TO THE LORD CHANCELLOR AND SECRETARY OF STATE OF ENGLAND AND WALES

THE RT. HON ROBERT BUCKLAND QC.

PETITION FOR MERCY IN THE MATTER OF ALEX HENRY

1. This is a petition to the Lord Chancellor and Secretary of State for Justice the Rt. Hon Robert Buckland QC to recommend to Her Majesty the Queen the exercise of the Royal Prerogative of Mercy to grant a Pardon for Alex Henry (born 3rd December 1992), hereafter referred to as Alex.

2. The exercise of the Royal Prerogative of Mercy may currently take one of three forms:[1]
    a. The grant of a Free Pardon;
    b. The grant of a Conditional Pardon;
    c. Remission of all or part of a penalty by either a) a pledge of public faith, which most commonly occurs when an offender's release dates are incorrectly calculated or b) for meritorious conduct, such as saving the life of another offender/member of staff or coming to the aid of a member of staff.

3. By constitutional convention, the Lord Chancellor and Secretary of State for Justice (in succession to the Home Secretary) is responsible, in England and Wales (and the Channel Islands), for recommending to Her Majesty the Queen the exercise of the prerogative of mercy to grant a Royal Pardon.

4. For the reasons set out below, Alex seeks the grant of a **conditional Pardon** to enable his immediate release. He is currently serving a sentence of life imprisonment with a non-parole period of 19 years for a murder that he did not physically commit. He has been the subject of a catalogue of events that have led to serious injustice. A conditional exercise of the Royal Prerogative of Mercy will not expunge his conviction but allows Her Majesty to correct significant injustice. Alex is autistic and he has been in custody since 8th August 2013, when he was only 20 years of age.

1 See 2014 Parliamentary questions available at < https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-11-04/HL2637>

5. The Royal Prerogative of Mercy is justifiably regarded as an exceptional remedy.[2] It is submitted that Alex's case is exceptional: he was not the principal offender, he was young; he is autistic; his trial jury were wrongly directed in law on complicity (known as joint enterprise); neither the jury nor the sentencing judge knew he was autistic; and he was wrongly barred from an appeal which had merit. A life sentence with a near two-decade mandatory term is significantly harsher than reflects his individual responsibility.

6. In Alex's case, the miscarriage of justice is heightened by: the courts' grave error in complicity cases (known as joint enterprise) despite Parliamentary repeal of constructive liability, errors which were not corrected until the decision in *R v Jogee (Jogee)*[3] which was ***after*** Alex was wrongly convicted; the inflexibility of mandatory sentencing for alleged accessories; and the appellate courts' imposition of such a significantly high bar to appeal that prevents access to justice for meritorious appeals and creates a surreptitious return of the proviso, also repealed by Parliament.

7. Had the criminal justice system from trial to appeal functioned without error, he would have been acquitted of murder. However, there is a possibility that he might have been convicted of an alternative offence for which he would have received a much lesser sentence, less than he has already served and without life licence. Hence, he seeks a conditional Pardon to enable his immediate release.

8. Alex's case is a paradigm example of how the law on joint enterprise went wrong, mandatory sentencing can go wrong, how appeal courts seeking finality have affected access to justice and how the Executive, through the exercise of the Royal Prerogative of Mercy, must protect the most vulnerable, especially those with disabilities, from further injustice.

9. In submitting this petition, Alex acknowledges that the deceased was murdered by his co-accused and the deceased's family have suffered greatly from that crime. Alex also accepts that knife crime generally is an issue of public concern. However, there is also significant public concern in relation to miscarriages of justice.

[2] Hinton, M. and Caruso, D., 2012. The Institution of Mercy. In: T. Gray, M. Hinton and D. Caruso, ed., *Essays in Advocacy*. Barr Smith Press, pp.519-528.

[3] *R v Jogee (Ameen Hassan)* [2016] UKSC 8, [2017] A.C . 387, [2016] 2 WLUK 496.

10. There is an ongoing All-Party Parliamentary Group (APPG) on Miscarriages of Justice "to examine the structural problems within the criminal justice system which result in miscarriages of justice and to provide a forum from which to improve access to justice for those who have been wrongly convicted." In the 2017/18 report Barry Sheerman MP, Chair of the APPG on Miscarriages of Justice, said: 'Miscarriages of justice have a truly devastating consequence for those who are convicted. It is vital the state does everything it can to prevent them from occurring in the first place. **When miscarriages do happen, the state has to ensure there are quick and effective mechanisms in place to correct them.** Currently those obligations aren't being met.'[4]

11. Her Majesty will be aware that the Countess of Wessex has been the National Autistic Society's Royal patron since August 2003 and that she took over this role from The Princess Royal.[5] The National Autistic Society champions the rights of people with autism and aims to ensure that they receive quality services.[6] The National Autism Society campaigned for an Autism Act to make new legal duties to provide adult autism services in England. The Autism Act received royal assent on the 12th of November 2009. The Act provides for a Government strategy for improving services for autistic adults. There is therefore a strategy available for the relevant local authority which would be applicable to Alex on his release.

12. Expert evidence, set out below and attached, explains the reality, that the challenging behaviour Alex displayed throughout his life is attributable to his autism and personal circumstances. This does not mean he is not responsible for his actions. But is worth noting that his individual responsibility in this case was throwing a punch and a phone, neither of which demonstrate an intent to assist or encourage really serious injury, let alone a killing. This does not justify a mandatory life sentence.

13. In order to alleviate the injustice of a mandatory life sentence with a minimum term of 19 years for an autistic young offender and restore public confidence in the criminal

[4] APPG 2017/18 Report available at < https://appgmiscarriagesofjustice.files.wordpress.com/2018/12/Annual-Report-201819-APPG-on-Miscarriages-of-Justice-1.pdf>
[5] See Royal Family Website Patronages Page. Available at <https://www.royal.uk/charities-and-patronages?name=autistic&mrf=&field_themes_target_id=&field_world_region_value= >.
[6] National Autistic Society Website. Available at < https://www.autism.org.uk/>.

justice system with regards to autism and joint enterprise, it is submitted that it is appropriate for the Rt Hon Robert Buckland QC to recommend to Her Majesty that she grant Alex Henry a conditional Pardon to enable his immediate release.

14. In 2020 Palgrave published a study which involved over 200 people sentenced to mandatory life, with tariffs of 15 years or more that they received when, like Alex, they were 25 years old or younger, the results of which demonstrate the "profound and enduring" effects of the errors of law in joint enterprise. Extracts from that book are set out in paragraph 79 below. Findings of the study were published ***after*** Alex was refused leave to appeal. It is recommended that the Lord Chancellor and Secretary of State for Justice the Rt. Hon Robert Buckland QC consider the whole study as part of the consideration of this petition. It provides fresh and relevant matters not considered by the courts, consistent with the decision of the UK Supreme Court in *Jogee* where it was argued that joint enterprise over criminalised those affected by the errors of law. In addition, attached to this petition are the following:

    a. The decision of the UK Supreme Court in *R v Jogee*[7] correcting over 30 years of error in the law of complicity (known as joint enterprise).
    b. Report of world leading expert on autism Professor Baron Cohen diagnosing Alex as autistic provided as fresh evidence to the Court of Appeal Criminal Division (CACD).
    c. Addendum report by Professor Baron Cohen confirming his diagnosis after the CACD asked him to read medical records.[8]
    d. Decision of the CACD in 2017 (neutral citation *Grant-Murray and another v Regina* [2017] EWCA Crim 1228) wrongly rejecting the diagnosis of autism and its relevance and refusing leave to appeal on the *Jogee* issues raised.
    e. Fresh evidence by way of a further expert's report which confirms that Alex is indeed autistic. This was obtained ***after*** Alex was refused leave to appeal.
    f. Copy of Hansard for the 25th January 2018 where Rt. Hon Lucy Powell MP proposed a motion calling on the Government to review the use of joint enterprise. This took place ***after*** Alex was refused leave to appeal. Some parts of this debate are referred to in paragraph 71 below. MPs refer to the injustices in Alex's case.

[7] *R v Jogee (Ameen Hassan)* [2016] UKSC 8, [2017] A.C . 387, [2016] 2 WLUK 496.
[8] Note - There was no prosecution expert.

g. Further criminological research by the University of Cambridge on the "illegitimacy" of joint enterprise and the "collateral damage" of these convictions published in 2019 ***after*** Alex was refused leave to appeal. Some extracts from this research are referred to in paragraphs 70 and 79 below.

GROUNDS FOR MERCY

15. Alex has been the subject of a grave injustice and seeks a **conditional Pardon** on the following interlinked grounds:

(a) The miscarriage of law by fundamental legal errors in the law of complicity (known as joint enterprise) were identified and eventually corrected in 2016 in *R v Jogee (Jogee)*[9] but only *after* Alex was wrongly convicted (pages 17 to 31 below);

(b) The effect of unprincipled and harsh mandatory sentencing laws for accessories to murder which caused injustice to Alex and were applied without knowledge of Alex's autism (pages 31 to 43 below);

(c) The unjust and inflexible imposition of too high a bar to appeal for those affected by the errors of law in joint enterprise[10] which denied Alex access to justice (pages 43 to 49 below); and

(d) The morally and medically insensible decision by the Court of Appeal of England and Wales, Criminal Division (CACD) to reject correct and highly relevant expert evidence that Alex is autistic (pages 50 to 59 below).[11]

FACTUAL BACKGROUND – FROM TRIAL TO APPEAL

16. In March 2014 Alex was convicted of murder. He was not the principal offender but the Accessories and Abettors Act 1861 requires the courts to treat him as such because he was alleged to be an accessory as part of an alleged joint enterprise. He was sentenced to life imprisonment with a minimum term of 19 years before he can apply for parole. By then he was aged 21 which means he was transferred to adult prison and will not be eligible for

9 *R v Jogee (Ameen Hassan)* [2016] UKSC 8, [2017] A.C . 387, [2016] 2 WLUK 496.
10 See *R v Johnson (Lewis)* [2017] 4 W.L.R 104.
11 *R. v Grant-Murray (Janhelle) and others* [2017] EWCA Crim 1228; [2018] Crim. L.R. 71 (CA (Crim Div)).

release until 2032. His application for leave to appeal out of time was rejected in 2017 by the CACD. His attempt to appeal to the UK Supreme Court was frustrated. His appeal to the European Court of Human Rights was refused at the permission stage.

Alex's Trial

17. The killing took place in August 2013 near a shopping centre in Ealing, West London. A co-accused, Grant-Murray, had a trivial exchange with the deceased's group who were of similar age. Grant-Murray made a call. It was alleged that Grant-Murray had been heard to say "bring the nank [knife]" but at that stage Alex was not present and Grant Murray's call did not connect (para 8 *Grant-Murray and another v Regina* [2017] EWCA Crim 1228). Alex arrived at the scene with another co-accused, Ferguson, and the two groups engaged in a fight. The deceased was stabbed and died from his injuries. Ferguson had brought a knife and was the principal offender. He pleaded guilty part way through the trial to murder and inflicting grievous bodily harm on a second person and received a life sentence with a minimum term of 26 years imprisonment. There was considerable confusion as to the basis of his plea and how that left the prosecution case in relation to the others (para 16-19 *Grant-Murray and another v Regina* [2017] EWCA Crim 1228). The trial judge appeared to direct the jury to consider Alex's liability as an accessory rather than a principal offender.

18. Alex did not bring a knife and the call had not connected, which suggests that he did not know of Grant-Murray's alleged request. It was put by the prosecution at trial that Alex knew that Ferguson had a knife and that he foresaw what Ferguson might do. At trial, Alex denied knowing his co-accused had a knife and thus being able to foresee its use. Knowledge in this context is subjective (what he actually knew - not what he may have known). The evidence of individual conduct was that Alex threw one punch and a mobile telephone into the melee. Liability of an accessory depends on evidence of conduct that assists or encourages the crime and an intention to assist or encourage that crime (see ground 1 below).

19. Foresight of possibilities of what others might do as a legal test for *mens rea* was recognised as the wrong legal test and corrected in *Jogee.* This was only **after** Alex was convicted. The correct legal test for mens rea of a principal offender is an intention to cause really serious harm or death. The correct legal test for a common purpose where accused persons are joint principals is an agreement which involves an intention to cause really serious harm

or death (such an intention can be conditional). For an alleged accessory mens rea is knowledge of essential facts and conduct which demonstrates an intention to assist or encourage serious harm or death (murder). On these issues Alex's jury were not properly directed.

20. He has since been diagnosed on two separate occasions as autistic: Once post-conviction where the expert subsequently gave evidence before the CACD and once **after** the refusal of Alex's application for leave to appeal. Autism is relevant because it affects his ability to foresee what others might do, and therefore **critically** his ability to be complicit. This was not known at the time of trial so was not considered by his jury.

Alex's sentence

21. A life sentence was mandatory and the starting points are high. By the time of the verdict Alex was aged 21. An offender aged 21 and over who is convicted of murder, even as an alleged accessory, **must** be sentenced to imprisonment for life, pursuant to section 1(1) of the Murder (Abolition of Death Penalty) Act 1965. The Criminal Justice Act 2003 sections 269 and 277 and schedule 21 and 22 provide a statutory scheme for the setting of minimum tariffs. Judges have some flexibility in the minimum term to take account of, for example, role, age and any disabilities, such as autism. The trial judge was also not aware that Alex was autistic so did not consider this factor.

Alex's application for leave to appeal to the CACD.

22. The CACD did not apply the usual test under the Criminal Appeal Act for appeals as to whether his conviction was ***unsafe*** (which it clearly was). They refused to even grant leave to appeal. The CACD refused leave to appeal on the basis that Alex had not met a 'substantial injustice' test which had been set out obiter in *Jogee*[12] and interpreted in *R v Johnson (Lewis)*[13] as requiring anyone affected by the errors of law in joint enterprise to prove that they "would not have been convicted of murder" had the jury been properly directed.[14] The substantial injustice test is a creation of the courts. It usually applies to cases where Parliament changes the law but, through the decisions of *Jogee* and *Johnson*, it has

12 *R v Jogee (Ameen Hassan)*
13 *R v Johnson (Lewis)*
14 *Janhelle Grant-Murray* v *R* [2017] EWCA Crim 1228) [at para 23]

been extended to cases where the courts had created an error and particularly applied to joint enterprise appeals. Insofar as this was a coordinated approach by both courts, it is notable that Lord Thomas of Cwmgiedd, CJ sat on both *Jogee* and *Johnson*. The CACD decision was premised on the basis that there was "ready inference" of intention from someone else shouting "you're fucked now" (para 23). It is not clear as a matter of logic how such language allows for an inference that Alex knew there was a knife, nor that he foresaw (the trial judge used "anticipated") its use, nor that he had an intention to cause or assist in serious harm or death. The jury might well have been satisfied that Alex turned up for a fight, but not that Alex intended to assist or encourage murder. As is usual, the jury were not asked the basis of their verdict.

23. Further, the CACD rejected cogent and correct written and oral expert evidence from Professor Simon Baron-Cohen, a world renowned expert in autism,[15] that Alex is autistic and that would impact on his thinking at the time of the murder, and could have impacted on the jury's assessment of his culpability and their perception of his credibility.[16] In refusing leave to appeal, the CACD declined to receive Professor Simon Baron-Cohen's evidence at all.[17] Evidence of Alex's autism diagnosis was rejected even though the prosecution responding produced no expert evidence to controvert the diagnosis and the Court of Appeal appeared to miscategorise autism as a "mental illness".[18]

24. Alex lodged an application for the CACD to certify a point of law of general public importance including whether the substantial injustice test was correct given its violation of commitments to access to justice, particularly for disabled people such as those living with autism. The CACD stated that, pursuant to section 33 of the Criminal Appeal Act 1968, it was unable to certify a point of law of general public importance because leave to

[15] Qualifications and Career (Report 20 February 2016, pp.9-10): Professor of Developmental Psychopathology at the University of Cambridge and Fellow at Trinity College, Cambridge. He is Director of the Autism Research Centre (ARC) in Cambridge (www.autismresearchcentre.com). He holds degrees in Human Sciences from New College, Oxford, a PhD in Psychology from UCL, and an M.Phil in Clinical Psychology at the Institute of Psychiatry. He held lectureships in both of these departments in London before moving to Cambridge in 1994. He is author of *Autism and Asperger Syndrome: The Facts* (OUP, 2008). He has been awarded prizes from the American Psychological Association, the British Association for the Advancement of Science (BA), and the British Psychological Society (BPS) for his research into autism. He is Vice President of the International Society for Autism Research (INSAR). He is Patron of several autism and disability charities (Autism Anglia, Autism Yorkshire, and Speaking Up). He is a Fellow of the BPS, the British Academy, and the Association for Psychological Science, and is Chair of the NICE Guidelines.

[16] *R v Janhelle Grant-Murray*, paras.62-63.

[17] *Ibid*., para.64.

[18] *Ibid.*

appeal his conviction had been refused.[19] It cited the CACD decision of *Garwood* (also a joint enterprise CACD decision post *Jogee*) as the authority for the CACD lacking jurisdiction to grant a certificate in these circumstances.[20]

Alex's application to the UK Supreme Court

25. Alex applied directly to the UK Supreme Court to certify the matter in order to consider the jurisdictional issues that remarkably barred the highest court in the UK from considering points of law of general public importance, including those relating to violations of his rights preserved by the Human Rights Act 1998. Three issues were raised, as follows:

    (a) That section 33 of the Criminal Appeal Act (CAA) ought to be 'read down' to give Alex, as an autistic person, access to be heard by the UK Supreme Court.
    (b) Whether the interpretation and application of s.33 discriminated against all prisoners affected by the error of law in joint enterprise that was corrected in *Jogee*; and,
    (c) Whether the application by the CACD of s.23 CAA 1968 in relation to the diagnosis of autism was erroneous and discriminatory against him and disabled persons generally.

26. On 30 January 2018, the Supreme Court issued a letter to Alex stating, "the appellant's application for permission to appeal the order made by the Court of Appeal Criminal Division on 11 August 2017 *has now been issued by this Court*".[21] The application was issued *de bene esse*.[22] It invited submissions from the prosecution on the matters raised on Alex's behalf.[23]

27. The matter went before Lords Wilson, Hughes and Hodge. It was determined on the papers without a hearing or oral argument. On 25 July 2018, the Supreme Court issued an *order*

[19] Court of Appeal Letter 18 August 2017.
[20] *R v Garwood* [2017] 1 W.L.R. 3182.
[21] Supreme Court Letter 30 January 2018.
[22] *Ibid*.
[23] *Ibid.,* p.2

that Alex's application to be heard by the UK Supreme Court was refused.[24] The Court prioritised finality, relying on *Dunn v UK*.[25] *Dunn* is not an error of law case.

28. The Supreme Court's Order of 25 July 2018 refusing leave to appeal is the final effective decision concerning the Alex's conviction. Leave to appeal to the European Court of Human Rights (ECtHR) was sought **within the 6-month lime limit** from the UK Supreme Court order. This failed at the permission stage on the basis that the application was out of time. The error in relation to the calculation date was queried with the ECtHR, but permission remained refused.

29. This petition is Alex's only remaining remedy.

MERCY - APPLICABLE LAW

30. In the English tradition, the Royal Prerogative of Mercy is an historic Royal power reserved to the British monarch, in which she can grant pardons to persons convicted of criminal offences. The Lord Chancellor and Secretary of State for Justice has responsibility for recommending the use of the Royal Prerogative of Mercy to Her Majesty the Queen. It is exercised sparingly and only in cases of exceptionality.

31. There are two types of Pardon that may be granted: A Free Pardon; and a Conditional Pardon. The effect of a Free Pardon is that the conviction is disregarded to the extent that, insofar as is possible, the person is relieved of all penalties and other consequences of the conviction. However, the conviction is not quashed. Only the courts have the power to quash a conviction. A Conditional Pardon is used to substitute the original penalty with a lesser sentence.

32. Historically, the royal power of pardon was a power to forgive a legal wrong. The Jurisdiction in Liberties Act 1535 extinguished the powers of the Church and landowners to pardon and vested it in the Sovereign, thus ratifying and preserving the royal power. The Royal Prerogative of Mercy covers two functions – an act of forgiveness or acknowledgement of a mistake. It is a last resort correction that allows for compassion and

[24] Supreme Court Order 25 July 2018.
[25] *UK* (2013) 56 EHRR SE5

common sense for offenders who have been too severely punished or wrongly convicted by reason of some technical or procedural error; or convicted on the right facts under the wrong law and whose plight is discovered too late for redress in an appellate court.[26]

33. Historically, the principle of a pardon also derives from the Act of Settlement 1700 which altered the law so that a pardon could not "stop an impeachment … but there is to be nothing to prevent the king from pardoning after the impeached person has been convicted and sentenced." For a modern application of the law see *R v Foster (Barry)*.[27] In *Foster* it was held that the effect of a Free Pardon was to remove from the subject of the pardon "all pains, penalties, and punishments whatsoever that from the said conviction may ensue" but not to eliminate the conviction itself. Highlighting this point, Watkins LJ stated [at para 71]:

> " [counsel] has reminded us that constitutionally the Crown no longer has a prerogative of justice, but only a prerogative of mercy. It cannot, therefore … remove a conviction but only pardon its effects. The Court of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction."

34. The Royal Prerogative of Justice was abolished in the 17th Century. A Pardon is thus a common law extra-judicial power which is exercised by the Crown under the Royal Prerogative of Mercy.

35. Prior to the advent of the Court of Appeal it was a power granted pretty freely, particularly by the Stuart Kings. The report of the Criminal Code Commission in 1879 followed the wrongful conviction by misidentification of Albert Beck, ultimately pardoned in 1877 after 16 petitions for mercy. The Commission recommended extending the power of mercy to the Secretary of State (now vested in the Lord Chancellor and Secretary of State for Justice) to direct a retrial but this instead was given to the courts pursuant to the Indictable Offences Act 1848 which established the Court for Crown Cases Reserved (later the Court of Appeal). The Justice Secretary therefore cannot order a retrial, but retains the power to inquire into circumstances and to recommend that a sentence is remitted or commuted. [28]

[26] CH Rolph *The Queen's Pardon* 1978 Cassell ISBN 0 304 30030 6 at page 2
[27] [1985] QB 115; [1984] 3 W.L.R. 401]
[28] Ibid page 3

36. In 1883, Sir James Fitzjames Stephens wrote, when discussing the creation of a Court of Appeal:

> "A much more difficult question arises in relation to cases which occur from time to time where circumstances throwing doubt on the propriety of conviction are discovered after the conviction has taken place. In these cases… The Secretary of State is a better judge of the existence of such circumstances than a court of justice can be. He has every facility for enquiring into the special circumstances.… He is fettered by no rule and his decision does not form a precedent. We do not see how a better means could be provided for enquiring into the circumstances of the exceptional case in question." [29]

37. The Criminal Appeal Act 1907 contained a specific saving for the Royal Prerogative of Mercy and the prerogative remains and is consolidated by the Criminal Appeal Act 1995. Although referred to as a power for mercy because the coronation oath contains the promise that justice "shall be administered in mercy." The power has been described as "a disinterested decency, doing the 'right thing' at long last because no one else has the supreme or divine power to do it; and sometimes doing it without imposing conditions. "[30]

38. Blackstone described it as a King's power to extend mercy where he thinks it is deserved.[31] A former Justice Secretary stated that the subject of the Pardon must not be "tainted with unclean hands". That test, however, is not definitive and it is important to counterbalance all prevailing and relevant factors. Former Home Secretary, Herbert Gladstone, classically advised the House of Commons in 1907:

> "It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations – the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind … character and antecedents … and many other [factors] have to be taken into account in every case."

39. In the case of *Bentley,* Watkins L.J commented that the prerogative power is: "A flexible power and its exercise can and should be adapted to meet the circumstances of the particular

[29] Stephen, J., 1964. *A History Of The Criminal Law Of England*. New York: B. Franklin, p.135.
[30] Rolph, C., 1978. *The Queen's Pardon*. Michigan: Cassell, p.16.
[31] Ibid

case … the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour. It is now a constitutional safeguard against mistakes." [32] Thus, the power to pardon constitutes a broad and flexible constitutional safeguard against mistakes, encompassing Conditional as well as Free pardons.

40. The exercise of mercy enables release from a life sentence, separately from the Parole Board powers. It does not require a finding of innocence (although such a finding might lead to a Free Pardon[33]). One early example is the release of Frances Bacon, Lord Chancellor, who asked for a conditional pardon (by remission of his sentence) for taking bribes but was granted a free pardon in 1620, even though he had pleaded guilty.

41. More recently Alan Turing was posthumously granted a free pardon where law and society had changed to recognize the injustice of criminalization for same sex relationships. Similarly, Timothy Evans was granted a posthumous pardon despite a confession where his conviction did not take account of his cognitive limitations, and there was fresh evidence from the discovery of Christie's (the main witness against Evans) activities at 10 Rillington Place.

42. In other cases, grants of mercy have been as a result of errors in the criminal justice system. Derek Bentley is a paradigm example. The injustice was that the jury were not aware of his cognitive limitations and the effect they had on his ability to be complicit in the crime of another and they were wrongly directed on the test of accomplice liability. In the heightened emotional circumstances of the murder of a police officer, where Bentley told his accomplice to "let him have it", the capital sentence for Bentley was widely accepted as an injustice.

43. The Royal Prerogative of Mercy is therefore a wide power, not limited to circumstances where a party is known or indeed believed to be morally or technically innocence. Arguably a form of natural justice: to act fairly, in good faith and without bias or a power to rescue a person from the cruelty of unmerited punishment or to forgive.

[32] [1994] QB 349 at para 365.

[33] The modern statement on a free pardon is found in Watkins L.J judgment in the Court of Appeal in *Bentley* [1994] QB 349 at 364E where he declared: "We understand the strength of the argument that, despite the fact that a free pardon does not eliminate the conviction, a grant of a free pardon should be reserved for cases where it can be established that the convicted person was morally and technically innocent."

44. The Royal Prerogative of Mercy has been exercised to provide relief in cases where the accused had a mental illness, or suffered from insanity or some limitation, that was not properly medically understood at the time. As long ago as 1864, Edward Oxford was categorized as a "feeble minded youth" and "a miserable halfwit"[34] and was granted a conditional pardon for his role in the attempted assignation of the Queen. This, along with Bentley's and Evans' cases show how the Royal Prerogative has been especially necessary for those with cognitive limitations or other disabilities. Exercise of the Royal Prerogative of Mercy is not limited to cases where there is fresh evidence. Rolph has encapsulated the issues neatly as follows:

> "Especially interesting is the position of an alleged murder serving a life sentence for the crime he didn't commit. . . Men and women are in prison today who have done no wrong; that we owe them not pardon but honorable amends; and that, once we have found them and sought their forgiveness, we should go on to recognize as a principle of moral behavior, that a grievance is at its most poignant when it is almost redressed".[35]

45. In Capital cases, mercy was exercised where an examination concluded there was a possibility or scintilla of doubt, although rarely without fresh evidence or circumstances.[36] In Alex's case there is a high level of doubt that makes his conviction for murder **unsafe,** together with both a correction of law **after** his conviction, ample evidence that joint enterprise created a grave injustice and fresh evidence of his diagnosis of autism.

46. Granting the Royal Prerogative of Mercy is not an exercise of following precedent. Each case depends on its own merit. However, it is worth returning to the decision in Derek Bentley's case where a Pardon was granted posthumously in 1993. Bentley (B) and his co-accused (C) were convicted in 1952 of murdering a police officer. The prosecution case was that they had been engaged in a joint enterprise, B having shouted 'let him have it' before C fired the fatal shot. B was sentenced to death and C, aged only 16, imprisoned.

47. The case captured the public's attention and there were widespread protests. The considerations may have been different as the pardon was posthumous. The petition for a

[34] Ibid n30.
[35] Rolph, C., 1978. *The Queen's Pardon*. Michigan: Cassell, pp.142 and 148
[36] *Ibid*, page 49

Free Pardon was based on the fact his sentence should have been commuted to imprisonment and a Conditional Pardon would have offered little by way of reprieve. However, it is particularly relevant as much of the disquiet about his execution stemmed from the fact that Bentley was the secondary party and was epileptic with a mental age of 11-12. In his out of time posthumous appeal, the then CACD suggested that the liability of a party to a joint enterprise must be determined according to the common law as now understood, as opposed to the common law at the time, [at para 6]. It appears to have been determined on 'safety' not the current requirement on joint enterprise appeals to show 'substantial injustice':

> "The Court must judge the safety of the conviction according to the standards which would now apply in any other appeal under section 1 of the 1968 Act. Further, where between conviction and appeal there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the Court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time."[37]

48. The exercise of the Royal Prerogative of Mercy over the last century illustrates how the requirement of a person's moral and technical innocence has been significantly loosened. It is clear that a more accurate approach to the exercise of the Royal Prerogative of Mercy is that the power is sufficiently broad to take in to account cases where the criminal justice system falls into error, and there has been a miscarriage of justice.

49. All appeals have been rejected. The evidence provided herein includes material that has not been before the courts. It all demonstrates the injustices which have occurred. The *Bentley, Evans* and *Turing* cases highlight the flexible quality of the prerogative. The prerogative's exercise 'can and should be adapted to meet the circumstances of the particular case'. [38]

50. Headlines sometimes scream a floodgates argument but, to grant Alex Henry a conditional Pardon, is an exercise in relation to him alone. Others would have to apply and be considered separately. Even if all applied, this will not open any floodgates to murderers

[37] [2001] 1 Cr. App. R. 21
[38] *The Law Gazette*, 2015. The royal prerogative of mercy. [online] Available at: <https://www.lawgazette.co.uk/practice-points/the-royal-prerogative-of-mercy/5052062.article> [Accessed 29 March 2020].

being released. He was an alleged accessory who was wrongly convicted and harshly punished. Current prisoners affected by the error in complicity counted by the JengBA campaign appear to number approximately 1000. [39] Again, the decision in Derek Bentley's case is of assistance. In *R. v Harold Robert* [40] the suggestion that the approach set out by Bingham LJ in *Bentley* would lead to the floodgates being opened was dismissed.[41]

51. Therefore, the Royal Prerogative of Mercy allows a semblance of justice where justice has miscarried. Alex's case is sufficiently exceptional for a Conditional Pardon. Sixty eight years after Derek Bentley's wrongful conviction, Alex Henry is a wrongly convicted alleged accessory to murder serving a life sentence for a murder which he did not physically commit. He cannot apply for parole until he is nearly 40 years old. The trial judge misdirected the jury and they were not told Alex is autistic or how that affects him.

52. It follows that a conditional Pardon is available and the Lord Chancellor and Secretary of State for Justice the Rt Hon Robert Buckland QC has wide powers to consider the type of material provided herein and to consult. However, insofar as such consultations usually involve the judiciary, in this case, it must be borne in mind that some of the errors were created by the judiciary themselves and thus, it is submitted that caution should be exercised in this regard. It is for these reasons that a lengthy petition has been drafted with detailed reference to legal history, evidence from Justice Committee Reports, the Law Commission reports and rigorous academic research.

53. The Lord Chancellor and Secretary of State for Justice the Rt Hon Robert Buckland QC is therefore requested to recommend a Conditional Pardon to correct errors and manifest injustice and to enable Alex's immediate release.

54. In an exercise of Conditional Pardon it may well be relevant to consider that Mr Jogee was later acquitted of murder at a retrial but convicted of manslaughter. He was not the principal offender but an accessory. He waved a bottle and shouted encouragement. He was sentenced to 12 years for manslaughter which allowed for release after 6, which is less than Alex has served.

[39] *Inside Time*, 2020. Tireless campaigners. [online] Available at: <https://insidetime.org/tireless-campaigners/> [Accessed 6 April 2020].
[40] [2001] 1 Cr. App. R. 26, Woolf C.J
[41] [2001] 1 Cr. App. R. 21

Ground 1: The miscarriage of law by fundamental legal errors in the law of complicity (known as joint enterprise) were identified and eventually corrected in 2016 in *R v Jogee (Jogee)*[42] but only *after* Alex was convicted;

55. A substantial error in the law of complicity (known joint enterprise) has caused a grave injustice. Juries were directed that they could convict on foresight of possibilities rather than an intention to assist or encourage. This error of law was corrected by the UK Supreme Court in 2016 in *Jogee*..[43] This correction occurred after Alex Henry was convicted of a murder that he did not physically commit. As a result of this error, his jury were not properly directed.

56. The error of law was said by the UK Supreme Court in *Jogee* to have occurred over 30 years ago in the Judicial Committee of the Privy Council (JCPC) in 1984 in *Chan Wing-Siu*.[44] It was "to equate foresight with intention to assist, as a matter of law; the correct approach is to treat it as evidence of intent" and, by necessary implication, that for every crime the defendant is alleged to be an accomplice to, the defendant must in fact assist or encourage that crime.[45]

57. The error was then erroneously and deliberately adopted by the House of Lords in *Powell and English*.[46] The effect was that the courts reinstated and widened what Parliament had expressly removed. In 1957 Parliament put an end to the notion of 'constructive malice' by abolishing the felony-murder rule[47] and in 1967 Parliament abolished objective

[42] *R v Jogee (Ameen Hassan)*
[43] *Ibid*
[44] *Chan Wing-Siu v R* [1985] A.C. 168.
[45] *R v Jogee (Ameen Hassan) [At paras 87 and 8]*
[46] *R v Powell (Anthony); R v English*
[47] The effect of the 'felony murder rule' was to create murder offences when someone was killed in the course of an unlawful act of violence, even where there was no intention to kill or indeed harm and the killing was purely accidental. The rule was abolished in 1957 by virtue of The Homicide Act. Section 1(1) of the 1957 Act abolished the felony murder rule as follows: Abolition of "constructive malice" (1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

'constructive liability'[48]. The courts therefore took a 'wrong turn'[49] and developed an extended the principle of criminal liability for accessories at common law. This extended principle of accessorial liability looked to whether the accessory had foreseen the possibility that the perpetrator might commit the crime rather than whether the accessory had intended to assist or encourage that crime (and had in fact assisted or encouraged the principal offender to commit it).

58. This erroneous development of common law originally affected only cases where a defendant had been party to the commission of one crime jointly with one or more other offenders one of whom then went on to commit a second, usually more serious, offence. In that second offence the defendant did not play any role other than having possibly foreseen that the second crime might happen. This came to be known as parasitic accessorial liability (PAL): the second crime being parasitic on commission of the first. Over time, liability based on foresight was also applied to simple complicity cases (also known as aiding & abetting), starting around the time *Rook*[50] was decided, and thus was deliberately adopted by the judiciary to ground accessorial liability across the spectrum of complicity cases, replacing the more stringent legal requirements that had hitherto applied to simple complicity cases, being acts of aiding & abetting undertaken with an intent to aid or abet the principal offender's crime.

59. Put shortly, the courts wrongly created a situation which over-criminalised alleged secondary parties, convicting people on a low threshold of foresight of what another might do rather than the correct law of an intention to assist or encourage the crime (formerly termed aid, abet, counsel or procure). The tension resulting from sensible legislative

[48] Parliament reversed the objective intention test set out in *DPP v Smith* [1961] A.C. 290, where the accused was deemed to have foreseen the risk which a reasonable person in the position of the accused would have foreseen, by way of Section 8 of the Criminal Justice Act 1967, which reads as follows: A court or jury in determining whether a person has committed an offence -(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason of its being a natural and probable consequence of those actions but (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inference from the evidence as appear proper in the circumstances.

[49] *R v Jogee (Ameen Hassan)* [2016] UKSC 8, [2017] A.C . 387, [2016] 2 WLUK 496.**At para 87:** "It would not be satisfactory for this court simply to disapprove the Chan Wing-Siu principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles. We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before **the law took a wrong turn**. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre- Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose. We address below the potential impact on past convictions."

[50] *R v Rook* (Adrian) [1993] 1 W.L.R. 1005

reforms on the one side, and the erroneous developments at common law on the other, has created substantial miscarriages of justice. The practical result of such miscarriages is that those who had no intention to assist in murder are serving life sentences with long minimum terms. This grave injustice by the courts has affected approximately 1000 currently serving prisoners of whom Alex is one of the youngest.[51]

60. Their Lordships in *Jogee* cited the error of law as commencing in the Judicial Committee of the Privy Council (JCPC) in *Chan Wing-Siu* in 1984.[52] Notably, only 2 cases were cited to the court in *Chan Wing-Siu*. Their Lordships in *Jogee* made a point of stating that they had been supplied with much more material.[53] Their Lordships in *Jogee* also reversed the House of Lords decision in *Powell and English* which developed the Chan Wing-Siu principle.[54] Notably, in *Powell and English*, the House of Lords openly conceded that their decision was "illogical". [55]

[51] *Inside Time*, 2020. Tireless campaigners. [online] Available at: <https://insidetime.org/tireless-campaigners/> [Accessed 6 April 2020].

[52] *Chan Wing-Siu v R*

[53] *R v Jogee (Ameen Hassan)*

[At para 61]: "The court has had the benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability than on past occasions."

[At para 80]: "Firstly, we have had the benefit of a much fuller analysis than on previous occasions when the topic has been considered. In the Chan Wing-Siu case only two English cases were referred to in the judgment: *R v Anderson; R v Morris [1966] 2 QB 110* and *Davies v Director of Public Prosecutions [1954] AC 378* . More were referred to in the judgments in R v Powell ; **416* R v English , but they did not include (among others) R v Collison 4 Car & P 565 , *R v Skeet (1866) 4 F & F 931* , *R v Spraggett [1960] Crim LR 840* or notably R v Reid (Barry) 62 Cr App R 109 ."

[54] *R v Jogee (Ameen Hassan)*

[at para 79] It will be apparent from what we have said that we do not consider that the Chan Wing-Siu principle can be supported, except on the basis that it has been decided and followed at the highest level. In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments. We recognise the significance of reversing a statement of principle which has been made and followed by the Privy Council and the House of Lords on a number of occasions. We consider that it is right to do so for several reasons.

[at para 97] We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre- Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose.

[55] *R v Powell (Anthony); R v English* [at para 25] "My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. **But the rules of the common law are not based solely on logic** but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *Reg. v. Majewski [1977] A.C. 443* , 482e, in rejecting criticism based on strict logic of a rule of the common law, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic."

Lord Hutton's concession referred to in Jogee [at para 55] "Lord Hutton recognised that **as a matter of logic there was force in the argument that it was anomalous** that foreseeability of death or really serious harm was

61. The results of the ill-informed and illogical decisions by the senior courts caused juries in England and Wales to be wrongly directed. This had direct effect on the trial for Alex Henry. He is therefore the victim of a miscarriage of justice by miscarriage of law in relation to his conviction. As a result of the prohibitive appellate procedures, the Justice Secretary is the only one who can correct this injustice through the recommendation of the exercise of the Royal Prerogative of Mercy.

62. Evidence that the errors of law in complicity caused grave injustice is available in Justice Committee Reports, Parliamentary debates and academic and journalistic research as follows:

Justice Committee Reports before the decision in Jogee

63. What follows is a *selection* of commentary on the law and its effects **pre-*Jogee;*** that is, at the time it was applied to Alex's case:

64. The *Justice Committee, Joint Enterprise*[56] report concluded that the then lack of clarity relating to the doctrine of joint enterprise was 'unacceptable for such an important aspect of the criminal law' [at para 36]. A warning that joint enterprise may facilitate overcharging was given [at para 32] and the DPP invited to issue guidance on the proper threshold at which association becomes criminal [at para 33]:

> "Evidence put before the Committee came from a variety of actors including JENGbA, the DPP, The Prison Reform Trust and the Campaign to Reform Joint Enterprise. This evidence included case studies to demonstrate that the law as it stood had led to grave injustice. The findings of the report did not at that stage go quite as far. It accepted that the doctrine is so unclear that it could *potentially* cause injustice to both victims and defendants."

not sufficient mens rea for the principal to be guilty of murder, but was sufficient in a secondary party. But he said that there were weighty and important practical considerations related to public policy which prevailed over considerations of strict logic. He saw considerable force in the argument that a party who takes part in a criminal enterprise (for example, a bank robbery), with foresight that a deadly weapon may be used, should not escape liability for murder because he, unlike the principal party, is not suddenly confronted by the security officer so that he has to decide whether to use the gun or knife or have the enterprise thwarted and face arrest."

[56] *(HC 2010–12, 1597-I)*

65. After 3 years there was a second report, The *Justice Committee, Joint Enterprise: follow-up*[57], which requested that the Law Commission undertake an urgent review of the law of joint enterprise in murder cases:

> "Has use of the doctrine of joint enterprise led to miscarriages of justice? The usual definition of a miscarriage of justice is a case in which somebody is convicted for a crime there are particular difficulties with bringing successful appeals in joint enterprise cases. Furthermore, concerns about the impact of the joint enterprise doctrine are not primarily focused on whether it is being misapplied in individual cases. The concerns are, rather, with whether the doctrine, as it has developed through case law and is now being applied, is leading to injustices in the wider sense, including through a mismatch between culpability and penalty. The subjective and objective information which has been accumulated through JENGbA's campaigning, the work of the TBIJ, and the research by the Cambridge Institute of Criminology all call into question, in their different ways, the compatibility of joint enterprise with a wider conception of justice." [at para 38]

> "In light of the evidence we have heard in this inquiry, and the other developments which have taken place since our previous Report, our disquiet at the functioning of the law on joint enterprise has grown. Notwithstanding the positive development of the publication of the CPS's guidance on joint enterprise charging decisions, there seems to be no willingness on the part of the Government to recognize that there may be negative effects from the operation of the doctrine, for the reputation of the justice system and for wider society, as well as for the interests of some of those convicted under the doctrine and for the victims of crimes.
>
> We are no longer of the view that it is satisfactory for a consultation to be held on the Law Commission's previous proposals on joint enterprise as contained in their Participating in Crime report, as we recommended in our 2012 Report. The evidence which we have received in this inquiry has persuaded us that the

[57] *(HC 2014–15, 310-I)*

doubts over the appropriateness of the Chan Wing-siu principle, as it has emerged and then developed in case law since 1985, are sufficiently serious to mean that its retention should not be taken as a starting point for any consultation, which was the Law Commission's inclination.

We now recommend that the Government should request the Law Commission to undertake an urgent review of the law of joint enterprise in murder cases. This review should consider the appropriateness of the threshold of foresight in the establishment of culpability of secondary participants in joint enterprise cases. It should also consider the proposition that in joint enterprise murder cases it should not be possible to charge with murder secondary participants who did not encourage or assist the perpetration of the murder, **who should instead be charged with manslaughter or another lesser offence.** The Law Commission should be asked to present proposals for the codification in statute of the law of joint enterprise, together with any proposed changes arising from its review. We consider that the Law Commission should be asked to report on these matters by the end of 2015. We also recommend that the Justice Committee in the next Parliament should return to this issue." [at para 45-47]

Stakeholders and the Judiciary before the decision in Jogee

66. Stakeholders were significantly concerned: For example, *The Prison Reform Trust, Report 2011*[58] voiced concerns that joint enterprise was being used as a 'drag-net' targeting specific groups and bringing individuals into the criminal justice system who need not be there. The report observed that young people in particular were subject to a doctrine which experienced practitioners find complex and confusing. The report cites two case studies where youths have been charged where they were not present at time of the attack or instructed they had no involvement.

67. The judiciary were also vocal. For example, In 2008, Lord Nicholas Phillips, then Lord Chief Justice who would go on to be the founding President of the Supreme Court,

[58] *Prison Reform Trust Response To The Justice Committee Enquiry Joint Enterprise*. [online] Available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Justice%20Committee%20Joint%20Entreprise%20submission.pdf> [Accessed 28 March 2020].

questioned the fairness of the law of joint enterprise,[59] including in his Essex University/Clifford Chance lecture on reforming the law.[60] Lord Toulson also in his 2013 book chapter (before *Jogee*) raised concerns that joint enterprise had become uncoupled from any connection with causation.[61]

Legal and criminological research before the decision in Jogee

68. Academic opinion pre *Jogee* was also significant. Some examples are as follows:

a. B. Crewe, A. Liebling, N. Padfield and G. Virgo, *"Joint Enterprise: The Implications of an Unfair and Unclear Law"* [2015] Crim. L.R. 249.

"The problems with the law are most marked in the context of murder, in large part because of the indiscriminate operation of the mandatory life sentence and the low threshold of culpability to secure conviction as a secondary party. This makes a mockery of the criminal law which is founded on fundamental principles of the rule of law, namely the need to identify degrees of criminality and to reflect this in the hierarchy of offences and the sentence which is imposed." [pp.268-269]

b. M Dyson, 2015. *'Might Alone Does Not Make Right: Justifying Secondary Liability'* Crim LR 967:

"Currently a defendant, D, must foresee a substantial risk of the principal, P, committing a crime, to be liable as a secondary party to it. This is an unjustifiably low level of fault considering that D can be tried, convicted and punished to the same degree as P. The authority that the Court of Appeal has

[59] Phillips, N., 2008. *Reforming The Law Of Homicide*. The University of Essex, 6 November 2008. [pp.15] "I believe that the present law suffers from two defects. First it is unclear and can pose problems for judge and jury alike. Secondly, on at least one view of the law, it is unfair."
[pp.26] "Apart from the complexity of the law as it stands, is it fair? I am not convinced that it is."
[60] See also Wright, O., 2014. Revealed: how 300-year-old duellist law is jailing hundreds for 'joint enterprise' killings. *The Independent*, [online] Available at: <https://www.independent.co.uk/news/uk/crime/revealed-how-300-year-old-duellist-law-is-jailing-hundreds-for-joint-enterprise-killings-9226896.html> [Accessed 7 April 2020].
[61] See, e.g., Sir Roger Toulson, 'Sir Michael Foster, Professor Williams and complicity in murder' in Dennis Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law: The legacy of Glanville Williams* (Cambridge, CUP, 2013).

developed has suspect foundations, no normative justification and has worrying practical implications."

c. Wilson, W. and Ormerod, D., 2015. *'Simply harsh to fairly simple: joint enterprise reform',* Criminal Law Review, 3, 5-2:

"Particularly in the case of murder, there is a significant injustice arising from the present state of the law founded on the joint enterprise approach. A conviction for being party to a joint enterprise may mean that D suffers all the consequences of a murder conviction, including the offence label and the mandatory sentence (ratcheted up in real terms by the Sch.21 tariffs to the Criminal Justice Act 2003), without necessarily having demonstrated any of the culpability or wrongdoing of the principal offender."

d. Bridges, L., 2013. *'The case against joint enterprise',* Race & Class, 54(4), 33-42.

This article argues that when used as a dragnet against groups of people through police and prosecutorial over-charging, and convictions based on 'foresight' rather than criminal intent, this can all lead to miscarriages of justice.

e. Mitchell, B. and Roberts, J.V., 2010. *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales.* Coventry: Coventry University.

Survey research conducted in 2010 found public resistance to the notion that an accessory could be convicted of murder on the grounds of involvement in the lethal act which fell short of physical participation.

f. Krebs, B., 2010. *Joint Criminal Enterprise.* The Modern Law Review, 73(4), pp.578-604.

"The result [of foresight as a requirement for liability in its own right] is a doctrine of joint enterprise which is over-inclusive and lacks clear boundaries.

> It can lead to harsh results, particularly where the offence charged is murder with its anomalous mens rea requirement. [. . .] The prosecution can secure convictions without bothering to prove individual acts and intentions, with all the troubling implications this has for the rule of law or the notion of 'fair warning'. . . [The policy grounds] that have been put forward are not persuasive and cannot bear the load of such a significant extension of criminal liability." [at pp.603].

Journalist research before the decision in Jogee

69. Public opinion through the media was also engaged: The Bureau of Investigative Journalism's extensive research inquiry, carried out over a period of 8 months, was published in '*Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions*.' [62] A selection of its findings are as follows:

> At page 7: "The Bureau also found that the more defendants involved in a homicide charge, the more likely it would be that the prosecution would later drop the case against some of the defendants or that the trial would go ahead and some defendants would eventually be acquitted. This suggests that in multiple prosecutions some people are being swept up into serious trials who should not be there."
>
> At page 8**:** "In 2008 and 2012 it was more likely a joint enterprise homicide ruling would be upheld at the Court of Appeal as compared to a non-joint enterprise ruling. This suggests it is harder for those convicted under joint enterprise to get their sentences reduced."
>
> At page 19: "The Bureau's analysis of joint enterprise homicide conviction appeals show that the appeals failed nearly 70% of the time."
>
> At page 24: "Once present it can be hard for defendants to argue that their presence alone was not an encouraging factor. A heavy burden is placed on them to explain

[62] https://www.thebureauinvestigates.com/stories/2014-03-31/read-the-report-joint-enterprise-an-investigation. See also McFadyean, M., 2014. In the Wrong Crown. *London Review of Books*, [online] 36(18). Available at: <https://www.lrb.co.uk/the-paper/v36/n18/melanie-mcfadyean/diary?referrer=> [Accessed 29 March 2020].

themselves, and this appears to be inconsistent with the cardinal rule that the prosecution bears the burden of proving guilt."

At page 42: "These convictions [examined as part of the research] may adhere to the law as it currently stands, but they also raise important moral questions about the fairness of long sentences, and whether justice is actually being served."

Academic research published after Alex was refused leave to appeal

70. In an academic research project by the University of Cambridge conducted with affected prisoners [63] Hulley, S., Crewe, B. and Wright, S. 2019. Making Sense of 'Joint Enterprise' for Murder: Legal Legitimacy or Instrumental Acquiescence?' *British Journal of Criminology*, 59, pp.1328-1346, the findings in relation to prisoners affected by the errors of law are stark (see attached and also para 79 below):

    a. At page 1335: "[M]ost secondary parties accepted that their actions rendered them culpable of some kind of legal offence but denied being legally and morally responsible for killing someone. Many admitted that they were present at the scene or acknowledged that they had lied to the police. In legal terms, then, they felt that they were guilty of an offence such as perverting the course of justice and reported that being convicted for a lesser offence would have felt legitimate.[…] In this context, the 'murder' conviction and subsequent mandatory life sentence was experienced as deeply illegitimate because the meaning and label of being 'a murderer' felt far removed from the actions for which the individual felt culpable, such as lying (about being present at the scene, e.g.), not calling the police or not intervening during a violent altercation. For such prisoners, then, the consequences of a murder conviction felt highly disproportionate and joint enterprise lacked legal legitimacy because it allowed them to be held liable for murder (as a secondary party) (Murphy et al. 2009)'. Such feelings of illegitimacy led to feelings of anger and frustration among secondary parties, leading some to respond by 'causing 'havoc'' to justify their

63 ESRC-funded study being undertaken by researchers from the Institute of Criminology, at the University of Cambridge. Findings previously presented to *The Justice Committee, Joint Enterprise: follow-up (HC 2014–15, 310-I) available at:* <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/Justice/Joint%20Enterprise%20followup/written/10886.html>(last accessed 7th April 2020)

imprisonment (p.1338), while for others (women in particular) it led to anger being 'directed inward' in the form of self -harm (p.1339)."

b. At page 1336: "For many secondary parties, a murder conviction simply 'didn't make sense'. Individuals questioned how their conviction could be considered morally right (Sparks and Bottoms 1995), illustrating a 'legitimacy deficit' (Beetham 1991: 20) relating to the law itself."

c. At page 1342: "We have discussed elsewhere the ways in which prisoners adapt to and defend against long sentences in order to avoid drowning in their initial distress (Crewe et al. 2016; Wright et al. 2017). Joint enterprise prisoners have the additional burden of deciphering why they are in prison for murder."

d. At page 1342-1343: "These findings compel us to consider the moral justifiability of convictions that remove (often young) men and women, and disproportionately BAME men, from society for decades at a time for behaviour that, by definition, does not constitute killing 'with the intent to kill or cause grievous bodily harm' (Crown Prosecution Service 2019b). It is important to consider not only the damage the system inflicts upon such young minds and bodies during lengthy periods of imprisonment, including the impact of suppressed and displaced feelings of illegitimacy about such sentences (Liebling et al. 2014) but also the collateral damage of these convictions. Long-term imprisonment devastates psychological health, family relationships, future employment possibilities and economic well-being (see Liem and Kunst 2013: 333 on 'post-incarceration syndrome'), particularly for those wrongly convicted, who struggle to overcome feelings of unresolved anger and confusion on release (Grounds 2005)."

Parliamentary debate after Alex was refused leave to appeal

71. The exceptional injustice of Alex's case was reflected in the public concern at his conviction and sentence, a concern that has not abated over the years Alex has spent in custody and a concern that remains post *Jogee*. It is notable that the LCJ who usually sits in the CACD sat in the UKSC in *Jogee.* The handing down of obiter dicta on the applicability of a substantial injustice test involving the LCJ is of significant concern since that test was later applied by the CACD in *Johnson*. This obiter in *Jogee* which had the effect of blocking appeals and thus preventing access to justice for an acquittal, a

retrial or a substitute alternative verdict has sufficiently shocked the public consciousness to be raised post *Jogee* in Parliamentary debate, with specific reference to the injustice to Alex Henry: [64]

Lucy Powell MP:

a. [referring to *Jogee*] "At the time of the ruling, campaigners, parliamentarians and others viewed it as a victory and had confidence that injustices would be put right and that the use of joint enterprise would be more limited going forward. However, two years on, the Supreme Court ruling feels increasingly like a pyrrhic victory, with no case from the 30 years in which the "wrong" law was applied being awarded an appeal, and many new cases with all the hallmarks of the old cases being successfully prosecuted".

b. "We are now seeing a new generation of joint enterprise lifers in prison. The Supreme Court says it is "the responsibility of the court to put the law right". But many of us have come to the conclusion that the criminal justice system will not right itself, and is not righting itself, in relation to joint enterprise, and that we need to act. That is why Members on both sides of the House have joined together to send a strong signal both to the Government and to prosecutors and others that the way in which we continue to apply the law and the incredibly high bar that has been set for previous unsafe convictions to be reheard need to be redressed."
c. "With hundreds of lifers in prison after being convicted under what the Supreme Court views as a wrong application of the law, this is potentially one of the biggest and most widespread miscarriages of justice ever to face our justice system. As such, I fear that the cosy club of the criminal justice establishment is closing in on itself to prevent this from ever being fully exposed."

d. "The substantial injustice test was not clearly set out in the ruling and has never been set out by Parliament. The substantial injustice test has subsequently been tested through case law and is now an almost impossibly high bar for people to

[64] *Hansard* HC Deb. Vol. 635 cols. 445-477 25 January 2018. [Online]. [Accessed 28 March 2020] Available from: https://hansard.parliament.uk/Commons/2018-01-25/debates/00389B37-64AA-4AC8-BBBB-BE6B98F9C5C1/JointEnterprise

clear. That is why, nearly two years on, there has yet to be a single successful appeal awarded by the Court of Appeal."

e. "The final point is about retrospective cases and putting right the injustices of the past. We are not asking for automatic reopening of every single case. It is right that there must be a test, but the test is now so impossibly high that no cases have successfully been heard by the Court of Appeal, and the Criminal Cases Review Commission has yet to recommend that a single case should come back, despite having received 99 fresh applications and reviewing 90 more. Indeed, appeal judges seem utterly dismissive of these cases. Unlike in a usual appeal case, where the threshold is the possibility of an unsafe conviction, applicants in the case of the "wrong" law of joint enterprise are also required to demonstrate that, as well as being unsafe, had the correct law applied there "would" have been a substantial difference to the outcome. In most other cases, this would be simply that it "may" have done so. So we believe that the substantial injustice test needs establishing by Parliament in law, and it should make it clear that the threshold is "may", not "would".

f. We think that the Court of Appeal should also be allowed to consider the ongoing effect of the conviction on the applicant and, critically, take account of the applicant's age, mental health and other vulnerabilities at the time. The old, or wrong, foresight test now applied correctly to adolescents or those suffering with learning or mental difficulties would surely provide a substantial change to convictions. Today we would not expect an immature teenager or someone with learning difficulties to understand the old, weak foresight test.

g. "The law took a wrong turn. That now needs putting right. The establishment is evidently not putting itself right, so the Government and Parliament need to act. We urgently need a review of the use and scope of the prosecutions brought under joint enterprise, particularly its disproportionate use against young BAME men. We also need urgent clarification of the qualification for appeal so that we can put right decades of substantial injustices and unsafe convictions leading to many serving life sentences for murders they did not commit."

Chuka Umunna MP:

h. “Given the uncertainty, surely we are seeing the courts acting, in effect, as legislators. That is wrong. Where there is uncertainty in the law, it is for this House to tidy it up, particularly where the law is visiting injustice upon people in the way we are seeing.”

Andrew Mitchell MP:

i. “We know that thousands of people have been prosecuted under joint enterprise over the last decade alone, and we have a profound fear that some of these convictions are unsound [. . .] There is now a real suspicion that justice has miscarried in many joint enterprise cases. Juries were not directed on the correct law, even in the most serious of cases. The high standards of legal accuracy we are entitled to expect of our justice system have simply not been met. In such cases, we rightly expect the appeal system to function and to function effectively.”

j. “Here is now a logjam in our criminal justice system, with the Court of Appeal appearing wrongly to block appeals by joint enterprise prisoners. The burden of the substantial injustice test, to which I have referred, has been passed on to the prisoner.”

k. “In respect of these cases, our courts are too keen to block appeals by those who might have been convicted by error of the courts. Such behaviour serves only to undermine our faith in the justice system. There is a tendency in Britain to believe that we have the best criminal justice system in the world. I put it to the House that our attitude to the British crime and justice system is riddled with a complacency that is wholly unjustified. That view would be borne out by any fair-minded person who focused on joint enterprise.”

l. “We should not forget that all too often in Britain, injustice is remedied not by the organs of the state but by the investigative prowess of a free media or, indeed, by Members of the House.”

Julie Elliot MP:

m. “An injustice is carrying on for many who are still in prison today and cannot be granted an appeal because their cases are “out of time” and would therefore have to pass the substantial injustice test. . . As long as people are judged against such a ridiculously high bar, British justice will be failing the people in prison who were judged under a wrong law.”

Stephen Pound MP (MP for Alex Henry who wrote to the Minister for policing upon hearing about his conviction):

n. “This law does not serve a useful purpose: it penalises the wrong people, it brings the law into disrepute, it punishes wholly disproportionately, it destroys families, it wrecks individual lives and, above all, it disengages a whole group of people from the legal process, because when they see a system go so wrong, how can they possibly have any confidence in it?... As far as I am concerned, this law has to be changed.”

o. “The Supreme Court ruled that the law had been interpreted incorrectly, but that is only half of it. Interpreting the law incorrectly is one thing, but righting the wrong is what has to happen now.”

p. “I hope that today will be the beginning of a process that leads to people like Alex Henry seeing daylight, and his child and his family, again.”

q. “Alex is a man on the autism spectrum. In his appeal, evidence was submitted on his behalf by none less than Professor Baron-Cohen. One cannot get a higher authority than that. Was that opinion accepted? Clearly not, because my constituent is still in prison. He is a young, autistic man who, for 40 seconds of his life, did not stop something happening. He did not do anything wrong; he did not stop it happening. Can it really be right in this day and age that the law we are all sworn to uphold—that we are a part of as part of the establishment of this country—is having that impact on people, disproportionately on young black men, and disproportionately on the innocent?”

Ruth Cadbury MP (describes herself as representing members of the Henry family):

r. "Alex Henry's diagnosis of autism was important in his case. Despite Alex's having had many problems from an early age, no one had suggested to him or his family that he might be on the autistic spectrum until a viewer of the documentary made about the case wrote to the family. Alex's family then arranged for Alex to be assessed by Professor Simon Baron-Cohen, the leading academic on autism and Asperger's syndrome in this country. The professor's report states that it is incredibly unlikely that Alex could have foreseen what would or might happen in those 40 seconds since, due to his autism, he cannot predict the actions, behaviours or intentions of others. The Court of Appeal rejected that ground because Alex's mother has a PhD in psychology and so she could have coached Alex in "how to act autistic". That is shocking. The court also said that it could not understand why Alex was diagnosed so late in life, aged 23, despite seven previous mental health assessments, which did not result in a diagnosis."

s. Andrew Mitchell MP in support of Cadbury above: **"**I want to strongly support what the hon. Lady is saying about the judgment of the court in that case in respect of autism. I have read the case and, as a layman, I find the response of the court completely inexplicable."

Journalist publication after Alex was refused leave to appeal

72. There was further journalistic commentary, in particularly from Jon Robins.[65] A chapter of his book is dedicated to Alex's Henry's case. [66]

> At page 162: "With an air of calm deriving from a peerless command of his area of specialism, the psychiatrist proved a credible and persuasive witness. He was unfazed by a court that was clearly sceptical about a late diagnosis. . . . 'I see

[65] Robins, J., 2018. Caught in the Dragnet. In: *Guilty Until Proven Innocent: The Crisis In Our Justice System*. London: Biteback Publishing.

[66] Jon Robins is a freelance journalist, lecturer and author who writes regularly for the Times, the Observer, the Guardian, the Independent, the Financial Times, the Daily Express and the Sunday Express. He also runs the Justice Gap, an award -winning online magazine aimed at the public about jaw and justice and the difference between the two. He has won the Bar Councils legal journalist of the year twice.

autism as a complex disability.' The psychologist told the Court from the witness box. It affects many different functions, including the processing of information. People with autism struggle with situations where there is too much information that the jury needs to know. It is nobody's fault because the diagnosis hadn't been made yet.'

At page 163: "Under the law of joint enterprise, a jury can convict if it is proved that the secondary defendant foresaw the 'possibility' that death might occur. That is exactly the kind of subjective judgement an autistic person might well struggle with. As Professor Baron-Cohen made clear, if a typical person had known that Cameron had a knife, they may well have assumed he would use that knife to intentionally kill. Henry's autism meant that no such assumption could be made. This, the psychiatrist pointed out, was because in people with autism, 'common-sense' inferences were not automatically drawn."

73. All of the above is not merely relevant to acknowledging the correction of an error of law in joint enterprise in *Jogee* but is specifically relevant to the prisoners who were wrongly convicted. Alex has been affected by a fundamental miscarriage of law. This, combined with grounds 2 to 4 below, allows for a finding that Alex has suffered an exceptional injustice which can only be cured by a conditional Pardon to enable his immediate release.

Ground 2: The effect of unprincipled and harsh mandatory sentencing laws for accessories to murder which caused injustice to Alex and were applied without knowledge of Alex's autism;

74. By the Accessories and Abettors Act 1861, accessories are treated as principal offenders. This is why Alex was sentenced for murder even though he did not physically commit the killing. Obviously, the primary submission in this petition is that Alex should not remain in prison but, given the lack of opportunity for a retrial, the issues do not stop there as the sentencing issues need to be considered: There are **five points** to be made:
    a. Mandatory sentencing is unprincipled and harsh.
    b. Data is now available from criminological research published after Alex's application for leave to appeal was refused.

c. Had the learned sentencing judge known Alex was living with autism this would have led to a much lower minimum term.
d. Alex's right to be free from Cruel, inhuman or degrading treatment
e. Alex's right not to be arbitrarily detained

Mandatory sentencing is unprincipled and harsh.

75. As long ago as 2006, the Law Commission recommended the abolition of the mandatory life sentence for murder and dividing murder offences into three tiers, first degree murder, second degree murder and manslaughter, to properly reflect differing levels of moral culpability. In *Murder, Manslaughter and Infanticide (2006), Law Com. No.304,* these recommendations suggested that *only* first degree murder by principal or joint principal offenders would attract a *maximum* sentence of life imprisonment.

76. A Ministry of Justice, Coalition Government Green paper in 2010 referred to Schedule 21 as an "ill thought-out and overly prescriptive policy" and "badly in need of reform."[67] In addition, the Homicide Review Advisory Group in their 2011 report, found that the current sentencing provisions did not allow for sentences to match crimes and recommended the abolition of mandatory life sentences.[68]

77. In 2011, before *Jogee*, the then DPP acknowledged the unjust effect of mandatory life tariffs in cases involving joint enterprise in oral evidence to the Justice Committee:

> "The current approach, broadly speaking, calibrates culpability at the end of the exercise through sentence. Most of the time that ought to work reasonably well. It obviously does not work well with fixed sentences, murder being the obvious one. There is the tariff within the life sentence, but for everything else you can calibrate much more carefully according to the individual. I can see the disadvantages of the current approach, one of which is that, if someone has played a very minor part in a

[67] '*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders'*, Cm 7972, December 2010 [at para 170]
[68] Homicide Review Advisory Group, 2011. *Public Opinion and The Penalty For Murder: Report Of The Homicide Review Advisory Group On The Mandatory Sentence Of Life Imprisonment For Murder*. Waterside Press

very serious offence but is none the less convicted, they are convicted of that very serious offence." [69]

78. Academic research and opinion on mandatory sentencing has also been strident. For example:

    a. Ashworth, A., 2009. Techniques for Reducing Sentence Disparity. In: Von Hirsh, A., Ashworth, A., and Roberts, J. (eds.) *Principled Sentencing: Readings on Theory and Policy* (3rd Edn) Oxford: Hart Publishing.
    Chapter recognises the individual injustices that can occur under a mandatory sentencing scheme.

    b. Tonry, M., 1992. Mandatory Penalties. *Crime and Justice: A Review of Research* 16, pp.243-274
    "…such laws sometimes result in imposition of penalties in individual cases that everyone believes to be unjustly severe".

Data is now available from criminological research published after Alex's application for leave to appeal was refused

79. In addition, data is now available from the detailed research (also referred to in para 70 above) published in 2019: Hulley, S., Crewe, B. and Wright, S. (2019). *Making Sense of 'Joint Enterprise' for Murder: Legal Legitimacy or Instrumental Acquiescence?*' British Journal of Criminology, 59, pp. 1328-1346: At page 1337:

> 'The extraordinarily long prison terms that most participants had received meant that sentences—as well as convictions—often felt illegitimate. Twenty years' imprisonment, e.g. for failure to act or for being at the scene felt grossly unfair and 'life trashing' (Simon 2001). Participants were particularly aggrieved when they were given a tariff length that was the same as, or very similar to, the principal party—the person who had indisputably killed the victim. […] Parity in sentences between the principal party and the secondary party felt grossly unfair based on normative notions of proportionality and retributive justice.'

80. In addition, further research has shown that mandatory sentencing has a unique effect on those under the age of 25: Crewe, B., Hulley, S., and Wright, S. (2019), *Life imprisonment from early adulthood: Adaptation, Identity and Time.* Palgrave. This study involved over

[69] Oral evidence of DPP, Keir Starmer QC, *Justice Committee, Joint Enterprise* (HC 2010–12, 1597-I, Q24)

200 people sentenced to mandatory life, with tariffs of 15 years or more that they received when 25 years old or younger:

a. At page 309: ‘Prison was a non-normal environment — ‘not the right environment to be growing up in, I suppose’ (Jackie, 30s, late) —which placed remarkable limits on emotional and experiential possibilities. Hugo (20s, early), who had been in custody since the age of fifteen, expressed concern that he was ‘going to be an emotional retard when I get out’, because ‘the life experience isn’t the same as people on the out. You don’t have your first car, or your first flat, all that sort of stuff’. Casper (20s,early) stated that he could not ‘fully mature’ and was ‘stuck in time’, because, within prison, there were ‘no real new experiences to sculpt you into a more mature person’. Fernando (mid, 30s) felt as though he was ‘stuck in a void […] just stood still’, because ‘you don’t get to see and live’. As he went on to explain, this sense of social stasis, during a key period of life (O’Donnell 2014), was exacerbated by the awareness that contemporaries outside prison were moving on in their lives.’
b. At page 327: ‘The human weight of imprisonment impacts people profoundly, in ways that are moral, existential and relational as much as they are cognitive and psychological.’
c. At page 329 on: ‘Over many years, imprisonment alters prisoners in ways that are profound and enduring. […]While our study can make no claims about post-release outcomes, it is instructive that our findings are consistent with the literature that does. Liem and Kunst (2013), for example, identify in prisoners who had experienced prolonged incarceration, a specific cluster of symptoms similar to post-traumatic stress disorder, supplemented with ‘institutionalised personality traits’, including hypervigilance, difficulties with intimacy and social interaction, feelings of ‘not belonging’ (p.336), the suppression of emotion, self-isolation and a general distrust of the world (see also Haney 2003; Munn and Bruckert 2013). The ‘emotional numbing’ (Liem and Kunst 2013:335) that composes one part of this disorder corresponds with the intimate distancing that Jamieson and Grounds (2005) describe among a sample of wrongly convicted former prisoners, who struggled to relate to their families.’

81. Mandatory sentencing does not protect the community. Such laws have little effect on crime rates and community protection.[70] In North America, where modern mandatory sentencing began, studies have found little evidence that such laws succeed in protecting the community.[71] In fact, a review of two decades of crime data from 188 large cities suggested that cities enacting "three strikes" laws saw *increases* in certain crimes as compared to cities that did not introduce the laws.[72]

82. International reviews by Doob and Webster recognise the intuitive attraction of the deterrent sentence, but ultimately find that the evidence indicated "that sentence severity has no effect on the level of crime in society."[73]

Had the learned sentencing judge known Alex was living with autism this would have led to a much lower minimum term.

83. The Criminal Justice Act 2003 - Schedule 21 provides that the court *should* take in to account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point (para 9). Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order (para 10). Mitigating factors that may be relevant to the offence of murder include. . . the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957, lowered his degree of culpability (para 11(c)).

84. An offender aged 21 and over who is convicted of murder must be sentenced to imprisonment for life, pursuant to section 1(1) of the Murder (Abolition of Death Penalty)

[70] See: Tonry, M, 2005. Functions of Sentencing and Sentencing Reform 58 *Stanford Law Review* 58(37), pp.52-53 ("Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed by Republic presidents, reached that conclusion, as has every major survey of the evidence." citations omitted).
[71] See: Stolzenberg, L and D'Alessio, S., 1997. Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Laws on Serious Crime Rates *Crime & Delinquency* 43 pp. 457.
[72] Kovandzic, T et al., 2002. Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effect of 'Three Strikes' in U.S. Cities (1980-1999) *Criminology & Public Policy* 399
[73] Doob, A and Webster, C., 2003. Sentence Severity and Crime: Accepting the Null Hypothesis. *Crime and Justice: A Review of Research* 30(143), pp.143; Webster, C and Doob, A. 2012. Searching for Sasquatch: Deterrence of Crime through Sentences Severity, in J. Petersilia and K. Reitz (eds.), *Oxford Handbook of Sentencing and Corrections*, New York: Oxford University Press; Freiberg, A. and Gelb, K., 2008. *Penal Populism, Sentencing Councils and Sentencing Policy*. New South Wales: Hawkins Press.

Act 1965. The Criminal Justice Act 2003, sections 269 and 277 and schedule 21 and 22 provide a statutory scheme for the setting of minimum tariffs.

85. Schedule 21 of the Criminal Justice Act 2003 introduced minimum tariffs for life sentences. In accordance with Section 269, any court passing a mandatory life sentence is required to order the minimum term that must be served before the Parole Board can consider release on licence, unless the seriousness of the offence is so exceptionally high that the early release provisions should not apply.

86. The court must take in to account the seriousness of the offence and any time served in custody on remand (section 269(3)). In considering the seriousness of the offence, the court must have regard to the general principles set out in Schedule 21 (section 269(5)(a)).

87. The approach to be taken by judges when dealing with such cases is contained in Criminal Practice Directions 2015 Division VII: Sentencing. The court must first allocate a starting point based on the examples given in Schedule 21, then consider any aggravating or mitigating factors, the effects of the defendant's previous convictions, any plea of guilty and whether the offence was committed on bail.

88. Schedule 21 sets out a detailed scheme of 'general principles' for determination of the minimum term in relation to mandatory life sentences and applied to principle and secondary parties. There are four starting points for adults aged 21 years old and over: a whole life order; 30 years; 25 years and 15 years. Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010 (SI 2010/192) inserted a new paragraph into Schedule 21 which represents another 'general principle' (involving the use of a knife) to which the court must have regard when making the determination. The effect of this amendment was to increase the minimum term for a murder involving a knife from 15 years from 25.

89. Aggravating and mitigating are dealt with at paragraphs 9-12 of Schedule 21. Of particular relevance in this case, a statutory mitigating factor is listed at paragraph 11 as ***'the offender suffers from a mental disorder or disability (not falling within section 2(1) of the Homicide Act 1957) which lowered their degree of culpability.'***

Alex's right to be free from Cruel, inhuman or degrading treatment

90. Professor Glanville Williams has explained the principle of legality as an aspect of the the rule of law: "*The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach for breach of that law is purposeless cruelty."* [74]

91. The right to be free from cruel, inhuman or degrading treatment is contained in a number of international instruments.[75] The United Nations Committee Against Torture[76] and the United Nations Human Rights Committee[77] have both suggested that grossly disproportionate terms of imprisonment may amount to cruel, inhuman or degrading treatment.[78] As will be explained below, mandatory sentences are often grossly disproportionate and thus will often contravene the international law prohibition on cruel, inhuman or degrading treatment.

92. Canada has the most developed jurisprudence in the common law world on the way that mandatory minimum sentences can amount to cruel, inhuman or degrading treatment.[79] As early as 1987, the Supreme Court of Canada struck down a mandatory minimum narcotics sentence on the basis that it infringed the right to be free from cruel and unusual punishment. The Court defined cruel and unusual punishment to encompass a mandatory minimum sentence that is "grossly disproportionate" or "so excessive as to outrage

74 G. Williams Criminal Law: The General Part (Sweet & Maxwell 2nd edn. 1961) pp. 575-6.
75 A *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 7; *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*. See also Article 3 of the European Convention on Human Rights.
76 United Nations, *Conclusions and Recommendations of the Committee Against Torture: Australia*, CAT/C/XXH/Concl.3, (21 November 2000) 6(e), 7(h).
77 United Nations Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (112th session) concerning Communication No. 1968/2010 17.
78 In some jurisdictions, the right to be free from disproportionate punishment is considered a free-standing right independent of the torture prohibition. One example is Article 49(3) of the European Union Charter of Fundamental Rights. Article 49(3) of the European Union Charter of Fundamental Rights provides, relevantly that the "severity of penalties must not be disproportionate to the criminal offence." See also *Garage Molenheide v Belgium* [1997] ECR I-7281.
79 The Canadian jurisprudence stems from section 12 of the Canadian Charter of Rights, which provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." See *Constitution Act 1982* (Can), Pt I, s 12.

standards of decency".[80] When understood in these terms it is easy to see that Alex's sentence amounts to cruel, inhuman or degrading treatment. Alex's sentence is both grossly disproportionate to his involvement in the events concerned.

93. The UK also has a mature jurisprudence describing the link between disproportionate punishments and cruel, inhuman or degrading treatment.[81] The cases emphasize that a sentence will be amount to inhuman or degrading treatment where it does not allow for a meaningful possibility of a person rehabilitating themselves so as to re-enter the community outside of prison. In Alex's case, the 19 -year minimum term presents such a remote possibility of re-entry to the community as a young person that, for a young person, it can and should be seen to be cruel, inhuman or degrading treatment.

Alex's Right not to be arbitrarily detained

94. The right not to be arbitrarily detained[82] has been held to require that State detention of individuals be:

- Reasonable;
- Necessary;
- For a legitimate purpose;
- Proportionate to the purpose.[83]

95. There are a number of ways in which it can be seen that mandatory sentencing will often fail to satisfy these requirements. First, where mandatory sentencing laws require judges

[80] *R v Smith* [1987] S.C.J. No. 36, [53]. See also *R v Goltz* [1991] S.C.J. No. 90; *R v Morrisey* [2000] S.C.J. No. 39.

[81] See, e.g., *Vinter v United Kingdom* [2013] III Eur Court HR 317, 344 [102]; *Vinter v United Kingdom* (2012) 55 EHRR 34, [88]-[89], [93]; *Harkins v United Kingdom* (2012) 55 EHRR 19, [133]; *Ahmad v United Kingdom* (2013) 56 EHRR 1, [237]. The European jurisprudence focuses on Article 3 of the European Convention on Human Rights, which provides: "No one shall be subject to torture or to inhuman or degrading treatment or punishment."

[82] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, art 9(1).

[83] *Van Alphen v Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988 (23 July 1990) [5.8]; *Gorji-Dinka v Cameroon*, Communication No. 1134/2002, CCPR/c/83/D/1134/2002 (17 March 2005) [5.1]; United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement* (1999) [13]. See Article 5 of the Universal Declaration of Human Rights and associated guidance: The European Court of Human Rights, 2019. *Guide On Article 5 Of The European Convention On Human Rights*. [online] Available at: <https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> [Accessed 7 April 2020].

to impose a sentence of imprisonment without permitting consideration of all relevant circumstances this may be unreasonable, and thus arbitrary.[84]

96. This was recognised in the case of *R v Offen* (No 2), where the Court of Appeal reinterpreted the automatic life sentence for a second serious sexual or violent offence.[85] What parliament intended to be a relatively narrow provision for exceptional circumstances was held to mean that a court need not impose life imprisonment if it is satisfied that the particular offender does not represent an unacceptable risk. The Court was prepared to consider hypothetical circumstances in which the mandatory sentence would be manifestly disproportionate: that possibility was a major factor in the Court's reinterpretation of the section. The Court relied on both Article 5 of the European Convention of Human Rights, which outlaws arbitrary sentencing, and Article 3, which outlaws inhumane and degrading punishment to establish a 'constitutional' requirement that sentences must not be disproportionate:

> "The offence is manslaughter. The offender may have committed another serious offence when a young man. A life sentence in such circumstances may well be arbitrary and disproportionate and contravene Article 5. It could also be a punishment which contravene Article 3." [at para 95]

97. It is worth noting that human rights principles were not once mentioned, at any point, by government when supporting the automatic life sentences introduced by the Crime (Sentences) Act 1997, or Parliament when introducing mandatory minimum sentences via the Criminal Justice Act 2003 and were wrongly rejected by the UK Supreme Court in Alex's case.

98. One relevant respect in which cases may differ, and thus demand different sentences, is the level of moral culpability of each offender.[86] Homicide is an offence that is capable of

[84]Emmerson, B., Ashworth, A., Macdonald, A., Choo, A. and Summers, M., 2012. *Human Rights And Criminal Justice*. London: Sweet & Maxwell, Chapter 16.*There is strong authority to the effect that in their consideration of gross proportionality courts should take into account the seriousness of the offence and the characteristics of the offender. The point seems to be at its sharpest when the offender is young or suffers with a mental disorder of some kind. ECHR has held that in deciding if Article 3 is breached, a sentence must attain a 'minimum level of severity' and this should be assess in relation to 'sex, age and state of health of the offender.'*

[85] [2001] 1 W.R.L. 253

[86] See Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 *Oxford Journal of Legal Studies* 57, 69.

encompassing offenders of vastly different levels of moral culpability, whether as murder or manslaughter, principal offenders or secondary parties:

99. In 2006, the Law Commission recommendation to abolish mandatory life sentence for murder and dividing murder offences into three tiers, first degree murder, second degree murder and manslaughter, to properly reflect differing levels of moral culpability contained the following:[87]

> **"**The sentencing guidelines that Parliament has recently issued for murder cases presuppose that murder has a rational structure that properly reflects degrees of fault and provides appropriate defences. Unfortunately, the law does not have, and never has had, such a structure. Putting that right is an essential task for criminal law reform." [at para 1.9]

100. Research has since found a body of practitioners' opinion in favour of sentencing discretion so as to reflect the great variety of murders by principal offenders, joint principal offenders and a vast range of accessories.[88] Public opinion is also concerned about mandatory sentencing: For example, in *R v Martin*, the murder conviction for a defensive killing of a burglar was substituted for one of manslaughter.[89] The case attracted significant media attention about the injustices that arise from the mandatory life sentence. The media coverage strongly reflects the public perception that different cases demand different sentences:

> *"All murderers do not weigh the same in the scales of human wickedness, yet we discover that they are equal before the law...the weakness of the mandatory life sentence became clearer."*[90]

101. Even as an accessory Alex ought to have received a fixed sentence, not a life sentence but this option was not available to the sentencing judge. Additionally, because there was no retrial there was also no opportunity to reconsider manslaughter or to give weight to the

[87] *Murder, Manslaughter and Infanticide (2006), Law Com. No.304.*
[88] Fitz-Gibbon, K. (2013), '*The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion*', Criminology and Criminal Justice, 13: 506.
[89] [2003] Q.B. 1
[90] Young, H., 2020. *All murder is heinous, but not all murderers are alike*. *The Guardian*, [online] Available at: <https://www.theguardian.com/uk/2000/apr/27/tonymartin.ukcrime> [Accessed 29 March 2020].

diagnosis of autism. Alex's sentence can therefore be seen to be unreasonable, and thus arbitrary.

102. Ultimately sentencing is arbitrary if it is disproportionate. There is perhaps no better way to communicate disproportionality of Alex's sentence than to point to the expert evidence and research supplied in this petition on the effects of autism on daily life and then for Alex to be the subject of a life sentence when he did not physically perpetrate the murder.

103. There are at least three respects in which Alex's life sentence with a minimum term of 19 years can be seen to be untethered from his moral culpability:

a. First, by the very fact that the legislative provisions are mandatory and judges have no flexibility not to impose a life sentence in murder for those who are secondary parties, including those who are young or live with a disability;
b. Second, by reference to other sentences for offences which involve joint enterprise (manslaughter, affray, violent disorder, fights involving plans or assistance for some harm); and
c. Third, by accepting his diagnosis of autism and lowering his culpability having regard to the effect his diagnosis has on his ability to foresee what others might do and thus his intention.

104. Alex's case is therefore a paradigm example of how mandatory sentencing can create individual injustice which, in his case, can only be corrected by a conditional Pardon.

Ground 3: The unjust and inflexible imposition of too high a bar to appeal for those affected by the errors of law in joint enterprise[91] which denied Alex access to justice.

105. This ground considers two aspects:

a. The lack of access to justice caused by the imposition of a 'substantial injustice' test on appeals brought outside 28 days from the date of conviction; and
b. the surreptitious return of the abolished proviso.

[91] [2017] 4 W.L.R 104.

The lack of access to justice

106. The Supreme Court in *Jogee* stated *obiter*, that a 'substantial injustice' test would apply to future appeals affected by this fundamental error of the law in joint enterprise in the same way as general cases where the law had been clarified or changed.[92] Relying on the Supreme Court's *obiter* statements (and not the precedent of safety in *Bentley* – see para 47 above), the CACD in *R v Johnson (Lewis)* specifically rejected the submissions that the correction of the law of joint enterprise in itself demonstrated a 'substantial injustice'.[93] This was justified by "the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law".[94] The CACD in *Johnson* defined the 'substantial injustice' test as follows:

> "We approach the issue by considering the strength of the case that the **Applicant would not have been convicted of murder** if the jury had been directed on the basis of the law as set out in Jogee."[95] [at para 55]

107. This placed the burden on Alex to satisfy the CACD that he would not have been convicted. This test is far too high, it allows for opinion of the CACD on the evidence and prevents worthy cases of manifest injustice being given leave to appeal. The test is higher than 'safety' required for 'in time' appeals and higher than a possibility or even a significant possibility that a properly directed jury, acting reasonably, would have acquitted the appellant and/or considered the alternative offence of manslaughter or indeed some other offence. [96]

108. There is a particular inconsistency of approach by the Court of Appeal Criminal Division (CACD) that stems from the additional high hurdle for 'joint enterprise' appeals (which are

[92] *Jogee*, para.100.
[93] *R v Lewis Johnson, Asher Johnson, Jerone Green, Reece Garwood, Tyler Winston Burton, Nicholas Terrelonge, Queba Moises, John Derek Hore, Javed Miah, Mohammed Hussain, Fahim Khan, Rubel Miah, Michael Hall* [2016] EWCA Crim 1613, para.21 ("*Johnson*").
[94] *Johnson*, para.18.
[95] [Emphasis added].
[96] The CACD explicitly acknowledged in Towers at [61]: 'the substantial injustice test is a distinct one from that of safety, and one which brings with it a considerably higher threshold to justify interference with the conviction…'.

necessarily brought outside 28 days because the error of law persisted)[97] which is not applicable to appeals made within 28 days. There has been one successful "in time" appeal: In *Dreszer*[98] the Court of Appeal quashed the conviction in a murder by torture and a retrial was ordered on the basis the conviction was **unsafe** because it was *possible* the jury convicted on incorrect legal directions [see para 43], a much lower threshold than requiring Alex to prove he would not have been convicted. Mr Drezner pleaded guilty to manslaughter at a retrial and was sentenced to a fixed term of 12 years and 9 months, of which he should serve half – just over 6 years, less than Alex has served.

109. There has also been only one successful out of time appeal in a murder of an elderly man in his own home. In *R v Crilly,* [99] the jury were wrongly directed on foresight of another's crime and a retrial was ordered. At a retrial Mr Crilly pleaded guilty to manslaughter and was sentenced to 18 years, of which he would have served half, namely 9 years. In fact. Mr Crilly had already served 13 years and was immediately released. He went on to be one of the men who tackled the London Bridge terrorist.

110. Similarly, in *Jogee* the jury were wrongly directed using foresight instead of intention as *mens rea*. As set out above, at a retrial he was acquitted of murder and convicted of manslaughter. He was sentenced to 12 years imprisonment which was just over the time he had served. Alex Henry is in the same position in that his trial jury were wrongly directed at a time when the law on complicity was widely misunderstood. Mr Drezler, Mr Crilly and Mr Jogee were afforded retrials. **Alex was not.**

The surreptitious return of the abolished proviso.

111. In rejecting Alex's application for leave to appeal, the CACD effectively substituted their own opinion as to whether he would have been convicted had the jury been properly directed (which they were not), **rather than accepting that his conviction was unsafe**

[97] An appellant must serve an appeal notice (form NG Notice and Grounds of appeal) on the Crown Court office not more than 28 days after the conviction, sentence or order in accordance with Criminal Procedure Rules 39.2.)

[98] [2018] 3 WLUK 767

[99] *R. v Crilly (John Anthony)* [2018] 4 W.L.R. 114. *The Justice Gap*, 2018. John Crilly: 'I'm out – but everyone else is still suffering'. [online] Available at: <https://www.thejusticegap.com/john-crilly-im-out-but-everyone-else-is-still-suffering/> [Accessed 31 March 2020]: "Crilly spent 4 years of his 13 year sentence at the therapeutic prison, HMP Grendon. During his time there he extended an invitation to his trial judge, by then Sir Brian Leveson, President of the Queen's Bench Division, to visit him in prison. His invitation was accepted. Leveson wrote about his experience visiting Crilly in an article shared with other members of the judiciary"

and ordering a retrial. This is despite Parliament abolishing the relevant part of s.2(1) Criminal Appeal Act 1968 which used to contain what was known as a "proviso". [100] This was a limiting mechanism on criminal appeals:

> "That the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

112. This 'proviso' in section 2(1) was repealed by Criminal Appeal Act 1995 c. 35 Pt 1 s.2(1) (in force January 1, 1996 - SI 1995/3061 art.4) and substituted with the following:

> **2.— Grounds for allowing appeal under s. 1.**
> (1) Subject to the provisions of this Act, the Court of Appeal—
> (a) shall allow an appeal against conviction if they think that the conviction is **unsafe;** and
> (b) shall dismiss such an appeal in any other case.]

113. The proviso was applied where the CACD decided that, where a jury was not properly directed, had there been a notionally properly directed jury they would have reached the same verdict of guilty; or where a material irregularity did not produce a miscarriage of justice.

114. The "proviso" therefore enabled the CACD to uphold a conviction even in the face of a material irregularity or a crucially wrong decision on a question of law. As the CACD did not possess a power to order a retrial until 1988,[101] the mischief which led to the 'proviso's' abolition was that some judges found no error or applied the proviso more readily where

[100] Section 2(1) Criminal Appeal Act 1968, formerly section 4(1) of the Criminal Appeal Act 1907, contained the following: 2 Grounds for allowing appeal under s. 1(1)Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think—(a)that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or (b)that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or (c)that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal: Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.
[101] The Criminal Justice Act 1988 (UK) c 33 removed the requirement that the appeal be based on fresh evidence, as had been the case under the Criminal Appeal Act 1968 (UK) c 19

they believed the appellant was guilty, given that the only alternative would have been to acquit.[102] Lord Goddard CJ observed to the House of Lords in 1952:

> "I confess that there are cases when one is strongly tempted to apply the proviso, because one very often feels the moral conviction that the man appealing is guilty. But there it is. I do not say that the proviso is very freely used. . . . it would surely be more satisfactory to the prisoner and to everyone else. Instead of a court saying: 'We are going to say the jury ought to have found you guilty in spite of this misdirection or whatever it be,' they would be able to say: 'You shall go back and have another trial, with proper direction, and we shall see what the jury does then.' "

115. Lord Oaksey remarked in the same debate, referring to the proviso:

> "It is. . . usurping the jurisdiction of the constitutional authority—namely, the jury. It is a jury which has to convict in criminal cases; and if the Court of Criminal Appeal exercise peculiar jurisdiction under the proviso, they have really to usurp the function of the jury." [103]

116. The application of the 'substantial injustice' test is a judicially created hurdle. It echoes the abolished s.2(1) proviso provision and has, in effect, brought it back surreptitiously. The substantial injustice test is higher than 'safety' in s2(1) amended by Parliament. This is visible when one considers the decision of the Judicial Committee of the Privy Council in a *Cassell v Another v The Queen (Montserratt)* [2016] UKPC 19 where the proviso remains. Their Lordships said that "[t]he test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. That would be to substitute trial by appeal judges for trial by jury. True it is that the responsibility for applying or rejecting the proviso is laid squarely on the appellate court. That the appellate court is satisfied of guilt is certainly necessary, but is not by itself sufficient. The test is normally whether the appellate court is, further, satisfied that *any*

[102] Lord Goddard CJ observed to the House of Lords in 1952: "I confess that there are cases when one is strongly tempted to apply the proviso, because one often feels the moral conviction that the man appealing is guilty", United Kingdom Parliamentary Debates (8 May 1952) 793.

[103] *Hansard* HC Deb. Vol 176 cols. 745-94 08 May 1952

jury acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred: see *Lundy v The Queen*.[104]

117. By requiring Alex, as an applicant for leave to appeal out of time, to show he **"**would not have been convicted of murder" in order for leave to be granted under s.33(1) the CACD in effect applied a proviso type hurdle. This additional hurdle and the inconsistency between the Criminal Appeal Act, the approach of the CACD and the effect on the human rights of people living with autism is why Alex sought relief from the Supreme Court directly as an issue of general public importance when his application for leave to appeal was refused by the CACD. This was wrongly refused.

118. By refusing permission to appeal on the basis that he had failed to prove that he "would not have been convicted of murder"[105] Alex was denied access to a retrial before a properly directed jury which includes being denied the opportunity to suggest a plea to an alternative offence as was afforded to Mr Drezner and Mr Crilly.

119. In Alex's appeal, the CACD *inferred* from the jury's verdicts that the following factual findings were made:

> "If they convicted Henry on the basis of secondary liability and Ferguson on that basis, that each knew Ferguson had a knife and participated in the attack with that knowledge. It **would have been a ready inference that each knew Grant-Murray would or might intentionally use the knife to kill or cause really serious bodily injury.** As regards Grant-Murray, his shouting 'you're fucked now' after the arrival of Henry and Ferguson was powerful evidence that he appreciated that they were armed and would use the knives to kill or cause really serious bodily injury."[106]

120. The inference made by the CACD is premised on the basis that a conviction represents the jury wholly accepting the Prosecution's case. As set out above, the jury might well have been satisfied that Alex turned up for a fight (to commit an affray or assist in some harm), but not that Alex intended to assist or encourage murder. That the CACD concluded that

[104] [2013] UKPC 28".
[105] R v *Grant-Murray,* at para.23.
[106] *Ibid* at para 23.

there was a "ready inference" that it was foreseeable is insufficient, as the correct law in *Jogee* emphasised. On the basis of the corrected law, the jury had to be sure that Alex knew the essential facts and had the intention to assist or encourage murder. Here the evidence of knowledge was at least equivocal, his own acts were minor and his state of mind was affected by his autism (a fact about which the jury were not aware). In the absence of the jury providing reasons for their verdicts, the CACD cannot have safely ruled out that the jury's verdict was on the basis of foresight and not intent. In taking the approach it did, the CACD expanded its role from the trier of law to the trier of fact. It assumed the jury's role and substituted its own factual findings in place of the jury's to determine the basis of the conviction.

121. Alex was then refused permission to appeal further. The remedies of the courts were therefore not effective remedies. They were not accessible or capable of providing redress nor did they offer a reasonable prospect of success.[107] The way in which the law on joint enterprise appeals has been interpreted and applied produces manifest injustice and lack of access to justice.[108]

122. Moreover, as a result of this heightened standard given by the UKSC (obiter) in *Jogee* and applied by the CACD in *Johnson*, means Alex is unable to have the 'substantial injustice' test reviewed. As confirmed by the CACD in *Garwood*, "the approach of the [CACD] in these cases in relation to substantial injustice *cannot be challenged further*".[109] Alex has been deprived of an effective remedy as a result of the 'substantial injustice' test.

123. Whilst there is an interest in finality of appeals this has to be set against the competing interests of a fair justice system for all, particularly those with disabilities, such as autism. In Alex's case there are a series of errors which can only be corrected by a conditional Pardon.

[107] *See* for example, *Vernillo v France,* XXX 20 February 1991, para.27; *Apostol v Georgia* [2006] (40765/02) 28 November 2006, para.35.
[108] *Scordino*, para.191; *Burdov v Russia (No.2)* (33509/04) 4 May 2009, para.99.
[109] *Garwood*, para.15 [emphasis added].

Ground 4: The morally and medically insensible decision by the Court of Appeal of England and Wales, Criminal Division (CACD) to reject correct to reject correct and highly relevant expert evidence that Alex is autistic.[110]

124. Notwithstanding the compelling expert evidence from two autism experts, Alex continues to serve a life sentence for murder and is already years into his minimum term as an autistic prisoner.

125. In his application for leave to appeal to the CACD, Alex sought leave to adduce 'fresh evidence' of his diagnosis of autism by Professor Simon Baron-Cohen, a world-renowned expert in autism.[111] Despite Professor Baron-Cohen's evidence that Alex's autism **would** have affected his knowledge of the knife and his own attention/understanding during the murder,[112] the CACD concluded that "it can have no effect on the issue of Henry's thinking process at the time of the murder in the respects identified by Professor Baron-Cohen".[113]

126. The CACD disregarded the weight of the medical evidence, and Professor Baron-Cohen's own testimony and substituted them with its own medical findings. There was no medical evidence to contradict that Alex was autistic. The CACD also placed undue emphasis on the fact that Alex's autism had been missed by other practitioners and psychologists during his childhood and the CACD confused autism with a mental health illness.[114]

127. When refusing to alter the minimum term on Alex's sentence having regard to his autism, the CACD concluded that, "[a]t worst Henry suffered from a mild *mental illness* that was immaterial to his culpability for murder".[115] This evidences the CACD's failure to engage

[110] *R. v Grant-Murray (Janhelle) and others* [2017] EWCA Crim 1228; [2018] Crim. L.R. 71 (CA (Crim Div)).
[111] Qualifications and Career (Report 20 February 2016, pp.9-10): Professor of Developmental Psychopathology at the University of Cambridge and Fellow at Trinity College, Cambridge. He is Director of the Autism Research Centre (ARC) in Cambridge (www.autismresearchcentre.com). He holds degrees in Human Sciences from New College, Oxford, a PhD in Psychology from UCL, and an M.Phil in Clinical Psychology at the Institute of Psychiatry. He held lectureships in both of these departments in London before moving to Cambridge in 1994. He is author of *Autism and Asperger Syndrome: The Facts* (OUP, 2008). He has been awarded prizes from the American Psychological Association, the British Association for the Advancement of Science (BA), and the British Psychological Society (BPS) for his research into autism. He is Vice President of the International Society for Autism Research (INSAR). He is Patron of several autism and disability charities (Autism Anglia, Autism Yorkshire, and Speaking Up). He is a Fellow of the BPS, the British Academy, and the Association for Psychological Science, and is Chair of the NICE Guidelines.
[112] Report 20 February 2016, pp.5-6, paras.3, 6. See further, Report 29 July 2015, 11 June 2017.
[113] *Grant-Murray et al.,* para.62.
[114] *Grant-Murray et al.,* para.60, 37-39, 41(ii), 41(vi), 42, 71.
[115] *Grant-Murray et al.,* para.71 [emphasis added].

with the expert medical evidence on what autism is, and how it affects those that suffer with it. The CACD's approach to Alex's retrospective diagnosis was manifestly erroneous.

128. Autism is a relevant consideration in Alex's case because "Individuals with autism experience challenges primarily in two ways: (1) not being able to correctly discern and draw meaning from the emotional state of the people with whom they interact, and (2) not being able to communicate or react appropriately to their own emotional states."[116] This is relevant to his position as an alleged offender for three reasons:

    a. Alex's jury did not know he was autistic. The rejection of his application for leave to appeal means no jury will ever hear his diagnosis and be able to understand the effect of autism on his inability to be complicit in the crime of another and how this makes drawing inferences from circumstantial facts very much different from someone who is not autistic. Similarly no prosecutor is able to consider these issues in relation to an alternative offence.
    b. The CACD was wrong to reject expert diagnosis of Alex's Autism Spectrum Disorder by giving too much weight to a delayed diagnosis and evidence of past challenging behaviour. The use of the language of 'mental illness' exposes that the CACD refused leave to appeal without understanding the autism issues. The refusal of leave to appeal means that there is no place to consider autism more generally and its effect on conduct and mens rea at common law in joint enterprise.
    c. Alex's sentencing judge did not know he was autistic, so his current sentence did not take his diagnosis into account and how it is relevant to his level of culpability.

Autism generally

129. Autism spectrum disorders (ASDs) are neurodevelopmental disorders which are typically characterised by impairments in social reciprocal interactions and communication and restricted, repetitive pattern of interests and behaviour. It is unknown what the "true" ASD prevalence is, but it is commonly considered to occur in about 1 per cent of the general

[116] Nelson, A., 2020. Nelson, Angela C. "Emerging Technologies in Autism Diagnosis, Therapy, Treatment, and Teaching. *Educational Technology*, 54(4), pp.32–37.

population. Autism is listed in the Diagnostic Statistical Manual (DSM-IV-TR).[117] It is a recognised disability.[118] The United Nations Special Rapporteur on Disability has stated in her report on the *Question of Monitoring* in 2006:

> "People with developmental disabilities are particularly vulnerable to human rights violations. Also, people with disabilities are rarely taken in to account, they have no political voice and are often a sub group of already marginalized social groups, and therefore, have no power to influence governments. They encounter significant problems in accessing the judicial system to protect their rights or to seek remedies for violations; and their access to organizations that may protect their rights is generally limited."[119]

130. In the 2019 *Report of the Special Rapporteur on the rights of persons with disabilities*, the Special Rapporteur on Disability stated as follows:[120]

At para 12: "Deprivation of liberty of persons with disabilities is a major global human rights concern."

117 American Psychiatric Association, 2013. *Diagnostic And Statistical Manual Of Mental Disorders*. 5th ed. Washington, DC: American Psychiatric Association

118 See Section 6(1) of The Equality Act 2010 defines as a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. Part 1 of Schedule 1 of the 2010 Act clarifies the definition of 'disability' in section 6(1). Substantial means more than minor or trivial. Long term means 12 months of more. The definition is a broad one and ASD is not explicitly listed as a disability which automatically meets the definition of disability for the purposes of the Act. Autism is a broad spectrum condition with features bordering what Simon Baron-Cohen would call an 'autistic condition'. Evidently, it affects different people in different ways to varying degrees. However, given that it is a life-long condition that affects people's perceptions and social interactions, most autistic people would satisfy the legal definition. The government issued guidance which accompanies the act supports this view. Pages 8-9 state that 'a disability can arise from a wide range of impairments' including 'developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia". Two examples are given in the guidance of people would meet the definition of being disabled for the purposes of the Act have been diagnosed with a form of ASD. See Office for Disability Issues (2011) *Equality Act 2010 Guidance*, HM Government. Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf> (last accessed 8th April 2020). See General Assembly resolution 67/97, *Addressing the socioeconomic needs of individuals, families and societies affected by autism spectrum disorders, developmental disorders and associated disabilities*, A/RES/67/86 (12 December 2012) Available from: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/483/52/PDF/N1248352.pdf?OpenElement.

119 Introduction, para 2. Available at http://www.un.org/esa/socdev/enable/rapporteur.htm (last accessed 7 September 2014).

120 United Nations, *Report of the Special Rapporteur on the rights of persons with disabilities* (11 January 2019) Available from: https://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/40/54
A list of the most recent reports and statements from the Special Rapporteur on Disability can be found here: https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Reports.aspx. None of these were as relevant to report cited.

At para 13: Persons with disabilities are significantly overrepresented in mainstream settings of deprivation of liberty, such as prisons and immigration detention centres. While it is estimated that persons with disabilities represent 15 per cent of the population, in many countries the proportion of persons with disabilities in prisons represents as many as 50 per cent of prisoners.

At para 24: "Persons with disabilities deprived of their liberty are invariably placed into an extremely vulnerable position."

At para 73: Persons with disabilities should have access to justice on an equal basis with others to challenge any deprivation of liberty. . . States must also promote appropriate training for those working in the field of the administration of justice.

131. The UK remains a signatory to the European Convention on Human Rights (ECHR). Article 14 ECHR ensures that rights are freedoms set out in the Convention are secured without discrimination 'on any ground'. A non-exhaustive list of grounds is provided within the Article itself. A violation of fair trial rights (Article 6) read in conjunction with Article 14, can occur where a certain group is deprived of a *remedy* without a legitimate reason, while one is available to others in respect of the same types of actions.[121] The difference in treatment must pursue a legitimate aim and the means employed must be proportionate to the aim pursued.[122] Art.13 guarantees a domestic remedy to enforce the substance of Convention rights and freedoms. The right gives direct expression to a States' obligation to protect human rights at the domestic level, by ensuring that an individual can effectively enjoy that right.[123] The remedy under Art.13 must be 'effective' in practice as well as in law,[124] in the sense that its exercise "must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State".[125] In assessing effectiveness, account must be taken of not only the formal remedies available, but also of the legal and

[121] *Belgium v Belgium*, 'Belgium Linguistics Case' (1474/62; 1667/62; 1691/62; 1769/63; 2126/64) 1 January 1970, paras.9-10.
[122] *Ibid*., para.10.
[123] *Kulda v Poland*, (30210/96) 26 October 2000, para.152 ("*Kulda"*)
[124] *MacFarlane v Ireland* (31333/06) 10 September 2010, para.114; *Riccardi Pizzati v Italy* (62361/00) 29 March 2006, para.38; *El-Masti v The former Yugoslav Republic of Macedonia* (39630/09) 13 December 2012, para.255 (*"El-Masti"*); *Kudla*, para.152.
[125] *El-Matsi*, para.255.

political context which they operate, as well as the personal circumstances of the person affected.[126]

132. A less than full application of the guarantees of Art.13 would, "undermine the operation of the subsidiary character of the Court […] and more generally, weaken the effective functioning, on both the national and international level".[127] The Convention guarantees that this is a practical and effective right to a remedy, not a theoretical and illusory one.[128] As such, subsidiarity does not mean that the Court renounces the supervision of domestic remedies.[129]

133. Minimum non-parole periods will almost certainly disproportionately impact on those with autism and create an upward spiral of the already shockingly large numbers of persons with disabilities in custody. Mandatory sentencing disproportionately impacts people from certain groups because sentencing judges are precluded from mitigating their sentences based on the particular disadvantages experienced by members of those groups.

134. Where mandatory sentencing regimes disproportionately impact people of a particular group those regimes may contravene international law, particularly the Convention on the Rights of Persons with Disabilities (CRPD). Article 13 CRPD states as follows:

> "State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodation, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> In order to help to ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration do justice…"

[126] *Dordovic v Croatia* (41256/10) 24 July 2012, para.101; *Van Oosterwijck v Belgium* (7654/76) 6 November 1980, paras.36-40.
[127] *MacFarlane v Ireland* (31333/06) 10 September 2010, para.112; Kudla, para.155.
[128] *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para.192 (*"Scordino*").
[129] *Riccardi Pizzati v Italy* (62361/00) 29 March 2006, para.82.

135. People living with ASD are incapable of' putting themselves into someone else's shoes' and cannot conceptualize, understand or predict knowledge, thoughts and beliefs, emotions, feelings and desires, behaviour, actions and intentions of another person. This concept of a cognitive divergence can occur in the delayed development of children resulting in an individual who is unable to attribute mental states to others.[130] Key features of autism such as:[131]

    a. social naiveté, leading the autistic person to be easily manipulated;
    b. poor social judgement, leading them to make poor decisions, especially under conditions of stress and when they feel trapped or threatened by others
    c. communication difficulties, leading them to not consult others about how to solve a problem or misunderstanding a person's meaning;
    d. obsessive thinking, leading them to be unable to let go of a plan;

[130] Gallagher, H. and Frith, C.. 2003. Functional imaging of 'theory of mind'. *Trends in Cognitive Sciences* **7** (2), pp. 77–83; Baron-Cohen, S., 2009. Autism: The Empathizing-Systemizing (E-S) Theory. *Annals of the New York Academy of Sciences*: *The Year in Cognitive Neuroscience* 1156(1), pp. 68–80*;* Frith, U., 2013. *Autism: Explaining The Enigma*. 2nd ed. Malden, Mass: Blackwell Publishing; Happé, F., 1994. *Autism: An Introduction To Psychological Theory*. London: UCL Press; Happé, F. and Fletcher-Watson, S., 2019. *Autism: A New Introduction To Psychological Theory And Current Debate*. 2nd ed. London: Routledge; Doherty, M. 2009) Theory of Mind. Hove: Psychology press; Hill, E., & Frith, U. 2003. Understanding Autism: Insights from Mind and Brain. *Philosophical Transactions: Biological Sciences*, 358(1430), pp. 281-289. The concept of 'mindblindness' and those with ASD being unable to put attribute mental states to other has been popularised, tested and developed by Baron-Cohen's research and writings. See

a. Baron-Cohen, S., Goodheart, F. 1994. The "seeing leads to knowing" deficit in autism: the Pratt and Bryant Probe. *British Journal of developmental Psychology*, 12, pp. 397-402. *Retests the theory that children with autism have a specific difficulty in understanding the principle that 'seeing leads to knowing', confirming the result is robust.*
b. Baron-Cohen, S., 1995. *Mindblindness: An Essay On Autism And Theory Of Mind (Learning, Development, And Conceptual Change)*. MIT Press. *Initial essay in which Baron-Cohen sets out the concept of 'mindblindness' and that the social-communication difficulties encountered by a person with ASD are difficulties understanding the emotional and mental states of others. As illustration of the difference between the typical and the atypical see:* ***At page 4****: "The gulf between 'mindreaders' and the 'mindblind' must be vast"*
c. Baron-Cohen, S. 1997 Are Children with autism superior at folk physics? *New Directions for Child Development* 75. pp. 45-54: *People with high functioning autism have weak "folk psychology abilities" such as inferring mental states from people's behaviour, but well developed "folk physics" abilities, such as inferring the physical causes of natural events.*
d. Baron-Cohen, S., 2000. Theory of mind and autism: A fifteen year review. In Baron-Cohen S, Tager-Flusberg. H,. *Understanding other minds: perspectives from developmental cognitive neuroscience*. 2nd edn Oxford: Oxford University Press. *Abstract: Abnormalities in understanding other minds is not the only cognitive feature of autism spectrum disorders, but it seems to be a core and possibly universal abnormality among such individuals. This chapter describes some of the manifestations of abnormalities in understanding other minds, and emphasizes how developmentally appropriate tests of this are needed in order to reveal it. In this chapter we use the terms 'theory of mind,' 'mindreading,' and 'understanding other minds' synonymously. In this chapter, I survey the work over the period from 1985 to the present. Whilst this is not exhaustive, it gives a good flavour of the studies from this time, summarizing many different experiments.*

[131] American Psychiatric Association, 2013. *Diagnostic and Statistical Manual Of Mental Disorders*. 5th ed. Washington, DC: American Psychiatric Association.

e. black and white (binary) thinking, leading them to only consider two extreme scenarios;
f. heightened anxiety, leading them to panic or feeling a need to take extreme actions;
g. executive dysfunction/weak central coherence, leading them to over-focus on one detail and not consider longer term consequences of actions;
h. empathy difficulties, leading them to struggle to imagine a victim's perspective;
i. reduced social awareness, leading them to not see how society or the criminal justice system will view their behaviour; and
j. experience of marginalisation, leading them to feel embittered towards others.

136. As long ago as 2004, the supplement to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities stated as follows: [132]

> At para 84: The two groups of persons, those with developmental and those with psychiatric disabilities, are different in regard to both the origin and the character of their problems. However, both groups belong to the most vulnerable among citizens of society. Their disabilities are surrounded with more negative attitudes and prejudice than most other groups of persons with disabilities. . . the voice of persons with developmental and psychiatric disabilities is seldom heard.
>
> At para 91: An important group of persons with disabilities are those who have disabilities that are not easily discovered by others. This often leads to misunderstandings and wrong conclusions. Among such groups with invisible disabilities, the following may be mentioned: persons with psychiatric or developmental disabilities; those with disabilities from chronic diseases; and those who are hard of hearing or deaf.

137. In the jurisdiction of England and Wales, procedural law has developed to allow for the adaptation of courtrooms for those with autism. This has followed research on how vital it

[132] [Annex E/CN.5/2004/4] Available from: https://www.un.org/development/desa/disabilities/resources/reaching-the-most-vulnerable-proposed-supplement-to-the-standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities-annex-ecn-520044.html#m

is to understand and properly present the behavioural characteristics of ASD in the court environment in order to reduce the negative impact this could have on the individual in terms of how they are interpreted and treated in the criminal justice system. [133] However, the effect of autism on conduct and *mens rea* is still woefully under-considered in criminal justice.[134] Notably, epidemiological studies have concluded that autism does not increase a person's likelihood of committing violent crime once other factors, such as comorbid diagnoses and life circumstances, have been taken in to account. [135]

[133] Archer, N., & Hurley, E., 2013. A justice system failing the autistic community. *Journal of Intellectual Disabilities and Offending Behaviour*, 4(1/2), pp.53-59.

[134]Allely, C., 2015. Experiences of prison inmates with autism spectrum disorders and the knowledge and understanding of the spectrum amongst prison staff: a review, *Journal of Intellectual Disabilities and Offending Behaviour*, 6(2) pp. 55 – 67; Maras, K., et al., 2017. Autism in the courtroom: Experiences of legal professionals and the autism community. *Journal of Autism and Developmental Disorders.* 47(8) pp. 2610-2620; Browning, A. and Caulfield, L., 2011. The Prevalence and Treatment of People with Asperger's Syndrome in the Criminal Justice System. *Criminology and Criminal Justice* 165(11); Archer, N., & Hurley, E. A. (2013). A justice system failing the autistic community. *Journal of Intellectual Disabilities and Offending Behaviour*, 4(1/2), 53-59; The Advocate's Gateway (2015). Witnesses and defendants with autism: memory and sensory issues. Toolkit 15. Available: https://www.theadvocatesgateway.org/images/toolkits/15-witnesses-and-defendants-with-autism-memory-and-sensory-issues-2015.pdf [Accessed 5 April 2020]; The Advocate's Gateway (2016). Planning to question someone with an autism spectrum disorder including Asperger syndrome. Toolkit 3. Available: https://www.theadvocatesgateway.org/images/toolkits/3-planning-to-question-someone-with-an-autism-spectrum-disorder-including-asperger-syndrome-2016.pdf [Accessed 5 April 2020]; Allely, C. and Cooper, P. (2017) Jurors' and Judges Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic PRISMA Review of Autism Spectrum Disorder in the Courtroom. *Journal of Law and Medicine* 25(1); Allely, C., 2020. Defendants with Autism Spectrum Disorder in the Courtroom: Considerations and Implications by Clare Allely. [Blog] *Gillberg's Blog*, Available at: <https://gillberg.blogg.gu.se/en/2020/03/04/defendants-with-autism-spectrum-disorder-in-the-courtroom-considerations-and-implications-by-clare-allely/> [Accessed 7 April 2020].

Allely, C., 2015, Experiences of prison inmates with autism spectrum disorders and the knowledge and understanding of the spectrum amongst prison staff: a review, *Journal of Intellectual Disabilities and Offending Behaviour*, 6(2) pp. 55 – 67; Cooper, P., & Allely, C. 2017. You can't judge a book by itscover: Evolving professional responsibilities, liabilities and 'judgecraft' when a party has Aperger's syndrome. *Northern Ireland Legal Quarterly*, 68 (1), 35–58; Cooper, P., Berryessa, C., and Allely, C., 2016. Understanding what the defendant with Asperger's syndrome understood: Effective Use of expert evidence to inform Judges and juries. *Criminal Law & Justice Weekly*, 180(44), pp. 792-794; Cooper, P., & Allely, C. 2016. The Curious Incident of the Man in The Bank: Procedural Fairness and a Defendant With Asperger's Syndrome. *Criminal Law & Justice Weekly*, 2016, 180(35), pp. 632-634; Lewis, A., et al., 2015. Development and implementation of autism standards for prisons. *Journal of Intellectual Disabilities and Offending Behaviour*, 6(2) pp. 68-80; McCarthy, J., et al., 2015. Screening and diagnostic assessment of neurodevelopmental disorders in a male prison, *Journal of Intellectual Disabilities and Offending Behaviour*, 6(2) pp. 102-111; Kirby, A. and Saunders, L. 2015. A case study of an embedded system in prison to support individuals with learning difficulties and disabilities in the criminal justice system. *Journal of Intellectual Disabilities and Offending Behaviour*. 6(2) pp. 112-124.

[135] Browning A, Caulfield L. 2001. The prevalence and treatment of people with Asperger's Syndrome in the criminal justice system. *Criminology and Criminal Justice*. 11(2): 165–80; Ghaziuddin, M et al. 1991. Brief report: Violence in Asperger syndrome, a critique. *Journal of autism and developmental disorders*. 21. 349-54; Mouridsen, S. 2012. Current status of research on autism spectrum disorders and offending. *Research in Autism Spectrum Disorders, 6*(1), 79–86; Howlin, P., 2004. *Autism*. 2nd ed. New York: Routledge; Woodbury-Smith, M. et al. (2005). A case-control study of offenders with high functioning autistic spectrum disorders. *Journal of Forensic Psychiatry & Psychology*. 16. pp. 747-763.

Autism in prison

138. Alex is an enhanced prisoner. However, prison is not the most appropriate environment for those living with autism. What little studies there have been indicate the presence of additional difficulties faced by this population within the prison environment. To date, research has made limited impact on the design of service provision for offenders with ASD and rehabilitative services for this group remain limited.[136] It is known that while in prison these individuals may be particularly vulnerable to bullying or exploitation and struggle to negotiate the criminal justice system.[137] Once people with learning disabilities or learning difficulties reach custody, they are likely to have difficulty understanding and adjusting to rules and regimes. Prison behaviour deemed disruptive, have all been linked to learning difficulties for some prisoners and leads to them being targeted, isolated or excluded. [138]

139. A report, led by the Prison Reform Trust indicates that the general prison regime (i.e. reception, induction, transfer and release) does not cater for the needs of prisoners with learning difficulties or learning disabilities. Prison terminology and complex rules and regimes mean that people with learning disabilities or learning difficulties, including difficulties with speech, language or communication, will have trouble coping with the demands of the prison environment.[139]

Alex's Autism

140. The refusal of leave to appeal means that no jury has been able to take the fact that Alex is autistic into account in considering their verdicts and the trial judge was not able to take this into account on sentence.

[136] Allely, C., 2015. Experiences of prison inmates with autism spectrum disorders and the knowledge and understanding of the spectrum amongst prison staff: a review. *Journal of Intellectual Disabilities and Offending Behaviour*, 6 (2) pp. 55 – 67.
[137] Edgar, K. and Rickford, D. 2009. Too little, too late: An independent review of unmet mental health need in prison, The Prison Reform Trust; Allen D, et al., 2008. Offending behaviour in adults with Asperger syndrome. *Autism Dev Disorder*, 38(4), pp.748-58.
[138] Bryan, K., Freer, J., and Furlong, C. 2004 Speech and Language Therapy for Young People in Prison Project: Third Project Report, May 2004 – October 2004. University of Surrey
[139] Loucks N, 2007, No one knows: Offenders with learning difficulties and learning disabilities – review of prevalence and associated needs. Avaliable at: http://www.prisonreformtrust.org.uk/uploads/documents/noknl.pdf [Accessed 13 April 2020]

141. The CACD rejected Alex's diagnosis, largely on the basis that he had not been diagnosed before. However, the CACD appeared to fail to understand that ASD is not a mental illness and often goes unrecognised. This lack of awareness by the CACD has been raised by experts in relation to Alex's application for leave to appeal in commentary in the Criminal Law Review.[140]

142. In addition, the suggestion by the CACD that Alex had somehow been coached by his mother was not merely appallingly insulting, but also contrary to the way in which diagnosis of autism is conducted. The CACD could not have made more of an effort to unjustly refuse leave. This suggests the purpose was to prevent other applications rather than consider Alex's case individually. The CACD has since refused a referral by the Criminal Cases Review Commission for an autistic offender citing Alex's case as authority.[141] The decisions at least suggest that upholding convictions is being disproportionately prioritised over miscarriages of justice for wrongly convicted disabled people and that it is only lip service that is being paid to the idea that each case is decided on its own facts.

143. ASD has been studied in relation to the U.S. judiciary[142] where autism from a legal perspective was considered. It was and concluded that it is doubtful whether ASD offenders can exhibit the essential *mens rea* of a crime necessary to attract liability. The study found the following:

> "Judges found it difficult to completely understand the roles of and abilities of these offenders to formulate intent in many of these offenders' criminal actions and how to consider it in their rulings, which can lead to questions whether hfASD offenders are exculpable from their actions because they are unable to exhibit the essential elements of a crime (*actus reus*, meaning "guilty act", and *mens rea*, meaning "guilty mind") necessary for liability."

144. The rejection of Alex's diagnosis on appeal, particularly where there was no expert called by the prosecution in response, is both morally and medically insensible and cries out for

[140] R v Grant Murray (Janhelle); R v McGill (Joseph) Crim. L.R. 2018,1, 71-76
[141] R v Roddis [2020] EWCA Crim 396.
[142] Berryessa, C., 2014. Judiciary views on criminal behaviour and intention of offenders with high functioning autism. *Journal of Intellectual Disabilities and Offending Behaviour*, pp. 97-106.

the exercise of mercy. Ground 4 is capable of standing alone but the level of injustice is reflected in all 4 grounds, hence they are presented as interlinked.

CONCLUSION

145. A strict and uniform application of the law, which may initially appear universally desirable, may generate injustice in individual cases. Accordingly, it is necessary to mitigate the rigour of the law by deciding individual cases on the ground of fairness, and thus make sure that law and the operation of law is compatible with justice. [143] There is a corrective dimension of the Royal Prerogative of Mercy which does not distort the proper application of legal principles to everyone and every situation but allows for correction where there is an injustice.

146. This ability to correct errors has been applied throughout history, including in cases involving mental and cognitive disabilities. The Royal Prerogative of Mercy is an available remedy with wide criteria to ensure justice can be achieved where the courts have failed to do so or find themselves unable to.

147. In 1946 it was observed that "*a man is not to be put in peril upon an ambiguity*": *London and North Eastern Rly Co v Berriman.*[144] The English law of joint enterprise at the time of Alex's trial (pre *Jogee)* was neither foreseeable nor accessible. This lack of clarity meant the jury directions in his trial were incorrect and he should have been the subject of a retrial. The effect of the error corrected in *Jogee* had been to lower the *mens rea* for accessorial liability, leading to incorrect jury directions. This error affected Alex. He was convicted of murder as an alleged accessory after the jury were wrongly directed and thus has been placed that very *peril* envisaged. That peril is exacerbated by the harshness of mandatory sentencing in his case.

148. Fresh evidence that Alex lives with autism, was adduced before the CACD but the CACD refused permission to appeal on the basis that Alex had not met the 'substantial injustice' test, by failing to prove that he "would not have been convicted of murder" had the jury been properly directed.[145] In the absence of a retrial, his culpability and diagnosis of autism

[143] This has been an accepted concept since as long ago as Aristotle's Ethics (Book 5, c. 10)
[144] [1946] AC 278
[145] *R v Janhelle Grant-Murray and Alex Henry* [2017] EWCA Crim 1228, para.23 (*"Grant-Murray"*)

can only be further considered through this petition. New evidence in a second expert report and a range of other evidence contained in and attached to this petition is available for consideration by the Lord Chancellor and Secretary of State for Justice the Rt. Hon Robert Buckland QC who has wide powers of investigation and consultation.

149. It is axiomatic that a person cannot be justly treated if there is no access to a remedy. The restrictions by the CACD reduced Alex's access to justice in such a way and to such an extent as to form a barrier that prevented Alex from having his case justly determined on the merits by a competent court.[146]

150. It might be argued that the differences in sentencing approaches as between sentencing of Ferguson and Alex reflect findings of different levels of moral culpability but in Alex's case, the position is not that simple:

(a) the law on joint enterprise was such a mess that the jury were given no proper opportunity to consider his culpability following accurate legal directions in relation to murder and alternatives;
(b) the sentencing judge is mandated to impose a life sentence and can only adjust the minimum term. This is fundamentally unjust for all accessories and the outcome was particularly unjust for Alex;
(c) in refusing Alex's appeal, the CACD wrongly denied Alex access to justice, particularly the opportunity for proper consideration of an alternative offence;
(d) in refusing to accept Alex's diagnosis of autism, the CACD discriminated against him as a disabled person;
(e) in refusing his application for leave to appeal against conviction, the CACD denied Alex the opportunity for a jury to consider the expert evidence of the effect of his autism on his foresight and intention;
(f) in refusing to reduce the minimum term on his sentence, the CACD denied Alex the opportunity for his sentence to reflect the expert evidence of his autism;

151. **Alex's conviction is unsafe and his sentence is manifestly harsh. If the criminal justice system had operated fairly and without error, the outcome for Alex would have been acquittal on murder with the possibility of a conviction on an alternative offence**

[146] *Kart v Turkey* (2010) 51 E.H.R.R. 40, para.79.

for which a fixed sentence (not a life sentence) would have been imposed at the level of what he has served or less.

152. Alex has therefore suffered a "significant disadvantage".[147] He is a young and autistic and currently serving a sentence of life imprisonment with a minimum term of 19 years. It is cases such as this that demonstrate where the prerogative powers can be uniquely utilised – in order to effect justice – including where the approach of the courts inhibits a balanced and fair solution.

153. The exercise of the Royal Prerogative of Mercy is rightly reserved for cases of exactly this nature, where systemic failure causes grave injustice and a taint on the broader criminal justice system. In order to ameliorate the consequences, it is appropriate for Lord Chancellor and Secretary of State for Justice the Rt Hon Robert Buckland QC to recommend to Her Majesty the Queen the exercise of the prerogative of mercy.

154. **Accordingly, it is submitted that it is appropriate that Alex be eligible for immediate release by way of a conditional Pardon.**

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Carmelite Chambers, London

20 April 2020

[147] *Shefer v Russia* (45175/04) 13 March 2012; *Korolev v Russia* (25551/05) 1 July 2010.