabulary, who held the case materials, would have to grant access to samples for further DNA testing. The Suffolk Constabulary declined, stating that there was no duty of disclosure post-conviction.

In April 2011, Nunn's solicitors sought a judicial review of Suffolk Police's refusal, arguing that while Nunn's forensic expert had found no faults in the forensic work undertaken, he did not have access to all of the files and so his conclusions were provisional, making necessary an examination of unused material, to ascertain whether there might be anything further that could strengthen an application to the CCRC. It was also argued that Articles 5 and 6 of the European Convention on Human Rights imposed a duty to disclose the material, as did s. 7 of the Data Protection Act 1998 with regard to the personal material contained within the files. Counsel for Suffolk Constabulary and the DPP countered that there was no duty of disclosure post-conviction unless new material cast doubt upon the safety of the conviction, and that convicted persons had no right to a ‘fishing expedition’. Further DNA testing may still not yield results, and even if a profile was produced, this would not necessarily render Nunn's conviction unsafe.

The Divisional Court found that the trial procedure gives the defendant the opportunity to receive disclosure, which itself is subject to review upon appeal and the possibility of an appeal and an application to the CCRC provided key safeguards post-conviction. Emphasis was placed on the

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January 2015). CPS Disclosure Manual, Revised: 26 February 2018 available at: [https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Disclosure%20Manual\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf) page

<sup>53</sup> CPS (2015) Reviewing previously finalised cases - CPS policy. Available at: [http://www.cps.gov.uk/legal/p\\_to\\_r/reviewing\\_previously\\_finalised\\_cases\\_-\\_cps\\_policy/](http://www.cps.gov.uk/legal/p_to_r/reviewing_previously_finalised_cases_-_cps_policy/) (accessed 15 January 2019) para.6C

primacy of the trial and the principle of finality: ‘the claimant [sought] access to material to enable the case to be re-investigated and re-examined. The time for that investigation and examination was the trial.’<sup>54</sup> Before any duty to disclose post-conviction arose, it must be demonstrated that there is evidence that ‘materially may cast doubt upon the safety of the conviction’.<sup>55</sup> In Nunn's case they found there was ‘nothing which [gave] rise to a duty to make disclosure of the files of the Forensic Science Service or to enable material to be re-tested’.<sup>56</sup>

Nunn was permitted to appeal to the Supreme Court, with the certified question:

‘whether the disclosure obligations of the Crown following conviction extended beyond a duty to disclose something that materially may cast doubt upon the safety of a conviction so that the Defendant was obliged to disclose material sought by the Claimant in these proceedings?’<sup>57</sup>

JUSTICE, the Criminal Appeals Lawyers Association and Innocence Network UK submitted a joint third party intervention submitting that the prosecution has a continuing duty of disclosure following conviction in order to prevent or correct a miscarriage of justice.<sup>58</sup> This duty ought to operate pre- and post-trial in order to be effective, and that having a different test post-conviction creates the risk of injustice. They argued, *inter alia*, that a continuing duty of disclosure should ensure that miscarriages of justice can be corrected and the test should be whether ‘there is material that could have been disclosed or tested at the time of trial, which would assist in the preparation of an appeal’.<sup>59</sup> It was also argued that the CCRC is an inappropriate safeguard, given that its discretion regarding whether or not to seek disclosure correlates with whether applicants have legal representation. Furthermore, there were many examples of new evidence being discovered by the applicant's representative, rather than by the CCRC.

The appeal was unanimously dismissed, the Supreme Court finding that the disclosure duties created by the CPIA were specifically limited after the conclusion of the criminal trial (or the cessation of proceedings).<sup>60</sup> The common law duty of disclosure exists alongside the statutory provisions, and although both underpinned by the objective of ‘fairness’, the demands of fairness differ according to the stages of the process at which disclosure is sought.<sup>61</sup> The justification for this is that defendants are presumed innocent up to the point of conviction, but post-conviction that presumption is no longer warranted. While there is a clear public interest in exposing flaws in the criminal process and correcting wrongful convictions, there is also strong public interest in finality

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<sup>54</sup> *Nunn v Suffolk Constabulary & Anor* [2012] EWHC 1186 (Admin).

<sup>55</sup> *Nunn v Suffolk Constabulary & Anor* [2012] EWHC 1186 (Admin).

<sup>56</sup> *Nunn v Suffolk Constabulary & Anor* [2012] EWHC 1186 (Admin). The Data Protection Act was deemed irrelevant given that Nunn was not seeking disclosure of his own material from the files.

<sup>57</sup> *R (on the application of Nunn) v Chief Constable of Suffolk Police* (Justice and Others Intervening) [2014] UKSC 7.

<sup>58</sup> UKSC 2012/0175 In The Supreme Court of the United Kingdom, *Kevin Nunn v The Chief Constable of Suffolk Constabulary, the Crown Prosecution Service: Interveners Case: three organisations: JUSTICE, Innocence Network UK (INUK) and the Criminal Appeal Lawyers Association (CALA)*.

<sup>59</sup> Interveners case, para 24.

<sup>60</sup> Modifying the test laid out in *R v Ward* [1993] 1 WLR 619 and *R v Keane* [1994] 1 WLR 746, 752.

<sup>61</sup> *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37, at 25: ‘what fairness requires varies according to the stage of the proceedings under consideration’. [at 22].

of proceedings.<sup>62</sup> This principle of finality plays a central role in the appellate system, as Hamer explains, the system: “pursues finality and does not aim for comprehensive error correction.”<sup>63</sup> There are clear reasons for respecting the principle of finality, including: “if convictions were subject to endless reassessment, the jury's role would be undermined, the criminal justice system would lose efficiency, and victims and society would be denied closure.”<sup>64</sup> There is also a pragmatic need for finality, as if the original trial verdict is open to doubt, should the appeal or a retrial verdict not be treated to equal scepticism? Or else we face “the prospect of 'infinite regress’.”<sup>65</sup> Thus a ‘line’ must be drawn somewhere, with Lord Wilberforce (in 1977) making a case for that line to be drawn under the original trial verdict:

“Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.”<sup>66</sup>

Further, the Court explained that if disclosure duties were to remain the same throughout a prisoner's lifetime (and perhaps beyond in the case of posthumous appeals), there would also be negative implications for police resources, with there being a strong public interest in ensuring that finite criminal justice resources are expended on current investigations, unless there is a good reason for revisiting a criminal investigation that has been concluded: “after conviction there is no indefinitely continuing duty on the police or prosecutor ... to respond to whatever inquiries the defendant may make for access to the case materials to allow re-investigation.”<sup>67</sup>

The Supreme Court held then that post-conviction disclosure should occur when:

- (1) Material comes to light that casts doubt upon the safety of the conviction, unless there is a good reason not to; and
- (2) There exists a real prospect that further enquiry will reveal something that may affect the safety of the conviction.

So while the police and prosecuting authorities should disclose any material coming to light that *prima facie* might cast doubt on the safety of the conviction, the material in Nunn's case did not meet this ‘*prima facie*’ requirement. Where it is alleged that material *may* exist, which *may* lead to a

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<sup>62</sup> [at 32].

<sup>63</sup> Hamer, D ‘Wrongful Convictions, Appeals and the Finality Principle: The Need for a Criminal Cases Review Commission’ (2014) *UNSW Law Journal* 37(1), p. 286

<sup>64</sup> Hamer, D. Wrongful Convictions, Appeals and the Finality Principle: The Need for a Criminal Cases Review Commission’ (2014) *UNSW Law Journal* 37(1), p. 270.

<sup>65</sup> Paul Roberts, ‘Double Jeopardy Law Reform: A Criminal Justice Commentary’ (2002) 65 *Modern Law Review* 393-400, p.421.

<sup>66</sup> ‘*The Amphill Peerage*’ [1977] AC 547, 569, quoted in *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson and Hayne J).

<sup>67</sup> [at 42].

reasonable prospect of a conviction being quashed, police and prosecutors are obliged to exercise sensible judgment over requests. If there appears to be a real prospect that further enquiry will uncover something of real value, there should be co-operation in making those further enquiries. Failing that, the CCRC can request disclosure and re-testing where appropriate, albeit the Court did say that: “It is in nobody’s interests to resist all enquiry unless and until the CCRC directs it.”<sup>68</sup>

### **Access to Materials for Post-Conviction Review after *Nunn***

The Supreme Court found the competing interests in finality and correcting injustice are balanced by having strong duties to disclose pre-trial and during the trial process, to safeguard against miscarriages of justice. Yet ongoing (or renewed/wider) access to case materials is crucial if a convicted person is to launch an appeal, or make an application to the CCRC. (Re)testing exhibits might reveal new evidence that may cast doubt on the safety of a conviction. Yet the effect of *Nunn* is that the State only need *consider* requests to access exhibits (using ‘sensible judgement’), if there is a ‘real prospect’ that it will cast doubt on the safety of the conviction. Because of this discretion, even supposing material has been correctly retained and stored, getting access to it then is a lottery. Not only is permission required of the investigating force, who may not be motivated to facilitate the re-opening of a case they consider closed (with an assumed concomitant criticism of their initial investigation), but decisions are made on a piecemeal basis, sometimes even exhibit by exhibit. The Centre for Criminal Appeals and Cardiff Innocence Project report in 2018 that:

“even highly specific requests for material from the police and CPS are normally turned down. This includes, for example, requests for unreviewed CCTV footage from around the crime scene, requests for police identity parade documentation when procedures can already be shown to have been violated, and requests for details of other, unfounded, allegations made by a complainant in a case.”<sup>69</sup>

The Criminal Appeal Lawyers Association, representing criminal defence solicitors who have worked on miscarriage of justice cases since the late 1960s, provides multiple examples where post—conviction disclosure has been refused with the ‘*Nunn*’ ruling at the Divisional Court being given in justification. Indeed, CALA state that: ‘the police and CPS have always co-operated with such requests up until the time of the *Nunn* case.’<sup>70</sup> Since the Divisional Court decision in *Nunn*:

“CALA members have reported a number of examples of police refusing co-operation in the normal process of running appeal cases. Refusals of assistance have even included cases

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<sup>68</sup> [at 41].

<sup>69</sup> Centre for Criminal Appeals and Cardiff Innocence Project, ‘*Disclosure*’, written submission to the Justice Committee, available at:

[https://static1.squarespace.com/static/5537d8c5e4b095f8b43098ff/t/5b1693a51ae6cfbba8dadab7/1528206250987/2018\\_00\\_00\\_CCA\\_and\\_CLSIP\\_Disclosure\\_Report.pdf](https://static1.squarespace.com/static/5537d8c5e4b095f8b43098ff/t/5b1693a51ae6cfbba8dadab7/1528206250987/2018_00_00_CCA_and_CLSIP_Disclosure_Report.pdf) (accessed 14th January 2019), para 11.

<sup>70</sup> Statement of the Criminal appeal Lawyers Association (CALA) in support of its application for leave to intervene in the case of *Nunn v Chief Constable of the Suffolk Constabulary & Anor.*, available at:

<https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2014/12/Statement-of-Criminal-Appeal-Lawyers-Association.pdf>, para 31.

where the right to appeal has never been exercised. In such cases the police apparently expect any disclosure order to come from the Court of Appeal.”<sup>71</sup>

In one ongoing inquiry by Inside Justice<sup>72</sup> it took four years for the police to agree to an expert attending the police station to view the FSS files where it was then established that there were serious errors in the interpretation of scientific evidence relied upon at trial. In another *Inside Justice* investigation, a vital exhibit that could exonerate a life-sentence prisoner claiming innocence, has been destroyed contrary to national guidelines. Other exhibits in the same case have been lost or inappropriately stored leading to potential contamination, while the police refuse to release original CCTV footage necessitating costly legal action to gain access.<sup>73</sup> Compounding the confusion and inconsistency found nationally around retention of materials, is widespread ignorance of the post-conviction disclosure requirements. As miscarriage of justice investigators report, police forces will often “incorrectly treat requests for disclosure as Subject Access or Freedom of Information requests (and then use FOIA exemptions to refuse disclosure).”<sup>74</sup>

The *Nunn* judgment emphasised the role of the CCRC as a final safety net, citing the availability of the CCRC as a powerful consideration in limiting the duty of the police and CPS. Yet the (resource-stretched) CCRC has demonstrated a clear reluctance to seek further testing of materials (to save time and money and prevent so-called ‘fishing expeditions’). Indeed, the CCRC has come under sustained criticism in recent years, with a growing lack of confidence in the ability of the CCRC to carry out diligent investigations, lacking the resources (and motivation) to undertake comprehensive inquiries.<sup>75</sup> Making the CCRC the final arbiter on disclosure requests means that applicants need access to materials to demonstrate that they need the CCRC to do further testing, yet the CCRC will not countenance disclosure requests until the applicant has demonstrated that the testing will support their claims of innocence. In written evidence to the Justice Committee most recent inquiry into disclosure, it was claimed that:

“It is not enough to say that the CCRC can access such material; their reviews are no longer sufficient to reliably identify miscarriages of justice resulting from disclosure failings. It is the defendant or would-be appellant to whom the right of access to post-conviction disclosure should apply. This right should not be denied because of the existence of an arm’s length body subject to the vagaries of government funding levels. In addition, defendants

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<sup>71</sup> Statement of the Criminal appeal Lawyers Association (CALA) in support of its application for leave to intervene in the case of *Nunn v Chief Constable of the Suffolk Constabulary & Anor.*, available at: <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2014/12/Statement-of-Criminal-Appeal-Lawyers-Association.pdf>, para19.

<sup>72</sup> Inside Justice is a registered charity, which investigates possible miscarriages of justice in instances where convicted prisoners persistently maintain their innocence. See <https://www.insidejustice.co.uk>

<sup>73</sup> ‘Inside Justice’ submission to House of Lords Science and Technology Select Committee, ‘Forensic Science’ Inquiry, October 2018. Available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/disclosure-criminal-cases-17-19/publications/>

<sup>74</sup> Centre for Criminal Appeals and Cardiff Innocence Project, ‘Disclosure’, written submission to the Justice Committee, page 11.

<sup>75</sup> E.g. see Naughton, M. (2012) ‘The Criminal Cases Review Commission: Innocence versus safety and the integrity of the criminal justice system’. *Criminal Law Quarterly*. 58: 207-244, also Justice Committee Inquiry into the CCRC 2014.

who have not been able to find grounds for appeal without further disclosure are almost never eligible for the CCRC's assistance."<sup>76</sup>

The discretion then places applicants in a catch-22 situation with the CCRC historically taking the position that until test results have been provided, any new scientific tests are 'speculative'. Convicted persons who are deemed to have insufficient grounds for appeal may thus be denied access to the material that could provide those grounds.

In 1994, JUSTICE made the argument that post-conviction disclosure could be of vital importance in those cases where the defendant(s) have been convicted upon the basis of a confession, or admissions plus circumstantial evidence. Convictions such as these are tolerated in a legal system where corroboration is not required and a culture where confessions are deemed overwhelming evidence of guilt. JUSTICE pointed to 89 cases that it investigated, where defendants claimed to be wrongly convicted and yet there were some admissions of guilt pre-trial (72 of which post-dated PACE).<sup>77</sup> In such cases:

“the defendant's only hope may be to find evidence which undercuts the prosecution case. In such cases there may be no way of knowing what the vital piece of evidence is. This suggests that the only way to preserve fairness is to permit unlimited access by the defence. To erect a relevance filter operated by the prosecution is to accept the risk of further miscarriages as the cost of achieving economy.”<sup>78</sup>

And yet we know that a filter is applied by the police and prosecution (even unwittingly), and non-disclosure of even relevant material is never assured. If the defence have not had full disclosure pre-conviction in these cases, then it will be impossible for them to clearly state to the CCRC or police, what materials they require access to, in order to demonstrate that there are grounds for appeal in their case.

In Scotland there has been introduced a statutory post-conviction disclosure regime. Section 133 of the Criminal Justice and Licensing (Scotland) Act 2010 provides a duty to disclose after the conclusion of proceedings where appellate proceedings are instituted. This not only includes information that should already have been disclosed, but also information the prosecutor has become aware of since the conviction, and that would have been required to be disclosed had it been known at the earlier stage (s133(3)). Under section 135, an appellant may apply to the prosecutor for further disclosure. If a conviction is upheld on appeal, the prosecutor still has a residual duty to disclose information they may become aware of, if that has not already been disclosed and would have been required to disclose. With the *Nunn* ruling, the England and Wales criminal justice system looks like it will be trailing behind that of Scotland for the foreseeable future.

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<sup>76</sup> Centre for Criminal Appeals and Cardiff Law School Innocence Project, 'Disclosure', Written Evidence to the Justice Select Committee Inquiry, 2018. Page 8.

<sup>77</sup> JUSTICE, *Unreliable Evidence: Confessions and the safety of convictions* (1994).

<sup>78</sup> J. Wadham, "Miscarriages of Justice: Pre-trial and Trial Stage" in *Criminal Justice in Crisis* (M. McConville and L. Bridges ed. 1994) at p.251.

## Conclusion

One of the most obvious ‘causes’ of current failures in pre-trial disclosure is under-resourcing. There are too few personnel and too little time to review all material generated during criminal investigations. Police duties to record all relevant materials may then prove too onerous when each investigation can generate vast volumes of materials, a problem exacerbated by confusion over the retention guidelines, confusion that should have been ameliorated by the latest national NPCC guidance. However, knowledge and application of this guidance looks presently to be patchy at best. While it has long been understood that pre-trial non-disclosure can cause miscarriages of justice, the *Nunn* ruling makes it clear that the Supreme Court does not consider post-conviction non-disclosure as posing equal risk, because the prisoner has already had the benefit of a full trial (and often, appeal). This stance sits uncomfortably with experience where post-conviction disclosure of materials has resulted in hundreds of wrongfully convicted prisoners, domestically and internationally, having their convictions overturned. In many instances, this has involved undertaking further investigations or inspections of materials that were available at trial in light of developing techniques and technologies. The rapid development of ‘post-conviction’ DNA access statutes in the US reflects the recognition that many exonerations depend upon access to original trial evidence and exhibits, and prisoners must be able to access these to demonstrate their innocence.

The Supreme Court had an opportunity in *Nunn* to lay down a regime that found a ‘balance’ between the rights of the convicted to have claims of innocence investigated, and respecting the public interest in finality and the preservation of scarce resources. The judgment has effectively shifted the burden of finding that balance onto the CCRC. As miscarriage of justice investigators have argued,<sup>79</sup> there are three inherent flaws in the system post-*Nunn*:

- 1) The ‘Catch 22’ or ‘Donald Rumsfeld’s “unknown unknowns” issue. Appellants need to specify the evidence they wish to access, and demonstrate the ‘real prospect’ that this will reveal something that affects the safety of their conviction, yet this is only possible by having access to the files and materials and reviewing them (necessitating the much disparaged ‘fishing expeditions’ which are crucial to effective post-conviction review);
- 2) The discretion to grant access to materials is left to the police/ CPS, who have “little incentive to open their past actions to scrutiny”;
- 3) The reliance upon the CCRC ‘safety net’ disregards the fact that individuals who have not had a first appeal are ineligible for case review by the CCRC (their first appeal may require post-conviction disclosure) and in practice: “the CCRC uses its investigatory powers very conservatively, as evidenced by its 0.77% referral rate (in 2016/17) and the case of Victor Nealon, who spent an extra 16 years wrongly imprisoned because the CCRC refused to conduct the DNA testing that would eventually exonerate him.”<sup>80</sup>

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<sup>79</sup> Centre for Criminal Appeals and Cardiff Law School Innocence Project, ‘Disclosure’, Written Evidence to the Justice Select Committee Inquiry, 2018. Page 7-8.

<sup>80</sup> Centre for Criminal Appeals and Cardiff Law School Innocence Project, ‘Disclosure’, Written Evidence to the Justice Select Committee Inquiry, 2018. Page 8.

The *Nunn* judgment also failed to factor in a victim's right to ensure, post-conviction, that the correct verdict was reached. A victim or their family and supporters must also have a vested interest in further disclosures that may reveal the true perpetrator. In order to establish where such injustices may have occurred, the duty to disclose must continue after trial. The situation in England and Wales is such that it is: “incredibly difficult for the wrongly convicted to discover and access police and CPS documents and exhibits that could help exonerate them.”<sup>81</sup> The post-conviction disclosure regime thus inhibits the ability of investigators to inquire into potential miscarriages of justice, leaving appellants unable to secure leave to appeal: “The right of appeal provides no protection to a wrongly convicted defendant unless he has the ability effectively to challenge the process...”<sup>82</sup> As Hamer makes clear:

“Wrongful convictions come to light relatively rarely. This reflects the difficulty of uncovering them, rather than their infrequency. The finality principle makes it difficult for the defendant to demonstrate factual error at the appeal stage and even more difficult post-appeal. And by this time most defendants – in prison, lacking resources and skills - are ill-placed to meet these demands.”<sup>83</sup>

While preferring pre-trial disclosure to be effective and miscarriages of justice prevented, the appellate system can only operate with effective post-conviction disclosure. Sean Hodgson, who served 27 years for a murder he did not commit, would never have had his conviction quashed had it not been for the determination of his legal team, the co-operation of the investigating police force and the safe and proper storage of exhibits by the FSS. However, in other instances access to materials has been denied, and this default ‘refusal’ position looks to be worsening post-*Nunn* with the judgment now being cited when refusing to disclose material and the police refusing requests with greater confidence.

The Centre for Criminal Appeals ‘Open Justice Charter’ outlines proposals for a ‘fairer, more effective post-conviction disclosure system’, which includes full access to all case materials unless the police/CPS could demonstrate a valid reason for non-disclosure; controlled access to physical evidence for forensic (re)examination unless a valid reason for refusal, and full (free) audio recordings of trials.<sup>84</sup> Where police deny disclosure, such a decision should remain judicially reviewable. Being legitimately denied access to materials is distinct from being *illegitimately* denied access. The Supreme Court in *Nunn* however, has arguably left too much discretion to police forces, which will force more, and unnecessary, judicial review applications of their decisions.

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<sup>81</sup> Centre for Criminal Appeals and Cardiff Law School Innocence Project, ‘Disclosure’, Written Evidence to the Justice Select Committee Inquiry, 2018. Page 8.

<sup>82</sup> UKSC 2012/0175 In The Supreme Court of the United Kingdom, Kevin Nunn v The Chief Constable of Suffolk Constabulary, the Crown Prosecution Service: Interveners Case: three organisations: JUSTICE, Innocence Network UK (INUK) and the Criminal Appeal Lawyers Association (CALA). Para 27.

<sup>83</sup> Hamer, p.298

<sup>84</sup> See Centre for Criminal Appeals, ‘Open Justice Charter’ (2016) available at: <http://www.criminalappeals.org.uk/open-justice/> (accessed 14<sup>th</sup> January 2019).

Inside Justice also make concrete recommendations on what can be done immediately to ensure justice, insisting that the NPCC guidance should be effectively disseminated to ensure that every member of staff who may need to decide what should be retained post-conviction is appropriately informed and trained. In addition, with just two years until the review of the Forensic Archive Ltd, the Home Office must take informed decisions about the future of the FAL. While it is clear that FSPs should retain DNA extracts and casefiles, a lack of clarity has led to reports of inappropriate destruction. More is clearly required to ensure that FSPs are aware of their responsibilities. Further, the additional burden placed on forces, to safeguard all forensic material without additional funding, will create difficulties for forces looking for budget cuts.

High profile appeals following new forensic testing illustrate the important role that post-conviction disclosure can play in remedying wrongful convictions. Cases often involve the use of scientific techniques now outdated or superseded by advances in both technology and interpretative understanding. It is therefore imperative there is full access to all relevant materials for experts to re-evaluate. It follows that if access to material is essential then proper storage of that material is also vital. The storage of material, post-conviction, is currently an opaque, unaudited landscape. While the new guidance on retention is helpful, more is now required to promote effective dissemination to ensure that every member of staff who may need to decide what should be retained post-conviction is appropriately informed and trained. Once materials are stored effectively, then disclosure is a possibility. Indeed, without access to material there is no point in storing it. Once post-conviction disclosure is effective, then appeals are a possibility. Without either, the Court of Criminal Appeal will become increasingly inconsequential.