

IN THE CARDIFF COUNTY COURT

BS 614159-MC65

CF101741 & CF204141

MAURICE JOHN KIRK

Claimant

and

THE CHIEF CONSTABLE OF SOUTH WALES POLICE

Defendant

**DEFENDANT'S SUBMISSIONS IN RESPONSE TO THE VIDEO PRODUCED BY
CLAIMANT CONCERNING ACTION 2, PARAGRAPH 11**

1. The Defendant's primary submission is that, regardless of the contents of the video, there is an extant conviction in respect of Mr Kirk's failure to provide a specimen of breath, and that Mr Kirk is mounting a collateral attack upon that conviction which, as a matter of law, he is not entitled to do. The Defendant relies upon the matters of law previously put before the Court, and in particular, the opinion of Lord Hoffman in the case of *Hall* (Divider 12, pages 705F to 706E) and the judgment of Lord Bingham in *Smith* (Divider 10, page 773A-H).
2. Insofar as there is any exception to the rule in *Hunter*, as interpreted and applied in *Hall*, then this case does not come within that exception. Such exception as still exists clearly relates to the situation where such an attack would not bring the administration of justice into disrepute, see *Walpole* (Divider 11) as commented upon by Lord Hoffman in *Hall*, at page 706E. Mr Kirk's attack upon the factual basis of his conviction, particularly where that conviction has been reviewed by a number of courts, including the Crown Court and the Divisional Court, and especially where that conviction arises

from an unequivocal plea of guilty, would bring, it is submitted, the administration of justice into disrepute.

3. If, which is denied, the fresh evidence exception as propounded by Lord Diplock in *Hunter* still exists, then the Defendant would contend that this case clearly falls outside that exception, in that:-

- a. This is not fresh evidence. It is clear from the history, as set out in our main submissions on this point, that Mr Kirk had this video available to him at a very early stage in the proceedings, certainly prior to his case being heard in the Crown Court and also prior to the various hearings in the Divisional Court and at the time of his application to the Magistrates' Court to vacate his guilty plea. It follows therefore, that those courts were considering Mr Kirk's submissions in relation to his original plea of guilty against the background of that video evidence being available. This is therefore not fresh evidence.
- b. A further important consideration is that Mr Kirk pleaded guilty. He therefore must have accepted that he had committed the offence. The video would not have revealed to Mr Kirk matters of which he was unaware before he decided to plead guilty.
- c. Whether one applies the civil test to justify the reception of fresh evidence (as one should, see Lord Diplock in *Hunter*, at page 545E), or the criminal test, it cannot be said that this video evidence materially undermines the statement of PC Osborne. Therefore, even if this were fresh evidence, which it is not, it is not such as would have an important influence on the result of the case.
- d. As the cases of *Hunter*, *Smith* and *Walpole* demonstrate, the Court cannot even begin to consider allowing Mr Kirk to adduce the video evidence so as to mount a collateral attack upon the conviction in the absence of any closely-argued analysis of the way in which it is said that the video evidence undermines the conviction.
- e. Finally, as was noted by Lord Bingham in *Smith* (page 773F) the Court must have regard to the "virtual impossibility of fairly re-trying at a later date the issue that was before the court on the earlier occasion".

4. Mr Kirk cannot circumvent the rule in *Hunter* by alleging that he wishes to adduce the video evidence, not only to attack the validity of the original conviction, but also in order to demonstrate his general theory that he has been the subject of a conspiracy by various Police officers of the South Wales Constabulary. Inevitably, even if the video evidence was received by the Court as being relevant to this “general” issue, this evidence would still be used by Mr Kirk as a “back-door” method of mounting a collateral attack upon the conviction. Further, the effect of receiving this evidence *at all*, regardless of the motivation or intent behind seeking to adduce it, would amount to a collateral attack and therefore would be an affront to justice, see *Walpole*, page 120E-H.
5. As this Court is well aware, the allegations of general conspiracy have always been advanced by Mr Kirk, when seeking to challenge his guilty plea in respect of this matter. He has consistently raised it before the Magistrates’ Court, Crown Court and Divisional Court. Mr Kirk’s allegations of conspiracy are therefore neither new nor un-litigated.

LLOYD WILLIAMS QC
NATALIE SANDERCOCK
29th October 2010