CCRC

Criminal Cases Review Commission

Independent review by Chris Henley KC of the CCRC's handling of the Andrew Malkinson case

Report & CCRC Response

Redacted Copy 29.5.2024

Contents

Introduction

1. On 10 February 2004, Andrew Malkinson was convicted of two counts of rape and one count of attempting to choke with intent to commit an indictable offence. On 24 January 2023, the CCRC referred Mr Malkinson's convictions to the Court of Appeal. This followed two earlier applications to the CCRC which were turned down in 2012 and 2020. On 26 July 2023, the Court quashed Mr Malkinson's convictions, handing down its judgment on 7 August 2023.

2. On 21 August 2023, the CCRC announced that it had commissioned Chris Henley KC to carry out an independent review of its handling of Mr Malkinson's case. The Terms of Reference are included below.

3. On 26 October 2023, the Lord Chancellor announced an independent inquiry into the miscarriage of justice suffered by Mr Malkinson. The Andrew Malkinson Inquiry is chaired by Her Honour Judge Sarah Munro KC. An unredacted copy of this document has been provided to the Inquiry.

4. The CCRC is grateful to those who have contributed to Mr Henley's review, including Mr Malkinson, and to Mr Henley for the considerable time and attention which he has given to the review.

5. This document contains the Terms of Reference, Mr Henley's report and the CCRC's response to Mr Henley's recommendations.

6. Individual names and roles have been anonymised as far as possible. Commissioners and employees of the CCRC are referred to as P1, P2 and so on; those external to the CCRC are referred to as E1, E2 etc. Witnesses have not generally been anonymised, unless it would otherwise lead to identification of the victim; an alternative suspect is referred to as Mr B. More details are provided with the key on page 124.

7. Mr Henley's findings are necessarily limited to this case. Nevertheless, we hope that by learning the lessons of the report and implementing Mr Henley's recommendations, in addition to any recommendations that may in due course be made by the Andrew Malkinson Inquiry, we will enhance our ability to find, investigate and refer miscarriages of justice. We are committed to doing so.

8. At the request of the Crown Prosecution Service and Greater Manchester Police, some of the information in this report has been redacted to avoid creating a substantial risk of prejudice to any ongoing investigation or

potential prosecution, and any future defendant's right to a fair trial. Redactions were finalised with the CPS and GMP on 28 May 2024.

Apology

"Mr Henley's report makes sobering reading, and it is clear from his findings that the Commission failed Mr Malkinson. For this, I am deeply sorry and wish to offer my sincere regret and an unreserved apology on behalf of the Commission.

I want to assure everyone of our commitment to learn from this. Mr Henley's report includes nine recommendations, and the Commission has already begun work to implement them.

Nobody can begin to imagine the devastating impact that this wrongful conviction has had on Mr Malkinson's life, and I am deeply sorry for the additional harm caused by our handling of the case.

On behalf of the Commission, I offer my deepest regret."

Helen Pitcher OBE

Chairman

Terms of Reference

9. The Terms of Reference for Mr Henley's review are reproduced below.

Terms of Reference

Review of the CCRC's Handling of Andrew Malkinson's Case

Context

1. On 26 July 2023, the Court of Appeal quashed Mr Malkinson's convictions for rape and his sentence of life imprisonment. On 7 August 2023, the Court published its judgment.[1]

2. The convictions were quashed on grounds relating to new DNA evidence and undisclosed material recovered from police files.

3. The CCRC had referred the case following a third review. Concerns have been raised about the investigative strategies in the two previous reviews that had resulted in refusals to refer, the length of time taken and the quality of the decisions made.

4. On 17 August 2023, the CCRC decided that a review of the handling of the case would be led by an external KC.

Purpose

5. The review will consider the conduct of the CCRC's three reviews.

Format

6. A KC will be appointed to conduct the review. The KC will have a blend of prosecutorial and defence experience as well as senior

[1] Malkinson -v- R (judiciary.uk)

standing within the profession and availability to complete work within a reasonable timeframe.

7. The KC will have sole responsibility for making findings and recommendations as well as drafting a report to the CCRC Board.

Key Considerations

8. The CCRC considers that the KC should have a wide scope for comment. The KC should seek to address the investigative decisions made in each of the three reviews. It is anticipated that considerations will include:

    i. The decisions not to obtain the police file.
    ii. Opportunities and decisions relating to DNA work.
    iii. Criticisms and concerns raised in the media.
    iv. Other observations, learning points and recommendations.

Sources of Information

9. The KC will have full and open access to all of the case material held by the CCRC.

10. Requests are being made for files held by the courts, police, CPS and forensic scientists. Again, the KC will have full and open access to all of the material provided by these agencies.

11. Additionally:

    i. Commissioners and CCRC staff involved in the reviews and who are still in post may be asked questions by the KC.
    ii. The KC may ask Independent Non-Executive Directors to share their experience of governance and scrutinising the organisation.
    iii. Consideration can be given to contacting individuals who were involved in the reviews and have since left the CCRC.

Resources and Budget

12. The following arrangements will be made:

    i. Kings Counsel at a day rate to be agreed with Chambers.[2]

[2] Commercial figure to be shared with the Board.

ii. Operational and administrative support to be provided as required from within existing CCRC staffing.

Accountability, Output and Timescales

13. The KC is to provide a report to the CCRC Board.

14. It is envisaged that the full report will be shared with the Lord Chancellor's office and the findings made public.[3]

15. Periodic updates on progress are to be provided to the CCRC Board by the KC.

16. The full report is to be provided by 24 October 2023 and earlier if possible.

21 August 2023

[3] Personal data and sensitive information would be redacted in line with any legal constraints or privacy issues.

Mr Henley's Report

10. Mr Henley's report dated 5 April 2024 is reproduced on the following pages.

11. At the request of the Crown Prosecution Service and Greater Manchester Police, some of the information in this report has been redacted to avoid creating a substantial risk of prejudice to any ongoing investigation or potential prosecution, and any future defendant's right to a fair trial.

INDEPENDENT REVIEW OF THE CRIMINAL CASES REVIEW COMMISSION'S HANDLING OF ANDREW MALKINSON'S CASE BY CHRIS HENLEY KC

CONTEXT AND TERMS OF REFERENCE

On 26th July 2023 the Court of Appeal quashed Andrew Malkinson's convictions for two offences of rape, and one offence of attempting to choke with intent to commit an indictable offence, namely rape. He had been sentenced on 30th March 2004 to life imprisonment with a minimum term of 7 years (less the days already served on remand) but spent 17 years in prison before he was released, throughout which time he steadfastly maintained his innocence. It had taken 20 years to put this appalling miscarriage of justice right. The serious failings, particularly in relation to disclosure but not limited to this, which caused Mr Malkinson's wrongful conviction in the first place, and the unconscionable time it took for his convictions to be quashed, are the subject of a number of inquiries, the highest profile and widest ranging of which is the Andrew Malkinson Inquiry chaired by HHJ Munro KC. The Criminal Justice System failed Mr Malkinson and he is owed the clearest possible explanation for the mistakes made which have cost him so dearly.

I have been asked to review the role of the CCRC in this case. An effective CCRC is fundamental both to collective public confidence in our Criminal Justice System's ability to identify and overturn wrongful convictions but, perhaps at least as importantly it is essential that there is a vigorous, rigorous, well-resourced, organisation that the wrongly convicted can turn to and have full confidence in.

Mr Malkinson made three applications to the CCRC in 2009, 2018 and 2021 to use its statutory powers to refer his case back to the Court of Appeal. The first two applications were refused. The third application resulted in a referral back to the Court of Appeal in January 2023, and ultimately the successful appeal hearing on 26th July 2023. My task is to review all the work undertaken by the CCRC during their consideration of the three applications, the quality of the decisions made, the investigative strategies, and the length of time taken to reach conclusions.

Specifically, I am asked to look at:

i) The decision not to obtain the police file;

ii) Opportunities and decisions relating to DNA work;

iii) Criticisms and concerns raised in the media;

iv) Other observations, learning points and recommendations.

I have been provided by the CCRC with all relevant material in relation to each of the three applications made by Mr Malkinson, as well as internal case records. The internal case records provide a real time record of the steps taken, all the relevant correspondence, including e-mails and notes of telephone calls, notes of internal discussions, the questions raised, the conclusions reached, and the decisions made, and they identify who within the CCRC was responsible each step of the way. I have seen initial drafts and the final version of the 'Statement of Reasons' for each application, which is the formal document provided to an applicant explaining why the decision made, to refer or not to refer, has been reached.

I have received and reviewed the CPS file for the case, the Court of Appeal file and the Court of Appeal judgments from 2006 and 2023, the Crown Court file for the 2004 trial, the 1018 page defence solicitors' file, the Greater Manchester Police file, and statements and other material from the forensic scientists who conducted the scientific testing of DNA material throughout the life of this case from the early stages of the investigation through to the time of the 2023 referral to the Court of Appeal. I have met with Mr Malkinson and his legal team at 'Appeal' and have received and considered 67 pages of written submissions from them setting out their position on the CCRC's handling of Mr Malkinson's case, together with appended supporting documents. I have spoken to several current and former employees of the CCRC, to obtain both an overview of the evolution of the organisation and its processes, but also to speak to one of the original case review managers who had charge of the first application and his group leader. I had

wanted to speak to the CCRC Commissioner who had ultimate oversight and decision-making responsibility for the first application, but for reasons he explained in writing he didn't feel able to participate in this review. I was also very keen to speak to one of the principal forensic scientists, E1, who played a key role in providing a strong, CPS/GMP Redaction ----------CPS/GMP Redaction---------- , steer to the CCRC in relation to developments in the DNA information at the time of the first application, and the early stages of the third application (which is set out with my conclusions later in this report). However, E1 has been advised by the CPS not to meet with me because of a perceived risk of negatively impacting the ongoing investigation ----CPS/GMP Redaction----. I do not accept that this is a real risk, or a risk that could not be managed. I anticipate the same issues that I was interested in pursuing with E1 are ones which the Andrew Malkinson Inquiry will likely also wish to pursue.

I would like to express my gratitude to Amanda Pearce, Director of Casework at the CCRC, and John Curtis, the CCRC's In-House Counsel, for their time, openness and support on a wide range of issues, including facilitating meetings and access to material. I would also like to thank Alex Simpson-Vince, Head of Information Governance at the CCRC for his technical support.

There are surely many lessons to be learned from this dreadful case. This case exemplifies, once again, the fundamental importance of full and transparent pre-trial disclosure of all relevant material to the defence, to ensure the integrity of the trial

process. It also provides a lesson about the very strong emotional pull of identification evidence, not only on a jury but also on legal professionals and Judges, and its fallibility, even when it comes from multiple witnesses, which is so difficult to assess. The profoundly mistaken verdicts in this case underscore the danger of relying on identification evidence in the absence of any other independent supporting evidence, as other miscarriage cases have before. Perhaps above all, this case demonstrates a deep-seated, system-wide, cultural reluctance, which starts right at the top in the Court of Appeal, to acknowledge our Criminal Justice System will on occasion make mistakes, that entirely innocent defendants will sometimes be convicted, and have this possibility at the forefront of our collective mind when trying and reviewing cases – this is no more than being faithful to the presumption of innocence, the guiding principle of our system of justice, which we all subscribe to. It is not by any standard a success, or a demonstration that things are working properly, that Mr Malkinson had to wait 20 years to be exonerated.

It is perhaps, also, important for me to state at the outset that I have reviewed the CCRC's work only on this one case. Therefore, whilst I do make severe criticism of significant shortcomings and flaws in the CCRC's work on this case, particularly in relation to the first application, my findings are necessarily limited to this case. Nevertheless, I have made a series of recommendations at the end of this report which I believe will, if fully implemented, make it much less likely that things could go as badly wrong for current and future applicants as they did for Mr Malkinson.

INTRODUCTION – OFFENCE, INVESTIGATION, CHARGE AND TRIAL

Offence

1. On 19th July 2003 a young woman (who I will refer to as C, as the 2023 Court of Appeal did) was attacked and brutally raped as she walked to her home in the early hours of the morning. C was forced through a fence, down an embankment, restrained on the ground, straddled, choked to loss of consciousness, and then, whilst unconscious, she was raped both vaginally and anally. During the attack she was severely beaten, suffering a partially severed left nipple, ---------CPS/GMP Redaction-----, a fractured cheek bone, with extensive bruising to her face, as well as other areas of bruising to her neck, forehead and elsewhere, and other cuts and bruises all over her body. There were other injuries consistent with recent sexual assault.

2. When she regained consciousness, her pants had been pulled right down and were round her right ankle, she was still wearing her denim skirt which was slightly hitched up, one arm of her cream/beige fleece was not in its sleeve, ----------CPS/GMP Redaction----------. None of her jewellery was missing. Beneath the vest top C was wearing a white bra. ----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction-----.

3. When she regained consciousness C managed to climb back up the embankment ----------CPS/GMP Redaction----------, through the fence at the top and onto the road. She told the first person she came across, Philip Coucill, who was out walking his dog, that she had been attacked and raped – '*I asked him to call the police and told him I had been raped. The man lived a short distance away and took me to his house where he called the police*' (C's witness statement dated 20/07/03). When she had become aware of being followed, prior to the attack, she had texted her boyfriend. Her final text to him, in which said she was scared about a man's threatening behaviour, was timed at 04.26. Mr Coucill put the time of his first seeing her at shortly after 05.30.

4. C did not know her attacker but was able to provide the police with a general description of him: his approximate age, general build and height, hair colour and length, his having a local accent (----CPS/GMP Redaction--) and the fact that he had a shiny hairless chest; he was wearing a fully unbuttoned white collared shirt which he had removed as he was attacking her. C also told the police that just before she lost consciousness, believing she might be about to die, she had reached out with her left hand and caused him a deep scratch to the right-hand side of his face, across his cheek from just below the eye to the tip of his jaw. In her witness statement, and in her evidence at trial, she reported that she dug her nails into her attacker's face with such force that it had caused the nail to the middle finger of her left hand to break off – '*the nail on the middle finger of my left hand snapped off……..I have caused a deep scratch in the man's face*' (C's Witness Statement dated 20/7/2003).

Investigation

5. The following afternoon two local officers, PC Baybutt and PC Waite, were asked to attend the scene of the attack on C, which was still being forensically examined. They were given details of the description of the offender provided by C as part of the briefing process. In response to being given the description they both named Andrew Malkinson as a potential suspect, who they had recently stopped and

spoken to on 14th June, on a motorbike, about a mile and a half away from the crime scene.

6. On the morning of Sunday 20th July PCs Baybutt and Waite went to the Security Office, at the Ellesmere Shopping Centre where Mr Malkinson was working as a security guard. They recognised him from the stop on 14th June and had '*a brief conversation*' with him (statements of PC Waite and PC Baybutt both dated 03/2/2004). This was within about 30 hours of the attack. They saw no injuries to any part of his face. PC Baybutt returned to the office a few days later and spoke to Mr Malkinson's manager, Darren Embury, to ask if he could provide a photograph of him. No photograph of Mr Malkinson was immediately available, but a few days later Mr Embury brought a photograph of Andrew Malkinson to Little Hulton Police station and left it for PC Baybutt's attention.

7. On Saturday 2nd August 2003 at 08.15 Mr Malkinson was arrested at a Salvation Army Hostel in Grimsby on suspicion of the attempted murder and rape of C. His response to his arrest was '*It's ridiculous. I've been working over there as a security guard*' (statement of DC Pattison dated 02/8/2003).

8. He was taken in custody to The Crescent Police station in Salford, Greater Manchester where he was interviewed the same day from 19.10 until 19.48 in the presence of a solicitor. He was further interviewed the following day, Sunday 3rd

August, from 13.01 until 13.46, then again at 14.33 until 15.18, and finally at 15.22 until 15.31. He answered all questions, and repeatedly denied any involvement in the attack on C.

9. Between the first interview on the Saturday and the three interviews on the Sunday two identification procedures took place. An officer, PC Twiss, was present and in charge of working the equipment for both parades. Mr Malkinson's solicitor assisted in the making of the selection of the eight additional images to be shown to the witnesses. Mr Malkinson's image was at position 4 in the sequence. The first witness who took part in an identification procedure, which occurred at 00.43 on 3rd August 2003, was C. She made a positive identification of number 4, Mr Malkinson, as her attacker.

10. The second witness was a member of the public, Beverley Craig (BC), who told police she was the front passenger in a car which drove past the scene of the attack at the relevant time, and who said she had seen a man, with a fully unbuttoned white shirt, and a woman ahead of him, to whom for reasons explained in her statement, she paid some attention. Her descriptions were consistent not only with the appearance of C but also of the man C had described as her attacker, particularly because of what she had said about the appearance of the shirt. Beverley Craig provided a formal statement to police on 28th July 2003. She participated in the

second identification procedure which commenced shortly after the first parade at 01.01.

11. Both C and Beverley Craig had been brought to the police station together in the same police car. In the identification suite she identified the image of one of the volunteers at position 1 as the man with the unbuttoned white shirt she had seen in the early hours of 19th July. However shortly after leaving the suite Craig said she had changed her mind and commented to PC Twiss, who accompanied her out of the viewing room, that 'it must have been number four'. No written record was made of this change of Beverley Craig's mind at the time, and there was no reference to a positive identification being made by her in the later interviews with Mr Malkinson; he was told only that C had identified him. PC Twiss did not make any contemporaneous note of what had happened and did not provide his statement which included details of BC's change of image selection from image 1 to image 4 until 11th September, more than a month later. Beverley Craig never provided a statement setting out the circumstances and reasons for the change to her identification. Nevertheless, at trial Beverley Craig's evidence was that she was sure that it was the man at position 4, not position 1, who she had seen in the early hours of 19th July 2003.

12. For completeness in relation to identification evidence, Michael Seward, Beverley Craig's partner, who had been driving the car in which she was the front seat passenger, also attended an identification procedure but not until 14th January

2004, six months after C was raped. He also made a positive identification of Mr Malkinson, whose image was positioned at number 6 in the sequence on this occasion, as the man he had seen. The significant delay in Seward's attendance for the identification procedure was never adequately accounted for. It should also be noted at this stage that important information bearing upon Beverley Craig's and Michael Seward's credibility ie that they both had multiple criminal convictions for offences of dishonesty, that Seward was a heroin user, and at the time of the identification procedure he participated in he had just been released from custody having been arrested on a warrant, were not disclosed at the time of the trial, and did not become known to those representing Mr Malkinson until almost 17 years after his conviction. Both had been characterised at the trial as 'honest' witnesses doing their best (see Summing Up paragraphs 17 and 26).

13. In Mr Malkinson's first interview, he answered all questions. At the outset he emphatically denied being the man who had attacked C – '*I'd like to comment that I know absolutely nothing about any kinds of attacks or any crimes on this date and its absolutely nothing to do with me*'. He agreed to stand on an identification parade and said he '*would be very happy to supply samples*' for DNA purposes. At the conclusion of that first interview he maintained his innocence and '*expressed his understanding of the serious nature of the matter and his wish to assist with the investigation'*. The next thing that happened was the identification procedures involving C and Beverley Craig took place.

14. In the second interview he confirmed that he understood that he had been identified by C, the victim. When asked if he had any comment he said '*My only comment to you sir is that I believe it's a mistaken identity. I know I did not do these offences and I feel that in due course when the DNA Tests come back I will be vindicated totally*'.

15. In his third interview he referred to an incident on 25th July 2003 when he had been threatened at his place of work by DH, a person he had previously been staying with, because of a dispute over money. He had contacted the police about the threats the same day and had been visited by police officers '*at hom*e' later that evening (police records confirm this). He also explained that it was that night after he had spoken to the police that he had decided it was time to leave the Manchester area. He wasn't enjoying his job at the shopping centre and the dispute with DH and her family was '*the final straw*'. He ended up in Grimsby, where he was arrested, which is where his mum lived. The detail of the allegation was put to him. He repeatedly denied being the person who attacked C – '*I'd like to say all of these events have nothing to do with me*'. He also said he did not have any scratches to his face on 19th July and suggested the possibility of video evidence from the Ellesmere Centre or speaking to staff there to confirm the absence of any scratch injury.

16. In the fourth and final part of the interview he again said the identification must have been mistaken, and that the attacker '*possibly looks similar to me….I reiterate*

when the DNA samples come, the results, I will be vindicated cause I know I'm innocent'. No reference in any of the interviews was made to the change to a positive identification by Beverley Craig after she had left the room. It is clear from the contents of the very detailed statement prepared by Mr Malkinson's original solicitor, E3 of Burton Copeland, who was at the police station on the 2nd/3rd August to advise Mr Malkinson and assist in the selection of the images shown that night to the witnesses, he was not informed of Beverley Craig's later change of image choice from image 1 to image 4 (Malkinson). He did however record serious concerns that 'C' and Craig had arrived together in the same police car (in apparent breach of the rules set out in Annex A, para 10, Code D of PACE). He also noted Mr Malkinson's '*adamant*' denials that he had anything to do with the offence, and how he was 'sure' he would not be identified. Mr Malkinson was '*very, very distraught and upset* [at] *the news that there had been a positive identification'* (Trial Defence Files p354 to 358, Statement of E3).

Charge

17. At 16.56 on Sunday 3rd August 2003 Mr Malkinson was charged with rape, to which he replied '*I am categorically totally in every shape or form, innocent of this allegation*', and attempted murder, to which his response was '*Absolutely not guilty*'. At the time of his charge the only evidence against him that he knew about was the

identification of him by C. A statement dealing with Beverley Craig's identification would subsequently be provided by PC Twiss on 11th September 2003. Later, on 14th January 2004, just 3 weeks before trial Michael Seward also positively identified Andrew Malkinson as the man in the open white shirt, he had seen from his car in the vicinity of the crime's location at the relevant time. But there was nothing else. No other evidence supported the correctness of the identification evidence.

The 2004 Trial

18. The trial of Mr Malkinson commenced on 2nd February 2004. There had been a very recent change of solicitors representing Mr Malkinson (only confirmed on 8th January), and he met his barrister for the first time at Wakefield prison on 19th January. I have seen telephone attendance notes of calls from Mr Malkinson to his new solicitor, and a letter written by him dated 28th January 2004 (the day following his second conference with counsel) in which he says that they are not properly prepared and urges an adjournment of his trial – '*We need more time. Much more*' and '*I know for a fact that whilst I've been here, other guys on the same remand wing, just prior to their trials, were visited on an almost daily basis*' (p463 of 1018 Trial Defence Files). No application was made for an adjournment of the trial.

19. In the early stages of the trial the Judge refused applications to exclude the identifications of Mr Malkinson made by Craig and Seward ruling that the issue with Craig's change in selection of the image after leaving the room, and the 6 months delay in Seward attending a VIPER procedure went to their weight not admissibility (copies of both written rulings are in the 'Other Review Docs' section of the 2009 application file). Both Craig and Seward gave evidence and were briefly cross-examined, essentially on the basis that they had made the same mistaken but honest identifications. (NB: A comprehensive list of arguable code D breaches relating to the way in which the parades were arranged and conducted were set out in detail in Mr Malkinson's second application to the CCRC in 2018. Few of them were raised as part of the objections made to the admissibility of the identification evidence at the trial. Putting to one side whether it might have made a difference to the outcome of the applications to exclude, the absence of reference to the multiple breaches subsequently identified as part of the second application to the CCRC provides some support to Mr Malkinson's complaint in 2004 that there had been inadequate preparation of his case).

20. A letter marked 'very urgent' had been sent to the CPS on 22nd January 2004 asking '*Please supply copies of the previous convictions, if any, of <u>all</u> civilian witnesses'* and asking for confirmation that a police officer had attended Mr Malkinson's then address on 25th July 2003 to deal with a complaint about threats he had received (he had raised this matter in his third interview but now was asking for formal

confirmation). Full previous convictions were provided in relation to other prosecution civilian witnesses but nothing in relation to convictions was provided for either Beverly Craig or Michael Seward.

21. The state of the DNA evidence at the time of the trial was extremely limited, lacking in probative value either way to the issue of whether Andrew Malkinson had been correctly identified. Amongst the items of clothing and swabs taken from C the only item that produced any result was an area of staining to the left upper front of C's vest top, ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. Nevertheless, at that stage low copy DNA testing produced no DNA profile from this area of the vest top. In the statement of E2, the first forensic scientist involved in the case, dated 24th September 2003, he reported that '*the DNA profile* [from the upper front of the vest top] *is very incomplete and contains very little information, however there is sufficient to say that there is DNA from two sources. If it is assumed that* [C] *has contributed to this profile then there is a single piece of information*

relating to DNA from the other source. Andrew Malkinson could be the source of this DNA. However the occurrence of this trace of DNA is estimated as 1 in every 2 individuals', so 50% of the population. Effectively, this result flagged the presence of DNA from another individual but provided no meaningful indication as to who that could be. No reliance was placed on this finding and the jury were told by the Judge in the summing up that '*This is not a case where the identification evidence is supported, for example, by forensic evidence, because in this case, there is no such evidence'.*

22. It is worth noting at this stage that whilst no usable DNA profiles were obtained from the items examined by E2, he attempted to obtain profiles from the nail cuttings and scrapings from the left hand (MA12), a swab from the left side of the neck MA17, --CPS/GMP Redaction---from the left cup of the bra ST3, which, like the vest top ST5, produced a trace of DNA from a second individual. These were the samples which years later would yield sufficient DNA profile information, as a result of advances in DNA testing techniques, to exonerate Mr Malkinson, and implicate another suspect whose DNA profile provided a match.

23. Mr Malkinson gave evidence on 6th February 2004, and whilst he agreed he had the theoretical opportunity to have committed the offence simply by reason of living nearby and his relative physical strength, he repeatedly denied having anything to do with it. He also denied owning a full buttoned, long sleeve white shirt, a fact

confirmed by the civilian witnesses called by the prosecution who he had lived with in the weeks prior to the attack. The jury retired to consider their verdict on Monday 9th February at 13.24. At 16.35 on 10th February 2004 Andrew Malkinson was convicted, by majority verdict of 10 to 2 of three offences: attempting to choke, suffocate or strangle with intent to rape (count 2), vaginal rape (count 3), and anal rape (count 4). He was acquitted of attempted murder (count 1).

Sentence

24. On 30th March 2004 he was sentenced to life imprisonment with a minimum term to be served of 7 years less the days already served in custody (which produced an adjusted figure of 6 years 125 days). A psychiatric report had been ordered by the Judge prior to sentence. When Mr Malkinson was interviewed by the Forensic Psychiatrist '*he denied that he had anything to do with the alleged offences on 19 July 2003. He told me that he would not be capable of committing such offences. He told me he greatly disapproved of the offences*.' (Para 11.1). The psychiatrist made the unsurprising comment that '*the man who committed the offences on 19th July 2003 would pose serious risk of future sexual offences and possibly other offences on the basis of the nature and severity of the assault'* but about Mr Malkinson, having assessed him in two meetings and having reviewed his personal and psychiatric history, the psychiatrist concluded '*If I was to leave aside the incident on 19th July*

2003 I would not be able to find other evidence that Mr Malkinson poses a risk of future sexual or violent offences' (para 15.2).

THE FIRST APPEAL 2006

25. Mr Malkinson appealed against both his conviction and sentence. The Grounds of Appeal were settled on 18th February 2004, prior to sentence, to comply with the 28 day time limit. On 7th July 2006 the appeal was heard and dismissed in both respects by the Court of Appeal in robust terms. The Court of Appeal rejected submissions that the Judge's summing up was (i) unbalanced and read as a second prosecution speech, (ii) that he had failed to direct the jury adequately on the dangers of unsupported identification evidence, and (iii) that his comments about the reliability of C's recollection about scratching her attacker's face – Mr Malkinson's face had no scratch injury - glossed over a significant difficulty in the prosecution case – '*we do not think the judge's comments went beyond what was permissible*' (para 31, 2006 Court of Appeal Judgment). In dealing with this last point the Court of Appeal misstated the hand C said she had used to scratch her assailant's face, suggesting that it had been with her right hand (C had said in the most unequivocal terms that it was her left).

26. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------
----------CPS/GMP Redaction----------CPS/GMP Redaction----------
---------CPS/GMP Redaction----------CPS/GMP Redaction----------
--------CPS/GMP Redaction----------CPS/GMP Redaction----------
-------CPS/GMP Redaction----------CPS/GMP Redaction----------
------CPS/GMP Redaction----------CPS/GMP Redaction----------
-----CPS/GMP Redaction----------CPS/GMP Redaction----------
----CPS/GMP Redaction----------CPS/GMP Redaction----------
---CPS/GMP Redaction----------CPS/GMP Redaction----------
--CPS/GMP Redaction----------CPS/GMP Redaction----------
-CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction---------- However, I note that not only was this a 10-2 majority verdict by the jury (so two members refused to convict) but that during their retirement, they had asked specifically to be reminded again of the Judge's direction to them about how to approach the issue of the absence of a scratch to Mr Malkinson's face. This was plainly an issue of real concern to the jury.

27. The Court of Appeal (in 2006) rejected every argument against the safety of the convictions advanced on Mr Malkinson's behalf, finding that he had been convicted '*on compelling evidence*'. They found all the verdicts were safe and having heard C give evidence on a discrete point in relation to potentially fresh evidence, concerning the possible contamination of swabs producing false positives for the presence of condom lubricant on C's pants, determined that '*we have no doubt that if the jury had this fresh evidence before it, it would have reached the same* [guilty]

conclusion'. The Court also upheld the life sentence and its terms stating that '*this was one of the most serious cases of this type'*.

JULY 2009: THE FIRST APPLICATION TO THE CCRC – A FULL FORENSIC REVIEW?

28. On 21st July 2009 the Criminal Cases Review Commission received an application from Stephensons solicitors, the new firm acting for Mr Malkinson, asking for a review of his case. The main submission being made on Mr Malkinson's behalf related to the lack of forensic evidence – '*The most compelling issue in this case is the lack of forensic evidence* [against Mr Malkinson]' (p5, Submission to the CCRC 21 July 2009). The jury at the 2004 trial had been directed that the case against Mr Malkinson depended wholly on the correctness of the identification evidence (see Summing Up paragraph 25). The jury was told there was no forensic evidence available which supported the identifications. Importantly, Stephensons' written submissions to the CCRC referred to new DNA test results. Matters had come to light, unconnected to this case, casting doubt on the efficacy of some of the scientific testing that had been undertaken during this period and as a result there had been a wholesale re-testing process undertaken by the Forensic Science Service (FSS) of all potential DNA samples collected between 2000 and 2005 which had failed to produce useable results. This nationwide retesting exercise was known as 'Operation Cube'. As part of the Operation Cube retesting initiative the samples that had been obtained for DNA analysis in this case were retested.

29. In their application Stephensons drew attention to the fact that the retesting in 2007, by E4 of the FSS, of cellular material from C's vest top (ST5) had produced a new and much improved DNA result (E4's statement dealing with this is dated 20th December 2007). The retesting produced a mixed result showing not only the presence of a DNA profile matching C, but also a searchable partial profile for another person. The source of this new DNA profile could not have been C's boyfriend or Andrew Malkinson, both of whose DNA profiles were compared to the new result and excluded for being the second contributor. The cellular material which had produced the new result was taken from the area of staining on the left upper front of C's vest top in 2003, ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. This was presumably why a swab was taken from this area in the first place. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

30. The application also raised a number of ancillary points including (i) possible contamination of the original swabs used for obtaining the original samples which might have produced false positives for the use of a condom, an issue which had been dealt with by the Court of Appeal in 2006 and ultimately had no merit, (ii) the

possible existence of CCTV evidence – there was none which might have assisted, (iii) cell site evidence relating to post-offence use of C's 'stolen' phone – there was no evidence of any subsequent use of her phone, (iv) concerns about the crime scene and the handling of certain items belonging to the complainant; ---------- CPS/GMP Redaction----------CPS/GMP Redaction-----. These ancillary issues fell away, and so it was the new DNA result which the determination of this first application to the CCRC centred upon.

31. The application asked for a '*full review'* of the forensic evidence in the case and also suggested that the identification evidence was '*highly unsatisfactory*', in contradistinction to the Court of Appeal's conclusion in 2006 that it was '*compelling*'. It must logically follow that if the conclusion from the new DNA evidence was that the offender might not be Mr Malkinson, then it would also follow that identification evidence might be unreliable too, and therefore would warrant further scrutiny. The one impacted on the other. However, if the DNA donor could be identified and excluded as possible offender, then the new result could be discounted as having any impact on the correctness of the identification evidence.

Setting the context for consideration of the CCRC's handling of the 2009 Application

32. Before looking at the way the CCRC handled this application (by the two Case Review Managers, 'CRMs', who had the main conduct of this application, the Group Leader who oversaw their work and the Commissioner who was the ultimate decision maker) it is necessary to make some general points. The first matter to have at the forefront of one's mind when reviewing what happened is the test which the CCRC must apply to every application which raises new or 'fresh' evidence that was not known about and could not reasonably have been known about by the defence at the time of the trial. The test which should be applied is set out in section 13(1)(a) of the Criminal Appeal Act 1995 – '*a reference of a conviction, verdict or finding or sentence shall not be made… unless the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference made*'. This is more commonly known as 't*he real possibility test*'; The Court of Appeal will quash the conviction if the Court concludes the jury's verdict might have been different if they had heard the new evidence, because of its potential significance, and thus the conviction can no longer be regarded as safe. On occasion this might necessitate a re-trial at which the new evidence will be heard, along with the original evidence, by a fresh jury.

33. In 2006 the Court of Appeal said that they had heard nothing at that appeal hearing that could '*vitiate what must have been a clear finding by the jury, <u>on compelling evidence</u>, that the appellant had attacked* [C]'. This was in very sharp contrast to what was said by the Court of Appeal in 2023: by then new DNA evidence had come to

light implicating another man, -------CPS/GMP Redaction---. When this new evidence was put before the Court of Appeal in 2023 their conclusion was that the 'new' DNA evidence, '*clearly shows the convictions to be unsafe*' (para 54, line 8 of the 2023 Judgment). Further, the Court also separately found that had there not been a failure by the prosecution, specifically by GMP, to disclose photographs of C's hands, ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ---------). The appeal was allowed on this ground too. Finally, the Court of Appeal also found that had the prosecution, again specifically GMP, not failed to disclose to the defence the previous criminal records of Beverly Craig and Michael Seward, who were as a result misrepresented as honest, civic minded witnesses, whose motives could be trusted without reservation, the jury's verdicts might have been different – '*In our judgment, the challenge to the character and credibility of those two identifying witnesses would have been capable of affecting the jury's overall view as to whether they could be sure that the appellant was correctly identified*' (para 70, lines 4 & 5, of the 2023 Judgment). The test is therefore clear. The test does not require an applicant to prove his innocence to the criminal standard, it requires new evidence that might have affected the jury's decision.

34. Second, prior to the emergence of the new DNA evidence this was a case that relied wholly on the correctness of the identification evidence. The Court of Appeal in 2006 had described the ID evidence as '*compelling*'. Nevertheless, this did not mean that the test for referring the case back to the Court of Appeal was set any differently to any other case. If there was new evidence which necessarily called into question the correctness of the identification evidence this needed to be considered with care, following through on the potential implications of it with an open and critical mind, and acted upon as urgently as possible given Mr Malkinson was serving a life sentence. The question always being 'might the jury have reached different verdicts had they heard the new evidence, notwithstanding the identification evidence'.

35. Third, this was an extremely brutal sexual assault. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction, The Senior House Officer in the A & E Department at the Bolton Royal Infirmary, who examined C shortly after 06.05am on 19th July 2003 documented the injury in this way, '*the nipple on the left breast was partially avulsed (hanging off) and actively bleeding'* (Injury 6, statement of Dr RP, p75 prosecution witness statements). C had also been choked to unconsciousness; she described her attacker digging his thumbs hard into her neck, squeezing her

windpipe until she passed out. The injuries and pain to her neck were clearly *'consistent with strangulation'* ('Opinion' section of Dr A's statement, page 74 of the prosecution witness statements). Dr A also found an area of deeper purple bruising to C's neck *'with some petechiae, that could have been a suction mark – 'love bite'* (also in the 'Opinion' section of Dr A's statement). And, of course, C had described scratching her attacker's face in very vivid terms: (i) in her statement - '*At this point I reached up and dug my nails into the right side of his face and scratched in a downwards motion from his ear or cheek to his jaw line. The nail on my middle finger of my left hand snapped off*' (p 7 of the prosecution witness statements and recorded in the same way in the original handwritten notes of C's account taken at 7.00pm on 20/07/03 on which the statement was based) – (ii) in her evidence in chief at trial – '*I got one hand free and scratched his face……Scratching his face was the first time I had physically touched him. I scratched him on the right side downwards with my left hand whilst he was still strangling me*' (typed notes from the 'Trial Defence Files, p388/1018), and (iii) in cross-examination - '*I managed to get my hand free. I reached up and dug my hand into the right-hand side of his face and scratched him from near his eye or cheek down towards his jaw. I did not notice my nail was broken 'til I was with the paramedics though that's how the nail got broken. I told the police I had caused a deep scratch to the man's face*' (cross-examination, typed notes from the Trial Defence Files, p392/1018). Mr Malkinson was seen and spoken to by police officers the following day. No mark to his face was seen by them (statements were provided confirming this), and neither did his work

colleagues who were spoken to remember seeing any injury to his face the day after the attack.

36. It seems to me an inevitable conclusion to reach that given the various aspects of the attack I have highlighted, anyone reviewing this case post-conviction should have been alive to the possibility of future forensic opportunities in relation to DNA evidence. Testing techniques have advanced significantly since Mr Malkinson's conviction. New DNA results might on the one hand have been able to confirm the correctness of the jury's verdict that it was Mr Malkinson who attacked C, or on the other, to call the safety of his conviction into serious question, which is ultimately what happened. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. When C regained consciousness she said she was lying on her right side and one of her arms was out of the sleeve of her fleece, ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

37. The Forensic Scientist, E2, in his statement dated 24th September 2003 documented the various DNA tests that had been carried out in the weeks following the assault. I will set out the most relevant of them here. Intimate swabs were tested for the presence of semen with a negative result. Material obtained from nail cuttings and scrapings from the left hand (MA12) and the right hand (MA13) were tested, but produced no result apart from an incomplete profile that matched C. The swabs from the left nipple (MA16), from the left side of the neck (MA17), the right side of the neck (MA18), again produced only matches for C. C's bra (ST3) bore bloodstaining mainly to the left cup, [redacted] *the boyfriend of the complainant could be the source of this DNA'*. C's vest top (ST5) '*bears blood on both inside and outside.* [redacted]. *The DNA profile obtained is very incomplete and contains little information, however there is sufficient to say that there is DNA from two sources. If it is assumed that [C] has contributed to this profile then there is a single piece of information relating to the DNA from the other source. Andrew Malkinson could be the source of this DNA. However the occurrence of this trace of DNA is estimated as 1 in every 2 individuals.'* The match effectively to 50% of the population rendered this result as having no

meaningful probative value, and so the jury were directed that there was no forensic evidence capable of supporting the identification.

38. The CCRC was informed for the first time in Mr Malkinson's July 2009 application that there had been retesting of the original samples as part of Operation Cube in 2007 (on all the material I have reviewed it does not appear that the CCRC had been notified separately about the retesting of samples in this case by GMP or the CPS prior to receipt of this application). As consideration of the 2009 application progressed within the CCRC views were expressed, as recorded on the Case Record (CR), about the new DNA evidence, and whether any follow up work should be commissioned, as Mr Malkinson's solicitors were arguing for. The first substantive note on the Case Record is dated 24th August 2009, written by P1 who made the initial assessment of the case which reads as follows: '*I am slightly bemused by the submissions. Although some further work has been carried out since the appeal it appears to have got absolutely nowhere but [E5]* (Mr Malkinson's solicitor at the time) *seems to be suggesting all the more reason for making further enquiries. Just because it appears there is someone else's DNA on the complainant's vest (not her boyfriend's or the applicant's) cannot surely produce a hope of a successful referral in view of all the other strong ID evidence – and the case was really based on the ID evidence which has been approved by the COA*'. P1 made reference to a 'coke can' which might have been in C's handbag, and full, before the assault, asking whether it had been found empty, consistent with someone drinking from it, and then went

on to say '*I cannot see what else there is to do forensically, but the CRM should check all this out carefully*'. To suggest that the retesting had '*got absolutely nowhere*' is not an accurate reflection of the new results. It is strongly indicative of an approach which was not sufficiently curious, rationally reflective, or determined to fully understand the case and what the new DNA result might mean. There was a serious failure from the outset to engage with the primary evidence in this case, against which the new DNA evidence should have been judged. The new DNA results should immediately have raised a very obvious question about it possibly being C's attacker's DNA if all the detail I set out about the attack earlier in this review had been properly understood. The language recorded on the Case Record is casual and dismissive. This fundamental misunderstanding and misrepresentation of the new DNA findings set the tone for the way this first application was dealt with.

39. It is right to say that on receiving the application P1 did follow the proper procedure and issued notices to ensure that the FSS files, the police files and the CPS files would all be preserved using the CCRC's s17 powers and ensured that the Crown Court file should also be obtained. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP --Nevertheless, the tone of this first narrative entry, the author having only had an initial read through of the Court of Appeal papers from 2006, which provide only very basic summary detail, ----------CPS/GMP Redaction---------- CPS/GMP Redaction--, and the applicant's submissions, is one of heavy scepticism.

In my view P1, like others who looked at this application later in the process, fundamentally misunderstood the potential significance of the new DNA evidence, bearing in mind the location from where the cellular material was taken – [redacted], there was a real possibility, to put it at its most neutral, that this DNA might have come from C's attacker. From the outset and throughout the consideration of the first application this was not properly appreciated or understood within the CCRC.

40. Interestingly the potential significance of this result had not been lost on the CPS or GMP when it was first brought to their attention by the Forensic Science Service. In 2008, more than a year before the first application for a review of Mr Malkinson's case was received by the CCRC, the Forensic Science Service (FSS), reacting to this new DNA result - and by doing so leaving no doubt about its obvious potential importance - had undertaken further work to eliminate all possible identifiable alternative innocent sources of this new DNA profile, ie those people who had come into recent contact with C prior to the offence or immediately afterwards. The FSS had also carried out a speculative check on the National DNA Database (NDNAD), but locally focused, which had produced several potential matches.

41. The sequence of events within the FSS was as follows. On 20th December 2007, the FSS scientist E4 provided a statement evidencing the new DNA result: DNA from more than one contributor was present and that on the expected basis that the wearer's DNA was present (ie C's DNA) then the second contributor could not be Mr Malkinson or C's boyfriend. In the light of this development a meeting was held on 28th February 2008 between representatives of GMP Cold Case Review Unit and the FSS, including E1 who was the scientist who took the lead in relation to the further work which was carried out. GMP in an email the following day asked for consideration to be given to '*opportunities for further interpretation*', whether a better profile could be obtained from the lifts from ST5, for a profile from the neck swab to be obtained (MA/17), and whether Y-STR analysis could be used to improve the result and determine the sex of the contributor. Some further work was carried out but not all the actions suggested in the email were undertaken.

42. E1 provided a further statement on 19th March 2008. This provided information about the additional forensic work FSS had undertaken and the significance of the result. E1 confirmed that if the DNA was from C plus one other person that person could not be C's boyfriend or Mr Malkinson. E1 also reported that that the unknown partial profile had been compared to DNA profiles on the national DNA database (NDNAD) but limited to the five most local police force areas: Cheshire, Greater Manchester, Lancashire, Merseyside and North Wales. This had produced 26 'subject potential matches' (confirmed in a letter dated 11th May 2009 from the CPS

to Stephensons), but all had subsequently been eliminated as possible suspects for various reasons. Nevertheless, this confirmed that the outstanding partial profile was searchable. [----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

43. I have seen the Further Scientific Examination form, dated 18th May 2008, authorising further testing of DNA samples from potential 'innocent' contributors to the unknown profile. In the submission form it is explained that the proposal is to obtain and compare DNA profiles from persons C had been in contact with during the afternoon and evening of the day of the attack with the purpose of establishing whether they could have been the additional contributor to the DNA profile from the vest top. Authorisation for this further work was given. It is to be noted that this forensic testing strategy was stated to have been agreed in consultation with E6 of the CPS, whose details appear on the form, and who must therefore have been fully in the picture. Further it is noted on this same document that '*Andrew Nicholas*

Malkinson is currently serving prison sentences for these offences but is protesting his innocence'.

44. On 18th June 2008 E1 provided another statement which reported that comparison tests provided no support for C's boyfriend's son, who C had put to bed on the evening of 18th July 2003, as being a contributor to the profile. On 13th March 2009 E1 provided a statement which excluded Philip 'Council' (sic), who was out walking his dog when he was approached by C immediately after the attack and took her to his home before calling 999, as being the source of the DNA. Later statements were provided by E1 detailing DNA comparison testing and exclusion as the possible DNA contributors an 11 year old family friend, who C had also put to bed the previous evening, and the two paramedics who first attended C and took her to hospital. All those who had been in known recent contact with C were therefore eliminated as possible contributors to the DNA profile obtained from the ----------CPS/GMP Redaction- the vest top ST5. The significance of the unknown profile was growing with each elimination test carried out.

45. I have been provided with the minutes of a meeting held on 10th December 2009 attended by GMP, senior members of the CPS, and E1 and another scientist from FSS, the purpose of which was '*to review recent developments in the case of 'R v Malkinson'* '. Reference is made in the meeting notes to contact from 'the Defence' in June 2008 requesting access to the '*raw FSS data for this case*'. ----------CPS/GMP

Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. It was noted at point 4 in the meeting notes that E1 had produced an edited version of her 19th March 2008 report on 2nd April 2008 which had been forwarded to the CPS for onward service on the defence (I have seen a copy of the CPS covering letter to Stephensons Solicitors, also dated 2nd April 2008, enclosing E1's edited report of the same date). This report provided the basis for the DNA submissions made to the CCRC on Mr Malkinson's behalf in July 2009. The ultimate outcome of this meeting was that '*as, to everyone's knowledge, no formal appeal against conviction has actually been launched by Mr Malkinson, then no further work will be conducted by the Police or FSS at this time, bearing in mind the fact that he was convicted on evidence unrelated to DNA in the first place*.' This was in my judgment a very unsatisfactory decision, positively deciding against doing everything possible to obtain the fullest results in circumstances where those present knew that Mr Malkinson was doing all he could to have his conviction overturned. This was why his solicitors had asked for access to the 'raw data'.

46. Everyone at the 10th December 2009 meeting was aware of the viability of further forensic testing that could have been carried out. That potential further work was specifically itemised at point 6 in the meeting notes. The attendees also all knew that Mr Malkinson had appealed unsuccessfully on other grounds in 2006, and was

continuing to maintain his innocence, as had been clearly noted on the 18th March 2008 document. The FSS had been commissioned specifically to attempt to identify the unknown male contributor to the vest top mixed profile. This had not been successful. The whole purpose of the work already carried out was to attempt to identify who the additional contributor to the profile was, given the scientific finding that it was not Mr Malkinson, or C's partner. The logical reason for the further testing that had taken place must have been an unease that Mr Malkinson might not have committed the offences that he had been convicted of. Why else do it? The elimination of the obvious alternative candidates should have increased the unease of those looking at this case, and all efforts to bottom this issue out should have been redoubled. The fact that there had been no DNA or other scientific support for the prosecution case was precisely the reason why the new results were so significant.

47. These thoughts clearly occurred to E6 at CPS Manchester. His diary note of the meeting includes the following: '[redacted]. E6 also made reference to further

work that E1 had advised could be undertaken to improve the DNA result. Y-STR analysis, which had not yet been undertaken, had the potential to improve the male DNA result by removing any 'masking' of the male profile by C's DNA, by only identifying any male DNA present in the sample. The possibility had also been raised of undertaking further work to the fingernail scrapings in the hope of obtaining improved results. ----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction----------. The final sentence of the diary note was '*If it became apparent that there was to be a further appeal based upon [E1]'s additional work, then the position would change and the question of additional work in relation to bolstering the case as it stands could be undertaken*.' It seems the priority was to uphold the conviction rather than continue, open-mindedly, to try to obtain the fullest results. The work that had been undertaken and E6's thoughts on the results were not shared with the CCRC.

48. Returning to Mr Malkinson's first application to the CCRC, the various entries on the CCRC Case Record for the remainder of 2009 principally concern the s17 preservation requests and chasing the various files.

    a. The relevant material was received from the Crown Court, the CPS, and CICA with little difficulty.
    b. A telephone call was received from a DCI at GMP on 8/10/09 who '*by coincidence*' was the OIC in the original prosecution. He was recorded as having '*fairly robust views on the conviction*'. Whilst the police file was

confirmed as '*preserved*' in the record of that conversation it was not provided to the CCRC at that time, and the full file was never requested. No positive decision was recorded on the case record with reasons why the police file need not be obtained.

c. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

d. E-mails were received from the FSS which explained that the files were needed for a meeting in November with GMP and the CPS. This must have been a reference to the 10th December 2009 meeting, but little curiosity was shown by the CCRC about what the purpose of that meeting was or to ask to attend it. The FSS confirmed preservation of their own file on 21st December.

On 4th January 2010 E7 of the GMP 'cold case unit' called to inform the CCRC that E1 had been conducting some further work for them 'under Operation Cube'. The case was allocated to P2, on 19th January 2010, 6 months after the application was received, and P2 started reading the case on 28th January 2010.

49. On 31st March 2010 the Case Record records that Stephensons, by letter, asked that *'we undertake a 'full and comprehensive review of the forensic evidence'. They claim that the new testing carried out under Operation Cube contradicts the earlier results regarding the vest top because it now excludes Mr Malkinson as being a contributor'.*

This was obviously true. On 12th July 2010 P2 emailed a case plan to P3. The Court of Appeal file was requested the following day. Progress was very slow. A year had passed since the application had been received.

50. On 14th July 2010 P2 made notes on the Case Record about '*the need to obtain the Op Cube results and see if the re-testing provided any better results. Unless they do reveal anything of significance my view is that there is nothing to be gained by having any of the DNA exhibits re-tested yet again. This is because, as stated above* (I take this to be a reference to the initial narrative entry on 24th August 2009, because there is no other entry containing these details), *the ID evidence from the victim and the two witnesses BC and MS is forceful and, in any event, the jury was told that there was no DNA evidence that could help them.'* This line of reasoning entirely misses the point in relation to the significance of the new DNA evidence that excluded Mr Malkinson as a contributor to the newly obtained profile and misunderstands the test for a referral. The jury was told that there was no DNA evidence either way meaning there was no DNA evidence that could potentially implicate or exculpate anyone. The prosecution case at the trial rested exclusively on the ID evidence. The question that should have been in P2's mind was what might have been the outcome of the trial if the jury had been told about the new DNA results that appeared to exculpate Mr Malkinson; the new DNA profile that had been obtained ----------CPS/GMP Redaction----------seemed to implicate someone else, albeit they could not be identified at that time. Against this background P2 should have

been asking what follow up lines of enquiry should be considered. In my view the police file should have been obtained to ensure the fullest possible scrutiny of the investigation and the identification evidence which was plainly undermined by the new DNA profile.

51. On 16th July 2010, a year after the application was received, P2 spoke to E1, the forensic scientist, who '*confirmed that re-testing of the vest top undertaken using an advanced technique yielded an improved result – of an unidentified male*'. [redacted] CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---------- CPS/GMP Redaction----------CPS/GMP Redaction---. Mr Malkinson could be excluded as a contributor to the mixed DNA profile, and all the obvious candidates who had had recent contact with C had also been eliminated as contributors (as the Case Record entry confirms this was known by the CRM - '*Received elimination reports from [E1]*' 16/7/10). It was also from an area ordinarily concealed by her fleece jacket, so not otherwise easily

accessible by normal human interaction. This was a very different evidential picture to the one presented to the jury in February 2004. This should all have been better understood.

52. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------
----------CPS/GMP Redaction----------CPS/GMP Redaction----------
---------CPS/GMP Redaction----------CPS/GMP Redaction----------
---------CPS/GMP Redaction----------CPS/GMP Redaction----------
-------CPS/GMP Redaction----------CPS/GMP Redaction----------
------CPS/GMP Redaction----------CPS/GMP Redaction----------.

The caveats about scientists not being able to say exactly how, or to date exactly when, DNA or indeed fingerprints for that matter, came to be in a particular location invariably appear in their reports and should be well understood as a standard comment which should be understood as exactly and only that, rather than anything specific to the particular case the statement is referring to. The scientists, of course, report their findings from a hard and neutral scientific point of view, as they must, and separately the conclusion about how their findings might fit with the rest of the evidence is a judgment for others to make. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction---------- Nevertheless, P2 should have been perfectly able to understand the importance of this new DNA result, coupled with the elimination tests.

53. Also, on 16th July 2010 P2 recorded that a separate case note was being created to consolidate the pre and post-conviction forensic results. I have read through P2's 'Review of the DNA Results inc. Op Cube'. It doesn't get to grips with the issue. Much of it is cut and pasted from the CCRC's internal guidance on how to deal with DNA evidence, and there is little if any analysis of the implications of the new results. The notes of the meeting of 9/12/09 between GMP, CPS and FSS were requested and were provided to the CCRC on 19th July 2010, as a result of which P2 noted on the Case Record that no further testing was proposed '*because they were not aware of any then appeal by Mr Malkinson*'. On 29th July 2010 the original statement of the forensic scientist E2 dated 24/9/03 was provided, which referred to the initial finding that '*there is limited support for a view that Andrew Malkinson has contributed to a mixture of DNA on the vest to ST5*', this was the '1 in 2 people' result. The DNA findings had advanced very significantly since the time of that initial report in 2003, which by 2008 no longer had even the slightest probative value. The 2008 results excluded Mr Malkinson as a contributor to the mixed profile, so the 2003 results had been completely superseded. It is not clear from the entry whether P2 understood this. A very full summary of the 2003 DNA results was annotated onto the Case Record, emphasising that they did not rule out Mr Malkinson being a contributor, which seems a little unnecessary if the 2008 results were understood.

54. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------
----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

Following several further attempts to obtain them, all the most recent FSS reports were received on 27th August 2010. There was no further significant activity noted on the case file in September, October or November apart from summaries of the contents of correspondence from Mr Malkinson and his solicitors, Stephensons. These letters raised various points. Mr Malkinson made a number of complaints about his trial solicitor who had taken over his representation shortly before the trial. In particular Mr Malkinson had discovered that his 'solicitor', had in fact been imprisoned for 12 months for fraud and struck off as a consequence, so should not have been holding himself out as a solicitor at the time of the trial, and he was unhappy that their original file had still not been provided to his new solicitors.

55. On 6th December 2010 the CCRC received a detailed letter from Mr Malkinson raising ----------CPS/GMP Redaction----------, and a possible conspiracy to frame him. Further correspondence from Mr Malkinson and his solicitors was received and noted in early February 2011, after an apparent absence of any activity by P2 for 2 months. Other than these correspondence entries there had been no meaningful progress on the case or consideration of the new DNA evidence since August 2009, no further contact with the forensic scientist, and no discussion with the Group Leader, or any Commissioner about the potential impact of the new results on the safety of the conviction. Activity of any substance had effectively petered out. There appears to have been a complete failure to monitor and supervise the work, or lack of it, by P2.

56. I would have expected regular review meetings between the CRM and the Group Leader to take place on the progress of a case, to provide essential supervision, support, or direction, or even to reallocate a case, should a CRM have lost their way as badly as seems to have happened here. This should have been a routine part of the management structure of the organisation. P2's work lacked purpose and had been drifting for many months, with no indication that this was causing concern; but for that person leaving the organisation there appeared to be no plan in place to intervene.

57. The case was reallocated to P4 in May 2011, following P2's departure from the CCRC. From the records I have reviewed almost a year had been largely wasted. The solicitors had been regularly asking for updates on progress, but since the application had been received in July 2009 there had been very little progress, apart from issuing the preservation notices and the consequent receipt of the files from the external bodies (with the notable exception of the GMP file).

58. The objective position as at May 2011 was this: a key development in the case had been brought to the attention of the CCRC in July 2009, namely that a DNA profile had been obtained ----------CPS/GMP Redaction----------CPS/GMP Redaction, from an unknown male person, who could not be identified from testing those who had had the most recent contact with C, yet almost two years after receiving Mr Malkinson's application, which relied on this new DNA result, it was

still not understood within the CCRC what this DNA result might mean, and no sign of a plan to resolve what to do.

59. In my view there had been a complete failure to get to grips with the potential significance of this new DNA result. The obvious questions had not been asked, and no formal meeting had taken place with any scientific expert to make sure that the meaning and implications of the new finding were fully understood and acted upon, apart from a couple of superficial phone calls and some email exchanges. From the diary note of E6 of the CPS, referred to earlier, and an email from a senior member of GMP Cold Cases Review Unit – '*It needs to be investigated further bearing in mind the location of the DNA and the injury to the nipple*' (email from E7 of GMP CCRU dated 29/2/08) – it is clear that both the CPS and GMP had understood the potential significance of this development literally years earlier. (Questions need to be asked about their failure to follow through with further testing but that is matter for the Andrew Malkinson Inquiry not for me). However, by May 2011 it was still not properly understood by the CCRC. It should have been.

60. On 9th May 2011, the CCRC took a call from Stephensons asking for an update on the case. The Case Record shows that P4, notified Stephensons on 11th May 2011 that he had recently taken over conduct of the case. P4's first entry, on 19th May 2011 reflected the lacklustre and unfocused work of P2 – '*I have read the Case Record and confess that having read it I have not got a clue as to what this case is about. I intend to start at the beginning and deal as if newly allocated***.'** P4,

immediately did some reading the same day – '*I have read the application and submissions from Stephensons and I have put the submissions in order. I now have a rough idea what the case is about*'. The following day P4 wrote to Mr Malkinson, who had recently written to the CCRC '*wanting assurance*' that the DNA matters had been considered; P4 said he would provide regular updates.

61. By the 26th July 2011 P4 was now expressing reservations about his understanding of the case – '*on 19/5/11 I said I had some idea what this case was about but if I did, I no longer do'*. He described the case as a stranger rape of the worst kind, depending '*primarily*' on identification evidence. There were a couple of minor factual errors in his summary of the evidence – Seward's identification was 6 months after the event not 4 months, and the officer who thought Malkinson fitted the description had not overheard C describing her attacker, it had come from another officer reporting the description to him – and of course, as the trial Judge in 2004 and the Court of Appeal in 2006 had stated unequivocally, the case depended wholly, not 'primarily', on identification evidence. P4 then summarised the applicant's submissions. Effectively P4 was starting all over again from scratch, as he himself had suggested he would have to. It was as if the previous two years had never happened. Meanwhile Mr Malkinson remained in prison protesting his innocence.

62. I have no knowledge of any other application being dealt with during the same period by the CCRC. Perhaps P2 was a particularly poor CRM or knew that she was

very soon to be leaving the CCRC so was lacking in the motivation and enthusiasm which perhaps they had shown to other cases earlier in their time at the CCRC. However, the lack of oversight and direction of P2's work is a cause for real concern.

63. On 27th July 2011, P4 set out by date and scientist all the scientific statements he had received and summarised the effect of their contents. He noted the follow up work in 2008 which had eliminated all potential innocent sources of the new DNA profile. This was a good fresh start. He also summarised the wide-ranging submissions received from Mr Malkinson and his solicitors since July 2009. As P4 began to work through the various submissions, he recorded in red his thoughts. This was a much more systematic approach than had happened previously. P4 considered, correctly, that some of the matters raised were trial issues, (ie points that could/should have been taken at the trial) not new matters, and so were unlikely to lead to a decision to refer the case. For example, questions were raised by Mr Malkinson about whether ----------CPS/GMP Redaction---------- CPS/GMP Redaction--- the loss of C's handbag and contents, had been properly followed up, was there an informant, issues to do with the identification procedure were raised, ----------CPS/GMP Redaction----------. P4 also reviewed the summing up in some detail.

64. P4 correctly identified the key issue as '*what is capable of challenging the central plank of the prosecution case*' which was the identification evidence. P4 notes that

the Court of Appeal in 2006 had found the identifications '*to be satisfactory*' and also comments that '*it has considered the forensic evidence such as it is*'. The Court of Appeal had looked at the identification evidence from an admissibility point of view on what was known at the time. The appeal court judges found that the identification evidence was admissible, and 'compelling'. Of course, in 2006 the Court of Appeal knew nothing about the future DNA developments, which were the real basis of Mr Malkinson's application, undermining as they did the identification evidence.

65. P4 set out his views on the DNA evidence in the following terms – '*There is no DNA material to speak of and any further work would be extremely costly and would need to be very likely to assist the applicant's case. On the basis of what I have read so far I cannot see this would be justified. The best that could be achieved is a full profile of a male from the top of the complainant's vest but there is nothing to suggest that is a likely result. There is still the identification to get over*' (CR 29/7/11). P4 concluded that he couldn't see that anything was '*capable of mounting a challenge to the identification evidence and that is the core issue*'. P4 noted that he would talk this over with P3 and start drafting a PSOR (Provisional Statement of Reasons), which, given the views he was expressing, would (and did) formally confirm that the CCRC had decided not to refer the case to the Court of Appeal.

66. The comment – '*there is no DNA material to speak of*' - is plainly wrong. There was none '*to speak of*' at the time of the trial, and when the Court of Appeal looked at

the case in 2006 but by 2009 the DNA landscape had changed dramatically. This comment strongly suggests that P4 had not understood the effect of the new scientific evidence, that a new searchable male profile had been obtained which excluded Mr Malkinson as a contributor, or the obvious significance of the location from where it had been obtained. Further work should have been urgently undertaken, and all minds should have been focused on the implications for the safety of the convictions.

67. P4 sent an email to P3 on 4th August 2011 to share his thoughts and provisional conclusions. He referred P3 to the Case Record for his summary analysis of the prosecution case, and his responses to the applicant's submissions, then set out his position - '*I don't want to do anything on this which is a waste of time and neither do I wish to give it inadequate consideration. But I think it's a non-starter. I would appreciate your thoughts*.'

68. Although P4 had begun his work on the case in a more structured way, by noting all the scientific statements, he hadn't in fact engaged properly with the detail of the case, and, perhaps as a consequence, he doesn't appear to have understood the significance of the new DNA evidence. His analysis and the approach taken was to my mind somewhat superficial, only skimming the surface of the material, and showing himself to be insufficiently curious. P4 doesn't appear to have read through the primary evidence or other key material, against which the DNA developments should have been judged, rather he was relying almost entirely on

the limited 2006 Court of Appeal case summary '*to get a feel for the case*' - [redacted]. In his 29/7/11 entry he notes – '*I have not as yet seen any of the material which is here, and I will consider what from the file I need to see*'. Yet he was already expressing the view that the application was a 'non-starter'. Still the police file was not obtained; it had been preserved but not called in to be examined as part of the CCRC's review. Whereas P2, the first CRM, spent two years making very little progress, P4, the second CRM, had reached a very firm provisional conclusion, adverse to the application, without reading any of the important material, in little more than two months. It has been suggested to me by the CCRC that P4's failure was not to misapply the 'real possibility' test but the failure was to understand the evidence; because he didn't read the evidence he didn't understand the significance of the new DNA result.

69. On 25th August 2011, P4 noted on the CR '*I have re-read my Case Record entries and am conscious that <u>one of the things I have not done is view any of the material we have</u> here. <u>As matters stand, I cannot see how that is going to assist me</u>. Either this requires some further investigation or it does not, and examination of the files will not assist either of those positions, unless further investigation would be assisted by file examination*'. These lines rather lay bare the incoherent analysis - he says one thing then immediately its opposite - and the thinness of P4's approach. P4 has not read the material, by his own admission, but has nevertheless felt able to reach a clear conclusion that the application is a 'non-starter'. Surprisingly this same entry makes

reference to P4 having the '*Notes of the CPS/FSS/Police meeting'* (of 10th December 2009) which set out the further work that could be undertaken in relation to the new DNA profile. This should have alerted P4 to the importance of this issue, but it plainly didn't. I wanted to be fair to P4 so I asked for a meeting to be arranged with him, to enable me to question him about various aspects of his work on this application. I asked him whether the lack of progress made by P2 made him feel under pressure to reach a rapid conclusion when the case was passed to him. He said it did not, and that he had taken the time he felt the case needed.

70. P4's next entry is dated 12th September 2011 and deals with a meeting with P5, the CCRC's Internal Investigations Adviser, to review the case. There is discussion about whether the nail scrapings taken from C have been the subject of LCN DNA analysis – '*if they have with no positive result, end of story*' reads the entry. P4 undertakes to speak to the FSS scientist, E1, over the phone, and if that isn't sufficient to resolve matters, he will obtain the full FSS file. On 15/9/11 he decides to call in the FSS file. The entry for 3rd October 2011 deals with the contents of that file. P4 summarises E4's report of 20/12/07 about the finding of the new DNA mixed profile, the fact that the additional DNA components could not have come from C's boyfriend or Mr Malkinson, and the speculative search of the NDNAD using this new profile. P4 also records that the FSS material '*suggests that MA12, nail cuttings/scrapings (LH) could be LCN tested*', that the skin swab from the left side of the neck (MA17) had a '*possible trace of DNA from a male source'*, and that ST3, (C's bra) had '*trace DNA from a male source in the left cup'*. The FSS file also

suggested further work was possible on the vest top, bra and fleece. Importantly, P4 also refers to C's evidence about scratching her attacker's face with her left hand, and that therefore '*on this basis MA12 is the exhibit to concentrate on*'. P4 works through all the FSS reports noting the key evidence on the Case Record.

71. As part of the 3rd October 2011 entry P4 notes E1's conclusions about the new DNA result for ST5 (the vest top) as follows: '[E1]*'s conclusion re ST5 is noted as "Therefore although case assessment suggests results are relevant to offence (i.e. within range of expectations) given that source unknown, body fluid unknown (as any saliva may have originated from wearer or failed to yield a profile) and not known who (if anyone) has had contact with the vest top then it is difficult to assess the significance in the context of the case" '*. P4 is struggling to understand the DNA evidence – '*It is worth bearing in mind (I think) that the 'not Malkinson' argument is only valid if this profile is from one person. I am not sure what it means if there is more than one person involved. I assume he cannot be ruled out but certainly cannot be implicated. I may need to check this. [E1] later comments on this "which given D + 1 (?) maybe incorrect"*'. P4 was being candid about his lack of understanding, but this was the critical issue in relation to the decision whether to refer the case or not. P4 should have sought the assistance of P3, referred the issue to the relevant Commissioner for their input, and/or engaged an independent scientific expert to ensure that this issue was properly understood. There is still no indication that P4 understands ----------CPS/GMP----------Redaction----------CPS/GMP

[redacted] the new DNA result from this area of staining is potentially of huge significance.

72. On 3rd October 2011 P4 also noted on the Case Record the first forensic scientist's very limited findings from 2003, which had long been superseded by the new results, making reference to the fact these (old) findings could apply to '1 in 2 individuals… *BUT* (P4's emphasis) *it does not rule him* [Malkinson] *out*'. This entry reads as if P4 considers these old results still had some evidential value, which by then they did not, thus illustrating more confusion in P4's understanding of the scientific evidence.

73. On 4th October 2011, P4 set out his '*Conclusions following examination of FSS files - The most likely source of any new material lies in MA12, the nail scrapings from C's left hand. I cannot see that they have been LCN examined…In the event that was done, and a full profile emerged of a male person that would be at worst interesting, not to mention surprising. Were it shown to be a sex offender living round the corner then it would certainly call for a committee*.' One would certainly hope so, but this is setting bar far too high. P4 then raised a series of possible further investigative steps. He asks whether MA12 (the fingernail scrapings) should be re-examined using LCN or similar tests, the reason being C's evidence that she scratched the offender's face, and any profile '*logically, could be that of the offender*'. [redacted]. P4 also notes a comment from the 2005 statement of another scientist E8 - '*in my experience*

fingernail scrapings or cuttings rarely reveal any DNA profile other than the donor's own.' He considers whether further work should be carried out on ST5? – '*I think the justification to do so is far less convincing than for MA12. All the comment thus far on the unidentified profile is fairly negative. There is no certainty that the profile, were it identified, is incident specific. It could of course be identified.'* He also considered whether a '*coke bottle at the scene*' should be examined but dismissed this as speculative. His ultimate conclusion is that '*only MA12 has a convincing argument*'. He resolves to speak to E1, the principal forensic scientist working on the case for GMP/CPS, and then to speak again to P5, the Investigations Adviser. The thinking expressed in these written entries is muddled and the analysis poor, going backwards and forwards on whether further testing should be carried out, without reaching solid conclusions, or appearing to understand how the results already obtained impacted on the safety of the conviction. It does not inspire confidence.

74. P4's entry of 13/10/11 summarises his conversation with E1. E1 says '*there will be sufficient material left to carry out further work to ST5 and with the more sensitive methods now available then it is not impossible to get some results*. *The slide of MA12 is likely to consist of the fibres from the fingernail scrapings and any DNA material will be part of the frozen retained material of which there is some... There would be some logic (I asked her) should the decision be to carry out some further work returning to the original scientist who knows the case (ie her)'*. However, '[E1]*'s opinion based on her knowledge of the case, her original examinations and the review*

of the case that she carried out (Operation Cube) is that she would not be confident that a re-examination of the material would lead to the recovery of a profile sufficient for comparison on the DNA database.' P4 reads back his summary of E1's comments and she confirms them as accurate. In relation to testing nail clippings/scrapings from C's left hand P4 notes that E8 had only examined those from the right hand, which had only produced C's DNA, and not the left. It is not easy to see what is really being suggested about further tests, yes or no. [redacted]. Again, I would have liked to opportunity to speak to E1 about this discussion, and what she was intending to convey and why.

75. P4 sets out his conclusion from his conversation with E1 '*I believe the bottom line here is that any re-examination of DNA material is likely to be inconclusive, but it is possible to have it done. There are two considerations before we should do that, one is that it would cost a lot of money and the other is that to challenge the trial evidence, which was a case reliant on identification evidence it would need to be something which would a) lead to a profile, b) that profile being identifiable, and c) that person being a realistic suspect. Were that to be the result of materials from under her fingernails of course then it may be very relevant to Malkinson's application.'*

76. On the afternoon of 17th October 2011 P4 had a meeting with P5 to make decisions about further forensic testing. They agreed that only the fingernail scrapings had a

probative link to the offender – confirming that P4 had still not reviewed the medical evidence ----------CPS/GMP Redaction---------- but were nevertheless persuaded by E1's comment that '*the likelihood of recovering a full male profile from this sample was negligible'* and E8's observation from 2005 that '*fingernail scrapings rarely provides anything other than the donor's profile*' that this was work that shouldn't be undertaken. P4's view was that this all had to be seen in the context of '*the strength of the identification evidence against Malkinson*', and observed that any weaknesses in the Craig and Seward's identifications had been explored at trial – '*any DNA evidence would need to be of sufficient strength to overcome that evidence* ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ---------CPS/GMP Redaction---------CPS/GMP Redaction----------. He went on *'then comes cost and whilst this should not prevent examination, even when the outcome is far from certain, there must be a reasonable case to undertake it in the first instance. In this case we have reached the conclusion that no reasonable case exists here. And for that reason it should not be done. [P5] is comfortable that this approach is consistent with the commissions approach to undertaking further forensic examinations in casework.'*

77. On 17th October 2011 the Case Record was forwarded to P3 to inform him of the position, and P4 resolved to 'write this up as a non-referral'. A month later on 22 November 2011 P4 noted that he had completed a draft of the PSOR but also made

this entry on the CR - '*I am conscious that I have not yet looked at the material we have so have decided to do so*.' He makes very brief notes about some of the things he has read on the CPS file and the Crown Court file and says there is nothing to assist on the COA file. On 24 November 2011 P4 records his discussion about the case with P3. He says that they talked over the evidence and the submissions and in particular the '*forensic issues*'. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------.

78. P3, the Group Leader, approved P4's PSOR on 29th November 2011, and on 1st December 2011 P6, the CCRC Commissioner and decision maker assigned to the case, was sent the document which he approved the following day by email. I can see no evidence of P6 interrogating P4's conclusions or reviewing any of the material. I asked to speak to P6 to understand how he had reached the decision to sign off the PSOR so quickly without any discussion or other follow up, and to give him an opportunity to respond to my questions about how the new unknown DNA

profile issue was dealt with, but he has since left the CCRC and declined my request for an interview. He indicated that he had no recollection of this case, his life had moved on and he was not amenable to a meeting with me. I obviously respect this, but it leaves me having to draw conclusions on the adequacy of this Commissioner's input and oversight without hearing from him. I have concluded it was inadequate: see paragraph 92 below.

79. The Provisional Statement of Reasons was sent to Stephensons the same day, 02/12/2011. An extension for the solicitors to respond was agreed until 23/1/12. Further submissions were received on 23/1/12 and considered on 31/1/12. P4's view in relation to the submissions was '*There is nothing new that I can see and no new argument*'. The Final Statement of Reasons was drafted and signed off by P6, and sent to the Mr Malkinson's solicitors on 22nd February 2012. The s17 preservation orders were subsequently lifted.

80. The 'Final Statement of Reasons' for the decision not to make a reference to the Court of Appeal' formally sets out the main features of the case, the submissions made on behalf of the applicant, the material considered and the conclusions reached by the CCRC. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. At paragraph 43 it reads – '*The Commission notes that [E1]'s opinions as to the conclusions which could be drawn following the review of the forensic material did not change as a result of the Operation Cube review*'. In essence the CCRC concluded

that as the new DNA evidence was not '*capable of identifying a genuine and reasonable suspect*' (para 48) it was not fresh evidence of '*sufficient force to overcome a strong Crown case which depended upon identification evidence*' (para 47).

81. At paragraph 69 the SOR acknowledges that '*whilst the male DNA on the vest top could have originated from C's attacker it could equally have come from any number of individuals who had been close to or in contact with the top since it had last been washed. The presence of male DNA on the vest top, the profile of which excludes Mr Malkinson as the contributor, cannot therefore in itself assist Mr Malkinson's case.*' This is a statement with which I profoundly disagree, particularly the words '*any number of individuals*'. It ignores the elimination tests carried out in 2008 on all those who had come into recent contact with C (which was in any event a very limited number of people); [redacted]; it overlooks the fact that the profile [redacted]; and it misunderstands the test for a referral. The CCRC's SOR accepts that the new DNA evidence means that Mr Malkinson might have been wrongly convicted, that he might be innocent, but nevertheless maintains the position that this does not assist him because he it can't be proved with certainty that the new DNA came from C's attacker, because the DNA donor cannot be identified. The test is *might* the new evidence have made a difference to the jury's verdict; not *can* the applicant certainly prove his innocence. In my view if the

jury had heard that there was unaccounted for male DNA in that specific location on the vest top, that it was not Mr Malkinson's DNA and that all attempts at elimination had proved unsuccessful this might have made a difference to the jury's verdict. This is not a difficult conclusion to reach. The absence of any scratch mark to Mr Malkinson's face in this context also becomes arguably more significant.

The Victor Nealon Case

82. Before I turn to my findings in relation to Mr Malkinson's first application it is necessary to refer to an entry on the Case Record made by P7 (not previously involved in the case) on 6th February 2014. First some background. On 13th December 2013 the Court of Appeal allowed the appeal of Victor Nealon and quashed his conviction for attempted rape. The Full Judgment, which had been reserved, was handed down on 28th March 2014. Victor Nealon's case had been referred to the Court of Appeal by the CCRC on 17th July 2012, so just a matter of months after Mr Malkinson was informed that his application to the CCRC had been unsuccessful. Victor Nealon had been sentenced on 12th March 1997 to life imprisonment with a minimum term of 7 years. He too spent 17 years in prison before his conviction was finally quashed. An earlier appeal against his conviction was dismissed by the Court of Appeal in 1998.

83. Victor Nealon's case undoubtedly bore similarities to Mr Malkinson's case. Mr Nealon's conviction for attempted rape also depended wholly on identification evidence. There was no DNA evidence against him, or at all, at the time of the trial. There were issues with the identification evidence relied on by the prosecution which were examined at his trial, as Mr Nealon had physical features which appeared to conflict with the witnesses' descriptions. Nevertheless, in 1998 the Court of Appeal described the identification evidence as '*abundant*' when dismissing his first appeal against conviction. In 2010 items of the victim's clothing were released to the defence for fresh DNA testing. These tests produced a full male profile from the victim's blouse, from what was probably a saliva stain, and a consistent but incomplete profile on her bra. The source of the profile could not be identified but it was not from Mr Nealon. This led to an application for referral to the CCRC. The victim ('V') was reinterviewed by police, at the CCRC's request, and told officers that blouse and bra were purchased on the day of the attack or a couple of days before, from different shops, and it was the first time she had worn them. Tests were carried out on potential innocent DNA donor candidates - V's boyfriend, four other men who had been with her that night, the scientists who had examined the clothing and 8 police officers - but no match was found.

84. The Court of Appeal determined that the new DNA profile's '*effect on the safety of the conviction was substantial. We are clear in our view that if the jury had heard that in addition to the weaknesses in the identification evidence, it was a real possibility*

that DNA from a single unknown male had been found in some of the key places where the attacker had 'mauled' the victim (in particular, the probable saliva stains….) this could well have led to the appellant's acquittal' (paragraph 35 of the Judgment). ----------CPS/GMP Redaction----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------.

85. The entry on Mr Malkinson's Case Record made by P7 on 6th February 2014 recorded the contents of an internal email she had sent the same day to P8, another Group Leader within the CCRC, raising Mr Malkinson's case in the context of the successful outcome in the Nealon case – '*[P8], I wonder if you or E could have a look at Malkinson...I've skim read the SOR for the case. It looks a very different scenario to Nealon, but it is a case where we considered doing forensic work and rejected that option. Question is, if we looked at the case now, would we see it differently? [P7]'*. P8 responded on 17th February 2014 saying that he had '*looked into this matter*' but considered that the SOR in Malkinson's case were '*clear and well-reasoned with logic which still withstands scrutiny. In relation to the vest top this was a mixed profile with an unidentified male component.* ----------CPS/GMP Redaction---------- -----CPS/GMP Redaction----------CPS/GMP Redaction---------- ---------- *. Although modern methods might have a chance at obtaining better results, the logic at paragraph 69 of the Malkinson final SOR would still militate against doing the testing. We would need a credible alternative suspect – and unlike in the Nealon case – the location of the DNA on the vest top does not make it any more likely to*

have been left by the attacker as opposed to a different individual'. It was decided that there was no reasonable basis for retesting.

86. Paragraph 69 of the Final Statement of Reasons stated the following: '*In the view of the Commission therefore, whilst the male DNA in the mixed profile on the top could have originated from [C]'s attacker, it could equally have come from any number of individuals who had been close to or in contact with the top since it had last been washed. The presence of male DNA on the vest top, the profile of which excludes Mr Malkinson as the contributor, cannot therefore, in itself, assist Mr Malkinson's case.*'

87. P8 was repeating the mistake made by P4. P8 failed to understand the significance of the location from where the DNA had been obtained and seemed to disregard or be ignorant of the elimination tests on all those who had been in recent contact with C. Additionally the profile, although partial, was sufficient for comparison with the NDNAD. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. Furthermore, Mr Nealon had not been required to provide an identified credible alternative suspect; demonstrating that the presence of unknown male DNA likely to have been left by the attacker was sufficient to render the conviction unsafe. P8 also considered retesting the fingernail scrapings but rejected doing so for the same reasons as before.

88. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------. In my view Mr Malkinson's conviction would have been quashed almost 10 years earlier than it was, if the Nealon judgment had been properly understood and followed. P7's intervention was spot on.

89. During my review I was provided with the CCRC's 'Legal Briefing Paper – DNA Evidence', which was in existence at the time of the first application. This useful guide was designed to assist CCRC staff when dealing with cases involving DNA evidence. Sections from it were lifted and used by P2 in the note she created which I referred to in paragraph 53. It explains the science, the different sources of cellular material, swabbing procedures, issues relating to potential contamination, the techniques used for testing for DNA, the courts' approach to DNA evidence, the admissibility of partial profiles (which might be consistent with a suspect's profile, as far as it goes, or it might exclude a suspect completely), and '*the various ways in which DNA evidence can be relevant to the Commissions' work*'. Part of this guide reviews cases which the CCRC had dealt with involving DNA evidence.

90. This guide lists a number of cases referred to the Court of Appeal by the CCRC and reviews their outcomes. One of these cases, R v Shirley [2003] EWCA Crim 1976, was murder case in which the victim had been raped. Mr Shirley was convicted in 1988 but at the time there was an absence of DNA evidence. Subsequent testing produced a mixed profile and revealed that the male component of the mixed DNA profile from the crime stains did not match Mr Shirley. Although the male source of the DNA had not been identified by the time of the appeal Mr Shirley's conviction was nevertheless quashed in 2003. This is a further demonstration that it is not a prerequisite to prove who the 'unknown' DNA has come from. If it is or might be DNA from the offender and the applicant can be excluded as a contributor that can be sufficient to render a conviction unsafe. As a matter of logic if a partial profile can exclude a suspect or convicted person from being a contributor, then that will be sufficient, a full profile is not necessary to do this. A full profile might identify the true offender, but it won't better exclude someone who has already been excluded by the partial profile.

91. This guide or an updated version of it should be mandatory reading for all members of CCRC staff and I would advise annual group training days to ensure all staff remain completely on top of this challenging, but hugely important topic.

Conclusions about the way the first application was handled by the CCRC

92. The performance of P2 and P4 was very poor, and there appears to have been no effective supervision or direction of their work, particularly with P2. P2 allowed the case to drift with no sense of purpose or progress for more than a year and P4 reached firm conclusions far too quickly, without considering the material he should have taken the time to read through. He also plainly did not understand the significance of the new DNA evidence, ----------CPS/GMP Redaction---------- CPS/GMP Redaction--- (this might have because of his failure to familiarise himself properly with the case). His entries show vacillation, uncertainty and CPS/GMP influence from the forensic scientist already engaged by the prosecution. He should have understood that the new DNA result was likely to be of very great significance or taken action to address his failure to understand it. P3 seems to have adopted in its entirety P4's flawed analysis of the DNA evidence. P6 who approved the Statement of Reasons added nothing of value to P4's flawed assessment of the case, signing the SOR off within 24 hours of receiving it, with no challenge to it, or any discussion or enquiry about the inadequate analysis of the DNA evidence.

93. All involved failed correctly to apply the test for referring a case. The test is whether the jury might have decided differently if they had heard evidence that an unknown male's DNA had been located ----------CPS/GMP Redaction---------- on the vest top ------CPS/GMP Redaction----. It was not necessary, as P4 had asserted, for Mr Malkinson to identify the donor of the DNA, ----------CPS/GMP Redaction----------

----------CPS/GMP Redaction----------CPS/GMP Redaction----------
----------CPS/GMP Redaction----------CPS/GMP Redaction----------
----------.

94. The case of Nealon demonstrates the fallacy of this approach. The male who left cellular material (producing the DNA profile) on the victim's clothing in that case had not been identified by the time of Mr Nealon's successful appeal. The requirement set out in the SOR that an applicant would need to identify an alternative likely offender, ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------, before positive identification evidence could be displaced, was not satisfied in Mr Nealon's case. This is presumably why P7, albeit in a respectful and mild way, raised concerns that the successful appeal in the Nealon case might have implications for Mr Malkinson's case. P7's concerns were, in my view, wrongly dismissed,

95. I was able to interview both P4, and P3, on different occasions during this review. I very much appreciated their willingness to speak to me, their time and openness.

96. I discussed the DNA evidence with P4 at some length. I put it to him that the new DNA evidence meant that he should have understood, at the very least, that Mr Malkinson might not have been guilty of the attack on C. This was after all what the PSOR, which he had drafted, had concluded ('*the male DNA in the mixed profile on*

the top could have originated from C's attacker'). After a considerable pause, P4 agreed with me. I then asked if he agreed with this further proposition, that if Mr Malkinson might not have carried out the attack, then it would necessarily follow that the identifications of him by the three witnesses might be unreliable. Again, after a pause as P4 was processing what I was suggesting he agreed with me. I then said surely this ought to have led to an examination of the police file to assess what the full circumstances of the identifications had been. There were certainly a number of unsatisfactory aspects to what had happened at the identification procedure, for example, (i) Craig changed her mind about the identification she had made immediately after the procedure, but no contemporaneous note or statement was made about this, (ii) Seward did not attend a procedure until just before the trial, six months after the event, and (iii) Craig and C were brought to the police station together, in breach of the rules. There was also the absence of any scratch injury to Mr Malkinson's face. P4, who doesn't appear from the records ever to have read through C's account of the attack (either her first account recorded in the hours following the attack, her subsequent formal statement or a record of her trial evidence), and therefore would not have had sufficiently firmly in mind the full detail of what C had described, agreed that looking back on matters now it should all have been looked at much more carefully by the CCRC. I agree.

97. The significance of obtaining the full police file, the only file that was not obtained by the CCRC, was that it contained important undisclosed material that revealed

Craig and Seward had significant criminal records, particularly for offences of dishonesty. Seward was a long-term drug user. It was revealed years later that Seward had been taken into custody himself just before the ID procedure he participated in took place. The subsequent, and arguably lenient, disposal of the matters which had caused his arrest was the subject of argument at the 2023 appeal hearing. This is something I can't properly comment on, more information about this might come to light as part of the Andrew Malkinson Inquiry, but undoubtedly there was material that impacted on Craig and Seward's credibility which would have come to light at a much earlier stage if the police file had been obtained at the time of the first application.

98. The police file also contained photographs of C's hands which had not been disclosed to the defence, or the CPS. ----------CPS/GMP Redaction----------
-----CPS/GMP Redaction----------CPS/GMP Redaction----------
-----CPS/GMP Redaction----------CPS/GMP Redaction----------
----CPS/GMP Redaction----------CPS/GMP Redaction----------
---CPS/GMP Redaction----------CPS/GMP Redaction----------
--CPS/GMP Redaction----------CPS/GMP Redaction----------
-CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------

CPS/GMP Redaction----------. The Court of Appeal found this disclosure failure to be of such importance that it provided a freestanding successful ground of appeal (see paragraphs 59 to 66 of the 2023 Appeal Judgment).

99. I have looked through the entirety of the CPS file, and there is no sign of either the PNCs for Craig or Seward, or the missing photographs of C's hands, or any reference to them. The Court of Appeal concluded, as they were bound to on the evidence, that the police had failed to provide them to the CPS or the defence, as they should have done.

100. I am, as I have already stated, very mindful of the allure of the benefit of hindsight. Nevertheless, in this case, I am in no doubt that the police file should have been obtained during the CCRC's review of the first application. The source material for all the matters relating to the investigation, was held on that file. As a CRM ought to know, and expect, not every item of material obtained by the police during the course of a criminal investigation will be passed to the CPS. A preservation notice was issued, but although direct phone contact was made with GMP this was not adequately followed up. As already noted, all the other requested files were received. I conclude that the failure to obtain the police file was not the result of a

deliberate decision, which would have been recorded with reasons given, but the result of inefficiency and poor performance, particularly by P2. It didn't arrive without chasing and so it was left. P4 the second CRM reached his firm views without reading very much of what the CCRC had received so it is unsurprising that the importance of reviewing the police file didn't occur to him.

101. In my meeting with P3 he gave me a sense of the very formidable caseload that Group Leaders are responsible for. I am in no doubt that whilst the quality of decision-making is different to the issue of resources, the CCRC is hugely underfunded. This will inevitably impact on the time that can be given to cases and capacity generally. The delay in allocating the first application to a CRM, the very limited oversight, and the concern about the financial implications of certain decisions if they are felt to fall at the more speculative end of the spectrum, are all examples of the consequences of inadequate resources. The resources the CCRC has available is bound to impact on its capacity, and the quality of the work being undertaken. The work the CCRC undertakes is important and can be extremely challenging. To be an effective organisation it must comprise sufficient numbers of very able, experienced, motivated staff, all properly trained and effectively managed.

102. P3 clearly felt that it was reasonable to rely on the advice of the forensic scientist E1, who advised that further testing was unlikely to obtain a better result, and so no further work was carried out. ----------CPS/GMP Redaction----------

CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------
----------CPS/GMP Redaction----------. The only thing P3 volunteered that the CCRC might have done differently was to have arranged regular annual or bi-annual searches of the NDNAD to see if a potential match could be found to the unidentified male partial profile. ----------CPS/GMP Redaction----------
CPS/GMP Redaction----------CPS/GMP Redaction----------. There is surely a lesson for the future from this; if important speculative searches produce no match, then this should be revisited at regular intervals.

JUNE 2018: THE SECOND APPLICATION TO THE CCRC – CODE D BREACHES

103. Mr Malkinson's second application to the CCRC was received on 1st June 2018. Mr Malkinson was then represented by the Centre for Criminal Appeals (now Appeal), a charity specialising in assisting those challenging their convictions. The second application focused entirely on alleged breaches of PACE Code D in relation to how the identification evidence was obtained, and particularly the circumstances in which the parades were conducted and how the witnesses were managed. The document submitted by Appeal on Mr Malkinson's behalf was comprehensive and impressive. Nevertheless. I can deal with the way the CCRC handled this application much more succinctly than the first application.

104. I have read through all the documentation relating to this application held by the CCRC. There is a huge difference in quality compared to the first application. I am satisfied that the quality of work carried out in relation to this application was of a high standard. The Case Record entries are clear, coherent and show that the members of the CCRC who dealt with this application approached their consideration of it with care, thoroughness and importantly with an open mind. This does not mean that the CCRC agreed with the submissions made on Mr Malkinson's behalf; the final decision reached was not to refer the case to the Court of Appeal on any of the grounds set out in Appeal's application. I agree with the CCRC's analysis of each of the matters raised by Appeal. Some clearly amounted to breaches of Code D others did not, but none of the breaches, either on their own or together, were sufficiently substantial to lead to the conviction being regarded as unsafe, on these grounds.

105. It is perhaps significant that none of the matters raised in this second application were pursued on Mr Malkinson's behalf at the Court of Appeal hearing in 2023. Twelve different parts of Code D were cited as having not been complied with. For example, criticism was made of C being shown the E-fit which was created as a result of the description she had provided. Her input into this was inevitable and essential, and so the criticism was unrealistic. If the police had provided a copy of the E-fit to either Craig or Seward for them to view before the identification procedures they attended had taken place that would have been a very different

matter. I don't propose to review each of the alleged breaches raised by Appeal in turn, and give my opinion on their merits. Some of the alleged breaches identified by Appeal were accepted by the CCRC, but I agree with the CCRC's ultimate conclusion that none of them were sufficiently substantial, either individually or cumulatively, to impact the safety of the conviction, and therefore to warrant a referral of Mr Malkinson's case on any of these grounds. As an example of an accepted breach, Seward did not attend a procedure for 6 months. This was plainly not as soon as practicable as Code D, 3.11 requires, but the jury knew about the delay and will have weighed the delay in the balance. In my experience a delay in conducting the procedure is not unusual, even if is plainly less than ideal. The CCRC were correct in my view to conclude that the Court of Appeal would not quash the conviction on this ground, and, in any event, this was known at the time of the trial and was therefore not a new point. An application had been made to exclude Seward's identification evidence to the trial Judge and this application was effectively renewed unsuccessfully at the 2006 appeal. Similarly, the failure to record at the time Craig's change of decision was a significant failure, but again this was explored at the trial, and went to the weight the jury should attach to her evidence.

106. Generally, on reviewing the material relating to the second application I found very clear evidence throughout the Case Record of appropriate collaborative working, effective support, direction and supervision, with the group of individuals involved

in assessing this application working closely and well together. It is a very marked contrast to the quality of work carried out in respect of the first application.

107. To illustrate the more careful and open-minded way in which the matters raised in this application were addressed, an issue was raised about the propriety of PC Hindley bringing C and Craig together in the same vehicle to the police station late on 2nd August 2003 to attend ID procedures. They should have been brought separately to avoid the risk of either of them in any way influencing the other about their identifications (see Code D Annex A 10). Both C and Craig denied talking to each other about the case or about anything else to do with the identification. On 13th January 2020 P9, the Case Review Manager for this application, made the following note on the Case Record – '*PC Hindley was the escorting officer who brought C and BC to the VIPER. There were questions at trial about whether these two spoke about the VIPER, they denied it. Further subs* [submissions] *suggest we should check PC Hindley's pocket notebook to see what he said about this. On reflection I think they* [Appeal] *make an interesting point; Hindley is worth looking at closer. If records from Hindley show that [C] and* [BC*] were seen talking together this would be evidence that contradicted what they said at trial. It could (particularly if they spoke after one of them had taken part in the VIPER) undermine the credibility of their ID evidence, on which the prosecution case very heavily relied.*' This is clear evidence of an appropriately open and questioning mind on the part of the CRM. Hindley's witness statement was obtained and this satisfied P9 that appropriate instructions were given to C and BC about not discussing the case whilst together in the car,

these instructions were adhered to and once at the police station they were kept separately until both procedures had been completed.

108. I have read through the SOR dated 27th February 2020. The reasoning is clear, carefully dealing in turn with each point raised on Mr Malkinson's behalf.

109. A request for a 'pause' to consideration of the application was raised by Appeal on 22nd August 2019 to allow them to undertake some further DNA testing – Appeal had made an application for funding to the LAA - which Appeal hoped to have carried out by the end of October. The CCRC responded to the request for a pause stating that two months was too long, and offered the alternatives of either withdrawing the current application and renewing '*once they have the DNA evidence*', with the assurance that a renewed application would come straight back to the same CRM who would pick it up immediately to minimise any delay, or '*wait to see the outcome of the current application and, in the event of a turn-down reapply on just the DNA evidence'*. Submissions on the DNA evidence had not formed any part of the second application.

110. On 5th September 2019 Appeal asked the CCRC to reconsider the decision not to pause, arguing that a pause would ultimately save time, but the CCRC maintained its position. On 25th September Appeal made a third request for a pause to consideration of the case which was again refused. Also on 25th September P10, the allocated CCRC Commissioner, entered his conclusions on the Case Record,

evidencing his engagement with the case and his understanding of the issues. The final SOR was drafted and approved on 27th September 2019 and sent to Appeal with a deadline for any further representations of 25th October 2019. On 29th September a formal complaint letter was received from Appeal about the refusal to pause consideration of the case for two months. On 18th October Appeal emailed to say that the SOR had been sent to the wrong address, so it was re-sent out by post and email and the deadline for representations was extended to 15th November. A request was made by Appeal for a further extension to January 2020, in response to which an extension to the end of December 2019 was granted. On 17th November 2019 the '*substantial response*' to the complaint about the denial of the request for a pause was sent to Appeal. I have reviewed the CCRC's policy on receiving further submissions during the life of an ongoing application. I do not criticise the decisions made about refusing to pause in this case. The CCRC's suggested options to Appeal were reasonable, and in line with the written and publicly available policy. In any event the new DNA evidence did not become available within the timeframe suggested by Appeal in August. I would nevertheless expect, notwithstanding the refusal to agree to pause consideration of the application, if the compelling DNA results which were obtained much later had become available in October, November or December 2019, or even in January or February 2020, before this application was finally dealt with, that the CCRC would not have stood on pedantic procedural technicalities to refuse to incorporate them

immediately into this application. That would have been wholly contrary to the CCRC's core purpose.

111. There was further correspondence on a number of points of clarification and final 'Further Submissions' from Appeal received on 31st December 2019. From the evidence I have seen I can confirm that each submission was considered thoroughly, with detailed responses annotated on the Case Record. In some instances, the advice of others within the CCRC was sought, to ensure the analysis was correct, as it should have been.

112. After full consideration of the further submissions, the decision not to refer this application to the Court of Appeal was upheld. The Final SOR was despatched by Special Delivery on 27th February 2020.

113. In relation to the second application, the GMP file was preserved, but again not obtained. If it had been the important matters that were eventually discovered (the previous criminal records of Craig and Seward, and the photographs of C's hands), would have been obtained much sooner. There was every reason when considering the submissions being made by Appeal about the breaches of the code relating to the identifications to obtain the police file but this was not done. I suggest it would be valuable for the CCRC to do some work on whether there is a cultural reluctance to ask for police files, and if so what the reason for this might be. One of the lessons and learning points from this case is that it is dangerous to assume that everything

that the police should provide to the CPS will have been provided. The only way to be sure will be to examine the police file. In future if a decision is made not to obtain a police file, I advise that a positive decision note setting out the full reasons be entered onto the Case Record, to ensure that the decision is transparent, can be reviewed and there is full accountability.

114. Before leaving the second application, it is worth commenting on the fact that this second application presented a fresh opportunity to conduct a new speculative search of the DNA database, notwithstanding the fact that submissions on DNA did not form part of the second application. It was confirmed to me by the CCRC that those dealing with the second application would have had available to them the Statement of Reasons and Case Record from the first application. Given that Mr Malkinson was applying again to the CCRC and had by now been detained in prison for many years beyond the minimum term imposed by the trial judge in 2004, this was an obvious opportunity missed to see if a new potential profile match could at that stage have been obtained. If such a search had been undertaken at this time, with or without the more sophisticated testing techniques being utilised which were by then available, a potential match to Mr B's DNA profile would have been made. It is also perhaps disappointing that on finding out in August 2019 that Appeal had applied for funding to carry out fresh DNA testing, given what should have been known about the state of the DNA evidence and the decision not to carry out further tests at the time of the first application, the CCRC did not set up a meeting with

Appeal to understand what Appeal was proposing to do, and to give serious consideration to whether the CCRC could support them in this. Techniques for testing DNA had improved significantly since the time of the first application. The CCRC were not constrained from having further testing carried out themselves. A thorough reading of the material relating to the first application should have caused the CCRC to give serious thought to doing this work. This was an opportunity missed. I will return to this issue in my recommendations.

MAY 2021: THIRD APPLICATION – NEW DNA EVIDENCE AND DISCLOSURE FAILINGS

115. On 21st May 2021 the CCRC received Mr Malkinson's third application, again submitted by Appeal. This application was based on (1) new DNA tests that had provided a compelling basis to conclude that another man was responsible for the brutal attack on C, and (2) the failure of GMP to disclose details of the criminal histories of Craig and Seward; both, at the time of the trial, had previous criminal convictions for offences of dishonesty. Seward had continued to commit serious offences, even between the date of the attack and the trial at which he was an important witness. The application explained that '*GMP have conceded these conviction histories "should have been disclosed" and "could have been deployed…. at trial to attack the credibility of these two witnesses*" '.

116. Appeal submitted that taken either separately or together these two items of fresh evidence, clearly satisfied the real possibility test that the Court of Appeal would find Mr Malkinson's conviction unsafe. Appeal was obviously correct about this. Appeal asked for the application to be expedited. Given the history of this case this was a reasonable request. Plainly there was work for the CCRC to do, for example commissioning a review of the new results, undertaking further DNA work to ensure the best possible DNA evidence, liaising with GMP to check the NDNAD to establish whether the new profile produced any clear suspect, and assessing the disclosure failings.

117. Two reports dealing with the new DNA findings were provided by a scientist, E9, instructed by Appeal, who had had no previous dealings with the case, dated 2nd July 2020 and 19th March 2021. GMP had agreed to a request for access to material for DNA analysis on 12th August 2019, which coincides with Appeal's request for a pause later that same month to the CCRC's consideration of the second application submitted on behalf of Mr Malkinson. The testing techniques used were DNA-17 and Y-STR profiling for the reasons set out in the application.

118. Appeal's submissions described exactly what had been done and explained that GMP had confirmed to them that crucial items of clothing - C's pants, vest top and bra - could not be located. How this could have happened, in the circumstances described in Appeal's application document, will no doubt be of interest to the Andrew Malkinson Inquiry. The individual who authorised the removal and

presumably destruction, or the 'weeding', as it has rather crassly been described, of some of the most important exhibits in the case has not been identified. Nevertheless, the original samples taken from these items were fortunately still available, having been retained in the Forensic Archive.

119. E9's initial findings were as follows: male DNA which could not be from Mr Malkinson was detected ---------CPS/GMP Redaction----------on C's vest top, DNA which could not be from Mr Malkinson was detected in samples taken from C's left nail clippings, the left neck area and ----------CPS/GMP Redaction-----on her bra. E9 also stated that it is possible some of this DNA could have originated from the same source, but further testing would be required to determine this. Further testing was also required to conclusively eliminate Mr Malkinson as a contributor to these new findings.

120. GMP co-operated with further testing, and at E9's request in December 2020 GMP obtained a sample from C's boyfriend, and then arranged for a DNA-17 and a Y-STR profile to be extracted from the sample. The full profile was supplied to E9 who then produced his report of 19th March 2021. He reported that '*there is male DNA which could not be from Andrew Malkinson in the samples* ----------CPS/GMP Redaction---------- *recovered from C's vest top. There was also an indication of male DNA which could not be from Andrew Malkinson in the DNA results from C's left hand nail cuttings and scrapings, and left neck swabs'*. E9 commented that while the results from the left-hand fingernails and left neck area, taken in isolation, were of

extremely poor quality '*many of the components present, and all that have been confirmed, were present in the Unknown Male 1 profile observed in the Y-STR results generated from the vest top. In my opinion this is as would be expected if DNA from the same man was present in all three of these samples'*. (paragraph 9 of Appeal's submissions). DNA-17 profiling was only introduced in 2014, so not available in 2003 or 2004, and in 2003 Y-STR profiling was in its infancy.

121. For the reasons set out earlier in this document, relating to C's evidence of causing a deep scratch to the right side of her assailant's face with her left hand, the detection of unknown male DNA in the samples taken from C's left-hand fingernails, consistent with the male profile from the vest top was particularly striking. The submissions setting out the significance of these findings were presented in the most compelling way in Appeal's application for a referral. The submissions also referred back to the finding in 2007 of an unknown male profile ----------CPS/GMP Redaction------- on the vest top and reviewed the relevant case law, including R v Shirley and R v Nealon which I have already referred to, in support of the proposition that '*the Court of Appeal does not require that fresh DNA evidence identify a specific alternative suspect that conforms to eyewitness descriptions in order to find a conviction unsafe, even if the prosecution had a strong case at trial*.' (paragraph 63)

122. Additionally, Mr Malkinson's new application relied on the previous criminal histories of Craig and Seward for offences of dishonesty, and in Seward's case

convictions and cautions for possession of heroin, not previously disclosed by GMP (as they plainly should have been) as weakening the credibility of their identification evidence. The breaches of Code D which was the basis of the second application in 2018 were repeated to add weight to the other submissions, and to demonstrate that there were freestanding issues impacting on the strength and reliability of the identification evidence.

123. In my view it was inevitable, and reasonable, that the CCRC needed to take the steps they did to verify and improve the results presented to them in E9's reports. For convenience the CCRC asked E1 to work together with E9 to develop a testing strategy to ensure the best possible evidence, and to agree how a comparison with the profiles on the NDNAD should be conducted. This was done and the match was made to the profile of Mr B. This having been done, although it took time, it was clearly necessary for the police to interview him to establish what he had to say, if anything, to ensure that there was nothing that could explain innocently his DNA profile on the samples obtained from C following the attack. There was not. I therefore find that everything that was done in relation to the third and final review was necessary.

124. The one note of real concern that I need to express relates to two entries on the Case Narrative (as the Case Record had been renamed). The first is dated 17th January 2022, six months after the application had been received, which had set out the series of findings made by E9. In a detailed entry concerning a meeting

between P11 (the Case Review Manager for this application) and P12 (the Nominated Decision Maker/Commissioner) under the subheading 'Forensics' is written '*Agreed that once these enquiries are complete we are of the view that we have thrown everything possible at this issue at this point. It is likely that, short of a match on DNA database of a viable person of interest, this issue could not form the basis of a referral of the case*'. This entry was followed by a further note on the Case Narrative dated 2nd March 2022 – '*We have made the identification of an alternative suspect a requirement for the referring of conviction*'.

125. Fortunately for Mr Malkinson there was a match to Mr B on the NDNAD, but if there had not been there might have been no referral if these two entries are to be taken at face value. It appears that at least some within the CCRC have not learned the lessons of the Nealon case, in relation to the evaluation of DNA evidence. This also represents a failure to understand the test to be applied to these cases. I set out my reasoning on this issue when reviewing the first application. There can surely be no doubt that, putting it at its very lowest, it might have made a difference to the jury's verdict if they had heard that DNA components consistent with coming from the same unknown male source had been found [redacted], whether or not a match had been made to a profile on the NDNAD. There are several perfectly rational explanations for the absence of a DNA match to a profile on the NDNAD. Identifying a match for the outstanding DNA cannot logically be decisive. [redacted]. It is not inevitable that an offender's DNA profile will always be on the NDNAD; the absence

of a match is not a bar to a referral. The Court of Appeal in the cases of Shirley and Nealon confirmed this.

126. I have raised this issue with the CCRC. It has been pointed out that these notes do not represent a final decision not to refer in the absence of a match on the NDNAD, and that any final decision on whether to refer the case or not in absence of a match would have been taken by Committee not just by the senior individual overseeing the application at the time both entries were made. This is an accurate statement of the process, but that individual would have carried a great deal of sway with the three person committee, of which they were the leading member, and given their oversight role. It has also been drawn to my attention that there are other internal notes discussing whether the real possibility test might be met notwithstanding the absence of a match on the NDNAD. This was an earlier entry which pre-dates the notes in January and March 2022 I have referred to. It is, I accept, impossible to be sure what might have happened had no match been made to a profile on the NDNAD, but it is of real concern that ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction---------- it was still being contemplated that a referral might nevertheless not be made.

127. It is essential that the CCRC learns the lessons of the Nealon case and understands that identifying the source of the DNA donor, if the DNA is obtained from a 'key' ----CPS/GMP Redaction- location, or locations, is not a prerequisite to a referral. Like Nealon

there was evidence of consistent DNA components in ---CPS/GMP--- locations. I have seen the internal Report dated February 2013 drafted in the light of the Nealon case – 'New Draft Nealon Report' – which suggests 'the Commission should consider the possibility of a trawl for similar cases.' We know from the February 2014 entries on the Case Record that the CCRC decided at that time that Mr Malkinson's case was not a Nealon type case.

128. Like Mr Nealon, Mr Malkinson had asked for further forensic testing to be undertaken by the CCRC in 2009, but this request was declined. Again, like Mr Nealon, it was only when Mr Malkinson's lawyers undertook the further testing themselves that the new results came to light and were acted upon. Too cautious or restrictive an approach was taken in both cases. In my view their needs to be a fresh review or 'trawl' of all potentially similar cases involving DNA evidence, a comprehensive list needs to be compiled of these cases, dating back to 2013, with confirmation that further reviews have been carried out and giving reasons for the decisions made on retesting. This list should be provided to the Chair and Chief Executive and in order to restore confidence it would be advisable to bring in an external KC to review the cases on this list and the relevant decisions made in the light of Nealon.

129. Criticism has been made of the decision not to refer the case additionally and separately in relation to the non-disclosure of the photographs and the non-disclosure of the previous convictions of Craig and Seward. I share these concerns.

Putting the DNA to one side, in my opinion the photographs of C's hands was such important material supporting Mr Malkinson's innocence that this should have formed the basis of a referral on its own. ---------------CPS/GMP Redaction-------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction---------------------------------CPS/GMP Redaction---------------------------------CPS/GMP Redaction-------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction-------------------------------CPS/GMP Redaction-------------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction--------------------------------CPS/GMP Redaction----------------------. The non-disclosure of the previous convictions fits neatly with the photographs. If the jury had been told about the convictions of both Craig and Seward, and the other matters relating to Seward, ---------------CPS/GMP Redaction-------------------------------CPS/GMP Redaction----------------, they might not have been sure that MS and BC could be relied upon. Therefore, my finding is that the disclosure failures in both respects should have formed a second freestanding ground for referral. This is effectively what the Court of Appeal concluded in 2023, allowing the appeal on these grounds, additionally and distinctly to the DNA evidence.

130. It concerns me that if the new DNA evidence had not been obtained and only the disclosure failures (ie the convictions and photographs) had come to light, the

CCRC would not have made the referral. This suggests that the test even now is not being applied properly, and that the CCRC is taking too cautious an approach. This needs urgently to change.

131. I have raised this issue directly with the CCRC. The response I have received from the CCRC is that their view was that the new DNA evidence was so compelling that they did not feel it was necessary to raise the disclosure issues as further separate freestanding grounds for referral and did not want to cause any further unnecessary delay. It was felt to be sufficient to present the issues relating to the failure to disclosure the photographs of C's hands and Craig and Seward's previous convictions as providing support to the force of the DNA evidence. I'm not sure I can accept that. Once this material had come to light, whilst it plainly provided support to the ground upon which the referral was made, the freestanding importance of this material to the safety of Mr Malkinson's conviction should have been immediately apparent. It would have required very little further time or work to have presented the disclosure failings as sufficient grounds for referral. At the Court of Appeal hearing in July 2023 prosecution counsel explicitly relied upon the CCRC's failure to make them a separate ground for referral in his submissions resisting arguments from Mr Malkinson's counsel that these disclosure failures provided a sufficient basis for freestanding grounds of appeal. This was unfortunate and rather underscores the impression that the CCRC did not believe that these disclosure failings would have been sufficient on their own to provide grounds for referral.

Concluding remarks

132. The CCRC's core mission and statutory purpose is to refer cases where new evidence comes to light which might have made a difference to the jury's verdict, and therefore the verdict can no longer be regarded as safe. This is also the test the Court of Appeal applies. The new evidence might be the result of disclosure failings, as happened here, or important evidence which had previously been believed to be unassailable might be called into question by new material or even proved to be mistaken or false, as happened here, or new scientific evidence is obtained by advances in testing techniques, as also happened here. This is not an exhaustive list. I have found that there was too little engagement and focus on whether the jury might have reached a different decision if the new evidence had been available and presented at the time of the trial.

133. ----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction----------CPS/GMP Redaction------- The jury would also not have been told there was no DNA evidence that could help them one way or the other. By the time of the 2009

application there was DNA evidence -----CPS/GMP Redaction----- which was not Mr Malkinson's. Bearing in mind the elimination tests, this development should have been seen as case changing. I have explained the reason for this conclusion earlier in this review. The previous convictions of Craig and Seward meant that there would have been challenges to their presentation as honest reliable witnesses, and the inevitable further disclosure of the full circumstances in which Seward attended his identification procedure would have been explored in front of the jury. There were strong grounds for believing the jury might have concluded their evidence was not as reliable as it had first appeared to be. Whether or not the Court of Appeal ultimately agreed about the previous convictions being sufficient taken in isolation misses the point. The test is whether there is a 'real possibility' that the Court of Appeal will find that the jury might have reached a different decision.

134. The CCRC's role is to refer appropriate cases to the Court of Appeal. The CCRC must get the analysis of the material right and then apply the test for referral correctly. In this case the Court of Appeal in fact went further than the CCRC, identifying grounds to quash the convictions which the CCRC had failed to identify with the same clarity. The CCRC must learn from this. It must aspire to capturing more miscarriages of justice, and to achieve this it needs to be clearer sighted than happened in Mr Malkinson's case. The question should always be 'might this be a miscarriage case' rather than an exercise in thinking of reasons why the Court of Appeal might reject the referral. Of course, the assessment of a case must be

rational and grounded in a rigorous analysis of what the new evidence means. But the emphasis should be 'what if?', rather than 'why not'. There needs to be a regular refresh of the CCRC's mission with all those who work for this important organisation. The training on the lessons from Nealon was inadequate, and the oversight at the time of the first application was not good enough. I am concerned that the test for referral was not properly understood right up to the moment the match came back for Mr B. At that stage there really was conclusive proof that Mr Malkinson was not guilty of the brutal attack on C. But that is not the test. That would set the bar for referral too high. If the test had been applied properly the 2009 application would have resulted in a referral

Press Reporting - An Apology?

135. There have been calls in the press, particularly from Mr Malkinson himself and his lawyers, for the CCRC to make a public apology for failing to refer this case to the Court of Appeal much earlier than it did. From all that I have written it will be clear what my views are on this issue. There should be a wholehearted apology made by the CCRC to Mr Malkinson. The CCRC failed him. It required Appeal to obtain the new DNA evidence that ultimately resulted in the further work that led to the referral by the CCRC. It would not have happened otherwise. The opportunity to have this case referred in 2009 was missed, and a further opportunity to look again at the

DNA evidence when the second application was received in 2018 was not taken. The public statements of the CCRC's Chair do not properly reflect this. The Chair of the CCRC took part in a Sunday Times podcast in October 2021 about Andrew Malkinson's case – 'Seventeen Years - the Andrew Malkinson story'. In the interview the Chair stated that 'when we do [make mistakes] we stick our hands up as soon as possible'. This hasn't happened. If Appeal's application in August 2019 to the LAA for funding to carry out re-testing of the samples had been refused, from everything I have seen I have no confidence that the CCRC would have agreed to undertake this crucial initial testing work themselves. I have seen nothing to persuade me that the CCRC would have independently considered that retesting was justified or had any prospect of producing anything new which might call into question the safety of the conviction. The opportunity to do so in 2018/19 was not taken. The CCRC's consistent stance had been that this was a case that had been proved by identification evidence that the Court of Appeal had described, in 2006, as compelling. In my opinion, the statements made by the Chair in January 2023 at the time of the referral, and subsequently in July and August 2023, claimed too much credit for the new DNA evidence, and took too little responsibility for the mistakes that were made. Whilst the first two of these public statements made reference to some of the work of Appeal, the overall effect was to gloss over the CCRC's failure to understand the significance of the new DNA material at the time of the first application in 2009, the failure in 2018 to have further DNA testing undertaken themselves, or to support Appeal's retesting of the available samples

when this became known, and the fact that even in 2022 the CCRC appeared to be on the verge of repeating the error that no referral could be made unless the unknown DNA donor could be identified.

136. On 7th August 2023, the day the Court of Appeal's full judgment was handed down, in a press release issued by the CCRC the Chair said that '*In each review, we focused on the submissions made to us. But knowing what we know now we would have sought the undisclosed police evidence to refer this case'*. There was also a repeat of the assertion that it was *'the CCRC's forensic testing*' that had produced the DNA evidence that had unlocked the case and found the alternative suspect. This was not the full picture, and at face value both assertions had the potential to mislead. None of it would have happened without Appeal's intervention. I have already explained that the CCRC should have unearthed the disclosure failures, in relation to the photographs and previous convictions, at the time of the first application. It was a little disingenuous to suggest that the CCRC '*had focused on the submissions made to us*', which could be viewed as an attempt to absolve the CCRC of the failings I have identified in this review. Indeed, in the 'Seventeen Years – The Andrew Malkinson Story' podcast, the Chair assured the interviewer that the CCRC had asked GMP for Craig and Seward's previous convictions – '*I'm sure we did, I'm sure we did*'. The Chair clearly took the view that this was such an obvious enquiry to make that it must have been done. But it had not. The Chair also said: '*My team has assured me that they literally followed up every line of enquiry and asked for all*

the information that would help [to decide] *if this was a referable case'*. This comment doesn't sit easily with failure to obtain the police file in 2009 or in 2018 or even in 2021. Appeal found the photographs of C's hands in 2022, not the CCRC.

137. In my view, there should have been, and must still be, an expression of sincere regret that it took three applications before the referral was made, that there were shortcomings that would be reflected upon and that the CCRC would learn the lessons of this case and the Nealon case in relation to DNA opportunities and evidence. There should also have been an immediate commitment to review all cases which have the potential for new DNA opportunities.

To summarise:

i) The police file should have been obtained at the time of the first review (2009). There were a series of issues which should have called for the contents of the police file to be examined.

ii) During the course of the 2018 review a range of issues were raised concerning breaches of Code D relating to the way the identification evidence was obtained. In my view in order to review fully the detail of the points raised in this application, some of which the CCRC agreed constituted breaches of aspects of Code D, the police file should have been obtained. The record keeping by police on important issues which had been disclosed was incomplete. On 13th January 2019 a decision was made by P9 to obtain the police file to resolve at least two issues. A chasing email to GMP was sent on

24th January. On 5th February 2019 GMP contacted the CCRC to say that they had not received any preservation request. The CCRC resent the original preservation notice which had first been sent to GMP on 27th September 2018. However, the request made for the police file was rescinded on 7th February 2020, because the issues had been resolved from material contained in the CPS file, which had been received by this stage. The police file was therefore never examined.

iii) The significance of the new DNA evidence was not properly understood in 2009. Opportunities to obtain fuller DNA results were missed during the review of this application. The decision not to commission any further work in 2009 was because the 2007 results (reported by scientist E4 in his statement of 20th December 2007), and the relevance of elimination tests subsequently carried out in 2008 to the safety of Mr Malkinson's conviction were not properly understood. A searchable profile had been obtained in 2007 ------CPS/GMP Redaction---------- on C's vest top, which excluded Mr Malkinson as being a contributor. All potentially innocent sources of this DNA had also been excluded. Notes from a meeting held on 10th December 2009 between CPS Manchester, GMP and FSS at which these results were discussed were passed to the CCRC during the 2009 review. These notes itemised further work that could have been carried out. This should have been followed up. The safety of the convictions should have been called into question during this review and a referral made. A referral should not have been contingent on the source of the DNA profile being identified.

iv) The CCRC had decided that because the donor of the DNA components found by E4 in 2007 could not be matched to any profile on the DNA database, in the absence of an alternative identifiable suspect no referral should be made. Mr Malkinson's first application was therefore refused. On this basis the CCRC, in

the discharge of their statutory functions, should have continued to make their own regular searches of the NDNAD database in the years that followed to ascertain if a match could then be made as a result of new profiles being added to the database. ----------CPS/GMP Redaction---------- CPS/GMP Redaction----------. Additionally, in 2012 the CCRC should have independently resolved to commission further DNA testing on the samples in the future as techniques advanced, which they did in 2015 with the introduction of DNA-17.

v) The CCRC's initial reasoning in relation to the further DNA evidence submitted as part of Mr Malkinson's third application in 2021 appeared to repeat the same error in analysis as was made in 2009. The CCRC's provisional view, following a meeting between P11 and P12 on the new results, recorded on the Case Narrative on 17th January 2022 and 2nd March 2022, was that unless a named match could be obtained to the unknown male DNA profile and the consistent components, obtained from --------CPS/GMP Redaction---------– the vest top, the left bra cup, the left hand finger nail scrapings, and the neck - no referral would be made of this case to the Court of Appeal. In my view a referral should not have been contingent on identifying the source of the DNA. Whilst the CCRC were right in the circumstances to carry out further tests and then to compare the profile to the NDNAD, the decision to refer should have been made whether or not a specific match was obtained. The lessons of Nealon appear not to have been fully learned.

vi) Criticisms of the CCRC's failure to apologise in 2023 are well-founded. The quashing of Mr Malkinson's conviction in 2023 should not have been presented as an unqualified success, nor should it have been said that the CCRC '*in each review* [had] *focused on the submissions made to us',* creating the impression that everything had been done carefully and properly, and that if things were

missed it was because others had not raised them. The CCRC missed opportunities to make a referral at the time of the first application and failed to obtain the police file in 2009 and 2018, which would have produced a different outcome. Further the CCRC was wrong to appear, in the statement put out in August 2023, to take full credit for the re-testing that had taken place as part its consideration of the 2021 application. All the crucial initial tests, which led to the further testing overseen by the CCRC, had been carried out by Appeal without the assistance of the CCRC. When Appeal asked for a pause to consideration of the 2018 application so that further testing could be carried out to the samples the CCRC did not offer to partner Appeal or request more detail on why Appeal believed, rightly, that further tests should be carried out.

vii) Similarly, the work done which resulted in the discovery of undisclosed photographs of C's hands, and the previous convictions of BC and MS was the result of the efforts of Appeal. The body charged with investigating potential miscarriages of justice, with statutory powers to obtain relevant material, had failed to discover them during the course of the first two reviews. This should have been the cause of reflection within the CCRC, and an expression of regret and apology.

Recommendations

I have been asked to make any recommendations I consider appropriate. I advise:

a. That all cases with the possibility of new DNA opportunities should be looked at again in the light of the experience of the Malkinson case,

b. The CCRC should compile, for independent scrutiny, a list of all the cases that were identified as part of the internal review process following the Nealon case setting out in sufficient detail the further investigative steps taken and decisions made in relation to these cases,

c. That all CCRC staff should be provided, annually, with comprehensive training on how to interpret DNA evidence, including partial profiles, and limited DNA components in the context of other results. The new training should include a rehearsal in detail of the history of the Nealon and Malkinson cases to illustrate the errors that can be made, and how to avoid them. For example, once a partial profile has been obtained sufficient to exclude an applicant, a fuller profile which might identify a new suspect will not better exclude an already excluded person,

d. That training be provided to all CCRC staff to ensure that the test that should be applied to cases, particularly involving DNA evidence, is properly understood. The statutory test is that the '*Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made* (section 13(1)(a) Criminal Appeal Act 1995) – 'the real possibility test'. When considering new evidence, the real possibility test should not be interpreted to mean anything other than the jury might have decided differently if they had known about the new evidence at the time of the trial. It should not be taken to mean can the defendant prove his or her innocence, as it was during the 2009 application and, on the face of the written case record, during the 2021 application. The importance of understanding the test is that the new evidence needs to be reviewed carefully in the context of what the issues were at the time of the

trial and what was said about them. This is a very different exercise to considering whether new evidence proves an applicant's innocence,

e. Disclosure failures have been at the root of many miscarriages of justice cases. I recommend that if it is decided not to obtain the police file a full written justification for the reasons not to obtain it is set out on the case record document both when the decision is first made but also at the end of consideration of the application if the decision is made not to refer the case. This will ensure full transparency and accountability of the decision. It will also ensure that there has been a proper focus on whether there might be important material contained within the police file, both at the beginning of the process when not everything can be known, but also as a final part of the process so that no potential opportunity to discover important material is missed. From what I have seen in this case there seems more of a reluctance to obtain the police file than the files from the CPS. Crown Court, Court of Appeal or FSS. The police file will often contain the most important material, particularly if there have been disclosure failings,

f. That in future following any decision not to refer a case, consideration should be given to whether any recommendations can be made for future work which might result in a different decision being made. In this case, as acknowledged to me by P3, there should have been an action point to continue to make regular checks on the DNA database for a match to the DNA profile obtained by the FSS scientist in 2007. I maintain my criticisms of the first review but, in any event, if a decision had been made to do this it would have produced a positive resolution to this case perhaps ten years sooner. Consideration of future action would or might provide the same safeguard in other cases. The decision not to refer should not be regarded

as a hard line that always brings consideration of an application to a complete end, absent a fresh application.

g. I also advise the CCRC should always aim to be as collaborative as possible with the representatives of applicants. It might be unique to this case, but I got a sense of tension on both sides, particularly during the second application when the pause was requested and denied, reasonably as I have found. Nevertheless, on hearing that attempts were being made for further DNA tests to be carried out, a better approach would have been to convene a meeting with Appeal to understand what was being proposed and why, and to consider supporting that process. Advances in DNA testing techniques had happened since the refusal of the first application, and if time had been taken to listen to the basis for Appeal's decision to retest the samples, the CCRC might, on reviewing the SOR from the first application, have decided to support this. In my view they should have done. This issue was left hanging at the end of the first application. If a less territorial and more open-minded and collaborative approach had been taken in 2019 there is every reason to believe the outcome achieved in 2023 would have been achieved sooner.

h. I advise that Group Leaders should hold regular review meetings with their CRMs to ensure that progress is being made, to provide support and effective oversight of the work. Additional voices and minds will always bring useful advice, experience and challenge. In an age of increasing remote working putting in place structures to ensure regular face to face communication and collaboration is essential. I have already observed that the levels of support and collaboration evident in the second and third applications was of a much higher standard than in the first, so this might be a recommendation that requires little adjustment in the processes

already in place at the CCRC. I feel it necessary to make this recommendation because the oversight and support during the first application was so poor.

i. The CCRC should be provided with more resources by Government. It faces formidable challenges. Its caseload has grown dramatically over recent years. In the period to 2011/12 the average number of applications submitted annually to the CCRC was 955. Since 2012/13 the average number of applications received each year has increased to 1407. In the current year the number of cases is on course to exceed 1600, an increase of almost 70% on the figures for the period to 2012. The resources provided to the CCRC have not kept pace with the increase in cases numbers it is now dealing with. The CCRC's annual budget for the current year, in real terms, is 17% less than the amount it had previously received on average since 1997. The numbers of cases being managed by each CRM has grown enormously during the same period, as one would expect. This of course must also impact on the level and quality of the supervision GL's have the capacity to provide. There is a growing awareness of the importance of the CCRC's work, but also the complexity of the evidence increasing numbers of the cases involve. It is unreasonable to require the CCRC to improve the perception and reality of its performance without providing it with the commensurate level of resources it needs to achieve this. This is an urgent issue and needs to be addressed as soon as possible.

Finally

My final observation is this. Miscarriages of justice disfigure the lives of all connected to the case and make the public generally less safe. Mr Malkinson has suffered atrocious injustice for a very long time. There needs to be a culture within our Criminal Justice

System where it is acknowledged that mistakes can be made, and in our various roles, when making decisions we are all alive to this potential risk. If we are vigilant in this way, it will make miscarriages of justice less likely to happen. When mistakes are made the victims of miscarriages need a robust, appropriately resourced, bold, mission driven organisation, fearlessly asking the right questions, and analysing new evidence and submissions rigorously, and above all correctly identifying the cases that should be referred. This is what the CCRC must always aspire to be.

CHRIS HENLEY KC

5 APRIL 2024

The CCRC's Response

1. We acknowledge and deeply regret that the CCRC failed Mr Malkinson and that our analysis and handling of this case was flawed.

2. We note Mr Henley's observation that his findings are necessarily limited to this case.

3. Nonetheless, as an organisation, we will learn from the mistakes that were made. Mr Henley's recommendations will be acted upon, and work to address them has already started. We believe that the steps we are taking in response to our reflections upon what went wrong in Mr Malkinson's case will help to ensure that we enhance our ability to find, investigate and refer miscarriages of justice.

Recommendation a.

That all cases with the possibility of DNA opportunities should be looked at again in the light of the experience of the Andrew Malkinson case.

4. We welcome Mr Henley's recommendation which accords with work already underway. Discussions about a trawl of this kind began in March 2023, in light of the impact of DNA-17 profiling on CCRC casework. Preliminary scoping work took place in the summer of 2023.

5. We are currently focusing on cases where the identity of the offender is in question, beginning with convictions for rape or murder. We are limiting the exercise to those cases where the conviction was before 1 January 2016, because convictions after that date will have had the benefit of DNA-17 testing where appropriate.

6. We have identified over 6,700 applications where the applicant was convicted of rape or murder before 1 January 2016. Allowing for multiple applications, this is almost 5,500 individual cases. We anticipate that only a small proportion of those cases will be ones in which there are new forensic opportunities.

7. Phase 1 of the exercise involves identifying those cases where the identity of the offender is in issue and excluding those where it is not. Work to date suggests that between two-thirds and three-quarters of the cases will be excluded at this stage. For example, there will be murder cases where the applicant accepts responsibility for the killing but argues self-defence,

provocation or diminished responsibility; there will be joint enterprise murder cases where the applicant accepts presence at the scene but denies the necessary intent; there will be murder cases where the applicant challenges causation. Many of the rape cases will be ones where the applicant accepts that sexual intercourse occurred but argues consent.

8. In phase 2, cases will be assessed to identify those where there might be further forensic opportunities which could give rise to fresh evidence capable of raising a real possibility of a successful appeal.

9. In phase 3, relevant cases will be re-opened, and relevant forensic opportunities pursued.

10. The scale of the exercise is such that we will be seeking additional funding from the Ministry of Justice to establish a dedicated team, so that the work can be completed in a reasonable timeframe.

Recommendation b. That the CCRC should compile, for independent scrutiny, a list of all the cases that were identified as part of the internal review process following the Nealon case setting out in sufficient detail the further investigative steps taken and decisions made in relation to these cases.

11. The internal 'New Draft Nealon Report' referred to in paragraph 127 of Mr Henley's report recommended that the CCRC should "*keep under review*" the possibility of conducting a trawl in respect of convictions recorded between 1990 and 2000 where new techniques might give rise to fresh evidence.

12. We have found no record of an internal review of cases following the Nealon decision. On that basis, and given the practicalities referred to below, we have concluded that no such work was undertaken.

13. P7's request for P8 to look at Mr Malkinson's case in the light of the Nealon case was prompted by a media article drawing comparisons between the two. It was not part of a wider internal review. We believe that the difficulty of identifying suitable parameters, problems of scale and scope, and the length of the waiting time for new cases to be reviewed in 2014/15, led to advice that we should not conduct such an exercise. This was also against the backdrop of a less sophisticated technology and case management system than is now in place.

14. Had a trawl been carried out with the parameters envisaged by the 'New Draft Nealon Report' - convictions between 1990 and 2000 - it would not have included Mr Malkinson's case because he was not convicted until 2004.

15. Our response to recommendation a. above will encompass cases that might have been captured by an internal review post-Nealon.

Recommendation c. That all CCRC staff should be provided, annually, with comprehensive training on how to interpret DNA evidence, including partial profiles, and limited DNA components in the context of other results.

16. Work on this recommendation has begun. We will be working with forensic providers to design a DNA training programme for all casework staff and Commissioners.

17. The in-house DNA guidance which Mr Henley has commended, will be refreshed, updated, and relaunched.

18. To add to the in-house expertise that we have had over the years, we will also recruit a forensic science and expert evidence adviser to ensure that we remain up to date with ongoing developments and to support us in sourcing the most appropriate experts to provide opinions in individual cases.

Recommendation d. That training be provided to all CCRC staff to ensure that the test that should be applied to cases, particularly involving DNA evidence, is properly understood.

19. We will update our training and guidance on case analysis and the real possibility test. We will ensure that it includes case studies and that it emphasises the importance of identifying key details within the evidential matrix because we believe that in the first review the focus on an identifiable alternative suspect was based on an error in the analysis of the evidence, rather than a misunderstanding of the real possibility test.

20. We agree that it is important to ensure that staff and Commissioners continue to be trained in and regularly reminded of our statutory test.

Section 13 of the Criminal Appeal Act 1995 requires the CCRC to determine whether there is a real possibility that the Court will not uphold a conviction. The test is not straightforward: it requires the CCRC to predict the Court's view of the safety of the conviction and to have regard to the Court's practice[4]. In a fresh evidence case, that may include considering whether a jury might *reasonably* have reached a different verdict[5] (or 'might *reasonably* have acquitted'[6]). Assessing the effect of fresh evidence – whether directly on the minds of the Court of Appeal judges or indirectly via the jury impact test – requires the CCRC to 'evaluate its importance in the context of the remainder of the evidence in the case'[7]. There must be a reasoned basis for the reference. Importantly, the Court has repeatedly emphasised the need to deal with real rather than remote or fanciful possibilities[8]. The Court has also been clear that the jury impact test does not override the question of safety[9].

21. In our first review, the partial DNA profile was evaluated in the context of the identification evidence. Regrettably, the significance of the location from which the profile was obtained, ----------CPS/GMP Redaction---------- was not recognised when considering the impact of the partial DNA profile and this led to the wrong conclusion. A proper and thorough review would have identified the significance of the location ----------CPS/GMP Redaction----------. Many of the conclusions which we reached flowed from this initial error. The failure to recognise it in the first review had a consequent impact on the reconsideration in 2014, which was informed by the first Statement of Reasons.

22. If the partial DNA profile had been obtained from clothing with no clear link to the offence, it might not have been sufficient to outweigh the identification evidence[10] given the possibility of innocent transfer or contamination[11]. The location from which the profile was obtained ----------CPS/GMP Redaction----

[4] *R v CCRC ex p Pearson* [2000] 1 Cr App R 141
[5] *Dial & Dottin v State of Trinidad & Tobago* [2004] UKPC 4
[6] *Lundy v R* [2013] UKPC 28
[7] *R v Noye* [2011] EWCA Crim 650
[8] *R v Mushtaq Ahmed* [2010] EWCA Crim 2899. In particular, paragraph 24 per Hughes VP.
[9] For a comprehensive analysis of the relationship between the tests and the legal framework, see *R v Gordon Park* [2020] Crim 589 at 159-167 and 173-178.
[10] Notwithstanding issues in the management of the VIPER identification and dissimilarities between Mr Malkinson and the description of the offender, the victim was "more than 100% sure that the man she picked out was the man who attacked her" [Summing-Up 93].
[11] Mr Henley's report states that all the potentially innocent donors had been excluded at the time of the CCRC's first review. They had not. There are four people mentioned in C's statement with whom she had contact in the afternoon and evening before the offence who had not been eliminated at the time of the CCRC's first review.

[redacted] was, therefore, crucial. If consideration had been given to that evidence, we believe it is likely that we would have reached the same conclusion that we reached in the Nealon case – namely that a DNA profile obtained from an area of clothing [redacted] excluded Mr Malkinson, was sufficient to raise a real possibility. This leads us to believe that the focus on an identifiable alternative suspect was based on an error in the analysis of the evidence, rather than a misunderstanding of the real possibility test. We do not suggest that that excuses the outcome. Rather, we think it helps to focus accurately on where things went wrong.

23. Mr Henley's conclusions regarding the third review are based on two entries in the Case Narrative. The second entry is not a statement of the CCRC's position, but a summary of a letter from Mr Malkinson's representatives, setting out their perception of the CCRC's position. We consider that drawing conclusions from these two entries risks overlooking the totality of the CCRC's thinking. Elsewhere in the case notes and in the instructions to the forensic scientists it is very clear that specific thought was given to the case of Nealon and to the possibility of a reference based on multiple partial DNA profiles from the same unknown male.

24. Notwithstanding these comments, we agree that it is important that guidance and training is updated and delivered.

Recommendation e. That if it is decided not to obtain the police file a full written justification for the reasons not to obtain it is set out on the case record document both when the decision is first made but also at the end consideration of the application if the decision is made not to refer the case.

25. We are updating our Case Narrative and Decision Pathway templates to ensure that we routinely record an explicit decision, with reasons, whether to request the police file. We will consider whether this should be extended to other 'core' files (prosecution, trial court, appeal court, defence). Under section 17 of the Criminal Appeal Act 1995 requests for material must be reasonable and proportionate.

26. Initial examination of our case data suggests that we issue a similar number of section 17 notices to the police and CPS, and that the majority of section 17 notices to the police are requests rather than preservations. We will explore this further.

Recommendation f. That in future following any decision not to refer a case, consideration should be given to whether any recommendations can be made for future work which might result in a different decision being made.

27. We will consider how best to track and re-visit unsuccessful forensic inquiries, whether or not an applicant re-applies, including:

    - Tests which fail to produce profiles
    - Partial profiles which might later be improved
    - Complete profiles which do not produce a match
    - Developments in areas other than DNA.

28. We will seek advice from the National DNA Database (NDNAD) with regard to the frequency with which we can repeat previously unsuccessful speculative searches. There is also an issue across the criminal justice system about unmatched DNA profiles which are not suitable for permanent loading to the NDNAD, where the convicted person has not applied to the CCRC. We will raise this issue with other partners in the criminal justice system.

Recommendation g. The CCRC should always aim to be as collaborative as possible with the representatives of applicants.

29. We will review our guidance to ensure that this aim is clearly stated and given effect in our casework.

30. As an organisation, we aim to collaborate with all our stakeholders, whilst maintaining our independence and the absolute requirement to reach an impartial decision in each case. We regret that in this case we fell below the standards we set for ourselves.

31. We are updating our guidance to provide that we will always look at whether we should take responsibility for lines of investigation which applicants or their representatives ask for time to pursue.

Recommendation h. Group Leaders should hold regular review meetings with their CRMs to ensure that progress is being made, to provide support and effective oversight of the work.

32. As Mr Henley recognises, this is a recommendation which requires little, if any, adjustment in the CCRC's approach. It is a process which is already in place and has been for many years. We welcome Mr Henley's observation that 'the levels of support and collaboration evident in the second and third applications [were] of a much higher standard'.

33. In addition to meetings with Group Leaders, we encourage all casework staff and Commissioners to seek constructive challenge and feedback from colleagues.

34. We also have a quality management system which includes formal scrutiny when a case has been under review for 10 months and a Long-Running Cases Committee, which monitors progress in cases which have been under review for more than 2 years. This is an area where we are constantly looking to improve our performance, for instance we have recently introduced quality assurance of case planning and dip sampling of 10-month scrutiny checks.

35. As part of performance appraisal, Group Leaders are assessed on their management of CRMs.

Recommendation i. The CCRC should be provided with more resources by Government.

36. The CCRC agrees. In 2023-24 we received 1629 applications – the most we have ever received in a single year.

37. For 2024/25 we have requested a budget from the MoJ which represents a 15% (£1.2m) increase on our 23/24 budget allocation. If granted, the increased budget will be used to recruit a sixth casework group and additional Commissioner resources to address the significant increase in applications over the last 2 years.

38. As mentioned in response to recommendation a. we will need to seek additional funding to complete the internal review of cases with potential forensic opportunities in a reasonable timeframe.

In addition to Mr Henley's recommendations, we have identified the following additional improvement opportunities in light of both Mr Henley's work and our own assessment of lessons to be learned.

39. We will ensure that guidance on re-application cases reflects existing good practice by including a reminder to consider whether there have been any relevant scientific, medical, legal, or other developments which might require further investigation and could lead us to look again at some aspect of the case. Additionally, we will update guidance to ensure that where forensic testing is unsuccessful (or not possible) there is a clear entry in the Case Narrative to emphasise the need to revisit that in the event of a re-application. This reflects good practice which will now be formalised.

    This work is in progress.

40. We will update policy and guidance to ensure that expert advice is always obtained formally. Although it may be appropriate to make informal contact with an expert, advice must always be obtained formally in writing, including advice that testing or analysis is not possible.

    This work is in progress.

41. It can be challenging to capture and convey the nuance of complex casework decisions in a public forum such as a press release or media interview, bearing in mind the legal restrictions on what we can disclose. We will continue to work to improve on this.

    This work is in progress.

Concluding Remarks

42. The CCRC is dedicated to finding, investigating, and referring possible miscarriages of justice and we make an important contribution to the criminal justice system. We have referred 839 cases for appeal, and the Court of Appeal Criminal Division has often commended our investigative work and analysis. Two large independent academic research projects, that have been published and provided evidence in parliamentary inquiries, examined our decision making and found no evidence that we were missing opportunities to refer cases for appeal[12],[13].

43. Against that background, we deeply regret that our analysis and handling of Mr Malkinson's case did not meet the standards we set for ourselves, and which applicants are entitled to expect, and we offer our wholehearted and unreserved apologies to Mr Malkinson.

[12] Dr Steve Heaton's A critical evaluation of the utility of using innocence as a criterion in the post conviction process. - UEA Digital Repository

[13] Professor Carolyn Hoyle & Dr Mai Sato's Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission | Oxford Academic (oup.com)

Additional Information

44. The following table provides a key[14] to anonymised personnel:

CCRC Personnel	
P1, P6, P10, P12	CCRC Commissioners. • Commissioners are responsible for making the decision whether to refer a case to the appeal court. • A single Commissioner may make a decision not to refer a case. A decision to refer may only be made by a committee of at least three Commissioners. • Commissioners may also be appointed as a Nominated Decision Maker, to provide advice or direction during the review.
P2, P3, P4, P5, P7, P8, P9, P11	CCRC Staff, including: • *Case Review Managers (CRMs)* – who are responsible for the review and investigation of a portfolio of cases; • *Group Leaders* – who manage a team of Case Review Managers and Casework Administrators; • *Investigations Adviser* – member of the Investigations Team, responsible for providing advice to CRMs and Commissioners; • *Director of Casework Operations* – member of the Senior Management Team responsible for casework.
Non-CCRC personnel involved in the case	
E1, E2, E4, E8, E9	Forensic Scientists.
E3, E5	Solicitors for Mr Malkinson.
E6	Member of Complex Casework Unit, CPS.
E7	Member of GMP Cold Case Unit.

[14] A full key will be provided as necessary.

45. For the benefit of the Andrew Malkinson Inquiry, on the following pages we provide some factual information additional to that contained in Mr Henley's report.

Paragraph	Notes
4	According to the judge's summing up, the victim said, "…the voice sounded local meaning, to her, Bolton. Later when speaking of the accent, she said again, "It sounded local with a tinge of something else in it. But she also added she was not very good with accents and she does not know accents." [Summing Up 58]
12	In addition to MS, two other witnesses attended a VIPER identification procedure 6 months after the offence.
20	The request was for "copies of the previous convictions, if any of all civilian witnesses but particularly [JH] and [DH]". JH and DH were the witnesses whose previous convictions were provided to the defence.
21	----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction----------
26	----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ---------- CPS/GMP Redaction ----------
27	The false positive was generated from intimate swabs. Subsequent testing of C's underwear confirmed the presence of an oil consistent with condom lubricant.
29	The profile was suitable only for a local one-off speculative search. It was not suitable for a search of the whole NDNAD. ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction---------- ----------CPS/GMP Redaction-

32	Section 13 of the Criminal Appeal Act 1995 requires the CCRC to determine whether there is a real possibility that the Court will not uphold a conviction. The test requires the CCRC to predict the Court's view of the safety of the conviction and to have regard to the Court's practice[15]. In a fresh evidence case, that may include considering whether a jury might *reasonably* have reached a different verdict[16] (or 'might *reasonably* have acquitted'[17]). Assessing the effect of fresh evidence – whether directly on the minds of the Court of Appeal judges or indirectly via the jury impact test – requires the CCRC to 'evaluate its importance in the context of the remainder of the evidence in the case'[18]. The Court has emphasised the need to deal with real rather than remote or fanciful possibilities[19]. The Court has also been clear that the jury impact test does not override the question of safety[20].
33	The Court of Appeal found that, "If ground 3 stood alone, we would not regard it as sufficient to cast doubt on the safety of the convictions; but when taken in conjunction with ground 2 we conclude, with some hesitation, that the appeal should succeed on ground 3 also." *R v Malkinson* [2023] EWCA Crim 954, paragraph 71
38	---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ---------- ---------- CPS/GMP Redaction ----------
40, 44, 46, 51, 58, 63, 81, 87, iii	Not all the potentially innocent donors had been excluded at the time of the CCRC's first review. There are four people mentioned C's statement with whom she had contact in the afternoon and evening before the offence who had not been eliminated at the time of the CCRC's first review. All four were present at the gathering at C's boyfriend's house. There is no evidence that C was wearing the fleece all day. (It was July.)
48d.	At the time of the meeting in December 2009, the case had not been allocated to a Case Review Manager. It was in a 'queue' awaiting allocation.
51	----------CPS/GMP Redaction ---------- ----------CPS/GMP Redaction ----------

[15] *R v CCRC ex p Pearson* [2000] 1 Cr App R 141
[16] *Dial & Dottin v State of Trinidad & Tobago* [2004] UKPC 4
[17] *Lundy v R* [2013] UKPC 28
[18] *R v Noye* [2011] EWCA Crim 650
[19] *R v Mushtaq Ahmed* [2010] EWCA Crim 2899. In particular, paragraph 24 per Hughes VP.
[20] For a comprehensive analysis of the relationship between the tests and the legal framework, see *R v Gordon Park* [2020] Crim 589 at 159-167 and 173-178.

	[redacted]
45, 69	There are two sets of notes of the meeting on 10 December 2009. The CCRC had obtained a set prepared by E7 of Greater Manchester Police. The CCRC was not aware at that time that E6 had created a separate diary note. E6's diary note was not in the CPS file.
68	[redacted]
79	In further submissions, Mr Malkinson's legal representatives did not argue that the DNA on the vest top must realistically have come from the offender. This does not excuse the CCRC's failure to consider that line of reasoning.
97	The Court of Appeal rejected grounds of appeal based on the suggestion that MS received an inducement for giving evidence (ground 4) and the impact of his drug use (ground 5): "We are satisfied that the criteria for admitting as fresh evidence the material underlying ground 4 are not met, and that ground 4 cannot in itself provide any basis for doubting the safety of the convictions. Having reached those conclusions about grounds 4 and 5 individually, we have considered their collective effect. Even taking them together, and even treating them as an adjunct to grounds 2 and 3, they are not, in our view, capable of casting doubt on the safety of the convictions."
124-126	Mr Henley did not speak to P11, P12 or the other members of the committee. The Case Narrative is not a decision document. It is a document in which Case Review Managers and Commissioners are free to explore, test, and record their thinking as it develops. The CCRC commissioned a forensic strategy with the aim of answering the following questions. Question 2 indicates that we were considering the possibility of a reference based on multiple profiles from the same unknown male. 1. Can we identify another male who could be an alternative suspect? 2. If not, can we show that there is DNA from an unknown male on a number of items, left by the offender, which is not Mr Malkinson's? 3. Can we find anything to exculpate Mr Malkinson? 4. Is there anything to implicate Mr Malkinson? The Case Narrative entry dated 2 March 2022 is not a statement of the CCRC's position. It is a summary of a letter received from Appeal setting

	out their perception of the CCRC's position. In the same letter, Appeal "welcome[d] efforts to identify the real perpetrator".
126	The views of all three Commissioners on a decision-making committee are of equal weight. The Lead Commissioner is responsible for chairing the meeting, but their view does not carry special significance or influence. There have been cases where the decision has been contrary to a view expressed by the Lead Commissioner.
129-131	Whether or not described as free-standing grounds of referral, the non-disclosure of the photographs and the previous convictions were part of the CCRC's reasons for referring the case. If the search of the NDNAD had not produced a match, it is likely that the other grounds would have received a greater degree of scrutiny and more detailed reasoning.
133	The CCRC's conclusion in relation to the non-disclosure of the previous convictions was: 174. The CCRC has analysed this issue on the basis that these records were not made available to defence. Taking everything into account, the information contained in the PNC records does not give rise to a ground for referral on its own. Nevertheless, the information may be supportive of the referral outlined above, especially as it goes to the honesty of the witnesses in a case where the only evidence was identification evidence and the only evidential support was that the three identification witnesses supported each other. The previous convictions of the identification witnesses were relatively minor, nevertheless, they would have been of some assistance to the defence. That is consistent with the Court of Appeal's finding that, "If ground 3 stood alone, we would not regard it as sufficient to cast doubt on the safety of the convictions; but when taken in conjunction with ground 2 we conclude, with some hesitation, that the appeal should succeed on ground 3 also."

Criminal Cases Review Commission, 23 Stephenson Street, Birmingham B3 2PW

www.ccrc.gov.uk