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# **Truth-finding and the adversarial tradition: the experience of the Cardiff Law School Innocence Project**

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## **Introduction**

Recent years have seen the emergence in British Universities of what are often termed 'innocence projects' in which students, acting under the supervision of academics and sometimes legal practitioners, re-investigate alleged miscarriages of justice. Innocence projects started in the United States but now exist in a range of traditional common law jurisdictions as well as some countries from Continental Europe. The first project was started in 1992 at the Benjamin Cardozo Law School, Yeshiva University, New York. By 2004 an international Innocence Network (IN) had been established which now has 68 member projects worldwide. The first British innocence project was set up by Michael Naughton in 2005 at the University of Bristol. At one stage, there were around 35 university projects in the UK but the number has now declined to around 15 with some institutions now using alternative titles such as Miscarriage of Justice Unit.<sup>1</sup> Nevertheless, they have become an established feature of University pro bono provision in the UK.<sup>2</sup> In 2014, the Cardiff Law School Innocence Project (CLSIP) became the first - and so far the only - University project to pursue investigations that led not just to the Criminal Cases Review Commission (CCRC) making a referral to the Court of Appeal (CA) but also to the ultimate quashing of the conviction.<sup>3</sup> Yet the

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<sup>1</sup> For an analysis of the current situation and future prospects for innocence projects in the UK, see H Greenwood, "The UK innocence movement: past, present, and future?" in L Luparia (ed), *Understanding Wrongful Conviction* (2015) and "Innocence projects: losing their appeal?" in P McKeown and C Ashford (eds), *Social Justice and Legal Education* (2016 forthcoming).

<sup>2</sup> For a recent profile of the work of University law students in investigating miscarriages of justice see 'Guilty until proven innocent' (2016) 58 *Lawyer* 2B 42

<sup>3</sup> This was the case of Dwaine George which involved new scientific evidence relating to gunshot residue. The Court of Appeal explicitly paid tribute to the work of the Cardiff Law School Innocence Project: *R. v George (Dwaine)* [2014] EWCA Crim 2507 at para. 54

relationship between these established institutions of the criminal justice system and innocence projects has not always been one based on a shared vision of how to respond to allegations of wrongful conviction. In 2015, several representatives of innocent projects, including Cardiff, gave evidence to the House of Commons Justice Select Committee. Along with others involved in responding to alleged miscarriages, they argued the need for a broader approach to intervention by the CCRC and the Court of Appeal. This prompted the Select Committee to recommend that the CCRC be less cautious in its approach to the criteria for referral and the consideration of a broader statutory test for quashing convictions to encourage the Court of Appeal to include cases in which no fresh evidence or argument is identified. But the Government declined to implement their recommendation on the advice of the Court itself.<sup>4</sup>

This article draws on the experience of the Cardiff Law School Innocence Project (CLSIP) in reinvestigating cases where clients argue that they have been wrongfully convicted. The work involves close reading of the case-materials and often the commissioning of (further) expert reports and the constructing of applications to the CCRC for referral to the Court of Appeal. The cases investigated certainly do not constitute a representative sample of investigations into serious offences and include only one case officially acknowledged to be a miscarriage of justice (the case of Dwaine George whose conviction was quashed on appeal in December 2014). But they are cases where the defendants continue to assert their innocence of very serious offences long after conviction and the exhaustion of the normal appeal process. We use the experience of the CLSIP to ask questions about truth-finding in a criminal

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<sup>4</sup> House of Commons Justice Committee, Report on Criminal Cases Review Commission (2015) HC 850, available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/publications/>. The evidence to the Committee is available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/criminal-cases-review-commission-academics/> (both last accessed 13<sup>th</sup> December 2016).

justice system still strongly shaped by the adversarial tradition. The authors are both based at Cardiff University: one has been a case-consultant with the innocence project since 2009 with responsibility for training students, supervising their case-work and drafting applications to the CCRC; the other is an academic with a long-standing interest in the assumptions of the adversarial tradition and how they shape criminal justice practice on the ground in England and Wales. In Part 1, we highlight significant weaknesses in the conduct of police investigations in many of the cases examined by the CLSIP as well as limits in the capacity of the defence to expose relevant weaknesses in the prosecution case. We argue that this suggests vulnerabilities in our approach to fact-finding that are linked to the way in which the adversarial tradition has been interpreted and operationalized in England and Wales. Specifically, we point to continuing uncertainties surrounding the relationship between the role of the defence and the police in truth-finding and in the significance of defence access to materials generated by police investigation. In Part 2 we draw on the experience of the CLSIP's relations with the CCRC and specifically the CCRC's reaction to CLSIP applications. That experience, we argue, suggests that the review functions of the CCRC - and by implication, those of the Court of Appeal - do not, as officially defined and interpreted, enable these institutions properly to address the structural vulnerabilities revealed in Part 1.

Some of the cases that come to the CLSIP are referred by solicitors, other agencies or organisations. But many are self-referrals from prisoners or their families who often learn of the work of the project through word of mouth: in particular, the publicity surrounding the exoneration of Dwaine George led to a surge of requests. Responding to initial letters from prisoners can be challenging: sometimes they are very isolated and struggle to explain their case and its circumstances in writing. Furthermore, most cases only reach the project when lawyers have closed the file: typically, clients have already used up their appeal

options and, in some cases, have already been unsuccessful with their first application to the CCRC (which is their only route to a second appeal). The first step is always to establish the client's version of events and then examine the available case papers obtained from the client's previous solicitor for any indications of innocence or doubts about the validity of the conviction. To do this, the CLSIP uses volunteer law students working under academic and, when available, professional legal supervision. Students work in groups of around six with a more experienced student team leader. Often the CLSIP will seek further disclosure from the police or CPS but this is usually refused: the police are reluctant to spend time and resources disclosing material in relation to a case that they consider to have been resolved. Furthermore, the Supreme Court Judgement in *R v Nunn* (2014)<sup>5</sup> has confirmed that the public interest in finality of proceedings means that the common-law duty of disclosure post-conviction is not as extensive as the statutory regime that prevails until trial. Different police forces invoke variously the Data Protection Act, the Human Rights Act and (ironically) the Freedom of Information Act to deny disclosure after trial. One approach is to treat all requests as Freedom of Information requests - whether or not they have been made under that framework - so that the exemptions under the Act can be cited as justification for refusing disclosure. In the absence (usually) of further disclosure, if it is thought appropriate, an attempt will be made by the CLSIP to seek out new evidence or construct new argument that might form grounds of appeal: usually these grounds will be put to the CCRC in an application for referral to the Court of Appeal. If no appeal has yet been made, which is the case in about a third of CLSIP cases, authority for an appeal out of time will be sought. In conducting any additional examination of the evidence, the CLSIP is reliant on pro bono assistance from experts in various fields including policing, medicine, computing, forensic science and psychology. Since its inception

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<sup>5</sup> *R (on the application of Nunn) v Chief Constable of Suffolk Constabulary and another* [2014] UKSC 37

in 2006, CLSIP has worked to varying degrees on around 30 cases, most of which have been murder convictions. The vast majority of current requests for help however involve sexual abuse convictions. The project has made 15 applications to the CCRC, including two cases where CLSIP has made a second application after the rejection of its first. All but one of the 15 applications have led to a full 'stage two' review by the CCRC:<sup>6</sup> six cases are still being considered; one was referred by the CCRC to the Court of Appeal and the conviction quashed and 7 applications for referral have been turned down.

### **Part 1: Truth-finding vulnerabilities in the pre-trial process**

Since the creation of the Criminal Procedures Rules in 2005 we have had a legislative foundation for the view that one of the key objectives of the criminal justice system in England and Wales is accuracy of outcomes.<sup>7</sup> Yet while endorsing a procedural approach derived from the adversarial tradition, recent Royal Commissions and other major reviews such as the Auld Report have not provided a systematic account of how truth is found within the criminal justice system in England and Wales. But piecing together fragments from both academic and official accounts,<sup>8</sup> such truth-finding claims seem to rest on one or more of the following propositions. First, there is an adversarial view of truth-finding in which the trial is seen as a contest between autonomous parties who seek to present and challenge competing accounts of what has happened: this enables an

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<sup>6</sup> The majority of applications to the CCRC are rejected at an early stage because they are ineligible (not having exhausted their appeal options) or because they raise nothing new. A Stage 2 review means that the CCRC agrees that there are matters in the application that warrant investigation and therefore a Case Review Manager (CRM) will be appointed to undertake the review.

<sup>7</sup> The Criminal Procedure Rules 2015, Part 1, Para 1(1) state that the overriding objective of the system is to deal with cases 'justly' and that this includes 'acquitting the innocent and convicting the guilty.'

<sup>8</sup> On theories of fact-finding and procedural tradition see the following: G Goodpaster (1987) 78 "On the Theory of American Adversary Criminal Trial" *Journal of Criminal Law and Criminology* 133, J Jackson (1988) 10 "Theories of Truth-Finding in Criminal Procedure: An Evolutionary Approach" *Cardozo Law Review* 475, C Brants and S Field (2016) 'Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: when strengths become weaknesses' 20 *International Journal of Evidence and Proof* 266

impartial jury to find facts effectively even without having their own powers to seek out evidence. This explanation of truth-finding depends on the defence being able actively to seek out available exculpatory evidence and present it effectively at trial. Indeed, this account seems to depend on some rough equality of investigative arms: otherwise the relative strength of the competing versions of reality presented at trial will reflect that inequality rather than the intrinsic merit of the potential evidence out there. Before the arrival of a professional state police in the 1830s, when most prosecutions were conducted by victims rather than the state, this may have been a plausible assumption. In more recent times, as the adversarial search for evidence has become a contest between an organised state police and a legally-funded defence firm, a second, rather different, account of fact-finding has been given: the police are said to conduct an effective truth-finding investigation which identifies the relevant evidence both for and against the accused. Thus, the Runciman Commission, a Royal Commission set up in response to the release of the Birmingham 6, argued that it was the "duty of the police to investigate fairly and thoroughly all the relevant evidence, including that which exonerates the suspect".<sup>9</sup> In contrast to the traditional adversarial account, this places trust in the capacity of the state to act as an active but impartial truth-finder and thus the prosecution to act in a quasi-judicial manner. Official accounts do not consider the relationship between these two very different accounts of fact-finding and, in particular, their implications for the respective roles of defence and police in the pre-trial process. However, one might argue that the duty of the police<sup>10</sup> to seek

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<sup>9</sup> Report of the Royal Commission on Criminal Justice, 1993, Cm 2263 (Chair: Lord Runciman), 9. The Commission also stated that it is the duty of the police "to discover the facts relevant to an alleged or reported criminal offence, including those which may tend to exonerate the suspect" Ibid, 69. See now Criminal Procedure and Investigations Act 1996, Code of Practice on Disclosure, Para. 3.4: 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.'

<sup>10</sup> For discussion as to whether this really constitutes a duty established in law and some scepticism about its enforceability in practice, see C Brants and S Field (2016), *op cit.*, at 273-4

out both exculpatory and inculpatory evidence should now be seen in the light of the extensive prosecution duties of advance disclosure in relation to unused materials. It might be argued that this enables even a legally-aided defence to put the relevant exculpatory evidence before the jury. But in this article, we argue that the experience of the CLSIP is that none of these accounts of how truth-finding might operate consistently reflect practice even in the serious cases re-examined by the project (where one would expect the most scrupulous concern for rigorous fact-finding). Part 1 is therefore organised as an examination, in the light of the experience of the CLSIP, of the following key propositions. First, that the police conduct an effective search for the truth exploring exculpatory as well as inculpatory evidence. Secondly, that defence lawyers can be relied upon actively to seek out any relevant exculpatory materials. Thirdly, that any defence difficulties in actively pursuing an independent search for exculpatory materials are compensated for by access to the unused material generated by the prosecution.

### **Police investigations as a systematic and effective search for truth**

The CLSIP's experience of examining in detail materials from major cases raises doubts about whether the relevant police investigations can be consistently seen as systematic and effective searches for the truth. In at least eight of the 13 cases where CLSIP has made applications to the CCRC those have raised serious concerns about the conduct of the investigation. Miscarriages of justice from many jurisdictions reveal the effect of a psychological phenomenon, which has also been widely documented in experimental research, known as confirmation bias or tunnel vision. This suggests that information is filtered through an established lens. Where we have a pre-existing view about the facts (for example a suspect's guilt) we do not deal symmetrically with subsequent information. We tend to seek to confirm our pre-existing hypothesis and

have difficulty in 'seeing' – or seeing the significance of – facts pointing to alternative explanations.<sup>11</sup> The experience of CLSIP is that in several of their cases there has been a strong and early police investment in a particular theory of the case and a corresponding neglect of alternative hypotheses. Once the police decide that they have a primary suspect their energy and time is devoted to building the case against the suspect, which sometimes involves the construction and pursuit of active strategies for generating new evidence against him or her - for example by persuading co-defendants or other potential suspects to assist the police in generating additional incriminating evidence. In one case (Case 6) the police took a co-defendant of the CLSIP's client on a number of trips to locate evidence.<sup>12</sup> During several of these car journeys, the co-defendant apparently made statements in which he implicated himself while emphasizing his limited involvement (in comparison to the CLSIP client who was given very much the primary role in the murder). The admissions and allegations were later recorded in formal statements but the conversations in the police cars were largely unrecorded apart from a few brief notes which were mainly concerned to record the suspect's acceptance of being interviewed without a solicitor present. The police then facilitated a meeting between that same co-defendant and a relative immediately before the trial in which the former persuaded the latter to give evidence which further implicated the CLSIP's client. In another case (Case 2) the initial investigation produced several essentially "neutral" witness statements about the character of the accused in a domestic murder. But some time later, when the CLSIP client had become a suspect, the police took new statements from the same people which now contained allegations that he had been unkind and unreasonable to his

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<sup>11</sup> C Brants (2013) "Tunnel vision, belief perseverance and bias confirmation: only human?" in C. Ronald Huff and M Killias (eds), *Wrongful Convictions and Miscarriages of Justice* at 163-6, Brants and Field (2016), *op. cit.*, at 267. For the related concept of construction of conviction see M McConville and others, *The Case for the Prosecution* (1991)

<sup>12</sup> References to CLSIP cases are numbered 1-7 in order to anonymize them.

wife (the victim). The trial was ultimately dominated, in the absence of more direct evidence of guilt, by these damaging assessments of character (which became particularly powerful indirect evidence of motive given that the defence chose not to adduce any positive character evidence). The point about these examples is that they illustrate the way in which police enquiries may involve strategic choices about who is the real target of investigation and an active investment in building evidence against them. That raises questions about any conception of the police role as one involving a continuing commitment over the course of the investigation to explore evidence both for and against the suspect with equal zeal and energy.

This is reflected in some of the CLSIP cases in what seems to be a very cursory approach by the police to some aspects of the investigation where these do not fit the established police theory of the case. For example, in Case 6, the police files reveal a decision not to send cigarette ends found at a crime scene for DNA examination because they were not of a brand used by the primary suspects. In a couple of cases where the offences were associated with burglaries, similar offences in the local area with similar modes of operation were identified but there is no record of an attempt to pursue this. More commonly there are potential alternative suspects in these cases who do not appear to have been vigorously investigated because the police feel they already have their 'man'. The CLSIP felt that this was the case in ten of the thirteen cases where CCRC applications were made. In Case 1, individuals were named by a member of the public as having been in explicit discussion of the murder and describing a good place to dump the body. Yet no statement was taken for 8 months, by which time the CLSIP suspect had long been charged and a simple denial was accepted. In another example from the same case, the lines of communication were more indirect: another member of the public reported that a woman had said that her ex-boyfriend was responsible for the murder. She indicated that he had some diverse and specific connections to the offence (relevant job, car matching description

and similar pattern of behaviour), yet the files show no evidence of follow up. In Case 4, a member of the public named a person who fitted a distinctive description of the perpetrator given by a witness. The police abandoned the attempt to contact him when he failed several times to answer the mobile phone number they had been given.

It may be that in relation to each of these instances the police had good reasons for doubting the reliability of the original information and therefore not prioritizing the follow-up. But if there are such reasons which go beyond the fact that a different primary suspect had already been identified, they are not recorded in the case-papers. Furthermore, it seems that the kind of active truth-finding role envisaged by the Runciman Commission would require that in a murder case these persons should both be traced and implicated or eliminated in a thorough and timely fashion. The fact that the information (if true) would disturb rather than confirm the established police theory of the case should not make a difference under any view of the police as inquisitorial truth-finders.

The experience of the CLSIP reflects the conclusions drawn from other recent research into murder investigations that once there is a 'prime suspect' he or she becomes the dominant focus and priority for investigation.<sup>13</sup> Indeed, it has been said that because Senior Investigating Officers are under pressure to be aware of costs of investigations, 'once the suspect was identified, there [is] immense pressure to discontinue previous lines of enquiry which were now seen as unproductive and costly'.<sup>14</sup> This suggests the vulnerability of any theory that the police can be relied upon, without external prompting, to seek out exculpatory as well as inculpatory evidence.

## **Defence lawyers and the pursuit of exculpatory materials**

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<sup>13</sup> M Innes (2003) *Investigating Homicide* at 256-9, F Brookman and M Innes M (2013) "The problem of success: What is a good homicide investigation" *23 Policing and Society* 292 at 297.

<sup>14</sup> Innes, *op. cit.* at 261-2.

A classical adversarial theory of truth-finding assumes independent proactive investigation by the defence.<sup>15</sup> The CLSIP cases involve some impressive examples of very detailed and insightful work by defence lawyers: finding and obtaining statements from supportive witnesses, seeking out experts and challenging the evidence from many angles. Yet the cases also reveal some failures and some very considerable structural obstacles to any active defence search for exculpatory evidence. There are examples of failures to appreciate the significance of relevant information and thus to commission expert reports that might have been critical. For example, in Case 1, the prosecution account of events relied on CCTV footage of what was allegedly the defendant's car making the trip to dispose of the body in water at a precise location and at a precise time. So the prosecution case depended on the body having been in the water long enough to make the alleged time of disposal plausible. Yet when the original pathology report did not even consider the issue of how long the victim's body had been in the water the defence neither questioned this nor sought to conduct further tests.<sup>16</sup> In another case (Case 7) the defence failed to obtain psychological reports which would have indicated (as they now have) that the defendant's learning disability was such that his understanding and ability to process information and explain his actions was extremely limited. This was highly relevant not just to his capacity to give reliable answers in police custody or under cross-examination but even to understand the trial process.

More generally and more frequently the cases reveal the limited capacity of the defence to overcome any lacuna in the police search for exculpatory material. We have pointed above to several cases in which investigation into potential alternative suspects was not pursued in a

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<sup>15</sup> Jackson, Goodpaster, *op. cit.*

<sup>16</sup> For more examples of defence failures to seek out exculpatory evidence see Field and Brants. In two recent collections, a range of experienced lawyers and investigative journalists have argued that inadequate preparation by first instance defence lawyers is a key causal influence in many miscarriages of justice: J Robins (ed.) (2012) *Wrongly Accused* and J Robins (ed.) (2013) *No Defence: Lawyers and Miscarriages of Justice*.

timely and thorough manner. We should spare a thought for the position in which those police failures leave the defence solicitor, who may be faced with the difficult task of finding and interviewing the relevant suspects. They might well refuse to answer (further) questions. If they do, it would be very dangerous for the defence barrister to summons them as witnesses: who knows what they might say and what impact their testimony might have? This illustrates the way in which the defence are at a major structural disadvantage in pursuing independently the relevant exculpatory evidence, lacking effective powers to arrest, interrogate and search, or indeed even to keep under surveillance, those unlikely to wish to co-operate with the defence. Furthermore, all of this assumes that the defence can identify and find alternative suspects mentioned in unused prosecution materials. But it is by no means certain that their significance will be recognised and understood by the defence. This brings us to the capacity of the defence to exploit unused material.

### **Defence difficulties in appreciating the significance of material theoretically available to it.**

We have suggested that one possible way of constructing a coherent account of truth-finding in England and Wales is to argue that defence difficulties in actively pursuing an independent search for exculpatory materials may be compensated for by access to the unused material generated by the prosecution. The prosecution has an ongoing duty to review materials in their possession and normally to disclose anything that is capable of undermining the prosecution case or assisting the defence.<sup>17</sup> Beyond that, the defence normally have rights of access to materials held by the police and listed in the schedule of unused material

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<sup>17</sup> Criminal Procedure and Investigations Act 1996, s 3(1)a. There are continuing doubts about the effectiveness of the implementation of disclosure rights: D Ormerod, "Editorial: A Further Review of Disclosure", [2013] Crim LR 97, M Fouzder "Prosecution disclosure failures to be probed" Law Society Gazette 6 July 2016, available at <https://www.lawgazette.co.uk/law/prosecution-disclosure-failures-to-be-probed/5056412.fullarticle>. For a summary of rules on prosecution disclosure generally, see A Ashworth and M Redmayne (2010) Criminal Process, pp. 259-262.

if they can show them to be relevant to their case. But the significance of the listed items will not necessarily be evident from the categories used in the schedule. Behind possibly unrevealing labels will be a myriad of actions, messages, documents, statements, exhibits and other material generated by the original police investigation that will not simply be routinely disclosed. To get access to these materials and to construct an alternative narrative from them, the defence will need to make sense of the police investigation and its selective strategic choices and to begin to grasp the complex buried connections between what may appear to be very disparate facts. This requires knowledge and experience of how such investigations are conducted and documented - in particular of the relevant official protocols as to how such investigations should be conducted and recorded.<sup>18</sup> Only then can the defence appreciate any potential 'gaps' in the disclosed materials by knowing what should be there. CLSIP has needed access to expert pro-bono police advice to enable it effectively to interrogate police practice in this way.

The key to making sense of how an investigation has developed is to know how, and in what order, documents have been indexed. This is difficult for the defence because some critical documentation, such as the central, cross-referenced HOLMES Nominal Index, is not routinely disclosed (and certainly not in unedited form).<sup>19</sup> Defence solicitors have only limited access to HOLMES computer technology and only the more specialist firms use any kind of casework software. Furthermore, the format in which the schedule of unused materials is presented varies considerably and frequently does not contain important information such as dates: this makes it very difficult to understand the relationship

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<sup>18</sup> National Centre for Policy Excellence (CENTREX)/Association of Chief Police Officers (ACPO), Guidance on Major Incident Room Standardized Administrative Procedures 2005 (MIRSAP), [library.college.police.uk/docs/APPref/MIRSAP.pdf](http://library.college.police.uk/docs/APPref/MIRSAP.pdf) and Murder Investigation Manual 2006: [library.college.police.uk/docs/APPREF/murder](http://library.college.police.uk/docs/APPREF/murder) (both last accessed 17<sup>th</sup> October 2016).

<sup>19</sup> HOLMES (Home Office Large and Major Enquiry System) is a computer-based information management system and the Nominal Index lists the names of those who have come into contact with the investigation.

between events or facts. What makes things worse is that, in several cases, the CLSIP has found significant anomalies in the sequencing and organisation of documentation which do not make chronological sense and suggest incomplete, tardy and/or inaccurate indexing and perhaps re-indexing. Sometimes, for example, actions have been recorded as having taken place before the message on which the action was apparently based had even been received. For example, in one case an investigative Action was recorded as allocated at a specific time but the result of that Action was logged at an earlier time. In another, there was a record of a Senior Investigating Officer being informed of actions, which - according to the indexing - had not yet taken place. Of course, each and every one of these anomalies may be explained by incompetence, failure to follow established protocols, or simple error. But sometimes they raise suspicions that documents may have been substituted or removed or re-ordered.

The problem is that it is virtually impossible for defence lawyers, even if they are able to identify anomalies, to pursue and investigate these anomalies and tactically very dangerous to argue that the record has been constructed to support the prosecution hypothesis without some very precise evidence of who has done what and why. Without that, it will always be very provocative to run a trial defence on the basis of police construction of the evidence. In one case (Case 4) there was an absolutely crucial police message which described a suspect wearing a very distinctive item in a very particular way. The item concerned was found near the crime scene. The timing of this message was critical in that it provided apparently independent corroboration for exactly the same strange detail in a co-defendant's statement to police in which he incriminated the CLSIP client. But the relevant message was subject to a number of recording anomalies: it was not recorded in the Incident Log, it was not properly referenced on the schedule of unused material, and was not properly referenced or signed off by the Indexer. Indeed, the

reference on the message to its place on the unused schedule was incorrect. The message did not appear on the schedule at all and the corresponding number related to an entirely different message. Of course, given the importance of the message to the prosecution case, these kinds of anomalies raised questions about the integrity of the incriminating message. Might it have been created at a later stage in order to artificially strengthen the evidence? But it is virtually impossible for the defence to investigate such suspicions in the pre-trial process and it would be very dangerous to suggest police manipulation of evidence at trial without having proof.

The more general difficulty is that the time and expertise required to examine and cross reference all this material may prove simply too demanding for defence lawyers: the risk of missing an important piece of evidence (or the connection between two apparently unrelated facts within this mass of material) is considerable. What the CLSIP is able to do is to draw on a very considerable amount of time volunteered by students (organized into teams led by an experienced student team leader who is in turn supervised by the first author). They become used to trawling through the police interview transcripts, court documents, witness statements, expert reports and the other paperwork, tapes and videos that amass in a major investigation and lengthy legal process. In some cases, connections between facts have emerged from this detailed trawling that had apparently eluded the original defence lawyers.

Much of this involves developing a detailed understanding of the contexts and background to relationships in the case in order to understand how the prosecution narrative has been constructed. For example, where a suspect or co-defendant becomes a key witness for the prosecution, it may be important to develop a picture of the relationship between that person and the investigating team. This may suggest the testimony for the prosecution was the result of negotiations. In one CLSIP case (Case 5), close scrutiny of disclosed officers' reports on informant handling, prison visiting information and custody records revealed a

pattern of contact between witnesses, the informant and the police. This not only deviated from standard informant procedures but also involved certain suspects being dropped from the police investigation as well as significant rewards for the informant (time out from prison; moves from one prison to another). With a great deal of investment of time these links were traceable through the unused material, yet they had not been put before the jury by the defence at first instance. In another example, Case 3, a CLSIP client was convicted solely on the basis of telephone records linking him to a mobile phone used in the crime. However, close scrutiny by a student researcher of a mass of phone records eventually revealed that one of the co-defendants lived in the same cell site area and shared many of the contacts stored in the phone with the CLSIP client. In other words, the only incriminating evidence in relation to the CLSIP client – which was the presence of his friends and family members in the phone’s memory – was also equally applicable to a co-defendant. This had not been identified at trial and the co-defendant was acquitted on the direction of the Judge on the basis that there was insufficient evidence for a reasonable jury to convict him. The effect was that the CLSIP client had been convicted on evidence that was equally incriminating of the acquitted co-defendant. Moreover, that co-defendant had a very serious criminal record (whereas the CLSIP client had none) and, unlike the CLSIP client, he had been implicated in the case by certain witnesses. But the important point to emphasize is the difficulties that exist for defence lawyers in identifying all the relevant factual connections latent in the unused materials. The size and complexity of these materials is such that it requires the ability to put aside considerable amounts of time to know the files with sufficient precision and detail. There are real material constraints on the capacity of defence lawyers to do this under the increasing economic pressure of legal aid cuts: under the current graduated fixed fee system, solicitors get a sum based on the number of

pages disclosed, not the time taken to read them.<sup>20</sup> So for many solicitors struggling to make a profit from their criminal work, it is hard to invest lots of time on poring over disclosed documents and schedules of potentially disclosable materials. It has to be said that it may not simply be a matter of limited time and resources: generalist criminal solicitors only deal infrequently with not guilty pleas involving major large-scale investigations. In several cases CLSIP clients have felt that the inadequacy of their legal advisors' pre-trial preparation and representation at first instance was linked to inexperience in relation to major cases and have sought help from more specialist firms after conviction.

We have suggested that the capacity of the system to find facts accurately at first instance rests upon the assumptions identified at the start of the article. CLSIP experience suggests that in those cases where things go wrong it is often because those assumptions are not reflected in practice on the ground.

## **Part 2: CCRC and the Cardiff Law School Innocence Project**

In Part 2 we argue that the way in which the CCRC has responded to CLSIP applications suggests that its statutory review functions do not adequately compensate for the structural vulnerabilities in fact-finding identified in Part 1. The experience of the CLSIP – admittedly based on only a limited number of cases – is that it is only under very particular conditions that the CCRC will investigate relevant leads that might (or indeed should) have been pursued by the police or the defence. This suggests significant doubts as to whether the CCRC can provide an effective guarantee of the integrity and coherence of police investigations

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<sup>20</sup> F Garland and J Ewan J (2012) "Embracing the overriding objective: difficulties and dilemmas in the new criminal climate" 16 *International Journal of Evidence & Proof* 233 at 245, A Nurse (2013) "The client comes first: effective representation and investigation to prevent miscarriages of justice" in J Robins J (ed) *No Defence: Lawyers and Miscarriages of Justice* at 77

as an inquiry into truth and that all relevant evidence has been put before the fact-finder by the defence.

### **Responding to challenges to the integrity, coherence and completeness of police investigations**

The CLSIP experience is that arguing that the police investigation is selective in the narratives it has sought to construct will not be enough to prompt either referral or re-investigation. For example, where the CLSIP has suggested that the police may have been negotiating off the record with a co-defendant to secure his co-operation in actively constructing the case against its client, the CCRC commented simply that it saw no evidence of 'improper' pressure or influence (Case 6). The implication is that the strategic construction or targeting of investigations is not improper. As for suggestions that a police investigation may be incomplete because the police have made only cursory attempts to seek out witnesses where this might disturb the established police narrative (for example to investigate potential alternative suspects), the CCRC responded as follows in a Statement of Reasons<sup>21</sup> in Case 4:

"At the beginning of a major investigation the police will identify numerous lines of enquiry. As the investigation continues some lines of enquiry fall away before they are completed because the focus of the investigation can be narrowed in response to emerging evidence. Provided this process does not result in a valid line of investigation being lost, and all relevant information is disclosed to the defence during the trial process, there can be no criticism of the police handling of the case."

The problem is that without investigation of such alternative suspects it is not easy to know whether a valid line of investigation has been lost.

In applications, the CLSIP will often point to anomalies, undiscovered or unpursued by the police or defence, which seem to cast doubt on the prosecution theory of the case and therefore (in the CLSIP view) warrant

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<sup>21</sup> This refers to a document which sets out the CCRC reasons for not referring a case to the Court of Appeal

further investigation. Generally, the CLSIP has struggled to persuade the CCRC on this basis that further scientific investigations should be conducted, that witnesses should be (re)interviewed or reviews undertaken into aspects of the police investigation. The suggestion that the original investigation or presentation of evidence looks incomplete or superficial in certain specified regards, without a specific investigative act being competently conducted, is not of itself regarded as a sufficient reason for the CCRC to carry it out now. It might be different if the CLSIP could show that carrying out the requested investigative act was likely to provide positive concrete evidence that would undermine a significant element of the prosecution case and thus cast doubt on the safety of the conviction. But the difficulty for the CLSIP is that it does not have the powers, financial resources or access to the breadth of expertise necessary to conduct the investigations that it thinks the police or defence should have conducted: had it such resources it would have done so prior to the application to the CCRC. Therefore, it cannot say what the outcome of doing that further investigation would be likely to be. For example, in one case (Case 6) the CLSIP raised concerns about a person with connections to the case who had been implicated by certain witnesses but never apparently treated as a suspect. But when the CLSIP requested that he be investigated, the CCRC reaction was that there was no evidence to suggest that he was involved in the murder. The CLSIP reaction in turn was that investigation was needed exactly to find out whether there was further evidence against him.

In effect, the CLSIP feels that these leads should be pursued because, where there are doubts about the integrity of the investigation of a serious case, a full investigation into the truth should be conducted by the state. That of course reflects assumptions more associated with the inquisitorial tradition in criminal procedure. The CCRC does not see its role as extending to ensuring the adequacy of the investigation as a search for truth. That may be an understandable response to budgetary constraints and a limited statutory remit. But it means that we have no

external institution ensuring that we make good on the Runciman Commission's vision of the truth-finding police investigation.

### **Responding to failures of active defence investigation**

We have pointed out that one of the assumptions underpinning an adversarial theory of truth-finding is that it is for the defence independently to seek out and present the available exculpatory evidence. We have suggested that in the cases examined by CLSIP, this by no means always happens before the trial at first-instance. But where the CLSIP points to potential exculpatory evidence that has been left unexplored by the defence, it certainly does not follow that the CCRC will see it as its role to pursue the issues. Where an explanation is given for such refusal in its Statement of Reasons, there are two common elements to the response. First, that the evidence was available at the time of trial, therefore the issues raised are not new and could not therefore be the basis for a referral to the Court of Appeal. It is not therefore the CCRC's role to investigate them. Secondly, that the unexplored anomalies have not been shown to be likely to affect the safety of the conviction and therefore do not warrant further investigation. The effect of the first difficulty is that the truth-finding capacity of the system is to a very significant extent dependent on thorough and active defence investigation of potential exculpatory evidence before the first trial. Where that does not happen the defendant's legitimate interests and the truth-finding capacity of the system will be significantly and irrevocably prejudiced. The CLSIP will sometimes argue that an examination of the case papers by an expert working pro-bono suggests that specific investigative acts – such as the analysis of phone records (Case 6) – should have been conducted and therefore should be conducted by the CCRC. Often the CCRC will respond that it was open to both sides to have done whatever further analysis they chose before trial. The fact that they did not do so means this cannot form the basis of a referral now (because it is not new). If the CLSIP expresses concern about unrecorded meetings between the police

and original suspects (perhaps because followed by their immediate release and the arrest of those they incriminate), the CCRC response is likely to be that a challenge could have been made at trial to the admissibility of the statements, thus this is not a new argument and therefore cannot provide grounds for referral.

In effect, the adversarial preference for a one-shot trial leaves us with fact-finding that is based on a one-shot investigation: if there is anything to the points we have made in Part 1 about the structural limits to both police and defence preparedness and capacity to fully investigate exculpatory evidence then the CCRC does not see itself as being in a position to make up for such weaknesses.

The second common CCRC response to anomalies in the investigation - that they have not been shown to be likely to affect the safety of the conviction and therefore do not warrant further investigation - also suggests the limits to the capacity of the CCRC to respond to failures in pre-trial investigation. The CLSIP often feels that it has pointed to several significant weaknesses in the way the police investigation was conducted in cases where the evidence against the accused is a long way from overwhelming and potential relevant exculpatory evidence has not been pursued. The unease of the CLSIP about the conviction is often cumulative: it is not that this or that failing on its own calls the integrity and coherence of the whole investigation into doubt. Rather it is the combination of failings that creates that doubt. But this kind of generalised critique of the investigation is not what the CCRC wants to hear: it wants the CLSIP to identify a particular piece of evidence that was not available at trial that substantially undermines a significant element of the prosecution case.<sup>22</sup> Often it will respond in relation to each of a number of identified anomalies that they do not have any obvious implication for the safety of the conviction.

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<sup>22</sup> This is what Laurie Elks has described as the 'atomistic' approach: (L Elks (2010) "The Criminal Cases Review Commission: Time for a Review" 7 Justice Journal 6.

## **Responding to failures in procedures relating to disclosure**

Given the above, it is perhaps predictable that the CCRC should be very reluctant to take up arguments simply based on the lack of coherence of the police investigation as evidenced by the documentation available to CLSIP. The kind of thing that CLSIP has identified in various cases are discrepancies involving a Crime Scene Log which suggested that people had found items at times they were not present, police Actions apparently completed before they were issued, unsigned alterations to the exhibit list or the absence of an audit trail of movement of key exhibits. Again, often the CCRC response is to treat these as errors with no demonstrated implications for the safety of the conviction. This extends even to situations when CLSIP has identified what appear to be systematic failures to apply established MIRSAP protocols in relation to recording practices in operating the HOLMES computer system. The CCRC response has been that failure to comply with such protocols is not of itself malpractice and that, short of demonstrated wrong-doing, it is for the police to decide what recording practices best enable them to investigate the crime in question. For the CLSIP, the established police protocols exist to ensure and demonstrate the integrity of the investigation. Yet they do not seem to constitute enforceable expectations. This has implications for any suggestion that extensive rights to advance disclosure can put defence lawyers in a position to use prosecution materials to develop defence arguments. In order proactively to develop their lines of investigation and even to challenge the police investigation, defence lawyers need to be able to follow the detailed relationships between disparate facts, including those relating to the conduct of the investigation. Yet they may be presented with a mass of disclosed documentation that is incoherent, incomplete or contradictory. But arguments that MIRSAP protocols on recording major investigations have not been followed is unlikely to prompt re-investigation or referral by the CCRC. Thus, if (for example) the CLSIP points out that police records indicate that an Action has taken place before it has been allocated, the CCRC response is that that action

will not have been before the jury and thus cannot have influenced the verdict. More generally, incoherence or contradiction in the documentation of the investigation is a long way away from the kind of close connection that the CCRC wants between identification of specific new evidence and the undermining of a significant element of the prosecution narrative at trial.

## **Conclusions**

What our statutory provisions for appeal do not seem to do - even with the addition of the CCRC - is to offer general guarantees of the truth-finding integrity and reliability of the state investigation into the facts. The cases referred by the CLSIP project to the CCRC are based on investigations where close analysis of the documentation suggests significant doubts, uncertainties and contradictions. But the CCRC does not see its role as to systematically confront or resolve them after the normal appeal process has been exhausted. Instead a system still rooted in the assumptions of the adversarial tradition offers the defence an opportunity to present evidence orally before the jury at trial and to criticise the detail of the prosecution evidence. If at trial the defence fails to use the resources theoretically available to it in this regard, this can cause irreparable prejudice both to defence interests and the truth-finding capacity of the criminal justice system. Unless there is new evidence that was simply not available before trial, the system assumes that one first-instance defence opportunity to put forward an effective critique of the police investigation and to identify and present exculpatory evidence is enough. In their evidence before the Justice Select Committee, several representatives of innocence projects (and others engaged in investigating miscarriages of justice) expressed doubts about the capacity of the established criminal justice institutions to correct first-instance errors. CLSIP experience is based on a small number of serious cases where suspects continue to protest their innocence long after conviction.

These are unlikely to be a representative sample even of serious cases. Yet the failings in these cases relate to some critical assumptions about truth-finding: that the police will search for exculpatory evidence with the same zeal as they do inculpatory evidence, that defence lawyers will find relevant helpful evidence through active autonomous investigations or be able effectively to challenge the prosecution theory of the case with disclosed materials. In those cases where this does not happen at first instance, the experience of the Cardiff Law School Innocence Project suggests doubts as to about how well equipped our criminal justice system is to correct such flaws after conviction. These questions are likely to become even more pressing with growing financial pressures on both police resources and those of the legally-aided defence.