

1

Wednesday, 3rd June 2009

2

(10.15 am)

3

Opening address by MR MOYNIHAN (continued)

4

MR MOYNIHAN: In the text are available I am on page 123,

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section 4.17. This deals with re-photographing on Y7

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and fresh ten prints on 18th February.

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Inspector McAllister briefly describes the events of

8

18th February seeing that a full identification exercise

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was carried out afresh. He does not know who did the

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re-checking at SCRO but that afternoon he was told by

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Superintendent Thomson that the mark had again been

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identified as that of Ms McKie.

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On the morning of 18th February Sergeant Shields

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took a further set of elimination prints from Ms McKie

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in the presence of inspector McAllister and Inspector

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Pollock. In due course this became production 179 in

17

the McKie trial. The Inquiry has the original of this

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fingerprint form.

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Ms McKie then returned to the **locus** with inspector

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McAllister, Inspector Pollock, Sergeant Shields and two

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officers from the identification branch who had not

22

previously been involved in the murder Inquiry. They

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were Sergeant Derek Thomson and Constable McKinlay.

24

A label was applied to the wooden door surround and

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signed by Ms McKie and Inspector McAllister.

1 Y7 was re-photographed and the film retained by
2 Thomson and McKinlay.

3 A copy of that photograph is the right-hand
4 photograph on page 1 of production 152.

5 Constable McKinlay has given a statement. He
6 confirms that he was instructed by Chief Inspector Hogg
7 to rephotograph Y7 on 18th February and did so with
8 Sergeant Thomson in the presence of Ms McKie.

9 He took photographs of Y7 with its original label
10 and with a new label initialled by him, Thomson and
11 McKie.

12 The photographs in production 189 were both taken by
13 him that day.

14 He also took general photographs of the vicinity and
15 the photocopies in Mr Wilson's disciplinary report at
16 pages 188 to 189 are photographs that he took.

17 He does not remember to whom he gave his negatives
18 and photographs but he thinks that it may have been to
19 complaints and discipline. (That would be consistent
20 with copies appearing in the disciplinary report.)

21 The SCRO elimination page relating to police
22 officers records a second check against batch Y7 to V9
23 for Ms McKie and Martin Fairley on 18th February. The
24 initials are those of Graeme Smillie but his evidence is
25 he was dealing with the remaining, that is to say

1 uneliminated marks in the batch and not with Y7. That
2 would be consistent with the evidence of Mr Macpherson
3 that Y7 was removed from the bundle after his
4 identification of it.

5 The Wilson report states that the comparison of the
6 new image and elimination print form was carried out by
7 Macpherson, Stewart and McBride. The statement for
8 Ms McBride does refer to 18th February but reads more
9 naturally as a reference to 10th and 11th February.

10 The Mackay report lists as those involved Mackenzie,
11 Dunbar and Halliday. It also states that Mackenzie
12 believed that it was also checked by Mr Macpherson.

13 Mr Macpherson has no recollection of comparing a new
14 image with the prints. All that he remembers is
15 comparing the further set of elimination prints with the
16 original set and he says:

17 "This was just to make sure that they had been
18 accurately taken."

19 Mr McKenna says that he was not involved in
20 rechecking on 18th February.

21 Mr Mackenzie says that on the morning of
22 18th February he was called to the office of the head of
23 SCRO CS Ferry. At some stage the meeting was joined by
24 the head of CID. Mr Mackenzie was told that a
25 re-examination was can be conducted with a new image and

1 a further set of elimination prints.

2 He and Dunbar had a meeting that morning with Ferry
3 during which Ferry appeared to be angry. Ferry wanted
4 to clarify with Mackenzie and Dunbar that they were
5 satisfied with the elimination because, as he put it, an
6 officer's career was on the line.

7 Mackenzie found this unusual because it was
8 commonplace to find police officers' prints at the
9 **locus**.

10 Mackenzie was aware that Ferry had refused a request
11 for Ms McKie to be present during the comparison and he
12 thinks that that decision was correct because it would
13 not be normal to have the officer present.

14 Mackenzie states that the new fingerprint form and
15 photographs were delivered to SCRO after 11.00 am.

16 Independent comparisons were carried out by four
17 officers: Mackenzie, Dunbar, Halliday and a fourth
18 officer whose name he cannot now recall. His statement
19 to Operation Alba mentions Mr Geddes and
20 Mr Macpherson as possibilities though, he is
21 contradictory in relation to the latter.

22 The second image of Y7 was perfect and was of the
23 same quality as the first one that he had seen.

24 The second set of impressions was better than the
25 first. In both comparisons he used the plain (not

1 rolled) impressions. The rolled impressions available
2 on 17th and 18th February were inferior and were
3 smudged.

4 He used magnifying glasses and the comparator, as he
5 had done on the 17th.

6 Again, he concentrated on the lower part below the
7 fault line from the core out to the right-hand side.

8 The improved detail on the second
9 impressions enabled him to form an opinion based on 12
10 or 13 characteristics.

11 The results of the re-examination were relayed to
12 Ferry by phone.

13 Mr Dunbar's statement. He examined the material
14 available on 18th February and believes that it was also
15 examined by Mackenzie and Halliday. After they were
16 finished the material was given to the team led by
17 Macpherson and he assumes that they did their own
18 comparison again, but he cannot confirm this.

19 His conclusion is in these terms:

20 "I do not recall any improvement in the comparison
21 of the new form and photographs of Y7 and I was still
22 satisfied with the area below the fault line and those
23 characteristics that I couldn't account for above the
24 fault line being as a result of movement or double
25 touch."

1 He and Mackenzie were called to Ferry's room and he
2 describes the meeting as a rant: Ferry seemed to be
3 concerned because of the damage that could be done to a
4 serving officer. He assumes that Ferry had got himself
5 in a state of excitement because of the conversations
6 that he was having with other officers.

7 Mr Stewart in his statement says that he was one of
8 those who compared the second image and set of
9 elimination prints on 18th February with the same
10 result. He was asked to do so by Mr Mackenzie. The
11 only other person he names as having been involved was
12 David Halliday.

13 David Halliday's statement. He examined Y7 at the
14 request of Dunbar but is not now clear as to the date.
15 The statement noted from him by Operation Alba on
16 23rd August 2000 is consistent with him having carried
17 out a comparison on 18th February because the narrative
18 points to him having examined the mark the day after the
19 "blind" test.

20 The crime scene print and the known print were on an
21 unmarked comparator. He removed them from the
22 comparator and examined them using magnifying glasses.
23 He also used the comparator.

24 His initial impression was that the crime scene mark
25 was a right thumb but on closer examination concluded

1 that it was a left thumb with a lot of distortion giving
2 the impression of a right thumb. He saw this from near
3 the top of the thumb.

4 The mark was "pretty ropey and tricky" scored at 2
5 out of 10 on the range of identification.

6 He was in no doubt. On the comparator he found 16
7 characteristics in sequence and agreement. He found no
8 points in disagreement, "although there were some
9 tolerances for movement, given the elasticity of the
10 skin." There was twisting clockwise to the right to
11 about 1.30 or 2.00. He signed the screen and told
12 Dunbar that he was satisfied as to the identity of the
13 mark.

14 Chief Inspector Ferry was head of SCRO at the time.
15 He is deceased but on 16th August 2000 he provided a
16 statement to Operation Alba.

17 He is not precise on dates, referring to some time
18 in February 1997, nor does he mention Y7 by that name
19 but he clearly refers to the line of communication that
20 led to it being re-examined.

21 He was told of the identification of the mark as
22 that of Ms McKie by O'Neill.

23 He says that the mark was significant for two
24 reasons: (1) because it was close to the body and (2)
25 because Ms McKie had been involved in a previous

1 incident where her print had been found on a bag. The
2 statement continues:

3 "As a result of this the mark had apparently been
4 examined by four experts prior to me being informed."

5 His recollection is that Mackenzie had confirmed the
6 identification before he (Ferry) was informed because he
7 remembers asking him if he was sure and he said that he
8 was confident that he was.

9 Ferry informed Assistant Chief Constable Welsh and
10 Welsh asked him to have the mark re-examining to be
11 absolutely certain before any action was taken -- the
12 implication being that any further action would have
13 been against Ms McKie.

14 He asked O'Neill to have the mark checked again and
15 was later informed that the other experts had examined
16 the mark to and confirmed the identification. He
17 relayed that back to Assistant Chief Constable Welsh.

18 The Inquiry has explored the question whether the
19 previous incident mentioned in the Ferry statement, in
20 which Ms McKie's fingerprints may have been on a bag in
21 1993, was in the mind of any of the SCRO fingerprint
22 examiners when they were examining Y7 in February 1997.

23 A report into this matter was prepared for the
24 Procurator Fiscal by Detective Superintendent Malcolm on
25 3rd April 1997. It was forwarded to Crown Office and a

1 copy of that report is on the Crown Office file.

2 One possible history of this particular point is set
3 out in the witness statement of DC Lunardi. She says
4 that the earlier incident was mentioned by Ms McKie to
5 DC Lunardi on the 6th when SCRO requested elimination
6 prints from Ms McKie; plainly Ms McKie assuming that
7 SCRO must already have her prints because of the earlier
8 incident. Lunardi says that Heath mentioned this
9 incident to her during the week when Y7 was identified
10 as Ms McKie's fingerprint. Heath says that he first
11 heard of this matter when Lunardi told him.

12 Ms McKie says that she did not mention the previous
13 incident to anyone on or around 6th February.

14 Charles Stewart and Terry Foley of SCRO had been
15 involved in 1993 and provided witness statements on this
16 matter on 3rd April 1997 to Mr Malcolm. Those are on
17 the Crown Office file.

18 It is not clear whether information about the 1993
19 incident would have come to the attention of the SCRO
20 personnel any earlier. There is no reference anywhere
21 else to this matter being in the minds of the SCRO
22 examiners at the time of the initial identification.

23 There were telephone calls back and forth between police
24 and SCRO, so it is possible this information was
25 imparted in a call.

1 Mr Macpherson says that it was only months after his
2 initial identification of Y7 that he learned of the 1993
3 incident.

4 Charles Stewart covers this point in paragraph 138
5 of his statement. He has no memory of the 1993 case nor
6 of his statement dated 3rd April 1997 to Malcolm.

7 Similarly Mr MacKenzie says that he had no knowledge
8 of either this prior incident or Mr McKie at the time.

9 Likewise, Mr McKenna says that he was not aware of the
10 link to the earlier incident at the time and may not
11 have learned of it until 1998 or 1999.

12 Mr Geddes says that he knew nothing of the prior
13 incident.

14 Edward Bruce says that the 1993 incident became
15 common knowledge "after a certain time". He became
16 aware of it a couple of years after 1997.

17 So the issues arising from chapter 4 are these.
18 When was mark Y7 discovered? What was its location and
19 orientation? Had it been placed there before or after
20 the application of aluminium powder? Had it been placed
21 there before or after the removal of the bathroom door?
22 When was mark Y7 identified, and in particular, had it
23 been identified as belonging to a police officer by
24 23rd January 1997? What was the precise sequence of
25 events whereby Y7 was identified with Ms McKie's left

1 thumb print? When, by whom and for what reason was it
2 decided to apply the full 16 point standard to the
3 matching of this mark with Ms McKie. What was each of
4 the checkers told prior to the examination of the mark?
5 To what extent was the comparator machine relied on in
6 this process and were the markings remaining before
7 successive examiners viewed the mark? What steps were
8 taken to check the identification of Y7 after it became
9 clear that Ms McKie denied having been inside 43 Irvine
10 Road, Kilmarnock? In particular what was the purpose of
11 re-photographing the mark on the 12th and to what use
12 was the photograph put? What steps were taken by Robert
13 Mackenzie and Alan Dunbar to review the identification?
14 What was the purpose of the "blind testing" exercise on
15 17th February? Who participated in that exercise and
16 what conclusions ought properly to have been drawn from
17 it? What steps were taken and by whom to check the
18 identification after the mark was re-photographed and
19 Ms McKie's prints retaken on 18th February? Were SCRO
20 examiners aware of this incident in 1993 when Ms McKie
21 was alleged to have left a fingerprint on a production
22 and if so at what point did they become aware of this
23 matter? Again, a list of witnesses whose names have
24 been mentioned in the narrative are listed at the end of
25 that section.

1 Turning then to chapter 5, this deals with the Crown
2 Office, Procurator Fiscal and preparation for the Asbury
3 trial.

4 First of all, beginning with Terms of Reference.
5 The Inquiry's Terms of Reference centre on the
6 fingerprint evidence. In reviewing the prosecution's
7 preparation for the trial it is not intended to consider
8 the exercise of discretion in deciding to proceed to
9 trial against Mr Asbury on a charge of murder. Rather,
10 the review of preparations for the trial is aimed at
11 casting light on the instructions that were given
12 relative to fingerprint evidence and what insight that
13 provided into attitudes towards fingerprint evidence at
14 the time.

15 The initial sequence of reports has already been
16 more fully narrated in chapter 4 and I will now pass on
17 to paragraph 5.1.9. Just to remind us of the critical
18 day, on 31st January 1997 David Asbury, appearing in
19 Kilmarnock Sheriff Court and was fully committed on a
20 charge of murder.

21 I now pick up the narrative after that date so far
22 as the matter being handled by the Crown Office and
23 Procurator Fiscal Service. The instruction for
24 pre-trial preparation. On 14th February 1997
25 Mr Gallacher wrote to the Procurator Fiscal advising

1 that the case had been provisionally allocated to the
2 sitting in Glasgow commencing on 12th May. The last
3 date for service of an indictment for that sitting was
4 9th April and Mr Gallacher informed the Fiscal that the
5 precognition would be required by 31st March.

6 There are reports by Mr Heath and Mr Orr and initial
7 contact with Procurator Fiscal and Crown Office by them.

8 Mr Heath said he submitted a report to Chief
9 Superintendent Cameron dated 14th February 1997.

10 On 20th February he told Deputy Divisional Commander
11 Thomson that he intended to speak to the Fiscal to
12 inform him about developments concerning the McKie
13 situation. His notebook also contains reference to a
14 discussion with Detective Chief Superintendent Orr. He
15 explains that he feels the steps taken after his report
16 on 14th February should have been taken in consultation
17 with the Fiscal.

18 On 20th February 1997 he met Mr McMenemy and told
19 him what he then knew. His notebook also refers to
20 Mr McGlennan. The Fiscal said he would inform Crown
21 Office.

22 After that he had a meeting with Thomson and Gibb.

23 This was prior to him going on holiday on 21st
24 February.

25 Now appended to Mr Heath's report of 14th February

1 beginning at page 6 is an undated report prepared by
2 Mr Thomson and addressed to Chief Superintendent Gibb.
3 Mr Heath has not seen this before, so it must be a later
4 addition.

5 Subsequently, a written report was prepared by
6 Mr Orr. It is in two parts: a memo dated 24th February
7 and an addendum dated 26th February.

8 In the addendum, there is reference to the partial
9 palm-print Z7: it "has no characteristics with which to
10 give an opinion as to its origin. It simply has the
11 shape of being part of a palm. Consequently, it can
12 never be identified."

13 The addendum refers at paragraph 33 to a discussion
14 between Mr Orr and Mr McGlennan on the 26th when the
15 report was delivered to the Procurator Fiscal's office.

16 It records that Mr McGlennan was to arrange a
17 meeting with the Home Advocate Depute, Mr Kevin Drummond
18 QC, to discuss the question of the fingerprint.

19 It concludes with a note that the log keepers could
20 be interviewed on a confidential basis and asked if
21 Ms McKie had been in the house.

22 Mr Heath has no knowledge of anything to do with
23 palm-print Z7.

24 There is no indication that a meeting actually took
25 place between Mr McGlennan and Mr Drummond. Examination

1 of the Crown Office file reveals that Mr McGlennan wrote
2 to Mr Gallacher in the High Court Unit in Edinburgh on
3 26th February 1997. His brief letter refers to "his
4 recent conversation with Mr Gallacher" and encloses the
5 report submitted by detective Chief Superintendent Orr.

6 The matter came to the attention of the Home
7 Advocate Depute Mr Drummond. His note, dated 27th
8 February, is on a slip in the file and is in the
9 following terms:

10 (1) eliminate her from the murder Inquiry. (2) once
11 (1) has been carried out the position of DC Cardwell
12 should be reconsidered, including (a) on list of
13 witnesses (b) precognosce on oath (c) further interview
14 by a counselling officer.

15 There follows a letter dated 28th February from
16 Mr Gallacher to Mr McGlennan. Its contents broadly
17 reflect and expand upon the content of Mr Drummond's
18 note. The matters covered included the possibility of
19 removing the doorframe to preserve the fingerprint and
20 also a more specific line of Inquiry and I quote:

21 "It would also be useful to obtain information from
22 the Scene of Crime Officers as to whether they can give
23 an opinion as to how fresh the print was and how
24 recently the imprint was made and whether any view can
25 be given as to the circumstances in which the print and

1 indeed the palm-print were made. In other words, what
2 was the person doing when they left those prints."

3 Crown Office sought an update by letter dated 26th
4 March and was informed that the precognition would be
5 submitted on 3rd April.

6 Mr McKie and Ms McKie in contact with Chief
7 Superintendent Cameron. Chief Superintendent Cameron
8 submitted a report dated 3rd March to the Deputy Chief
9 Constable. This details contact made by Mr McKie
10 initially by telephone on 27th February and then in
11 person on 28th February. It also records a meeting that
12 Cameron had with Ms McKie on 1st March. Ms McKie
13 maintained that she had not been beyond the front outer
14 porch. Mr McKie asked Mr Cameron to rule out the
15 possibility that Ms McKie's print might have been put at
16 the **locus** by someone else. Ms McKie stated that one
17 possible solution to the mystery was that her print had
18 been placed there by someone else by mistake, possibly
19 by transfer from the tin that she had found.

20 The Procurator Fiscal, Mr McGlennan, communicated
21 the Crown Office instructions to DS Orr by letter dated
22 3rd March 1997.

23 The response to the Crown Office request was a
24 report dated 1st April by Detective Superintendent
25 Malcolm, countersigned by Orr. That report in turn

1 refers, in section 5, to fingerprint evidence; in
2 section 6 to an identification bureau report by Chief
3 Inspector Hogg dated 14th March. A copy of the report
4 of 1st April was in due course bound into the Asbury
5 precognition along with its attachments, including
6 Hogg's report. The section of the precognition includes
7 a copy of the SCRO report dated 27th March 1997, so it
8 is possible that it is that report that provides the
9 basis for the observations in section 5 of the report
10 dated 1st April.

11 The report dated 1st April was detailed and included
12 the following. First, 50 police officers and two SOCOs
13 had been interviewed. The scene log was found to be
14 inaccurate but, nonetheless, no-one reported Ms McKie as
15 having gone beyond the porch. Secondly and I quote:

16 "The fingerprint 'Y7' has indisputably been
17 identified as that of DC Cardwell. That will be the
18 evidence of the SCRO experts."

19 Another quotation:

20 "An opinion was sought on what the person may have
21 been doing to leave the fingerprint in the position it
22 was found. In the first instance the opinion is that
23 the bathroom door was off. [It was removed pm on
24 9th January 97]. In the second, a person looking from
25 outside the door, leaning on the right-hand door

1 standard with their left hand to gain balance or
2 purchase when peering round the doorframe or round/over
3 some obstruction, eg another person, could have left the
4 print in that position. However, the fingerprint
5 officers are not prepared to include such an opinion in
6 their report."

7 Chief Inspector Hogg is noted as having been of the
8 opinion that the door was off.

9 Reference is made to some forensic testing by
10 Mr Eynon, which established that the timber in the
11 doorframe on which Y7 was found was similar to the
12 timber in other parts of the hallway.

13 Fingerprint examination of the tin did not reveal
14 fingerprints of Sergeant Shields or Ms McKie.

15 Ms McKie was interviewed on 31st March. She is
16 reported as having accepted that the print was hers but
17 that it had been "planted". She claimed that her print
18 had been placed at the **locus** illegally with the tin
19 being part of the scenario.

20 Mr Hogg confirms that he first learned of Y7 when he
21 returned from holiday lasting almost all of February.
22 Mr Orr asked him when everything had been found. Mr Orr
23 did not request a written report from him but Mr Hogg
24 did send a memo to Superintendent Malcolm dated
25 14th March 1997 detailing when and where certain marks

1 were found.

2 In his statement Mr Hogg comments on the opinion
3 that the door was off when Y7 was deposited. The view
4 he took is that it would have been very difficult to get
5 the left thumb print on to the doorframe with the door
6 in place but easy to have done so with the door removed.
7 It is difficult to be definite. That said, he did not
8 form a view as to which hand the fingerprint had come
9 from, and he accepts that in a statement dated
10 September 1997 he was commenting on the same question on
11 the premise that Y7 was a right thumb print.

12 Mr Thurley says he removed the doorframe on
13 6th March 1997 on the instructions of Chief Inspector
14 Hogg in order to preserve Y7.

15 The report to Crown Office. The case was reported
16 to the Crown Office on 3rd April 1997. The Procurator
17 Fiscal's full report on the case is known as "the
18 precognition".

19 Bound in as part of the precognition were copies of
20 the report by Detective Superintendent Malcolm dated
21 1st April, the report by Chief Inspector Hogg dated
22 14th March, the report by Mr Macpherson, Mr Stewart,
23 Mr McBride and McKenna regarding Y7 dated 27th
24 March 1997 containing a final paragraph relating to the
25 orientation of the print, and a statement taken from

1 Ms McKie by Detective Superintendent Malcolm on
2 31st March 1997.

3 The precognition is a self-contained series of
4 volumes containing the witness statements taken by the
5 investigating precognition officer and expert reports.
6 It opens with a narrative of the facts of the case and
7 an analysis of the critical evidence, both prepared by
8 the precognition officer (Mrs Berry), and includes the
9 recommendation of the precognition officer, and a
10 reasoned note by the PF Depute (Mr McMenemy) endorsing
11 the recommendation that Mr Asbury be prosecuted for
12 murder.

13 The analysis of the evidence by the precognition
14 officer identified a sufficiency of evidence based on:
15 (1) the print on the gift tag (ie XF -- attached to the
16 boxed soap set purchased in 1996; the partial prints of
17 Mr Asbury and Miss Ross on the tin, ie QI2; evidence
18 that the money in the tin was folded in a way considered
19 unique to Miss Ross; and Mr Asbury's disappearance after
20 the murder).

21 To that list the Procurator Fiscal Depute added
22 Mr Asbury's change of position when speaking to the
23 police and the suspiciously long delay before denying
24 that he killed Miss Ross.

25 Both the precognition officer and the

1 Procurator Fiscal Depute highlighted the difficulty
2 posed by the disputed identification of Y7, the
3 precognition officer observing, and I quote:

4 "If this situation cannot be resolved before this
5 case comes to court, the credibility of the fingerprint
6 officers will undoubtedly be called into question,
7 probably blowing the only substantial evidence we have
8 in this case apart."

9 Then the instruction to indict Mr Asbury and to
10 carry out further inquiries. Given the time limits
11 fixed in Scots law for trials, the indictment had to be
12 served on Mr Asbury by 10th April and accordingly the
13 Crown Office was working to a short deadline.

14 The potential difficulties with Y7 was immediately
15 appreciated, as is apparent from my handwritten note of
16 3rd April 1997. That note instructs that Mr Asbury be
17 indicted in the High Court. It records that the matter
18 had been brought to the attention of the Lord Advocate,
19 and instructs certain further inquiries. The
20 Lord Advocate was then Lord Mackay of Drumadoon. It is
21 apparent from this, and another, undated, note, that the
22 concern that I had at this point was that Ms McKie might
23 have moved the tin from the house of the deceased to the
24 house of the accused.

25 Within Crown Office the task of preparing the

1 indictment, and hence preparing the case for trial, was
2 assigned to Ms Climie, a Fiscal in the High Court Unit.

3 The investigations instructed in Crown Counsel's
4 note of 3rd April are reflected in a letter dated
5 7th April 1997 from Ms Climie to Ms Elizabeth Berry, the
6 precognition officer in the Kilmarnock Procurator
7 Fiscal's Office. It also contains instructions as to
8 other enquiries and aspects of preparation of the case.
9 The letter records that Crown Counsel was given further
10 consideration to the fingerprint evidence and in the
11 meantime asked Mrs Berry for a response to the points
12 raised in Mr Gallacher's letter of 28th February.

13 On 9th April the Crown Office forwarded the
14 indictment to the Procurator Fiscal for service.

15 A further detailed letter was sent by Ms Climie to
16 Ms Berry with instructions relating specifically to Y7.

17 The file contains a draft dated 10th April. It was
18 forwarded to Mr Drummond for revision. It is understood
19 that the file copy contains handwritten revisions by
20 Mr Drummond and the Deputy Crown Agent.

21 Mr Drummond asked Ms Climie to consult me on the
22 draft because I had expressed an interest in seeing
23 this.

24 The Crown Office file contains a copy letter dated
25 11th April marked as faxed that date. I would appear to

1 have been shown a revised draft dated 11th April and I
2 made a suggestion about the preparation of a master
3 table.

4 We then turn to fingerprint inquiries instructed by
5 Crown Office. Statements from personnel in Procurator
6 Fiscal Service are awaited.

7 Mr Heath and his contact with the defence. Mr Heath
8 was instructed by Superintendent Malcolm on 1st April to
9 despatch a precognition letter from McIntosh & Wyllie,
10 David Asbury's solicitors, to Ms McKie. He spoke to
11 Mr McMenemy of the Fiscal's Office before doing so.

12 On 30th April Divisional Commander Cameron told DCI
13 Heath that Ms McKie was denying having received a
14 precognition letter. Cameron instructed Heath to
15 arrange for a copy to be delivered, which he did. After
16 checking with the PF's office, Heath phoned "Bill"
17 Dunlop of McIntosh & Wyllie (Asbury's solicitors) to get
18 a copy of the letter and arrange for it to be delivered.

19 In his supplementary statement to Alba it is said
20 that when he contacted "Bill" Dunlop of McIntosh &
21 Wyllie, Mr Asbury's solicitors, Mr Heath told him that
22 it would be in their interests personally to precognosce
23 Ms McKie.

24 A statement was taken by Alba from Lesley Dowdalls,
25 a partner in McIntosh & Wyllie, and it confirms that

1 Mr Heath did contact the defence and suggest that they
2 precognosce Ms McKie and they did that in early May.
3 The contact was made with a trainee, Ross Dunlop.

4 In that statement Miss Dowdalls is recorded as
5 explaining that this led the defence to instruct
6 Mr Graham who confirmed the identification of Y7 as the
7 fingerprint of Ms McKie.

8 Ms McKie says the defence agents were unaware that
9 she was disputing that the mark had been made by her and
10 that they appeared astounded. It seems that neither the
11 Procurator Fiscal nor the police had disclosed this
12 matter to the defence before she did. Her previous
13 statement does record the defence solicitors as having
14 told her that Mr Heath had told them that she had
15 something interesting to tell them.

16 Now turning to 7th April, Mr Heath says that he left
17 a social event on 4th April at which Ms McKie was
18 present because he could have been placed in a
19 compromising position. He was later informed of unrest
20 caused by remarks made that night by Ms McKie. He
21 decided to submit a report and did so on 7th April.

22 Mr Heath indicates that he wanted to leave the CID
23 as a result of the whole matter and that he was
24 appointed to the Force Inspectorate but later returned
25 to Kilmarnock as detective superintendent in 2000.

1 Turning to the disciplinary proceedings, by the date
2 of the trial a disciplinary investigation led by
3 Mr Wilson had been commenced in relation to the possible
4 misconduct of Ms McKie. The investigation was set up on
5 8th May and an investigation form under the Police
6 (Conduct) (Scotland) Regulations was served on Ms McKie
7 that day. Ms McKie deals with this in paragraph 80 of
8 her statement by referring back to her prior statement.

9 Accordingly, when Ms McKie gave evidence at the
10 Asbury trial on 28th May she was already under
11 disciplinary investigation.

12 Turning now to examination of the doorframe, Mr Hogg
13 says that on 8th May the Procurator Fiscal, Mr McMenemy,
14 brought the doorframe to his office for Mr Hogg to
15 examine in the context of Ms McKie's allegation that the
16 fingerprint had been planted. He told the Procurator
17 Fiscal that he was not an expert on planting. He says
18 that it appeared to him to be a good print but he could
19 not comment on planting.

20 The fingerprint reports by Scottish Criminal Record
21 Office. The preparation of the fingerprint reports for
22 the trial in **HMA v Asbury** will be dealt with in chapter
23 6.

24 I then look at defence investigations of
25 fingerprints. Mr Asbury was represented by McIntosh &

1 Wyllie who instructed Malcolm Graham to provide a report
2 in relation to the fingerprint evidence.

3 He agreed the SCRO identifications of the critical
4 fingerprints, XF, DQ2, QI2 both Mr Asbury and Miss Ross
5 and Y7. Mr Asbury's present solicitors, Digby Brown,
6 have observed that Mr Graham would appear to have been
7 supplied two reports to McIntosh & Wyllie. The material
8 difference between the two reports is that in the copy
9 bearing the footer date 8th May and has Y7 as a right
10 thumb whereas in the copy with a footer dated
11 17th May 1997 the reference is to a left thumb.

12 Turning to the trial, there is no note on the Crown
13 Office file of any further involvement by Crown Office
14 between the date of the letter 11th April and the start
15 of the trial.

16 A note by the trial depute, Mr Allen Dewar, to the
17 Lord Advocate reports that he received the papers
18 shortly before the sitting was due to commence without
19 any prior notice. The trial proceeded between 16th May
20 and 4th June 1997 and Mr Asbury was convicted.

21 A concise summary of the proceedings, with some
22 incidental observations, is contained in the note
23 prepared by Mr Carle, the police observer.

24 The defence did not contest the SCRO evidence
25 regarding the identification of the critical

1 fingerprints. Mr Macpherson and Mr Stewart gave
2 evidence but neither was cross-examined by the defence.
3 The transcript of their evidence is produced and records
4 the absence of cross-examination of Mr Macpherson and
5 Mr Stewart.

6 Mr Graham was called as a defence witness though he
7 confirmed in cross that he had no doubt about the
8 identification of Q12 as the print of Miss Ross, and Y7
9 as that of Ms McKie, the thrust of his evidence was
10 directed to the possible means by which Miss Ross' print
11 could have been planted on the tin, the possibility that
12 he left standing being that it could have been placed on
13 the tin by contact with the corpse in the mortuary.

14 The defence case to the jury included the suggestion
15 that Miss Ross had not come in to contact with the tin
16 during her lifetime and that the part of Q12 that was
17 identified as her mark had been placed on the tin by
18 police officers at the mortuary. Y7 was cited by the
19 defence as a second print, the circumstances of the
20 deposition of which were contested.

21 It is not thought that this particular chapter
22 raises issues other than providing the narrative that
23 informs the chapter that I am next about to turn to
24 which is chapter 6, looking now in detail at the
25 preparation of reports by the Scottish Criminal Record

1 Office for both Asbury and McKie trials.

2 This chapter will address the matter in which the
3 SCRO witnesses prepared productions lodged in the two
4 criminal trials on the basis of which evidence was
5 given.

6 This chapter will discuss the specific reports and
7 productions prepared for the cases of Asbury and McKie
8 and will touch on some reports that were prepared but
9 not lodged.

10 In addition, this chapter will look more generally
11 at the practice within SCRO at the time in relation to
12 the preparation of fingerprint evidence in solemn cases
13 (that is to say, cases before a jury), with specific
14 reference to the purpose of enlargements and the
15 accuracy of the enlargements produced by the charting
16 computer.

17 Now looking firstly at Y7 reports in **HMA v Asbury**,
18 the Inquiry has recovered the original image of Y7 with
19 manuscript writing on the back used in the
20 identification of Y7 as Ms McKie's print.

21 The Inquiry also has the negative of that image.
22 The original image with writing on the back was not used
23 as a production in either trial.

24 I will now discuss the first of the reports dated
25 27th March 1997 which is now on the screen and it is

1 Inquiry database code DB0004.

2 The first joint report of Y7 is dated 27th
3 March 1997. It is signed by Macpherson, Stewart,
4 McBride and McKenna. It is based on a comparison of a
5 photograph of Y7 dated 16th January 1997 and an
6 elimination print form for Ms McKie dated
7 7th February 1997. It also contains a reference to the
8 "**locus** photograph of the impression Y7 in situ" and
9 contains an expression of opinion as to the orientation
10 of the print. That passage is now highlighted on the
11 screen and if I can just read it it says:

12 "From examination of the photograph impression
13 itself and the examination of the **locus** photograph of
14 the impression Y7 in situ, it was ascertained that the
15 top of the left thumb print which was identified was
16 facing in an inward direction relative to the bathroom."

17 The Inquiry has been unable to obtain an original
18 image of the "**locus** photograph of the impression Y7 in
19 situ."

20 Mr McKinlay's statement to Chief Inspector Wilson
21 would vouch the fact that on 18th February he took a
22 couple of general shots of the position of the print and
23 the Wilson report contains what may be a poor photocopy
24 of two such photographs at page 189. This has been
25 confirmed by Mr McKinlay in his statement to the

1 Inquiry.

2 A copy of that first report was included in the
3 precognition submitted to Crown Office. It may be the
4 report mentioned in paragraph 15.1 of the Malcolm
5 report. It does not seem to have been used in the trial
6 and was also not lodged as a production in **HMA v McKie**.

7 The detailed letter from Ms Climie dated 11th April 1997
8 does refer to this first report in paragraph m (ii)
9 where she says:

10 "A second examination of Y7 was carried out on
11 12th February, (presumably when the doorframe was still
12 in situ) and a second comparison carried out. Evidence
13 regarding this should be included. The report at
14 page 54 of the precognition [ie 27th March] appears to
15 be based on a comparison between the original photograph
16 of Y7 and the elimination prints. A second report
17 should be prepared based on the second photograph of Y7
18 and all necessary IB and SCRO witnesses and productions
19 added."

20 Turning to the report dated 10th April, the
21 production used in **HMA v Asbury** was a report by the same
22 signatories dated 10th April 1997. That is production
23 154 in **HMA v Asbury**.

24 It bears to be a report of the comparison of an
25 elimination print form for Ms McKie dated

1 7th February 1997 and two images of Y7, one dated
2 16th January and one dated 18th February. In court it
3 was accompanied by a book of photographs, production
4 152, containing two images of Y7 and a charted
5 enlargement relative to the fingerprint form production
6 153. The report itself says that the enlargements were
7 prepared to illustrate the identification.

8 The reports dated 27th March and 10th April both
9 refer to an elimination print form dated
10 7th February 1997. This is presumably a reference to
11 the prints taken on 6th February that have a SCRO date
12 stamp of 7th February. That is the print form lodged as
13 production 153 in the Asbury and McKie cases. The
14 Inquiry has the original of this print form.

15 Production 152 in **HMA v Asbury** contains two original
16 images of Y7: the one to the left is undated but is
17 presumably the image dated 16th January. That must be a
18 mistake. The other is dated 18th February 1997 and the
19 Y7 label is one with Ms McKie's initials.

20 There is general evidence about these two reports of
21 27th March and 10th April. Mr Macpherson says that he
22 prepared all of the productions in **HMA v Asbury**. The
23 reason why there were two reports (7th March and 10th
24 April) is probably that they were asked, he thinks by
25 the Fiscal, to do a preliminary report detailing Y7 in

1 situ. The 10th April report is the normal court report.

2 The photocopied photographs of Y7 in a wider context
3 are poor copies but may be the photographs referred to
4 in the 27th March report.

5 Specifically in relation to the 27th March 1997
6 report, first of all, the reference to the **locus**
7 photograph and the expression of opinion as to the
8 orientation of the print in this report does not appear
9 in any other SCRO Y7 report.

10 The Inquiry has been a unable to obtain an original
11 image of "the **locus** photograph of the impression Y7 in
12 situ" but in the Wilson report there may be a poor
13 photocopy of that photograph.

14 Mr Macpherson explains the comment on the
15 orientation of the print in paragraph 47 of his
16 supplementary statement. The part of the thumb that
17 made the mark was facing into the bathroom when the mark
18 was made, from which it may be inferred that the person
19 who made the mark was looking into the bathroom.

20 Mr Stewart describes that comment as non-standard
21 and says that the Procurator Fiscal would have asked for
22 it. He does not know why that paragraph was omitted
23 from later reports.

24 Mr McKenna has no memory of this paragraph. It is
25 not standard. He does not know why it was put in but

1 presumes that it was at the direction of the PF. He
2 does not know why the report of 10th April was prepared.

3 Miss McBride similarly cannot remember why two
4 reports were prepared. She cannot remember why the
5 **locus** photograph was mentioned on 27th March report, nor
6 why that is omitted from the 10th April report. She
7 assumes that the reports reflected instructions from the
8 Fiscal.

9 Y7 reports in the later trial, **HMA v McKie**. The
10 Asbury production, that is 152 to 154, were lodged by
11 the Crown as productions in **HMA v McKie**. There also was
12 a report dated 29th January 1999. For the purposes of
13 that trial the Crown also produced a Y7 report by the
14 same signatories dated 29th January 1999. It was
15 production 190. It bears to be a report of the
16 comparison of an elimination print from Ms McKie dated
17 15th March 1999 with two images of Y7, one dated
18 16th February(**sic**) and one dated 18th February. It was
19 accompanied by a fingerprint form production 187 and an
20 illustrative booklet production 189.

21 The fingerprints on the fingerprint form 187 were
22 taken on 6th March 1998 but the form has a SCRO date
23 stamp of 15th March hence the date referenced in the
24 report. The Inquiry has the original.

25 Bring up DB0012 and this is page 5 to begin with.

1 There are two original images of Y7 in production 189
2 displayed one above the other. Both images are undated.
3 The top image has a label for Y7 that does not include
4 Ms McKie's initials but is different from the image with
5 a similar label included to the right in production 152.
6 The bottom image has a Y7 label initialled by Ms McKie
7 and may be the same as the image to the left in
8 production 152.

9 PC McKinlay re-photographed Y7 on 18th February. In
10 his statement he refers to production 189 as book "L2".
11 His evidence is that the two photographs in production
12 189 which are on the screen were taken by him on
13 18th February 1997. In his evidence-in-chief at
14 **HMA v McKie** Mr Stewart said the illustrative enlargement
15 in production 189 had been based on the photograph at
16 the bottom of page 1 of the booklet, which would appear
17 to be that of 18th February.

18 The preparation of the report dated 29th
19 January 1999 would be consistent with the Crown Office
20 instruction dating back to 30th January 1998 that
21 Ms McKie be fingerprinted on arrest and fingerprint
22 officers carry out a further comparison of Y7 relative
23 to that print form. On 25th January 1999, Mrs Greaves,
24 the local Fiscal, told Ms Climie that she had passed the
25 instruction on to SCRO. There may be some variation in

1 the images of Y7 included in the booklets (that is
2 productions 152 and 189) but the principal difference
3 may be that the earlier production was prepared relative
4 to the elimination fingerprints taken in February 1997,
5 whereas the later report was prepared relative to the
6 arrest prints taken in March 1998.

7 Mrs Greaves confirms that the SCRO witnesses were
8 not asked to compare Y7 against the arrest ten-print
9 form until January 1999 and that they dealt with that
10 request expeditiously.

11 Mr Macpherson is not sure if he produced the
12 productions for **HMA v McKie** but he imagines that he
13 would have prepared most of them. In paragraph 168 of
14 his statement he discusses the joint report dated 29th
15 January 1999 and the book of photographs L2 (production
16 189). When his statement was being taken he used
17 slightly different Inquiry hearing database references
18 and I converted them from his statement to this analysis
19 but there is a mistake in the table. Production 189 in
20 the first line under the analysis reference there's a
21 reference DB0009. That should be DB0012.

22 So going back to the evidence of Mr Macpherson,
23 6.3.19, and I am going to bring up a sheet DB0012,
24 page 6. Again, this is a sheet from production 190.
25 Mr Macpherson thinks he prepared the Y7 joint report

1 (production 190) and the accompanying book of
2 photographs (production 189) and adds this:

3 "This was because we had to produce
4 enlargements ..." and the sheet on the screen is the
5 enlargements. He said:

6 "This was because we had to produce enlargements
7 from the charge form once Shirley McKie was charged with
8 perjury. We revisited our initial assessment to that
9 extent, but we were not carrying out a fresh
10 comparison."

11 Mr Stewart says that he prepared the report and the
12 productions, but that Mr Macpherson prepared the charted
13 enlargement. At some point the charge form fingerprints
14 dated 15th March became available and Mr Stewart carried
15 out a new comparison of Y7 against that form. As with
16 other reports, productions and enlargements, he would
17 have ensured they were accurate before he signed them.
18 Ms McBride says she carried at a full comparison of the
19 marks relative to the fingerprint form dated 6th March
20 1998 and ensured the report was accurate. Mr McKenna is
21 to the same effect.

22 I turn to the second production, production 180. A
23 third book of Y7 images and a charting was lodged as a
24 production in the McKie case, production 180. It bears
25 to have been signed by Mr Macpherson and Mr Stewart. It

1 contains two images of Y7. The right-hand one is
2 similar to the image dated 18th February in production
3 152 and 189. The one to the left differs from the
4 corresponding images used in production 152 and 189.
5 Mr Macpherson says the reason why there are two reports,
6 27th and 10th April 1997, is probably that they were
7 asked, he thinks by the Fiscal, to do a preliminary
8 report detailing Y7 in situ. Production 180 may have
9 been prepared as part of that preliminary investigation.
10 He is not sure why it is signed by only two people but
11 it may only have been for information. However, the
12 fact that a preliminary report may have been requested
13 might explain why there were three lots of enlargements
14 for Y7: a preliminary set, one for the Asbury trial and
15 one for the McKie trial.

16 Mr Stewart cannot explain why production 180 --
17 before I read this can we bring up again DB0004. In
18 fact, it will be page 3, I suspect. So this is a copy
19 of production 180.

20 Mr Stewart cannot explain why production 180 was
21 prepared. As to the suggested link with the report
22 dated 27th March, Mr Stewart says that he cannot
23 remember if a book of productions was prepared specific
24 to that report. The copy of the report available to the
25 Inquiry, which is on screen, has "report without book"

1 written on it. That can be seen in the top right-hand
2 corner. He says that that note is in his hand writing
3 and was written by him when he was collecting evidence
4 for the HMIC Inquiry.

5 I have finished with that document.

6 Mr Stewart in evidence-in-chief during **HMA v McKie**
7 testified that he had taken part in an exercise when Y7
8 was compared against the fingerprint form dated
9 18th February (production 179) and production 180 was
10 produced as an illustration of that exercise but using
11 an earlier fingerprint form instead of production 179
12 because the latter was over-inked and distorted.

13 Mr Macpherson gave evidence after Mr Stewart. The
14 Advocate Depute's questions proceeded on the premise
15 production 180 was referable to a second examination of
16 Y7 carried out by reference to the fingerprint form for
17 Ms McKie dated 18th February.

18 Dealing with differences in the charting in the Y7
19 reports, all of the chartings in these reports were done
20 to the 16 point standard. However, there were
21 differences between the chartings. While the chartings
22 in productions 152 and 180 appear similar the chartings
23 in those productions differ from production 189.
24 Point 14 on productions 152 and 180 were not marked on
25 production 189. Point 10 on production 189 was not

1 marked on either 152 or 180.

2 The end was that the SCRO witnesses in the McKie
3 trial spoke to a total of 17 points in agreement.

4 Viewed another way, the witnesses cited a different
5 combination of 16 points in each of the two cases.

6 Mr Macpherson identified these differences in the
7 chartings in productions 152 and 189 in his
8 evidence-in-chief in the McKie trial. Mr Stewart did
9 likewise in his evidence-in-chief on 5th May 1999.

10 Mr Macpherson dealt with the contrast between
11 productions 180 and 189 in a precognition for the
12 Scottish Executive. I will produce later in this a
13 table reconciling the numerical references to the
14 various characteristics highlighted in productions 152,
15 180 and 189.

16 Turning to planting of mark Y7, Mr Stewart says that
17 he and Mr Macpherson produced a report into the
18 possibility that Y7 had been planted. They concluded
19 that there had been no tampering.

20 Turning now away from Y7 to look at the other prints
21 XF, QD2 and the other marks identified as Mr Asbury.
22 The marks identified as David Asbury including XF, QD2,
23 QI2-part and QL2 were the subject of a joint report
24 production 100 in **HMA v Asbury**. It is dated
25 17th March 1997 and signed by Macpherson, Stewart,

1 McBride McKenna. Production 97 is the Asbury print form
2 referred to in the report. Production 98 contains the
3 images of XF in reversal, QD2, QI2 and QL2. Production
4 98 also contained a charted enlargement of XF and an
5 Asbury print. The Inquiry has only photocopies of the
6 Asbury prints. The Inquiry has the gift tag and
7 production 16 in **HMA v Asbury**, a book of photographs of
8 the Christmas present. In addition to the photographs,
9 the Inquiry has recovered an original image of XF
10 containing manuscript writing and a reversal.

11 Mr Macpherson says that he prepared both the joint
12 report and the charted enlargement of XF. The
13 enlargements of QD2 were produced later, as best he can
14 recollect after the identification of QD2 was disputed.

15 Mr Stewart says that he would have satisfied himself
16 that the enlargement and the characteristics noted
17 therein were accurate. Ms McBride says the same, as
18 does Mr McKenna.

19 Next looking to QI2. QI2 is a cluster of marks in
20 part identified as that of Mr Asbury and also in part
21 identified as that of Miss Ross. The part matched to
22 Miss Ross was addressed in the joint report production
23 101 in **HMA v Asbury** dated 17th March 1997 signed by
24 Macpherson Stewart McBride McKenna. Production 96 is
25 the Marion Ross print form referred to in the report,

1 production 99 is the accompanying book of photographs
2 containing an image of Q12, production 99 also contained
3 a charting comparison but the Inquiry has only recovered
4 a relatively poor photocopy of this production.

5 In addition to these productions the Inquiry has
6 recovered the original image of Q12, with writing
7 relating to the matches with Miss Ross and Mr Asbury and
8 the enclosing bag relating to the Ross identification.
9 The Inquiry also has the originals of the fingerprint
10 form for Miss Ross.

11 Mr Macpherson says that he was the author of the
12 joint report relating to Q12 and also that he produced
13 the charted enlargement. Mr Stewart agrees that
14 Mr Macpherson prepared the charting but he too claims
15 authorship of the report. This may not be material
16 because the report (unlike the charting) is a pro forma.

17 Mr McKenna says that he must have looked at Q12
18 first when either signing off the case envelope or
19 signing the report. He would have used a glass and
20 possibly a comparator. He would only have looked at the
21 images referred to in the report. He cannot remember
22 looking at the charted enlargement but he has signed it,
23 which means that at the time he was satisfied that it
24 accurately showed the same 16 points in sequence and
25 agreement in the mark and Miss Ross' print.

1 Why were Miss McBride and Mr McKenna signatories to
2 the joint report, even although they were not among
3 those who initially identified Q12? Mr Macpherson
4 explains that it may have been in part due to the fact
5 that McBride was his general substitute for evidence at
6 trial and McKenna was Stewart's. It may also have been
7 due to the fact that they had been involved with Y7,
8 which was known to be disputed, and bringing them in to
9 Q12 meant that they could deal with the case in its
10 entirety.

11 Mr Stewart confirms that SCRO operated a pairing
12 arrangement with substitutes to ensure that witnesses
13 were available at all times. The allocation of
14 witnesses was a management decision for Mr Mackenzie.

15 This is the evidence also of Ms McBride, Mr McKenna,
16 Mr Dunbar and Mr Mackenzie.

17 Other marks. In the letter dated 11th April 1997
18 the Crown Office instructed the local Fiscal that all
19 marks had to be carefully checked and lodged. I have
20 given details of the production references for all the
21 reports. However, it is not considered necessary for
22 this Inquiry to look into those reports.

23 Turning to a demonstration booklet in **HMA v McKie**,
24 in the trial **HMA v McKie** the Crown lodged a
25 demonstration booklet "A brief insight into fingerprints

1 and fingerprint identification", production 181. This
2 is signed by Macpherson and Stewart as is the
3 accompanying narrative in the Crown precognition.

4 Accordingly, for the McKie trial the SCRO witnesses
5 had available to them both generic material and material
6 available specific to the mark in question in that case.

7 Procedures in relation to court reports generally
8 and also in **HMA v Asbury**.

9 Mr Macpherson explains the procedure generally
10 positive identifications were placed in a case envelope.
11 Put up on screen an example of a case envelope and this
12 is the case envelope relating to the relevant
13 fingerprints for us. Positive identifications were
14 placed in a case envelope. At the end of all the
15 comparison work the envelope would be signed by the four
16 experts who made the majority of the identifications and
17 those who signed would have to be satisfied that they
18 agreed with all the identification marks in the
19 envelope. In this instance the case envelope is DB0529,
20 which is on screen, and it bears the date
21 14th March 1997. If I try, I may be able to highlight
22 that for you. A letter would be sent out signed by the
23 head of SCRO to the Senior Investigating Officer setting
24 out all the work that had been done on the case. When
25 the case was coming to trial, SCRO would be asked to

1 prepare the productions for the case. SG0457 is an
2 example of the SCRO preparation of evidence form. The
3 person receiving the request to prepare productions
4 (normally a clear case) would prepare this **pro forma**
5 document and it was then a decision for management to
6 decide which experts to allocate as the expert witnesses
7 for the trial.

8 Mr Macpherson deals specifically with the Asbury
9 case. He refers to the SCRO preparation of evidence
10 form and then the case envelope relating to the
11 identification marks is DB0529. It is signed -- and he
12 is now referring to the area which I can highlight -- it
13 is signed and it is thought to have been signed by
14 Mr Macpherson, Mr Stewart, Mr Geddes, Mr McKenna and
15 Miss McBride. The case envelope also records his choice
16 of marks to be enlarged -- if memory serves me correctly
17 it's there highlighted -- XF in the case of Asbury and
18 QI2 in the case of Miss Ross.

19 In the event, the Procurator Fiscal's instruction
20 was to cover all impressions: those identified, those
21 that were fragmentary and insufficient and those that
22 were outstanding. Every one was identified and a
23 separate enlargement produced. Mr Macpherson says that
24 this instruction from the Procurator Fiscal meant that
25 all of the enlargements had to be signed off by four

1 experts to the 16 point standard.

2 As far as contemporaneous documents are concerned,
3 the Inquiry has recovered the SCRO request form relating
4 to reports but it is unilluminating beyond recording
5 that request came from a letter from the Procurator
6 Fiscal dated 18th February 1997. Mr Mackenzie confirms
7 that this form bears a date of 20th February which is
8 two days after his re-checking of Y7 on 18th February.
9 Equally, the Inquiry has the Strathclyde
10 Police identification branch photographic assignment
11 forms but they do not add any detail.

12 It is the case envelope that is on the screen that
13 the Inquiry has and it is one of a related series of
14 case envelopes we have. The original case envelope is
15 DB0529 and it bears the date 14th March 1997. The
16 entries are explained by Mr Macpherson. The next
17 sentence is going to refer to an area I can highlight.
18 It details the marks that were identified and those that
19 were eliminated, including XF, QD2 and QI2 (both Asbury
20 and Miss Ross). This specific envelope does not deal
21 with Y7 and none of the other envelopes on their face
22 contain any reference to this mark.

23 Miss McBride gives a similar commentary on the case
24 envelope DB0529. She was the fifth person to sign it,
25 the other four being Macpherson, Stewart, Geddes and

1 McKenna. She says that normally only four signatories
2 would be required and she says that she may have been
3 the fifth signatory because Mr Geddes had not identified
4 Y7 to the 16 point standard.

5 The Inquiry also has a copy of the standard letter
6 from Chief Superintendent Ferry, as head of SCRO, to
7 Mr Heath dated 24th March 1997 giving a comprehensive
8 account of the results of the examination of the marks
9 in the Marion Ross case.

10 I am about to turn to a section on enlargements.

11 THE CHAIRMAN: We certainly stop at 11.30 so we can stop now
12 and start again at 11.40; in other words 15 minutes.

13 **(11.25 am)**

14 **(A short break)**

15 **(11.40 am)**

16 MR MOYNIHAN: I am now going to turn to the evidence from
17 the Scottish Criminal Record Office generally in
18 relation to preparation of reports and enlargements. I
19 will just put up an enlargement for illustrative
20 purposes.

21 Mr Mackenzie's evidence, there was a standard form
22 of report which had been agreed with the Crown in the
23 1980s. In solemn cases the Glasgow Bureau automatically
24 prepared a set of enlargements as a means of
25 illustrating a fingerprint identification. Regardless

1 of how many marks were identified, they would only do
2 one illustration. One might be requested by the PF or
3 it would be left to the fingerprint officer's judgment.

4 By 1997, a charting PC was being used to produce the
5 enlargements.

6 Both when photographic enlargements were being used
7 and when the charting PC was in use, the practice had
8 been to produce enlargements to illustrate
9 identifications within specific parts of the mark.

10 Accordingly, Mr Mackenzie did not regard "cropping" to
11 be an issue.

12 **HMA v McKie** highlighted shortcomings in the quality
13 of the images produced by this system and its use was
14 suspended and photographic enlargements were used
15 instead.

16 Now Mr Dunbar. He found the charting machine
17 difficult to operate, with a lack of detail in
18 comparison with photographic enlargements. There was
19 also a concern that there was a further deterioration in
20 quality when the enlargements were printed out.

21 One enlargement per accused was prepared, with the
22 expert deciding which mark in the case would provide a
23 good illustration for court purposes.

24 He says that the enlargement was merely an
25 illustration of the way they went about making an

1 identification "... as we cannot turn the jury into
2 fingerprint experts."

3 Mr Macpherson's evidence. In a case where he
4 carried out an initial comparison he would not redo the
5 exercise before preparing the court report.

6 If asked to sign a report without having been one of
7 those who did the initial comparison, he would start
8 from scratch.

9 The enlargements used in the report were, at the
10 time of the Asbury case, produced on a charting
11 computer. The quality of the image was poor: it was
12 difficult to plot the characteristics on it.

13 The Scottish Criminal Record Office was the only
14 bureau that used case specific enlargements in every
15 case. Other Fingerprint Bureaux in Scotland did so only
16 on request and otherwise used generic enlargements for
17 presentation in court.

18 He refers to the 1983 directive from the Crown
19 Office to stop using case specific enlargements in
20 summary cases but not in Solomn cases.

21 On 12th July 2006 he says they did away with
22 producing enlargements because of a Crown Office
23 directive but he does not know what is now used in
24 court.

25 He says that he would not have used the enlargements

1 for any actual comparison:

2 "They were just to show the jury the characteristics
3 that we looked for."

4 However, specifically in relation to XF he says that
5 he did the charted enlargement but that the other
6 signatories would have satisfied themselves that the
7 enlargement was correct.

8 Mr Stewart says that the senior expert would
9 allocate tasks amongst the experts who were to be
10 witnesses.

11 The report was a pro forma.

12 Though each signing expert had to be satisfied as to
13 the identification, Mr Stewart says that if he had
14 carried out a comparison beforehand he would not redo it
15 for the report, unless, for example, charge ten prints
16 had become available since his initial comparison. If,
17 however, he had not done a previous comparison he would
18 do so for the comparison of the report.

19 The ultimate decision on which marks were enlarged
20 for court purposes was for the Crown.

21 SCRO had wanted for years to move to generic
22 enlargements but the Crown insisted on case specific
23 enlargements.

24 The charting PC would only enlarge to certain sizes,
25 which meant that the image had to be cropped. The area

1 to be chosen for enlargement would be discussed by the
2 expert witnesses.

3 The four experts, who might have identified
4 different points of comparison, would discuss the area
5 to be used in the comparison and would reach a consensus
6 on the points to be used. Each expert would have to
7 agree that the points in sequence and agreement were
8 accurate and correct before they could sign.

9 The enlargements were prepared for illustrative
10 purposes to show how a fingerprint expert went about his
11 job. They were not evidence of the comparison or
12 identification. The evidence was the actual
13 photographs, the ten prints and the report.

14 The enlargement was also illustrative of the
15 specific case, showing a specific identification with
16 16 points in sequence and agreement. However, he says
17 that the charting PC was a dreadful machine and produced
18 poor quality images. Mr Stewart does note that the
19 Asbury case was unusual, with the Fiscal making a number
20 of non-standard requests, including reports relative to
21 every mark.

22 Ms McBride's statement. Ms McBride says that one or
23 both of the first two signatories would be responsible
24 for drafting the report and preparing the productions
25 and any enlargement. If she had carried out the initial

1 comparison she would not redo the exercise before
2 signing the report, unless, for example, a new ten-print
3 form (such as a charge form) had become available.

4 She agrees that substitutes would have to carry out
5 their own comparisons before signing a report.

6 She has refused to sign a report in the past.

7 Details are given in her supplementary statement from
8 paragraphs 73 to 85. The correspondence concerning this
9 matter is produced and reference may also be made to the
10 statement of Mr Bell at paragraph 16.

11 She says that the enlargement produced has to be
12 accurate. Only 16 points would be shown and the experts
13 would meet to discuss which parts of the mark and print
14 to use and which characteristics to choose. They would
15 choose the 16 clearest points. She says that she would
16 not sign off an enlargement unless she was satisfied
17 that this was correct and clear.

18 The charting PC was difficult to work. It was
19 difficult to mark points accurately on it. It took
20 longer to produce enlargements on the computer and to
21 ensure that the points were accurate. She says
22 specifically of Y7 that she would have checked that the
23 points marked on the enlargement were in sequence and
24 agreement saying the same in respect of XF, DQ2 and QI2.
25 She thinks that enlargements of QI2 may have the

1 appearance of photographic enlargements. As to the
2 purpose of enlargements, she says that they were not a
3 substitute for the identification itself and were not
4 designed to enable a jury to make an identification
5 because juries are not qualified to decide on
6 fingerprint identifications. They were shown to juries
7 as a means of explaining, in a generic way, how the
8 fingerprint experts go about their task. She says:

9 "We were not trying to prove an identification, it
10 was just for illustrative purposes."

11 Mr McKenna. He did not keep notes. He refers to
12 the SCRO wanting to use generic enlargements but the
13 Strathclyde Procurator Fiscals not wanting to change.
14 The enlargement was only illustrative. One mark per
15 accused would be selected for this purpose. Only parts
16 of the mark were enlarged. This was known as cropping.
17 The enlargement had to show 16 points in sequence and
18 agreement. It would be passed round the experts in the
19 case for agreement. The charting enlargement machine
20 was difficult to use. Case envelopes, of which DB0529
21 is an example, were not fit for purpose. He would sign
22 the case envelope having satisfied himself as to the
23 accuracy of the identifications, having checked those
24 that he had not seen before, but he cannot now remember
25 doing that.

1 The selection of signatories for reports was
2 determined by a number of factors, including who had
3 been involved in the case and annual leave. In
4 **HMA v Asbury** he was a substitute to cover for annual
5 leave. He would recheck comparisons that he had himself
6 carried out earlier because the charge form might not
7 have been available earlier.

8 He checked Y7 to ensure that he still agreed with
9 his identification.

10 He gives the same evidence in relation to XF and
11 QD2.

12 Specifically in relation to QI2, he says that he
13 would only have looked at the images referred to in the
14 report, though adding that he would have looked at the
15 photo of QI2, the Ross ten-print and the Marks Worksheet
16 that refers to the mark having been found on the tin.

17 He would have used the glass and possibly the
18 comparator.

19 He agrees that Mr Macpherson prepared the charting
20 of QI2. He has no memory of the charting but would have
21 looked at it and would have been satisfied that it
22 showed, accurately, the same 16 characteristics in
23 sequence and agreement in QI2 and Miss Ross'
24 fingerprint.

25 Mr Foley also describes enlargements as something

1 used for demonstration purposes and says that the
2 enlargement used might not be the 16 points "you
3 yourself identified". He says that experts were not
4 happy with the charting PC enlargements because they
5 were of poor quality.

6 I am going to skip the next section because the link
7 between enlargements and the best evidence rule was
8 already covered in chapter 1. So if I therefore move to
9 section 6.12 on the next page.

10 Dealing with enlargements and the prosecutor's
11 perspective. Paragraph (f) of the Crown Office letter
12 to the local Fiscal dated 11th April 1997 contained an
13 explicit instruction regarding Y7 evidence in these
14 terms:

15 "The photographed impression of Y7 should be lodged,
16 along with the elimination fingerprint form of Cardwell
17 used for the comparison and the comparison report. If
18 not already done enlargements should be prepared of the
19 photographed impression and the left thumb print form,
20 the elimination form, so that the comparison experts can
21 demonstrate the points of similarity."

22 Mrs Greaves. Her recollection is that the purpose
23 of these enlargements was to explain to the jury what
24 fingerprint experts looked at and comparing, like a
25 demonstration, and to enable the defence to be able to

1 see what Crown fingerprint experts had considered and
2 looked at as background information into the preparation
3 of the experts' joint report.

4 She would have expected that enlargements would
5 reflect the points of similarity identified by the
6 fingerprint experts as points of comparison. Those were
7 highlighted on the enlargements to enable the jury to
8 understand what the fingerprint officers were looking
9 for and what caused them to form their conclusion on the
10 basis of the points found. She was not aware of use of
11 the charting PC.

12 The evidence at trial in **HMA v McKie**. Mr Stewart's
13 evidence-in-chief in **HMA v McKie** was on 5th May 1999.

14 Under reference specifically to production 152 his
15 evidence was that enlargements were produced for
16 illustrative purposes to show the jury how "we" reach
17 "our" conclusions. He answered in the affirmative to
18 the question whether the 16 ridge characteristics
19 mentioned in the joint report were marked on the
20 illustrative document. When the Advocate Depute said of
21 the charting on page 2 of the booklet that some of the
22 points did not appear entirely clear on the left image
23 (ie, the image of Y7) he responded that the fingerprint
24 on the right) ie, from the elimination print form) was
25 produced under controlled circumstances and should be of

1 controlled quality, whereas that on the left was a
2 "chance impression", over which the fingerprint officer
3 has "no control over the quality and clarity of the
4 print and that why is there is a difference between the
5 two."

6 At page 78 to 79 the Advocate Depute specifically
7 commented that characteristics number 7 appeared to be
8 not particularly plain in the enlargement and Mr Stewart
9 indicated it on screen. At page 85 the Advocate Depute
10 asked that the copy of the production that Mr Stewart
11 had in the witness box be shown to the jury "in view of
12 the quality of the reproduction". These references are
13 consistent with the conclusion that there were
14 variations in the quality of the reproductions in the
15 copies available to the jury.

16 This witness did not indicate that there was a
17 problem in the quality of the enlargements as a faithful
18 presentation of points that matched in the mark and
19 fingerprint form.

20 The points in sequence and agreement cited were in
21 the lower part of the mark and are tabulated using the
22 evidence of Mr Stewart who was the lead prosecution
23 witness. To the 16 cited in production 152 it has to be
24 recalled that an alternate was used in production 189
25 giving a total of 17 points cited in evidence.

1 Mr Stewart was questioned on the 16 points in his
2 evidence-in-chief and cross-examination on 5th May.
3 From page 75 he was taken through the 16 points
4 identified on production 152 and from page 106 he
5 addressed production 189, then from page 108 both
6 side-by-side.

7 I have then tabulated the numerical references from
8 production 152, points 1 to 16. I have then given the
9 number in production 189 which corresponds to those
10 features in production 152 and also given what
11 Mr Stewart described as the nature of the
12 characteristic. I will not read out that table.

13 Turning to 6.13.4, Miss McBride says that she was
14 confused by the damage to the mark in the Wertheim
15 photographs put to her at the trial. In her evidence at
16 the trial she did express reservations about the quality
17 of the enlargements, stating that they were only
18 illustrative giving the jury a chance to make an
19 informed decision. In-chief she said that she was
20 reluctant to say whether point 14 shown in production
21 152 by a bifurcation or a ridge ending because the
22 enlargement was not as clear as looking at the original
23 under glass.

24 In cross much the same point prevented her from
25 expressing an opinion on Mr Wertheim's document, defence

1 production number 2. In re-examination she said that
2 she would not carry out a comparison exercise by
3 reference to an enlargement because it was not true to
4 life.

5 Mr Macpherson also emphasised that the enlargements
6 were illustrative and not what they would use in the
7 office when identifying a print. He did not question
8 the accuracy of the enlargements.

9 Now Mr Bell subsequently gave evidence to the
10 Scottish Parliament relative to a review meeting that
11 took place between SCRO and representatives of the
12 prosecuting authorities (including the Advocate Depute
13 and the then Deputy Crown Agent, Frank Crowe) on
14 20th May 1999 in which Mr Bell said that one of the
15 points that emerged was the Procurator Fiscals were to
16 be from circulated to the effect that generic
17 fingerprint material was to be examined to allow a more
18 professional presentation in high profile cases.

19 In May 2000, Temporary Inspector Tatnell produced a
20 report on the use of the charting PC. He recommended
21 the use of the charting PC be stopped and that instead
22 photographic enlargements be used. However, his report
23 records the use of the charting PC had been suspended at
24 an interim stage pending completion of his report.

25 His report also narrates why the use of the charting

1 PS was called into question and I quote:

2 "During the McKie trial defence experts called the
3 quality and reliability of the enlargements into
4 question. These enlargements were prepared on the
5 charting PC. Indeed, experts within the bureau had been
6 dissatisfied with the system for some time. They have
7 been frustrated not only by the fact that it's difficult
8 to use, but also by the fact that it is unreliable,
9 often crashing or jamming at the printing stage.
10 Following the McKie case, they have further lost
11 confidence in it, resulting in a reluctance to use it
12 and a return to conventional photographic enlargements."

13 From that narrative in chapter 6 the issues are
14 these. In relation to the completion of the paperwork
15 in the Asbury case, why was it that the Scottish
16 Criminal Record Office case envelope (DB0529) was
17 completed by the five signatories? Why were Ms McBride
18 and Mr McKenna selected to be signatories to the court
19 reports? What steps were taken by each of the
20 signatories of a joint report for a court case
21 independently to verify the identification in question
22 and the productions prepared for the case? Who selected
23 the images and specific print forms to be referred to in
24 the reports and why were those specific examples chosen?
25 Why was an observation included in the Y7 report dated

1 27th March regarding the orientation of that print and
2 why was that report not lodged in court? Why was
3 production 180 prepared? What was the purpose of
4 producing case specific enlargements? Were the charted
5 images produced for court accurate representations of
6 the characteristics in sequence and agreement identified
7 by the fingerprint examiners who signed them? If not,
8 was this fact known to the fingerprint witnesses at the
9 time when they prepared the productions for the
10 Asbury/McKie cases and what bearing did that have on the
11 preparation of their evidence?

12 Again, a list of witnesses is given to reflect the
13 people named in the narrative.

14 Turning now to chapter 7 which relates to the
15 preparation for prosecution in **HMA v McKie**, again I
16 start by referring back to the Terms of Reference.

17 As with chapter 5, in reviewing the prosecution's
18 preparation for the trial it is not intended to consider
19 the exercise of discretion in deciding to proceed to
20 trial against Ms McKie on a charge of perjury. Rather
21 the review of preparations for the trial is aimed at
22 casting light on the instructions that were given
23 relative to fingerprint evidence and what insight that
24 provides to attitudes toward fingerprint evidence at the
25 time.

1 The aftermath of **HMA v Asbury**. At the conclusion of
2 the trial of Mr Asbury, the trial Depute, Mr Dewar,
3 submitted a report to the Lord Advocate, Lord Hardie,
4 dated 5th June 1997 he recommended proceedings for
5 perjury against Ms McKie. Sheriff Crowe explains that
6 Crown Office procedures laid down that a different
7 Advocate Depute had to consider a full precognition and
8 to give instructions if Ms McKie was to be indicted.
9 The first stage was to obtain a transcript of her
10 evidence.

11 On 9th June the Lord Advocate, Lord Hardie,
12 instructed the Home Depute (by now Alister Campbell QC)
13 to obtain a transcript and he in turn passed that
14 instruction on to Mr Gallacher on 16th June.

15 Following receipt of the transcript, Mr Gallacher
16 wrote a memo to the Duty Advocate Depute dated 29th
17 July 1997 seeking instructions. The Duty AD (who is
18 presumed to be Philip Brodie QC) instructed that the
19 Procurator Fiscal Glasgow precognosce the case without
20 Ms McKie being placed on petition. Mr Gallacher duly
21 conveyed that instruction to the PF by letter dated
22 30th July.

23 Mrs Denise Greaves was appointed to precognosce the
24 case. Mrs Greaves explains that the procedure in a
25 perjury case is the reverse of the norm, with Crown

1 Counsel assessing the sufficiency of the evidence before
2 instructions are given to the Fiscal to precognosce the
3 case.

4 Lord Boyd of Duncansby, the Solicitor-General at the
5 time of the prosecution of Ms McKie, makes an analogous
6 point: this case was unusual because the matter was
7 fully precognosced before Ms McKie was placed on
8 petition, where the norm was for a petition appearance
9 to precede precognition of the case.

10 Dealing with Asbury's appeal, Mr Asbury lodged an
11 appeal on 5th August 1997 consistently with the position
12 adopted by the defence at the trial, the original
13 grounds of appeal did not dispute the identifications.

14 I then give some detail I will not read over. It
15 concludes with the last sentence in June 2002 the
16 defence solicitors intimated grounds of appeal amended
17 to include a challenge to the identification of
18 Miss Ross' print on Q12.

19 At least viewed from the Crown Office perspective,
20 investigations by the defence team instructed by
21 Mr Asbury were in abeyance pending the outcome of
22 **HMA v McKie**.

23 The basis on which Mr Asbury's conviction was
24 quashed is not within the Inquiry's Terms of Reference
25 but this much may be noted: it would seem that the

1 events concerning the prosecution of Ms McKie occurred
2 before the Crown Office and Procurator Fiscal Service
3 had any knowledge that the Asbury defence team were
4 challenging the identification of any of the critical
5 fingerprint in the case.

6 I deal with disciplinary proceedings now. A
7 disciplinary investigation of possible misconduct by
8 Ms McKie had been commenced in May 1997 by Strathclyde
9 Police. Chief Inspector Wilson's report is dated 27th
10 August 1997 and recommended disciplinary proceedings.
11 In anticipation, the Chief Constable had written to the
12 Regional Procurator Fiscal by letter dated
13 4th August 1997 enquiring whether a misconduct hearing
14 would impede any action that the Crown might propose.
15 That correspondence was referred to Crown Office and the
16 Deputy Crown Agent Mr MacFadyen advised the regional
17 Procurator Fiscal that because of the possibility of
18 perjury was being investigated he imagined that the
19 deputy Chief Constable would not wish to proceed with
20 misconduct proceedings at present. That was conveyed to
21 the Deputy Chief Constable.

22 Chief Inspector Laurence Wilson's involvement was
23 not confined to the preparation of the complaints and
24 discipline file. He corresponded with Mrs Greaves, the
25 Fiscal who was precognosing the case in Glasgow. She

1 requested and he provided a report on Ms McKie's
2 involvement in other murder inquiries. His response is
3 dated 20th January 1998.

4 Mrs Greaves has no recollection of the police
5 expressing reservations about the prospects of
6 conviction due to the fact that the police witnesses
7 spoke to Ms McKie not having been in the house but she
8 was aware that the police did have concerns about the
9 case. She observed that the log was a shambles, with
10 gaps.

11 Dealing with Crown Office and Procurator Fiscal
12 Service papers, the Crown Office has been unable to
13 locate the buff folder relating to the prosecution of
14 Ms McKie. This buff folder was the outer covering of
15 the High Court Unit correspondence file. They've
16 provided to the Inquiry: (a) papers (some tagged and
17 included in the file relating to **HMA v Asbury** and some
18 loose) that would have been in the folder relating to
19 **HMA v McKie** from its inception on 5th June 1997 through
20 to 8th April 1998 and then to 19th October 1998; (b) the
21 Glasgow Procurator Fiscal's file relating to the case;
22 and (c) the full precognition. Crown Office has
23 explained that over the years papers held by the Crown
24 Office and Procurator Fiscal Service have been supplied
25 to several other inquiries and investigations. While

1 they cannot say with certainty that there are not some
2 papers that are missing, they have supplied the Inquiry
3 with the vast majority of the papers associated with
4 case of Asbury and McKie in the original form.

5 In narrating the sequence of events this opening
6 statement draws on each of these sources of
7 contemporaneous documents, supplemented by witness
8 statements.

9 The precognition was submitted to Crown Office on
10 22nd December 1997. The analysis and recommendation
11 (and I have brought up the analysis sheet) in the
12 precognition was signed by Mrs Greaves and countersigned
13 by Mr Vannet, the Regional Procurator Fiscal. The
14 analysis proceeded on the hypothesis that the matching
15 of Y7 with Ms McKie was not in doubt. I will just
16 highlight that on the screen.

17 THE CHAIRMAN: I think we can see where it is.

18 MR MOYNIHAN: I am sorry: I failed.

19 "There is no doubt that the comparison shows her
20 prints and the impression to be identical."

21 The analysis also contains a reference to the
22 perception of infallibility and if I go back to the
23 first page in the section that has been highlighted for
24 me earlier.

25 THE CHAIRMAN: It is on the next page.

1 MR MOYNIHAN: There is also one, sir, in the middle of the
2 first page that has been highlighted, referring to
3 Ms McKie evidence she has called into question the
4 reliability and infallibility of fingerprint evidence.
5 Then if you go to page 4 the analysis also contains a
6 reference on page 4 that precognosces the second
7 highlighted passage.

8 "The precognoscer is aware that the police are
9 extremely concerned that should the case against Shirley
10 Cardwell proceed to a trial that a jury may not fully
11 understand the complexities of the case and the
12 infallible nature of fingerprint evidence."

13 That said, Mrs Greaves wrote -- and in the text I
14 have quoted part of the first highlighted paragraph and
15 it is probably better read the whole paragraph:

16 "While SCRO fingerprints are independent from
17 Strathclyde Police, I have compared the fingerprint
18 forms provided and the impression Y7 found in the house
19 of Marion Ross. Crown Counsel may wish to consider
20 whether or not an expert previously unconnected with the
21 case should make further comparison. In relation to the
22 articles which Chief Inspector Hogg has provided
23 relating to transplanted and faked fingerprints, Crown
24 Counsel are asked whether an expert in this field should
25 be instructed. Chief Inspector Hogg does not consider

1 himself an expert in transplanted and faked
2 fingerprints. The name Dr Terry came to the Home Office
3 at Sandwich has been named as a possible expert."

4 I then move to document CO3573. The origins of this
5 lie in an undated note in the Glasgow Procurator
6 Fiscal's files headed "Problems/observations/comments"
7 CO3573. Point 3 in the original note is in these terms:

8 "SCRO are independent and have compared the
9 fingerprint form and impression Y7 found at the house of
10 Marion Ross. Crown Counsel may wish to consider whether
11 or not an expert previously unconnected with the case
12 should make a further comparison."

13 Point 4 of that note covered the separate question
14 concerning transplanting of prints and fake prints.
15 Chief Inspector Hogg had said that he was not an expert
16 and the possibility of instructing an expert was raised,
17 the name of it should be Mr not Dr, Mr Kent being
18 mentioned in that regard.

19 In the copy available to the Inquiry points 3 and 4
20 are stroked through, presumably indicating that at some
21 stage they were deemed to have been completed.

22 In the analysis of evidence in the precognition
23 (that is CO2561 which is displayed first) points 3 and 4
24 are run together resulting in the appearance that
25 Mr Kent was being contemplated as an expert on both

1 points. Page 4, it is the middle paragraph on page 4
2 which falls to be compared with the problems sheet which
3 preceded it. Points 3 and 4 in effect now become one
4 continuous narrative.

5 Mrs Greaves is the person who prepared the
6 precognition. So she prepared the writing that we see
7 on the screen just now. She says that at the time when
8 the precognition was prepared the presumption was that
9 Mr Kent would be able to deal with both planting and the
10 re-comparison of Y7. It was not until his report became
11 available that it became known that fingerprint
12 comparison was not his area of expertise.

13 The Deputy Crown Agent dealt with the precognition
14 on 2nd January 1998 and referred it to Ms Climie for
15 comment, given her previous involvement in **HMA v Asbury**.
16 His note included the following observation and I quote:

17 "... but given the observations on Cardwell's
18 plausibility it may indeed make sense to involve an
19 independent expert -- both on the question of
20 transfer/planting and on the general basis for
21 concluding that fingerprint identification is
22 100 per cent reliable."

23 Ms Climie submitted her comment to the duty AD on
24 15th January 1998. She records that she had spoken to
25 Mr Dewar and that he was of the view that Ms McKie

1 should be prosecuted if there was a sufficiency of
2 evidence. Her note suggests that the DCA's observation
3 about an English expert derived from page 37 of the
4 precognition. She recommended that further expert
5 evidence be pursued. In addition to the two specific
6 matters mentioned by the DCA, she effectively added a
7 third. Having noted that it was her understanding that
8 the standard applied in England for matching prints was
9 more stringent, she wrote:

10 "It might be an idea to pursue whether Y7 can be
11 matched to Shirley Cardwell on the English standard.
12 Presumably the Home Office expert could deal with this."

13 The duty AD (presumed to be the late Jane Patterson)
14 gave an instruction dated 15th January 1998. She
15 instructed High Court proceedings against Ms McKie. She
16 endorsed the recommendation to instruct an independent
17 expert not only on the two points mentioned by the DCA
18 but also on the matter raised by Ms Climie. The duty
19 AD's instruction on that matter was in these terms:

20 "If the English requirement is more stringent, it
21 would be helpful if the expert making yet another
22 comparison could do so to the English requirements."

23 Ms Climie's subsequent note details what was
24 understood possibly to be the more stringent English
25 requirement: Ms Climie understood that Scots

1 practitioners would count a "lake" in a fingerprint as 2
2 characteristics towards the total of 16, whereas English
3 practitioners would count it as only 1. Her letter
4 suggests that she may have obtained this information
5 from Mrs Greaves.

6 For her part, Mrs Greaves says is that she thinks
7 the information about English practice came from the
8 police.

9 Ms Climie queried the instruction to proceed to
10 indict. She took the view that the first step should be
11 to place Ms McKie on petition but that that should be
12 deferred pending receipt of the English expert's
13 evidence, which could take some time.

14 The DCA reported the matter to the Solicitor-General
15 (Colin Boyd). The Solicitor-General's response is a
16 manuscript note dated 20th January 1998. He asked to
17 speak to the DCA about the timing of placing Ms McKie on
18 petition because of the complication that the
19 productions were required for the ongoing Asbury appeal.
20 However, he endorsed the need for an independent expert
21 and he wrote:

22 "Clearly we need a further independent expert but
23 that need not hold up the petition."

24 There is no record of the discussion between the DCA
25 and the Solicitor-General but the Solicitor-General's

1 manuscript instruction following the discussion is on
2 file and is dated 26th January 1998 and it is in these
3 terms:

4 "DCA as instructed, please arrange for Cardwell to
5 be placed on petition."

6 The Solicitor-General's instruction was passed by
7 the DCA to Ms Climie and she in turn relayed it to
8 Mrs Denise Greaves, by letter dated 30th January.
9 Ms McKie was placed on petition on 6th March. On
10 3rd April 1998 Ms Climie wrote to the Procurator Fiscal
11 Glasgow enquiring when the finalised precognition would
12 be submitted.

13 Lord Boyd of Duncansby QC has provided a statement.
14 He explains that the decision to prosecute a police
15 officer for an offence committed in the course of duty
16 fell to him as Solicitor-General and would not be taken
17 lightly. He would have read much of the precognition.
18 He remembers having had a discussion with the DCA. He
19 recalls that the log did not disclose that Ms McKie
20 had been at the **locus**, but there were issues about the
21 reliability of the log and his conclusion at the time
22 was that this was a matter for the jury.

23 He gave the instruction dated 26th January to place
24 Ms McKie on petition. He cannot recall giving any
25 further instructions in relation to the prosecution.

1 Accordingly, he infers that his instruction dated 26th
2 January was ultimately taken to include the decision to
3 indict.

4 He considers that there was a sufficiency of
5 evidence based on the evidence of the SCRO witnesses.

6 In relation to the instruction over an English
7 expert, he cannot recall whether that was a significant
8 consideration for him at the time. There was no reason
9 at the time to cast any doubt on the "substantive
10 reliability" of fingerprint evidence, which at the time
11 was regarded as "almost irrefutable evidence". He
12 understood the purpose of obtaining further fingerprint
13 evidence to be to meet the anticipated defence case,
14 which at that stage was believed to be planting.

15 He recalls no reservations being expressed by the
16 police or anyone else about the prospect of conviction
17 beyond those recorded in manuscript numbering page 37 of
18 the precognition, but those did not relate to the
19 quality of the fingerprint evidence.

20 Sheriff Crowe was not personally involved until
21 after the acquittal of Ms McKie. However, he does
22 discuss the perceived standing of fingerprint evidence
23 at that time. He does mention the reservations in
24 **Hamilton v HMA** in 1934, but says that since that case
25 most lawyers in criminal practice proceeded on the basis

1 that if fingerprint experts said that they could find
2 16 points of comparison "that was the end of the
3 matter".

4 So far as further enquiries are concerned, the Crown
5 Office letter of 30th January instructed that Ms McKie
6 be placed on petition and also contained specific
7 instructions regarding fingerprint evidence. It
8 instructed that evidence be obtained from a suitable
9 English expert.

10 Three specific points were mentioned: (1) transfer
11 and planting of fingerprints in general; (2) the general
12 basis of concluding that fingerprint identification is
13 100 per cent reliable; and (3) whether, on examination
14 of Y7, there was anything to suggest that it had been
15 transferred from another source on to the doorframe.

16 To those three was added the possibility of an
17 English opinion on the identification of Y7 as
18 Ms McKie's print. Ms Climie records that Mrs Greaves
19 had told her that English standards were more stringent
20 and Ms Climie wrote:

21 "If this is indeed the case, then the English expert
22 should be asked to look at Y7 and confirm that, on the
23 basis of the English practice, the print can be
24 identified as being that of Shirley Cardwell."

25 The letter also instructed that the English expert

1 be precognosed in detail with particular reference to
2 the different standards applicable to fingerprint
3 identification.

4 There was an instruction that Ms McKie be
5 fingerprinted on arrest and that those fingerprints be
6 used not only by the English expert but also by the
7 Scottish experts, who were to carry out further
8 comparison.

9 Turning to the Crown Office file of loose papers, in
10 addition to the tagged papers with the file for the
11 Asbury murder case described above, Crown Office has
12 supplied the Inquiry with loose papers that would also
13 have formed part of the ordinary buff folder relating to
14 **HMA v McKie**. This narrative continues by reference to
15 those loose papers.

16 A letter from Ms Climie dated 8th April 1998 sought
17 an indication as to the likely date for the submission
18 of the finalised precognition but noted that there was
19 no immediate rush given that the time-bar for
20 prosecution was not due to expire until March 1999.

21 Mrs Greaves responded by letter dated 15th April
22 attaching a form F32 bearing the date 15th March 1998.
23 The form F32 advised that the 12-month time-bar was due
24 to expire on 6th March 1999 and on the form Mrs Greaves
25 wrote and I quote:

1 "Crown Counsel's instructions are to proceed to High
2 Court. Additional investigation is ongoing. Crown
3 Office contact Ms Climie."

4 The one subsequent development was that, under cover
5 of a letter dated 15th May 1998, Mrs Greaves sent to
6 Ms Climie a copy of the Kent report dated 13th May.

7 That apart, the only other document of any substance
8 is one dated 19th October 1998, a letter written by
9 Mrs Greaves to Ms Climie asking her to "advise if Crown
10 Counsel are satisfied with terms of Terry Kent's
11 report". The loose papers end at that date.

12 Turning now to the Glasgow file, the Crown Office
13 also provided the Inquiry with papers as per an
14 inventory. Those include the Glasgow Procurator
15 Fiscal's file and in particular a bundle labelled
16 "miscellaneous correspondence notes and papers", and it
17 fills some of the gaps regarding (a) the Kent report and
18 (b) the indictment of Ms McKie.

19 Dealing with instruction of the Kent report, the
20 Glasgow file documents the instruction of Mr Kent. The
21 Crown Office letter dated 30th January requiring the
22 instruction of a suitable English expert is on file.

23 There are two draft letters of instruction to Mr Kent
24 dated 11th and 12th March 1998. The draft of 12th March
25 is incomplete but the letter of instruction dated

1 12th March 1998 is on Mr Kent's file. The Inquiry
2 database reference for that is given.

3 The instruction came from Mrs Greaves and the points
4 that she instructed be covered in the report were as
5 follows:

6 "(1) a narration of your expertise relative to
7 fingerprints; (2) an analysis of fingerprint planting
8 and manufacture; (3) the quality of the fingerprint Y7;
9 (4) any concerns that you may have regarding the
10 fingerprint Y7; (5) any comment that you may wish to
11 make on the SCRO 16-point comparison of fingerprints and
12 the statistical basis for duplication of fingerprints;
13 (6) if you are able to make comment on the identity of
14 the fingerprint compared with Shirley Cardwell's
15 fingerprint form this should also be included."

16 Mrs Greaves now has no recollection of conversations
17 with Mr Kent regarding the terms of his instructions.

18 The Kent report as lodged. The Kent report is dated
19 13th May 1998 and in due course was lodged by the Crown
20 in **HMA v McKie**. It was production 186. The Inquiry has
21 a number of copies of it and in this analysis the
22 reference will be to code number 3876.

23 Four points emerge from it: (1) it was Mr Kent's
24 opinion that Y7 was likely to have been deposited after
25 the SOCOs had applied aluminium powder to the doorframe

1 and that is paragraph 9; (2) he discounted Y7 as a
2 forgery: it had been left in the normal way by a finger;
3 (3) he made no comment in response to point (5) of his
4 instructions; and (4) in paragraph 33 he said he was not
5 qualified to express an opinion on the identification of
6 Y7, by implication indicating that he could not comment
7 on point (6).

8 The question in relation to the Kent report.
9 Mrs Greaves copied the report to the Crown Office under
10 cover of her letter dated 15th May 1998. She did not
11 comment on the absence of a response by Mr Kent to
12 points (5) and (6) in the letter of instruction.

13 The one point that she commented on was the
14 conclusion in paragraph 9 relating to the likely timing
15 of the deposit of Y7. She invited comment and further
16 instructions from Crown Office on this point. Now the
17 conclusion by Mr Kent in paragraph 9 was that it was
18 likely that Y7 had been deposited after the SOCOs had
19 treated the doorframe with aluminium powder.

20 I should say the aluminium powder was likely to have
21 been on 9th January.

22 However, Mrs Greaves observed on 14th January the
23 SOCOs also found fingerprints identified as those of
24 Miss Ross. Examples are D8 and E8, recorded into
25 documents. The Inquiry has them as having been found on

1 the downstairs rear bedroom door on that day, and
2 identified as belonging to Miss Ross. Mrs Greaves was
3 concerned that the finding of marks identified as those
4 of the deceased at the same time as the finding of Y7
5 undermined the conclusion reached by not only Mr Kent
6 but also by the prosecution "we", that Ms McKie must
7 have placed her fingerprint Y7 after the aluminium
8 dusting.

9 On the premise that the defence might suggest that
10 prints D8 and E8 should be scrutinised, she asked Crown
11 Office for comment and instructions.

12 A copy of the letter dated 19th October 1998, asking
13 Ms Climie to "advise if Crown Counsel are satisfied with
14 the terms of Terry Kent's report" is on file. The file
15 records two earlier requests to the same effect: one by
16 letter dated 10th September and the other by telephone
17 dated 17th August 1998. There are, in effect, three
18 chasers in relation to the issue raised in the letter
19 dated 15th May.

20 Looking at the Glasgow file, the reason for these
21 chasing letters would appear to have been requests from
22 defence solicitors Levy & McRay for access to
23 productions to enable an expert to complete a report.
24 The request was first made on 22nd May and Mrs Greaves
25 replied on 4th June advising Levy & McRae that some of

1 the productions relevant to fingerprint evidence had
2 been sent to St Albans (that is Mr Kent) for examination
3 and a report had been received and was being considered
4 by Crown Counsel. She wrote:

5 "Once Crown Counsel are satisfied that they do not
6 require any further examination to be carried out, then
7 I will arrange for the return of these items. It may be
8 appropriate to await return of these items prior to your
9 fingerprint expert attending to carry out his
10 examination.

11 Mrs Greaves' contact with the Crown Office on
12 17th August and 10th September were in the context of
13 reminders from Levy & McRae and a letter from
14 Mrs Greaves to Levy & McRae of 21st August, in response
15 to the reminder dated 20th August expands on her
16 manuscript note of 17th August:

17 "Last week I was in contact with the Depute at Crown
18 Office regard this case. She assures me I should have
19 Crown Counsel's instructions within the next two weeks.
20 Thereafter, I will either request further examination of
21 the productions which are at PSDB [that is Mr Kent's
22 department] or I will arrange for their return to
23 Glasgow."

24 In the event it was not until 9th November that
25 Mrs Greaves was able to write to Levy & McRae to advise

1 that she had now received instructions to request return
2 of the production from PSDP.

3 The file does not contain any record of any
4 instruction by Crown Counsel.

5 Mrs Greaves has been asked about this matter in her
6 statement. When first assigned the task of preparing
7 the precognition she was a member of the Complaints
8 Against the Police Unit. By the time she instructed
9 Mr Kent she was no longer a member of that unit but says
10 that she probably remained involved until the case was
11 indicted, dealing with points raised by the indicter
12 (Ms Climie) and Crown Counsel.

13 Her recollection of conversations with Mr Kent is
14 confined to his need to see the doorframe in order to
15 comment on the question of planting. She has no
16 recollection of any discussion regarding his ability to
17 carry out a comparison of Y7.

18 By the time his report was received it was apparent
19 that he could not perform a comparison of Y7 and she
20 asked Ms Climie if another report should be obtained on
21 this issue. He does not think she ever received an
22 answer from Ms Climie.

23 Mrs Greaves says she did think it necessary to get
24 another view on the identification of Y7 and she thinks
25 she mentioned that to Ms Climie. She may also have

1 mentioned this to the Area Procurator Fiscal Mr Vannet
2 or to the police but she cannot remember. Her
3 recollection is that a further expert opinion was a
4 matter for Crown Counsel to consider, though this was
5 not written down.

6 She thinks that the view taken in Crown Office was
7 that the defence expert in **HMA v Asbury** had already
8 provided independent support. She says this:

9 "Crown Office were keen to keep the case moving and
10 I do remember there being a fall back view taken that
11 there had already been independent consideration by a
12 fingerprint expert instructed by the defence in the
13 David Asbury case where no issue had been taken with
14 either Y7 or any other print used for that prosecution."

15 She concludes her statement by saying that the focus
16 at the time of the precognition was on the possibility
17 of forgery or planting and that the problem with the
18 print itself only crystallised during the trial.

19 Lord Boyd of Duncansby has no recollection of having
20 seen any of this correspondence and says that there
21 would have been no reason for him to have done so. He
22 has no recollection of seeing or discussing the Kent
23 report and sees no need to have done so given that there
24 was no reason at the time to question the reliability of
25 SCRO fingerprint evidence. An advocate depute may not

1 have been involved in such matters because it was not
2 until later that the reforms were introduced to make a
3 specific advocate depute responsible for overseeing
4 preparation of particular cases, though he does not
5 suggest that the decisions in the McKie case would have
6 been any different under the reformed regime.

7 For completeness, Mr Hogg says that he did some work
8 on the possibility of planting for Mrs Greaves and he
9 believes that he gave her a report on the subject.

10 Terence Kent. A statement has been taken from
11 Mr Kent. He was head of the Criminal Investigation
12 Sector and IT at the Home Office Police Scientific
13 Development Branch.

14 He cannot remember with whom he had contact first in
15 relation to the McKie case but he had quite a lot of
16 contact with Chief Inspector Hogg. His recollection is
17 that he was told that Pat Wertheim was likely to give
18 evidence that Y7 had been planted and he was asked to
19 look at the print. The focus of his examination was
20 whether Y7 was a forgery, by which he means a
21 transferred or reproduced fingerprint.

22 His letter of instruction was dated 10th March and
23 he uses a slightly different copy than the one I have
24 been referring to earlier, a copy to the same effect.
25 He took photographs of Y7 at various different

1 exposures.

2 His view now remains as it was when he prepared his
3 report, though he comments that that became somewhat
4 irrelevant when Mr Wertheim's evidence at the trial
5 concerned the identification of the mark.

6 He did not cover points 5 and 6 in his letter of
7 instruction.

8 As to point (6), interpretation of fingerprints was
9 not part of his expertise. He does not recall any
10 discussion with the Fiscal about this. He also does not
11 recall any discussion about his report.

12 He says that he formed no view about the
13 identification of Y7 because until Mr Wertheim had given
14 evidence, it never crossed his mind that the Scottish
15 experts could have made a mistake.

16 As for point (5), he says that in his statement that
17 he had concerns at the time about the move to dispense
18 with the 16 point standard in England but he does not
19 remember if this was discussed with anyone in the
20 Procurator Fiscal's office. He had carried out a study
21 in the mid-1990s that had found substantial variations
22 in the numbers of characteristics found by experts
23 studying the same image. He says that this highlighted
24 for him the absence of standards by which scene of crime
25 fingerprints were assessed. His experiments had found

1 "anomalies" that he raised in 1999 when consulted on the
2 move to the non-numeric system in England. He
3 recommended that the 16 point standard not be abandoned
4 "until the underlying problems with fingerprint evidence
5 were dealt with". He refers to a memo in January 2000
6 on this point. This may have led to a year-long delay
7 in effecting the change, but the change was made.

8 He cites the case of **R v McNamee** case "as
9 illustrating just how badly things can go wrong" where
10 what Mr Kent regards as best practice is not followed,
11 best practice being to assess the latent fingerprint
12 before the suspect ten-print is compared.

13 As noted one of his conclusions was that it was
14 likely that Y7 had been deposited after the SOCOs had
15 treated the doorframe with aluminium powder. He has
16 been asked by the Inquiry team to comment on the
17 observation made by Mrs Greaves that at the same time as
18 discovering Y7 the SOCOs also found fingerprints
19 identified as those of Miss Ross. He explains that his
20 opinion on the likely sequence of events derived from
21 his experience that the general rule, albeit with some
22 exceptions, is that if there is sufficient material to
23 develop a fingerprint with black powder then the print
24 will also be developed with aluminium powder. He does
25 not recall being aware that prints of the deceased were

1 also found, he says, "... although that fact does not
2 change my view based on the general rule."

3 His statement does allude to exceptions to the
4 general rule, including fact that aluminium powder may
5 not be suited to some surfaces, for example in kitchens
6 where there are fatty deposits. His evidence is that he
7 did not observe aluminium deposits on the doorframe and
8 he says that one very real issue in relation to the
9 question being discussed with him is the level of care
10 exercised in the application of the powder and the use
11 of a good lamp.

12 Mr Kent was called as a witness by the prosecution
13 on 6th May 1999. His evidence was brief and confined to
14 the issue of planting. There is a summary in the police
15 observer's note of the trial.

16 The comments that he makes in his statement
17 regarding issue (5) in his letter of instruction and the
18 lack of observable aluminium powder on the doorframe may
19 give an insight into the fact that he recounts a sense
20 of puzzlement at the time of the trial that his evidence
21 was apparently uncontested.

22 The Inquiry team is making further inquiries with
23 Mr Kent relating to the studies to which he refers. One
24 particular issue of concern, given that his statement
25 embraces events going beyond the date of the McKie

1 trial, is to establish the state of his knowledge (a)
2 when instructed by the Crown in March/May 1998 and (b)
3 by the date of the McKie trial. This has a bearing on
4 the information that the prosecution could have obtained
5 from him had issue (5) in his letter of instruction been
6 pursued further with him.

7 I then turn to the case of **R v McNamee**. This was
8 decided by the Court of Appeal on 17th December 1998.
9 It involved a conflict of evidence among fingerprint
10 experts including some of the witnesses involved in this
11 Inquiry, including Mr Mackenzie, Mr Dunbar and Mr Swann,
12 evidence was given by some to a standard lower than
13 16 points but the conviction was quashed in part due to
14 doubts about the fingerprint evidence. The leading
15 judgment is that of Swinton Thomas LJ.

16 It is worth recording the predicament that the court
17 faced and I quote from the judgment:

18 "We were persuaded to grant leave to call no less
19 than 14 fingerprint experts, all with great experience,
20 in this appeal, and we have heard evidence in relation
21 to this single thumb print over no less than seven full
22 court days. Some of the experts were instructed by the
23 Review Commission, some by the appellant and some by the
24 Crown. Remarkably, and worryingly, save for those who
25 said that the print was unreadable, there was no

1 unanimity between them, and very substantial areas of
2 disagreement. All of the experts, save Mr Swann who is
3 retired, are currently employed in various police
4 forces.

5 "Standards for the presentation of fingerprint
6 identification in court have been laid down since 1953
7 by agreement between the Fingerprint Bureau,
8 representatives of the United Kingdom Constabularies and
9 the Home Office. The current standard requires a match
10 of 16 ridge characteristics on any one digit or, where
11 prints are uplifted from two digits, not less than 10
12 matching characteristics for each digit."

13 The court's conclusion on the fingerprint evidence
14 was in these terms and again I quote:

15 "There was much disagreement between the experts in
16 relation to this print and it is impossible to know what
17 evidence a jury would be likely to accept and what
18 evidence they would be likely to reject. A case on 11
19 coincident markings is a case different from a case
20 based on 16 coincident markings. The experts asked to
21 give evidence on this issue, including Mr Swann, all
22 said that they would be satisfied with 8 or 10 matching
23 characteristics as sufficient to prove identity. That
24 would be likely to entitle the Crown to call evidence of
25 such matching characteristics in respect of a particular

1 mark. However, that was not the case presented at the
2 appellant's trial. We note that in the current 1998
3 edition of Archbold at paragraph 14-97 it is said that
4 between 10 and 15 matching characteristics on a single
5 fingerprint is regarded as a partial identification and
6 might be forwarded to the investigating authorities but
7 would not be adduced in court. If that statement is
8 intended to be a statement of law, we do not think it is
9 accurate. Evidence of fewer than 16 characteristics is
10 not inadmissible as evidence of identification. As we
11 were told by the experts, much depends on the quality of
12 the print itself and the quality of the matching
13 characteristics.

14 "We must bear in mind the considerable emphasis that
15 the trial judge in his summing-up laid on the presence
16 of three as opposed to one or two incriminating
17 fingerprints.

18 "Having heard all the expert evidence before us, it
19 is impossible to say with confidence which conclusion a
20 jury would have reached. It would have been open to
21 them to conclude not only that the thumb mark could be
22 read, but also that they were sure that it was the
23 appellant's print. On the other hand they might have
24 concluded that they were not sure that it was the
25 appellant's print. Accordingly we cannot be sure that a

1 jury on the totality of the evidence which we have heard
2 would have found that they were sure that it was the
3 appellant's print. That is a matter of importance when
4 we come to the conclusion whether or not this verdict is
5 unsafe."

6 The date of that judgment is significant. It falls
7 in the period between the decision by the
8 Solicitor-General to place Ms McKie on petition and the
9 date when she was indicted for trial.

10 Turning to the indictment of Ms McKie, the Glasgow
11 file contains some limited documentation relating to the
12 indictment of the case against Ms McKie. On
13 19th January 1999 Ms Climie wrote to Mrs Greaves
14 advising her that the case was to be indicted for the
15 High Court sitting commencing 1st March 1999. A draft
16 indictment was attached for revision and there is
17 reference to lodging Mr Kent's report as a production
18 and including him in the list of witnesses.

19 On 25th January 1999 Mrs Greaves wrote to the
20 Justiciary Department asking for the release of the tape
21 of Ms McKie's evidence at the Asbury case. That letter
22 records that "Crown Counsel have now instructed that
23 Ms McKie or Cardwell proceed on an indictment in respect
24 of a charge of perjury."

25 On the same date Mrs Greaves wrote to Ms Climie on a

1 number of detailed pretrial preparation points including
2 confirmation that she had instructed "SCRO fingerprints"
3 to compare the fingerprint form taken on the arrest of
4 Ms McKie and the "impression Y7 which she initialled."

5 Lord Boyd of Duncansby has no recollection of having
6 taken a separate decision to indict Ms McKie.

7 Mrs Greaves similarly does not know who took the
8 decision to indict.

9 Now the Crown Office response on incomplete files.
10 Mrs Greaves observes that correspondence is missing and
11 the Crown files are not complete. The Inquiry team was
12 aware of this before she gave statement.

13 The Crown Office has been advised that the papers
14 supplied to the fingerprint Inquiry regarding the
15 prosecution of Ms McKie are incomplete and, in
16 particular, that there is no record of the final
17 handling of the need for English expert evidence on the
18 identification of Y7. A response from Crown Office by
19 letter dated 10th March 2009 is on the Inquiry
20 hearing database.

21 Chapter 7 issues. As already observed there is a
22 follow-up Inquiry being made with Mr Kent that has a
23 bearing on the issues emerging from this chapter.

24 Subject to that, the issues are as follows: what was the
25 prevailing understanding as to the reliability of

1 fingerprint evidence prior to the trial in **HMA v McKie**?
2 Did the Crown fail to take an appropriate steps by
3 failing to exhaust instructions to Mr Kent? What
4 consequence flowed from the Crown's failure to exhaust
5 the instructions to Mr Kent and, again, the witnesses
6 are those named in the narrative.

7 Turning next to the trial in **HMA v McKie** and the
8 post trial review. The trial began on 21st April 1999
9 and concluded on 14th May 1999. A summary of the trial
10 was written by Inspector Carle, the police observer.
11 The Trial Depute was Sean Murphy QC, now Sheriff Murphy.

12 I then list some of the principal witnesses to give
13 cross-references with the Carle summary and also the
14 transcripts that we have available.

15 If I turn to Crown preparation, a Sheriff Murphy has
16 given a statement. He recalls that the trial was set
17 down for a sitting commencing on 14th April 1999. That
18 is a Wednesday -- that may be a misprint for 12th April.

19 Ordinarily a Trial Depute would receive his papers
20 about ten days before the sitting commenced. In this
21 instance he does not recall when he got his papers but
22 he did have a meeting with Mr Macpherson and Mr Stewart
23 at SCRO on 30th March 1999. This was for a general
24 briefing and was before Sheriff Murphy had received the
25 defence productions. His evidence is that he got the

1 defence productions "a couple of days before the trial,
2 during the sitting". He believes that he received a
3 copy of the Wertheim report on Friday of week 1 of the
4 sitting, which was presumably 16th April 1999. He does
5 not recall any separate material being lodged for
6 Mr Grieve.

7 Having read the report he contacted Mr Stewart and
8 Mr Macpherson who came down to the High Court and
9 examined the material at lunchtime. Sheriff Murphy says
10 that Mr Stewart and Mr Macpherson were confident that
11 they could maintain their position and had criticisms of
12 Mr Wertheim's approach, including "the fact that
13 Mr Wertheim had appeared to damage the print Y7".

14 Sheriff Murphy explains that he was content to
15 proceed to trial without the further opinion on Y7
16 "... on the basis that SCRO appeared to be confident."

17 Sheriff Murphy would appear to have had a number of
18 additional reasons for proceeding on this basis. To
19 have done otherwise would have required an adjournment
20 and, in any event, Sheriff Murphy was not in favour of
21 conducting cases with a large number of competing
22 experts. Further, he also believed that in James Kerr
23 he had an eye witness placing Ms McKie at the house at a
24 time when she no reason to be there.

25 The Crown productions included charting PC images.

1 Sheriff Murphy understood that these chartings were
2 illustrative and he explains what he understood by that:
3 they were illustrative "to the extent that SCRO officers
4 did not use these enlargements to perform their
5 comparisons, instead using clearer scene of crime
6 photographs of the fingerprints. He says:

7 "I understood the charting to illustrate not just
8 the methodology of their comparisons but also the
9 conclusions of the SCRO officers as to the marks in
10 question."

11 The clarity of these images when they were enlarged
12 on a projector became an issue at the trial. He does
13 not recollect any concerns being raised by SCRO about
14 the quality or accuracy of the content of the
15 enlargements when he consulted with them in advance of
16 the trial, nor did the SCRO witnesses mention that the
17 enlargements they had prepared would not be sufficient
18 for rebutting the defence position. The problems with
19 the definition of the SCRO images only became apparent
20 during the trial.

21 During the trial he got feedback from SCRO witnesses
22 after they had given evidence but he cannot now remember
23 if that was by meeting them personally or was via the
24 Fiscal.

25 Sheriff Murphy also explained his analysis of the

1 case prior to the trial. He had a general concern about
2 the prospects of success because the conviction rate is
3 not high. He had a specific concern in this case that
4 the trial would descend into an examination of the
5 minutiae of different approaches to fingerprint analysis
6 which might confuse a jury.

7 However, he did not believe that the Crown case
8 depended solely on fingerprint evidence because he
9 believed from his study of the papers, checked by asking
10 through others for the evidence to be confirmed, that in
11 James Kerr he had an eye witness placing Ms McKie at the
12 house at a time when she had no reason to be there.

13 It would appear that it was this "theory", rather
14 than any inference from the fact that the print Y7 was
15 not disclosed by the aluminium powder, that was central
16 to Sheriff Murphy's approach to the prosecution.

17 The evidence that he anticipated from James Kerr is
18 explained in detail at paragraphs 12 to 15. In short,
19 James Kerr had seen Ms McKie at the **locus** on Saturday
20 11th January 1997. The log had marked him as having
21 left at 1.15 pm and, therefore, that sighting must have
22 been earlier than that time when Ms McKie had no reason
23 to be at the house, her attendance to collect the log
24 being later at 5.00 pm.

25 On this hypothesis, since her attendance earlier

1 that day was not noted in the log, it had to be assumed
2 that both Ms McKie and a log keeper were lying. Sheriff
3 Murphy says that it was PC Lees who was thought to have
4 been the person most likely to have let Ms McKie into
5 the house.

6 For completeness, Sheriff Murphy said that he did
7 not regard Ms McKie's access to the keys to the house as
8 a matter of great evidential significance.

9 Mr Kent. Chapter 7 has raised issues about the
10 Crown's handling of the Kent report. Sheriff Murphy has
11 been asked about this. He is hampered by the incomplete
12 state of the Crown Office file. He would have expected
13 any question about the sufficiency of expert reports to
14 have been dealt with long before his involvement and
15 says that he is certain that he did not give the matter
16 any further consideration when he became involved.

17 In the event, he did meet Mr Kent at some stage
18 before the trial began and I quote:

19 "He came up to give evidence and also because he was
20 concerned about the possible implications of the case."

21 Though the purpose of Mr Kent's evidence was to
22 discount the possibility of mark Y7 having been in some
23 way forged or planted at the **locus**, Sheriff Murphy does
24 remember discussing with him the 16 point standard and
25 the move towards a non-numeric process of

1 identification. He also says this and I quote:

2 "Mr Kent also mentioned a case in England where a
3 fingerprint had been successfully challenged; and that
4 fingerprints were frequently challenged in the
5 United States, something of which I was aware myself."

6 Now Sheriff Murphy's account of the trial. Sheriff
7 Murphy gives an account of the progress of the trial
8 from his perspective, from which it is clear that the
9 prosecution did not pan out as expected.

10 Sheriff Murphy records two aspects of the case of
11 which he had been given no prior notice. The first was
12 the fact that the 1993 incident when Ms McKie's print
13 had been found on an exhibit could have been
14 attributable to a defect in the gloves issued to her.
15 The second related to the strip searching of Ms McKie on
16 arrest, which Sheriff Murphy thinks created a poor
17 impression.

18 He also mentions a third point on which the evidence
19 as it was presented at the trial did not accord with the
20 impression that he had from the precognition, and that
21 relates to Ms McKie's prospects as a police officer.

22 He had no particular concerns about PC Lees'
23 evidence nor about the SOCO evidence regarding the
24 possibility that Y7 was deposited after the aluminium
25 dusting.

1 James Kerr's evidence was, however, quite a
2 different matter. What he testified in court was that
3 he had seen Ms McKie at the **locus** at about 5.00 pm when
4 she had a legitimate reason to be there. That removed a
5 key piece of evidence that Sheriff Murphy had been
6 relying on and he says that he began to become concerned
7 because he was now relying solely on fingerprint
8 evidence to place Ms McKie in the house and, from that
9 point, the case became, in his words, "a battle between
10 the two sets of experts."

11 In the event, there also proved to be difficulties
12 with the SCRO evidence.

13 The first related to the poor quality of the
14 charting PC enlargements. When they were magnified by a
15 projector the images were "very unclear and blobby". By
16 contrast the defence productions were clearer.

17 The second related to the comparative performances
18 of the expert witnesses. Sheriff Murphy suspects that
19 the American defence experts were more experienced in
20 giving evidence in court when fingerprints were
21 disputed. In any event, they were more articulate in
22 explaining their position, whereas the SCRO witnesses
23 (Stewart, McBride and Macpherson) and I quote:

24 "... were not able to articulate a justification for
25 the opinion they had on particular aspects of the mark."

1 Given the competing interpretations of Y7 by the
2 experts, Sheriff Murphy says that by the close of the
3 defence case he was very concerned about the strength of
4 the Crown case and that it was extremely difficult for
5 the jury to be satisfied beyond reasonable doubt that Y7
6 was indeed Ms McKie's print.

7 Dealing just finally before lunch with the knowledge
8 of Mr Swann. Sheriff Murphy has also been asked about
9 his cross-examination of Ms McKie relative to her
10 knowledge of the examination of Y7 by other experts. In
11 particular, he has been asked if he knew at the time
12 that the defence had instructed Mr Swann. Sheriff
13 Murphy says that he did not know of Mr Swann's
14 involvement before the trial but he is fairly certain
15 that he did know this before the end of the trial. His
16 recollection is that the information that he had had
17 come from SCRO. As for his state of knowledge while
18 cross-examining Ms McKie, he says this and I quote:

19 "I did not think I knew of Peter Swann's
20 involvement, or had no way of verifying it, at the time
21 I was cross-examining Ms McKie, as I have couched my
22 questions to her on that point in general terms. If I
23 had more information as to Peter Swann's involvement at
24 that time, I would have challenged Ms McKie much more
25 sharply about the matter than I ultimately did."

