APPENDIX 3

STATEMENT OF CRIMINAL APPEAL LAWYERS ASSOCIATION (CALA)

The Criminal Appeal Lawyers Association ("CALA") makes the following statement in support of its application for leave to intervene in the case of Nunn v Chief Constable of the Suffolk Constabulary & Anor.[1]

CALA

1. CALA represents a number of the main solicitors firms and key counsel engaged in criminal appeals work. Its objects are:

   (i) to encourage and maintain the highest standards of preparation, representation and practice in relation to proceedings in the Court of Appeal Criminal Division and in relation to applications to the Criminal Cases Review Commission (the "areas");

   (ii) to participate in discussions on developments in the areas;

   (iii) to work for improvements in the law and procedure relating to criminal appeals; and

   (iv) to represent the interests of the Members of the Association and their clients.

2. CALA members have a strong track record of securing referrals by the CCRC to the Court of Appeal and a great deal of experience of the work which leads up to those referrals. Present and past CALA members have undertaken some of the most significant appeals in the last thirty years including R v Derek Bentley, R v James Hanratty, R v Hickey, Robinson and Molloy, R v Sam Hallam, R v Suzanne Holdsworth, R v Gilfoyle and R v Dallagher.

3. CALA members are unanimous in their belief that the decision of the Divisional Court in R v Chief Constable of Suffolk Ex p. Nunn has placed considerable and unjustified barriers in the way of proper advice to prisoners.

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1 [2012] EWHC 1186 (Admin) (04 May 2012).

4. Most work undertaken by CALA members is conducted on limited public funding under Criminal Defence Service funding (currently £49.70 per hour in London and £47.70 outside London) or pro bono.

5. In 2012-13 there were 4,391 cases in which the then Legal Services Commission paid for work on criminal appeals or CCRC applications. The average claim was £1,300.88.

6. An unknown additional number of such cases are paid for by prisoners or their families – it is believed there are several 100 of such cases each year. This occurs because prisoners are outside the scope of public funding due, eg, to home ownership or because their families wish to secure the help of an experienced lawyer.

7. It is the view of CALA that the most experienced criminal solicitors now undertake publicly funded work only on a small scale and as a matter of conscience rather than for profit. Many experienced solicitors give time to a couple of matters on this basis. This is some of the most important work we shall ever do, dealing with cases of potential system failure within the Criminal Justice System.

8. CALA members all turn down requests for assistance with appeals on a regular basis. The volume of enquiries received by CALA members seems to suggest that many convicted defendants have difficulty in finding a solicitor to act for them. Many callers looking for such assistance refer to lengthy and fruitless efforts to find assistance. In terms of senior and experienced criminal practitioners, demand outstrips supply.

9. There is however a significant volume of appeals advice given by relatively inexperienced solicitors or by paralegals. CALA members have been told on many occasions by staff at the CCRC that a large proportion of the applications which the CCRC receives from firms of solicitors contain little more than a completed application form and a bundle of papers. It is less common for the CCRC to receive an application with a properly argued submission or with relevant new materials.

THE IMPACT OF THE LAWYER ON THE PROCESS

10. Academic research[2] conducted by Professor Jacqueline Hodgson at the University of Warwick found that only 2.1% of unrepresented applicants gained a referral as against 7.6% of represented applicants. Professor Hodgson therefore looked into the quality of the applications received to determine what specific factors caused the difference. She pointed initially to a selection factor whereby lawyers would weed out unmeritorious cases and attach themselves only to those with a properly arguable case.

11. Professor Hodgson's research found in 2006-07, for example, that 18.1% of lawyer submissions were "Acceptably inactive" – i.e., that no legal input was required because the referral came from an external source such as a court. 37.3% of lawyer submissions were either inactive – i.e., without supporting argument – or poor. There were just 44.6% that fell into the category of reasonable submissions or successful submissions.

12. Professor Hodgson then looked at the 74 successful submissions over a two year period 2005 - 2007 to find out whether or not the work of the lawyer had played a determinative role. Her conclusions are set out in para 7.1 of her report. In summary, the applicant's legal representative appears to have played a crucial role in the process of getting a case referred to the Court of Appeal in nearly two fifths of all referral cases (38%). Looking only at those cases where the applicant was represented (57 out of 74 cases), the lawyer's role was crucial in 49% of cases. And, in 11 cases (15%), the lawyer's role was a key one because earlier applications without representation had failed, or the case was referred as a result of legal representations after a provisional decision not to refer, or even a decision not to review because there had been no appeal and no exceptional circumstances to merit a review.

THE ROLE OF LAWYERS

13. In many cases it has been CALA members who have made this critical difference to cases where the CCRC has not itself identified the crucial issue. Most of us at CALA

[2] The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission, J. Hodgson and J. Horne, University of Warwick, 2008.

have experience of changing the view the CCRC takes of a case. This gives us an important relevant perspective on why the involvement of a lawyer should make a difference, given the generally benevolent impulse driving the CCRC. We think this difference in outcome occurs for many reasons, including the direct client contact we have as lawyers, often our deeper involvement in the case, frequently because of our up-to-date criminal litigation skill which (for all its merits) the CCRC does not have, and in the deep experience in running complex criminal cases which our members bring to their work.

14. From the point of view of the convicted defendant having their own lawyer makes a critical difference in ensuring that the CCRC does its job properly. This is not a criticism in any way of the CCRC but a reflection of the reality that the UK legal and regulatory system is complex and even when working well those who approach it very often seek the help of a lawyer, as they are entitled to do within our framework of law.

15. It is the job of the lawyer in such a situation to mount a case which is persistent and vigorous, and (if the client continues to maintain that they are wrongly convicted) to keep digging despite setbacks. It has been that persistence which historically has righted many of the worst errors of the criminal justice system. The idea that there should be finality in the face of protestations of innocence would have left the Birmingham 6, the Guildford 4, and many other innocent defendants unjustly imprisoned at huge social, emotional and political cost.

ADVISING CLIENTS ON APPEAL CASES

16. All CALA members therefore filter the cases they take on, both pre and post retainer. Only a small proportion of cases which reach a solicitor are clearly meritorious and an obvious route to appeal exists (this is likewise the experience of the CCRC according to the research by Professor Hodgson). Where the grounds identified by a client have no merit a review is normally undertaken to determine whether the conviction might be impacted by any other evidence or argument.

17. A significant number of would-be appellants are advised at that stage that they have no arguable case and most of these accept the advice they are given. CALA member

Birds Solicitors estimates that of the cases taken on approximately 50% are advised to take the matter no further. Where that advice is given in clear terms and accepted by the client (as it most often is) it confers a real benefit on the client and their family, any victim and their family, the CCRC and those in the prison service who need to work with the client on their offending behavior.

18. In a number of cases, a decision on the correct course of action, and the consequent advice, can be formulated only after further work. Where such work will be required, it is common to seek assistance from the CPS and the police, as well as from previous representatives, in relation to disclosure issues. That disclosure may relate to material mentioned on a schedule of unused material which was not inspected prior to trial. It may relate to material not listed on such a schedule. It may – very occasionally – concern physical exhibits of which some further inspection or examination is required.

19. In the experience of CALA members (which stretches back to the late 1960s) the police and CPS have always co-operated with such requests up until the time of the Nunn case.

20. By such means, material is collected and analysed and a submission made to the CCRC or (where appeal rights subsist) an application for leave to appeal out of time is made to the Court of Criminal Appeal. In some cases there have been repeated applications to the CCRC or a lengthy process of debate over the formulation of grounds.

DISCLOSURE FAILURES

21. There have been many, sometimes shocking, disclosure failures in criminal cases. Our daily work experience is of cases where human failure has occurred and disclosure has not been given as it should. Two striking examples of this in the last couple of years are Maxwell[3] and Nunes[4]. In both cases the prosecution sought carefully to conceal the material which in the end rendered both convictions unsafe.

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3 R v Maxwell [2010] UKSC 48.

4 R v Nunes [2012] EWCA Crim 1475.

22. When the disclosure process works as it should, the safeguard of an independent lawyer doggedly pursuing further disclosure is entirely unnecessary. The argument advanced by CALA is that this is not a logical ground on which to deprive convicted defendants, who have suffered a disclosure failure, of the help they expect in a society committed to the rule of law and to the fairness of its justice system.

MAKING A DIFFERENCE

23. As long as CALA members have been in practice, their work has been improving the odds for wrongly convicted defendants. A range of examples of where disclosure has transformed a case include the following:

Hickey, Hickey and Robinson

24. The appellants, along with Mr Molloy (who had since died), were convicted of the murder of a newspaper delivery boy, Carl Bridgewater, during a burglary of a farmhouse. Their conviction was quashed on a third appeal. The case had been referred to the Court of Appeal by the Home Secretary because of the discovery of an unattributed fingerprint on the boy's bicycle. Following the referral the appellants' solicitor requested and was provided with the original notes of the confession statement allegedly made by Mr Molloy and arranged for them to be subjected to ESDA testing. This revealed the imprint of a fabricated statement attributed to Vincent Hickey, thus supporting Molloy's case that the reason for his confession was revenge against Vincent Hickey. On being presented with the results of the ESDA testing the Crown elected not to contest the appeal.

Mohammed Patel

25. Mr Patel was an accountant, whose customer was subject to a drug trafficking investigation. He was convicted in 1988 for prejudicing the investigation. His case was first referred to the Home Office on 7 June 1993. The Home Office investigation was inconclusive. A police complaint was therefore made on 7 December 1994 which led to a Police Complaint Authority investigation which provided a report and further disclosure on 1 May 1996. On the basis of this disclosure, further submissions were made to the Home Secretary which this time resulted in a referral to the Court of

Appeal on 26 November 1996. The use of the police complaint procedure is something which may be revived if the Police are relieved of any obligation to make post-appeal disclosure.

Whomes, Steele and Corry

26. This case was known as the Rettendon Range-Rover murder. The CCRC commissioned a fresh police inquiry when it was discovered that the main prosecution witness had sold his story to a journalist and referred the case to the Court of Appeal. The appellants' solicitor then further examined the material concerning the witness and was able to establish that at a time when the witness was still in police protective custody he had been taken to visit a literary agent. This cast doubt on the integrity of the police operation. Although the court concluded that the convictions were safe, the material suggesting police impropriety was only discovered as a result of the intervention of the solicitor.

Eddie Gilfoyle

27. Mr Gilfoyle was convicted in 1993 of the murder of his pregnant wife Paula. A suicide note which she had apparently left was alleged by the prosecution to have been obtained from her by Mr Gilfoyle by deceit. He appealed unsuccessfully twice and made two further applications to the CCRC, neither of which were successful. In 2010 his solicitor obtained co-operation from the Merseyside Police who provided a box of material taken from the Gilfoyle home at the time of the original investigation and never previously disclosed. The box included a diary in which Paula Gilfoyle had recorded her suicidal thoughts, which it is now argued would have seriously undermined the prosecution case. The discovery of the material was entirely due to the persistence of Mr Gilfoyle's present solicitor, despite an extensive previous review of the case by the CCRC, which is still considering whether to refer the case.

Victor Nealon

28. Mr Nealon pleaded not guilty to attempted rape but was convicted at Hereford Crown Court in January 1997 and sentenced to life imprisonment. His appeal was dismissed. He twice applied to the CCRC but was turned down. His solicitor persisted in seeking

further disclosure material from the police and in 2010 was able to organise a DNA test which showed conclusively that someone other than Mr Nealon had deposited DNA on the victim. His third application to the CCRC was referred back to the Court of Appeal in 2012. His conviction was finally quashed in December 2013, although the reasoned judgment has not been delivered at the time of writing. There was clearly no chance whatsoever that the CCRC would have persisted in the way that Mr Nealon's solicitor did.

Sean Hodgson

29. This case was referred to in the Divisional Court judgment in Nunn. Mr Hodgson was convicted in February 1982 of the murder of Teresa de Simone. He appealed against conviction in 1983 without success. He remained in custody for some 27 years until he instructed solicitors who sought testing of DNA in the possession of Hampshire Constabulary. As the Court of Appeal observed "It is perhaps worth noting in this dismal story that both the prosecution and the police have demonstrated their commitment to the interests of justice by co-operating positively and fully with the solicitors for the appellant to try to ensure that all the available material was produced and examined".

30. In the experience of CALA members this co-operation was typical in a case where the original officers had long left the scene and no-one remained in the relevant police service with an attachment to the case. This is not however a source of comfort since more recent convictions are often vigorously defended by the original case officers (as happened in the case of Nunn). This is may be one of the reasons why so many wrongful convictions take over a decade to clear up.

IMPACT OF THE NUNN JUDGMENT

31. Since the 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 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. This clearly creates a "catch 22" for the defendant who may fail to obtain leave to appeal, let alone a disclosure order, if an application is

made prematurely, and an increase of work at the Court of Appeal which will become a first line body for handling disclosure requests. Examples include the following:

Example 1 – CPS, Special Crime Division, York

32. The Defendant was convicted of murder in August 2011. The case had involved the Defendant punching the deceased in the street causing him to fall and bang his head. His defence at trial had been that he was acting in self-defence. No bad character application had been made in relation to the deceased as his antecedents revealed only minor matters of no relevance. The Defendant did not appeal. In 2012 he instructed new solicitors. They became aware that the deceased had previously served in the army and spent a period of time in detention. They ascertained from the trial solicitors that the deceased's military records had never been sought or disclosed before or during the trial. On 5th October 2012 they wrote to the CPS asking for disclosure of the deceased's military records. The CPS replied refusing to disclose the records and relying on the decision in Nunn.

Example 2 – CPS, Special Crime Division, York

33. In the same case a key issue at trial had been the deceased's demeanour prior to being struck with the fatal blow. The defence case had been that he had shown aggression and was armed with a bottle at one stage. This was in contrast to the prosecution's case that he had been unarmed and that he had been non-aggressive at all times. There was CCTV of the incident but was not very clear. The new solicitors instructed an expert in video analysis to enhance the footage – something that had not been done by the defence in their preparation of the case for trial. The expert required the original footage to conduct enhancement. The solicitors wrote to the CPS on 22nd January 2013 asking for access to the original footage. The CPS refused the request, referring to the previous letter and stating that "any access to previously undisclosed material must be justified by reference to any potentially successful grounds of appeal."

Example 3 – CPS, East of England Area

34. The Defendant had been convicted after trial of possession of indecent images of

children. Some of the images had been found on a CD-ROM which was in a computer at the Defendant's work premises. Others worked in those premises. At trial the defence had not considered having the item forensically tested to see if it contained fingerprints or DNA from someone other than the Defendant. He did not appeal. New solicitors were instructed post-conviction and they wrote to the CPS in July 2013 asking for access to the disc so that forensic examination of it could take place. The CPS replied on 30th July refusing the request and relying on the decision in Nunn. When further representations were made the CPS replied reiterating the contents of their previous letter and maintaining that their position was based on the decision in Nunn.

Example 4 - Leicestershire Constabulary

35. The Defendant was convicted of murder in 1992. His renewed application for leave to appeal was refused in 1996. Since that time the CCRC have refused his applications to have his case referred back to the Court of Appeal on two separate occasions. There is a third application currently with the CCRC. The Defendant's solicitors sought disclosure from the CPS and the police of material collated by the police during the original investigation. This request was refused. In March 2013 judicial review proceedings were lodged in relation to this refusal. Those proceedings were defended and reliance was placed on the decision in Nunn. In July 2013, the Single Judge refused permission and also placed reliance on the decision in Nunn. A renewed application for permission is pending.

36. In the meantime the CCRC and the currently instructed solicitors have made requests of Leicestershire Constabulary regarding disclosure of previously unserved material held on the HOLMES system relevant to the initial police investigation. The Constabulary responded that they could not find the papers and that whilst they were probably still in existence somewhere, they did not know where. In response to a further written request for information as to what efforts had been made to locate the missing documents the Acting Chief Constable of Leicestershire Police responded on 10th October 2013 by stating (for the first time) that "I note you have not specified what information it is that you seek and refer you to the judgment in the High Court (in this case) in June, as well as the decision in R v Nunn cited in that ruling."

37. The problem with the Nunn judgment is the difficulty that can arise in demonstrating that information sought or tests required "materially may cast doubt upon the safety of a conviction", particularly without sight of material or knowledge of test outcomes. This is far too stringent a test. CALA submits that the proper test is that there is material, which could have been disclosed or tested at the time of trial, which would assist in the preparation of an appeal. This is the test, which has always applied until now, and in the experience of CALA members the number of requests to police and prosecuting authorities for such material is truly tiny. In those very rare cases where it is appropriate, it can make a great difference to the prospects of an innocent applicant or appellant.

CONCLUSION

38. By reason of the matters above, CALA would not argue that the rule in the Nunn case will impact on the majority of cases, but there is a small number of miscarriages of justice where the absence of any duty by the police to co-operate would bring to a decisive end a really important "long stop" in righting rare but serious errors in the criminal justice system.