Centre for Criminal Appeals – Written evidence (FRS0068)

1. The Centre for Criminal Appeals is a legal action charity that fights miscarriages of justice and demands reform.

2. We are writing to provide the House of Lords Science and Technology Committee with a brief perspective on the following topic, based on our experience investigating and litigating potential wrongful conviction cases in England and Wales:

“How the Criminal Justice System can be equipped with robust, accurate and transparent forensic science”.

3. It has long been known that misleading, unscientific or otherwise flawed forensic evidence can contribute towards the wrongful conviction of innocent people.

4. However, forensic science also has the potential help to put miscarriages of justice right. New testing techniques may exonerate an individual, while improved scientific understanding may reveal that expert evidence presented to the jury was flawed.

5. Unfortunately, there is currently too little transparency surrounding forensic science in our criminal justice system. Too often it is impossible to test the robustness and accuracy of forensic evidence presented to juries, or conduct new forensic work which may exonerate a person. In our view, miscarriages of justice are going unidentified and uncorrected as a result.

6. First, transcripts of expert evidence in criminal cases are too often inaccessible. This is partly due to the premature destruction of transcripts and audio recordings of trial proceedings. However, it is also a consequence of the high prices charged by transcription companies. It is rare to be granted legal aid to cover the costs of purchasing transcripts of witnesses’ evidence. What this means in practice is that it is often very difficult for appeal practitioners to establish what exactly an expert witness has told a jury. This makes it nearly impossible to prove if an expert has misrepresented the significance of their findings or gone beyond their area of expertise.

7. Second, the legal framework governing post-conviction disclosure makes it nearly impossible for appeal practitioners to access documentary material and physical evidence for scientific testing which could lead to a convicted defendant’s exoneration.

8. Post-conviction disclosure is governed by:
   - Section 72 of the Attorney General’s Guidelines on Disclosure (2013), which states: "Where, after the conclusion of the proceedings, material comes to light, that might cast doubt on the safety of the conviction, the prosecutor must consider disclosure of such material."
   - The case of R (Nunn) v Chief Constable of Suffolk Constabulary and another [2014] UKSC 37, which endorsed this guideline “with the addition that if there exists a real prospect that further enquiry may reveal
something affecting the safety of the conviction, that enquiry ought to be made.”

9. This legal framework is inherently flawed for three reasons:
   - It places those seeking disclosure in a Catch-22. To make a successful request, they will need to know of the likely existence of specific exculpatory material held by police and prosecutors in advance. Yet the only possible way of discovering the existence of such material will almost always be through having access to the files and physical evidence and reviewing or testing these;
   - It leaves decision-making regarding access to material to police forces and the Crown Prosecution Service, who naturally have little incentive to open their past actions to scrutiny, let alone the resources to do so;
   - It relies on the Criminal Cases Review Commission as a “safety net” (Nunn, paragraph 39) that can be trusted to obtain and review sufficient post-conviction disclosure from the police and CPS. This disregards that facts that (a) in cases where a first appeal has not been possible (perhaps due to the need for post-conviction disclosure) defendants are ineligible for a case review by the CCRC, and (b) in practice the CCRC uses its investigatory powers very conservatively, as evidenced by its low referral rates (1.24% in 2017/18, 0.77% in 2016/17) and the tragic case of Victor Nealon, who spent an extra decade wrongly imprisoned because the CCRC refused to conduct the DNA testing that would eventually exonerate him.

10. What this lack of transparency means in practice is that is appeal practitioners are often prevented from being able to:
   - identify non-disclosure of exculpatory forensic material;
   - instruct new experts to identify serious flaws in the trial forensic evidence;
   - arrange fresh testing of physical evidence which may point to a convicted person’s innocence;
   - check whether unidentified DNA profiles or fingerprints which may belong to an alternative suspect can be matched with those contained on national databases.

11. Thirdly, documentary material and physical evidence is too often lost or prematurely destroyed by police forces. This of course makes it impossible for forensic evidence to be reviewed or retested.

12. In conclusion, we believe the following changes are needed to ensure that our criminal justice system can be equipped with robust, accurate and transparent forensic science:
   - Defendants without the means to pay should have a right to access transcripts of expert evidence given at their trial free of charge;
   - Via their appeal representatives, convicted defendants must be granted a right to controlled access to documentation held by police forces and the Crown Prosecution Service, such as correspondence with experts, forensic examiners’ bench notes and unused material and crime scene documentation, unless police or the CPS can demonstrate a specific and overwhelmingly compelling reason why such access should not be granted;
Suitably qualified experts instructed by appeal practitioners on behalf of convicted individuals must be granted controlled access to physical evidence so that they can be re-examined or re-tested, unless a police can demonstrate a specific and overwhelmingly compelling reason why such access should not be granted;

Police forces must take greater care to ensure documents and exhibits are not lost or prematurely destroyed, with appropriate penalties introduced for such failings. Physical evidence and documents in a case, including unused material and sensitive unused material should be retained for as long as the defendant remains under the supervision of the criminal justice system or remains on a risk register.

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