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INTERNATIONAL PERSPECTIVES ON CORRECTING WRONGFUL CONVICTIONS: THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Lissa Griffin*

INTRODUCTION

Not surprisingly, the problem of wrongful convictions has become a global one.[1] Of the many dimensions of the problem, one of the issues in the international

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[1] *See, e.g.*, Justin O. Brooks, *Redinocente Hosts First Latin American Innocence Conference*, WRONGFUL CONVICTIONS BLOG (July 14, 2012), http://wrongfulconvictionsblog.org/2012/07/14/redinocente-hosts-first-latin-american-innocence-conference/ ("This past week lawyers, activists, and law professors from throughout Latin America gathered in Santiago, Chile for the First Latin American Innocence Conference. The conference was hosted by Redinocente (http://www.redinocente.org), an organization launched this year with the mission of assisting in the creation and support of innocence efforts throughout Latin America."); Gordon Darroch, *Peter van Koppen on Miscarriages of Justice: 'Dutch Judges Need to Be More Critical*,' AMSTERDAM HERALD (June 9, 2012), http://amsterdamherald.com/index.php/allneuos-list/346-20120609-courts-lucia-de-berk-breda-six -schiedam-stabbing-netherlands ("Until a few years ago the phrase 'miscarriage of justice' was rarely heard in the Netherlands. But a handful of high-profile cases have put the country's justice system under the spotlight and raised questions about how its judges should be judged." (emphasis omitted)); *From the Wrongful Convictions Blog: International Innocence Round-up*, INNOCENCE PROJECT (June 27, 2012, 1:45 PM), http://www.innocenceproject.org/news/Blog-Search.php (type "Filipino academics" in the search bar and view the first entry) ("Filipino academics and activists launched a 'Philippines Innocence Project' last week, the first such project in the country."); Mischa Wilmers, *Experts Ask 'Who Is Responsible for Miscarriages of Justice?'*, THE GUARDIAN (July 6, 2012, 10:30 PM), http://www.guardian.co.uk/uk/the-northerner/2012/jul/06/manchester-justice-miscarriage?INTCMP=SRCH ("[A]n impressive panel of experts, lawyers and journalists at Manchester's BPP law school, to take part in a public debate aimed at reigniting an interest in the failings of our criminal justice system."); *see also* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778–80 (2007) (estimating that 3.3% to 5.0% of defendants convicted in capital rape-murder trials between 1982 and 1989 were innocent); Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 440 (2009) ("Each year, thousands of men and women in the United

discussion is the role of innocence commissions.[2] In 1997, the United Kingdom created the first such commission, the U.K. Criminal Cases Review Commission (CCRC).[3] This independent body has the power to investigate and refer claims of miscarriage of justice to the U.K. Court of Appeal.[4] Norway has a similar body.[5] While several U.S. states have study-and-report commissions,[6] the only similar, that

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States are wrongfully convicted of felonies that they did not commit."); Ken Armstrong & Steve Mills, *Part 1: Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, http://articles.chicagotribune.com/1999-11-14/news/chi-991114deathillinois1_1_capital-punishment-death-row-criminal-justice-system (beginning of a five-part series on faulty justice in Illinois capital cases from 1977 to 1999); Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 66, *available at* http://www.theatlantic.com/past/docs/issues/99nov/9911wrongman.htm (reporting on the "horrifyingly likely" prospect that "innocent people will be executed in America"); *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, *available at* http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Apr. 16, 2013) ("There have been 303 post-conviction DNA exonerations in the United States . . . . Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused.").

[2] For a general discussion of the defining features of innocence commissions, see Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89, 89 (2010) ("Innocence commissions have emerged over the last decade as a new institution in the criminal justice system. . . . Innocence commissions have ranged from self-appointed study commissions with an interest in systemic reform of the criminal justice system to temporary or permanent state-appointed inquiries into specific cases and/or systemic causes of wrongful convictions to permanent state-appointed commissions with a mandate to investigate claims of miscarriages of justice and to re-open judicial proceedings in individual cases."); *see also* David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV. 657, 676 (2004) ("The most that the Commission can offer is, in one sense, another statement of the obvious—namely, that miscarriages of justice will occur however robust the system—and the more serious observation that mature criminal justice systems have no problem accepting this as a reality and are therefore interested in identifying public mechanisms for redress that work for them.").

[3] For an analysis of the CCRC, see Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107 (2009).

[4] *See* Criminal Procedure (Scotland) Act, 1995, c. 46, § 194B (1), *available at* http://www.legislation.gov.uk/ukpga/1995/46/contents.

[5] The Norwegian Criminal Cases Review Commission was established January 1, 2004. *See Introduction*, NORWEGIAN CRIM. CASES REV. COMMISSION, http://www.gjenopptakelse.no/index.php?id=163 (last visited Apr. 16, 2013) ("The Norwegian Criminal Cases Review Commission is an independent body which has responsibility for deciding whether convicted persons who seek review of their conviction/sentence should have their cases retried in court. If the Commission decides that there should be a review, the case will be referred for retrial before a court other than that which imposed the conviction/sentence.").

[6] Amongst those states are California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas and Wisconsin. *See Criminal Justice Reform*

is, direct review commission in the United States is the North Carolina Innocence Inquiry Commission.[7] One commission that has received virtually no international attention is the Scottish Criminal Cases Review Commission (SCCRC),[8] which was created two years after the U.K.'s CCRC.[9] Like its older sister, the SCCRC is an independent body with the power to investigate and refer claims of miscarriage of justice to the domestic appellate court.[10] The SCCRC is the subject of this article.

It should be said at the outset that it is not an easy task to analyze and describe the SCCRC's work in correcting wrongful convictions. Unlike its U.K. counterpart, the SCCRC works under strict statutory non-disclosure rules that keep much of its work from public view.[11] It is thus impossible, for example, to review cases that are considered and investigated but not referred to the court because the SCCRC is not permitted to disclose its statement of reasons (for referral or non-referral).[12] For the same reason, it is not possible to know the basis for a referral, because the statement of reasons in referral cases is also confidential.[13] While the basis for the referral is

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Commissions: Case Studies, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php (last visited Apr. 16, 2013).

[7] The North Carolina Innocence Inquiry Commission was established in 2006. *See About Us*, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, http://www.innocencecommission-nc.gov/about.html (last visited Apr. 16, 2013) ("The Commission is charged with providing an independent and balanced truth-seeking forum for credible post-conviction claims of innocence in North Carolina. The Commission is separate from the appeals process. A person exonerated by the Commission process is declared innocent and cannot be retried for the same crime.").

[8] The Scottish Criminal Cases Review Commission was established in April 1999. *See About the Commission*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/aboutthecommission.aspx (last visited Apr. 16, 2013); *Role of SCCRC*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/role.aspx (last visited Apr. 16, 2013) ("Our role is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to conviction, sentence or both. . . . After the review has been completed, we will decide whether or not the case should be referred to the High Court. If we decide to refer a case, the case will be heard and determined by the High Court as if it were a normal appeal.").

[9] The CCRC was established in March 1997. *See About the Criminal Cases Review Commission (CCRC)*, MINISTRY JUST., http://www.justice.gov.uk/about/criminal-cases-review-commission (last visited Apr. 16, 2013) ("Our purpose is to review possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts.").

[10] The Commission is authorized to refer a case to the High Court when it determines: "(a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made." Criminal Procedure (Scotland) Act, 1995, c. 46,§ 194C (amended by Crime and Punishment (Scotland) Act, 1997, c. 48, § 25(1)), *available at* http://www.legislation.gov.uk/ukpga/1995/46/contents.

[11] *See Legislation*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/legislation.aspx (last visited Apr. 16, 2013).

[12] *See General*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/accesstoinformation.aspx (last visited Apr. 16, 2013).

[13] *Id.*

sometimes discussed in the ultimate court decision on a referred case, there have in fact been very few referrals and even fewer written decisions. From its inception in 1999 to March 2013, the SCCRC had referred only 115 cases.[14] Only fifty-one have resulted in written decisions.[15] While this may be an appropriate number of referrals, it is a challenge to discern patterns in such a small body of cases.

For these reasons, I requested and was given permission to visit the SCCRC's office in Glasgow, Scotland. During that visit I was graciously given the opportunity to speak at length with many members of the SCCRC staff, including its Executive Director, Gerard Sinclair. The staff was extremely forthcoming and it was a fascinating visit.

Ultimately, and despite these limitations, it is possible to draw some interesting conclusions about the work of the SCCRC.[16] First, the SCCRC seems willing to refer cases to the courts based on fresh evidence (what we call "newly discovered evidence"), when the Commission concludes that evidence is important and credible, even if the court ultimately disagrees and holds that it is not significant enough to require quashing the conviction. In fact, the SCCRC seems quite confident in drawing its own conclusions about the credibility and significance of fresh evidence in cases in which the court's ultimate decision reveals this to have been a fairly debatable question. The same is true of the SCCRC's willingness to refer cases demonstrating that the Crown had improperly failed to disclose exculpatory evidence to the defense (what we call a *Brady* violation).[17] Faced with a case involving serious prosecutorial non-disclosure, the SCCRC is likely to take a broad view of whether the non-disclosed evidence was important to the case, even when the court ultimately disagrees. Finally, the SCCRC takes very seriously the requirement that there be something new in the case before it can be referred;[18] consistent with the Court of Criminal Appeal's scope of review, the SCCRC will not refer a case in which it is troubled by the reliability of the verdict in the absence of new evidence or a new legal ground to do so.[19] This same position has led to some substantial criticism of the CCRC.

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[14] *See Case Statistics*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/casestatistics.aspx (last visited Apr. 16, 2013).

[15] *See Referred Cases*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/referredcases.aspx (last visited Apr. 16, 2013) (refer to the "conviction" and "sentence" sub-links in the left column to browse lists of individual cases with written decisions).

[16] References to information learned in person are noted in the footnotes that follow. I am extremely grateful for the professional, candid, and gracious opportunity I was given.

[17] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[18] *See* Peter Duff, *Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner*, 72 MOD. L. REV. 693, 702 & nn.53–54 (2009).

[19] According to former SCCRC member Peter Duff,

> [t]he Commission was not designed to act as an agent of the defence; rather it was intended by Parliament to operate in the public interest as "a non-adversarial body conducting neutral enquiries". Thus, the appropriate approach for us should be, in very broad terms, "inquisitorial"

For those interested in the role of innocence commissions as a method of correcting wrongful convictions, these conclusions may not be surprising. What is surprising, however, is the absence of traditional (read U.S.) causes of wrongful convictions in the applications made to the SCCRC and referred by them, i.e., faulty one-witness identification evidence, false testimony by jailhouse snitches and other informants, prosecutorial non-disclosure of exculpatory evidence, and junk science. Aside from prosecutorial suppression of exculpatory evidence, the other major causes of wrongful convictions in the United States did not make up a substantial part of the SCCRC's caseload. As will be discussed further, several significant aspects of Scottish criminal procedure—including, for example, a corroboration requirement, videotaping of confessions, and limited prosecutorial discretion for negotiation and cooperation deals—appear to prevent the proliferation of several categories of unreliable verdicts as we know them in the United States.

Part I of this Article traces the history of the SCCRC and outlines the procedures employed by the SCCRC after an application is received, with particular attention to its extensive investigatory procedures. It also describes and analyzes the standards for referral of an application to the Scottish court. Part II briefly sets forth the statistics concerning applications, referrals, and judicial decisions. Part III includes an analysis of the SCCRC's work by looking at the cases that have been referred and decided by the court. Those cases are divided into several categories: fresh evidence referrals, referrals based on a newly raised legal issue, and historic cases. It also includes a discussion of two *sui generis*, but very important decisions, and a consideration of how the SCCRC and the court deal with cases that do not involve any new factual or legal claims. Part IV reflects on and attempts to draw some conclusions about the SCCRC's role in the correction of wrongful convictions.

I. THE SCCRC

A. History

In April 1999, the SCCRC was established pursuant to the recommendation of the Sutherland Committee on Appeals Criteria and Alleged Miscarriages of Justice.[20]

> because we should carry out our own investigation independent of the parties, namely the applicant and the Crown.

Id. at 703–04 (footnote omitted) (quoting GREAT BRITAIN HOME OFFICE, CRIMINAL APPEALS AND THE ESTABLISHMENT OF A CRIMINAL CASE REVIEW AUTHORITY: A DISCUSSION PAPER ¶ 52 (1994)).

[20] The legislation added the SCCRC into the 1995 Act. *See* Criminal Procedure (Scotland) Act, 1995, c. 46, § 194A. After ten years in existence, the Commission had developed into "more than simply a gatekeeper for the appeal court, receiving and filtering applications by convicted persons." SCOTTISH CRIMINAL CASES REVIEW COMM'N, SCOTTISH CRIMINAL CASES REVIEW COMMISSION 10TH ANNIVERSARY RESEARCH FINAL REPORT 59 (2009), *available*

The SCCRC was established two years after its English counterpart, the CCRC.[21] Like its older sister, the SCCRC was given the power to refer cases to the courts;[22] like its older sister, it does not have the power actually to reverse or uphold convictions.[23] Prior to its establishment, convicted defendants who had exhausted the appeal process could apply to the U.K. Secretary of State for Scotland for review of their conviction or sentence.[24] This was the same procedure as in the United Kingdom prior to the establishment of the CCRC.[25] Once the old discretionary procedure was replaced by commission review for U.K. applicants, there was no basis to continue it in Scotland.[26]

The SCCRC is empowered to accept cases from individuals convicted in both summary and solemn proceedings.[27] Unlike its U.K. counterpart, however, there is no statutory requirement that an applicant have previously appealed or exhausted the appeals process.[28] Nevertheless, this is clearly the preferred route, and most of the

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at http://www.sccrc.org.uk/ViewFile.aspx?id=393. To this end, the Commission now provides a route to fix a wide range of irregularities undermining the veracity of the Scottish judiciary. *See id.* at 60–61 ("[T]he Commission's role is again not limited to any particular category of miscarriage of justice . . . . The Commission therefore provides an important route for the correction of such irregularities, which would otherwise be difficult to achieve."). For a thorough analysis of the establishment of the SCCRC, see Peter Duff, *Criminal Cases Review Commissions and "Deference" to the Courts: The Evaluation of Evidence and Evidentiary Rules*, 2001 CRIM. L. REV. 341, 341–62.

[21] *See supra* notes 8–10 and accompanying text.

[22] *See supra* note 10 and accompanying text.

[23] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 20, at 9.

[24] Duff, *supra* note 18, at 694. Applicants who are denied relief by the SCCRC, or defendants that have no legal avenues available for redress, may still petition the *nobile officium* of the High Court for review of their claims. *See id.* at 708 n.78 ("The *nobile officium* is an equitable remedy of last resort where no other legal options are available to the applicant.").

[25] Duff, *supra* note 18, at 694.

[26] Notably, the SCCRC may have the power to refer cases to the Secretary of State, for the exercise of the royal prerogative of mercy although there is no statutory authority for doing so, as there is in the United Kingdom. To date, it has not exercised this power. *See Innocence Projects*, INNOCENCE NETWORK UNITED KINGDOM (INUK), http://www.innocencenetwork.org.uk/inuk-protocols (last visited Apr. 16, 2013) ("It is also possible that innocence projects may make applications for a Free Pardon under the exercise of the Royal Prerogative of Mercy in applications to the Secretary of State if strong evidence of factual innocence exists that does not provide legal grounds for appeal in the eyes of the CCRC and/or the SCCRC.").

[27] *See* Criminal Procedure (Scotland) Act, 1995, c. 46, § 194E, ¶ 1 (amended by Crime and Punishment (Scotland) Act, 1997, c. 48, § 25(1)). Likewise, the Commission is empowered to refer a case for review even when an application has not been directly made by the person. *See* Johnston v. H.M. Advocate, [2006] HCJAC 30 (Scot.) (stating that the SCCRC referred both appellants' cases due to its own concern that there had been a miscarriage of justice and that the appellants subsequently chose to exercise their own opportunity to appeal their cases).

[28] Criminal Procedure (Scotland) Act, 1995 c. 46, § 194B, ¶ 1 (as amended by the Crime and Punishment (Scotland) Act, 1997, c. 48, § 25(1)) ("The Commission . . . may . . . at any

applications that are accepted for review involve cases in which the appeals process has been exhausted.[29] Like its U.K. counterpart, the SCCRC cannot decide a case; rather, it has the power to refer a case to the High Court of the Judiciary, which will treat it like any other appeal.

B. Procedure—Investigation and Review

Once a case is received, the Chief Executive of the Commission conducts an initial assessment (Stage 1: Pre-Acceptance Review) to decide whether the application should be accepted for full review.[30] He or she will then make a recommendation

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time, and whether or not an appeal against such conviction or sentence has previously been heard and determined by the High Court, refer the whole case to the High Court.").

[29] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, INFORMATION, *available at* http://www.sccrc.org.uk/ViewFile.aspx?id=429 (last visited Apr. 16, 2013) ("In normal circumstances, however, we look into an applicant's case only after he has made an unsuccessful appeal to the High Court. . . . The applicant must have exhausted the normal appeal process, unless there are exceptional circumstances (e.g. the applicant was prevented from appealing because serious threats were made against him or his family, or it is only our special powers of investigation that can uncover the evidence he needs).").

[30] *How We Review a Case*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/howwereviewacase.aspx (last visited Apr. 16, 2013). In 2010–11, the Commission also implemented a pre-acceptance procedure, (Stage 1: Pre-acceptance), to afford applicants a more detailed assessment of their claims prior to any subsequent rejection. SCOTTISH CRIMINAL CASES REVIEW COMM'N, ANNUAL AUDIT REPORT TO THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION AND THE AUDITOR GENERAL FOR SCOTLAND 5 (2011), *available at* http://www.audit-scotland.gov.uk/docs/central/2011/fa_1011_criminal_cases_review.pdf. Although the procedure is more time consuming, the SCCRC's initial review of an applicant's claims is far more comprehensive and detailed than ever before. *Id.* Once the Commission receives an application, the administration officer creates a case number and file, and checks to see if the applicant has previously sought the Commission's review. SCOTTISH CRIMINAL CASES REVIEW COMM'N, STAGE 1: PRE-ACCEPTANCE ¶ 1.1 [hereinafter SCOTTISH CRIMINAL CASES REVIEW COMM'N, STAGE 1: PRE-ACCEPTANCE], *available at* http://www.sccrc.org.uk/viewfile.aspx?id=524 (last visited Apr. 16, 2013). Thereafter, the Chief Executive is informed of the new application, and notifies the applicant and his representative to acknowledge receipt and to inform them of the SCCRC's procedures. *Id.* In the meantime, the administration officer writes to the Justiciary Office and/or the appropriate sheriff court to request all case papers necessary for the Commission's review. *Id.* Then, "[t]he Chief Executive allocates the case to an appropriate legal officer and Committee." *Id.* ¶ 1.3. Chief Executive also makes an inquiry into any conflicts of interests that the legal officer or members of the Commission may have. *Id.* Thereafter, the Chief Executive distributes duties to the legal officers for the case's review, and informs all parties of a meeting to be conducted by the Commission a month thereafter. *Id.* In anticipation of the review meeting, the legal officer drafts the "Stage 1 report," in which he provides full details of the applicant's conviction and sentence and grounds of review. *Id.* If necessary, the legal officer may take steps to obtain any further information that may be necessary so that the Committee can make a decision about whether to accept the case for review. *Id.* To that end, the Commission also takes into consideration the legal officer's recommendation as to whether the case should be accepted for review or rejected. *Id.* At the Stage 1

to the board and the board will agree or disagree whether a full review of the case should be undertaken by the Commission.[31]

The SCCRC has broad powers to investigate, and this is clearly its strength. In fact, the SCCRC can compel evidence by what we would consider subpoena power. Pursuant to Section 194H of the Crime and Punishment (Scotland) Act 1997, in cases in which it appears to the SCCRC that a person may have relevant information, and the person refuses to make a statement, the SCCRC may apply to the sheriff, who may summon that person for a statement under oath before the SCCRC.[32] A person who fails to appear after forty-eight hours may be fined or imprisoned up to twenty-one days and a warrant of arrest may be issued for his precognition.[33] Refusal to give information or lying to the SCCRC warrants an additional fine or imprisonment.[34]

The SCCRC also has the same broad powers to obtain documents. When it believes that any person or public body has documents that may assist it, it may apply to the court for what is in essence a subpoena.[35] This power applies whether it is in relation to a case before the Commission or any other case in any way related to that case.[36] It also applies regardless of other provisions requiring secrecy or non-disclosure.[37] Under this provision the SCCRC will routinely get the Crown

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meeting, the Commission members determine whether the case should be accepted. *Id.* ¶ 1.4. The Commission then proceeds to seek the Board's approval of its recommendation for referral. *Id.* ¶ 1.5. If accepted, the case proceeds forward for a full determination. *Id.* Throughout these proceedings, the applicant is informed of the decisions made by the Commission. *Id.* ¶ 1.1–1.3, 1.8.

[31] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, STAGE 1: PRE-ACCEPTANCE, *supra* note 30, ¶ 1.5; *How We Review a Case*, *supra* note 30 ("The Committee may decide to accept a case for review; if it does, the case proceeds to the allocation procedure and the Board will be advised accordingly. . . . If the Committee believes at the outset that a case should be rejected, the case will be continued to the next Board meeting for consideration and decision by the Board. The Board may decide, notwithstanding the recommendations of the Committee, to accept a case for review; if it does, the case will proceed to the allocation procedure."). If a case is accepted for full review (Stage 2) it "will be investigated by a legal officer in accordance with the Commission's Case Handling Procedures and under the guidance of the Chief Executive and the Board." SCOTTISH CRIMINAL CASES REVIEW COMM'N, BUSINESS PLAN 2012–13, at 2 (2012), *available at* http://www.sccrc.org.uk/viewfile.aspx?id=508.

[32] Criminal Procedure (Scotland) Act, 1995, c. 46, § 194H(1), (2) (amended by Crime and Punishment (Scotland) Act, 1997) c. 48, § 25(1)). The CCRC does not have such power. *See* Griffin, *supra* note 3, at 113 (describing the CCRC's Stage Two procedure).

[33] Criminal Procedure (Scotland) Act, 1995, c. 46, § 194H(3). "Precognition" refers to out of court questioning or deposing of witnesses.

[34] *Id.* § 194H(4).

[35] *Id.* § 194I(1).

[36] *Id.* § 194I(3).

[37] *Id.* § 194I(2). In this regard, too, the investigatory powers afforded to the SCCRC are broader than those afforded to the CCRC, which generally can access public documents and "seek disclosure for information that is not otherwise available to the defense." *See* Griffin, *supra* note 3, at 112; *see also* Coubrough v. H.M. Advocate, [2010] HCJAC 32 [30] (Scot.).

witness statements, evidence, and precognition, and may be able to secure the entire Crown file.[38]

In reality, the small SCCRC staff[39] really does more than just described.[40] First, they read the application,[41] which is really a bare-bones document.[42] Second, in virtually every case they meet with the applicant.[43] If it is not otherwise clear from the application, they explore every possible new issue—factual or legal—to see if

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[38] *See How We Review a Case*, *supra* note 30 (stating that "[o]nce an application is accepted [the Commission] will obtain papers from the Court, the police and the Crown").

[39] As of March 31, 2012, the Commission's staff included a Chief Executive, a Director of Corporate Services, two Senior Legal Officers, seven Legal Officers (one current vacancy), and three Administration Staff. SCOTTISH CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT 2011–12, at 8, (2012), *available at* http://www.sccrc.org.uk/viewfile.aspx?id=551.

[40] Regarding the depth and efficiency of the SCCRC's workload, Jean Couper, SCCRC Chairman helped explain

> [t]his is the first full year of the Commission's stage 1 pre-acceptance procedure which provides a more detailed assessment upon which to either accept or reject a case for full review. This procedure requires considerably more work for each application received but has led to a reduction in the percentage of cases accepted for full review, falling from a relatively static 66% in 2010–11 to 37% in 2011–12. It is also interesting to note that the referral rate of cases to the High Court following full review has increased from 2.8% in 2010–11 to 3.8% in 2011–12.

SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 3; *see also* SCOTTISH CRIMINAL CASES REVIEW COMM'N, STATE 1: PRE-ACCEPTANCE, *supra* note 30.

[41] Duff, *supra* note 18, at 694 ("[U]nlike in England, every application—whether it leads to a referral to the appeal court or a refusal—was, and still is, determined by a full Board, ie [sic] at a meeting attended by all of the Commissioners.").

[42] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, APPLICATION FORM FOR REVIEW OF CONVICTION OR SENTENCE OR BOTH, *available at* http://www.sccrc.org.uk/ViewFile.aspx?id=408 (last visited Apr. 16, 2013). In this regard, the Commission had envisioned that the pre-acceptance review (Stage 1) would provide procedural change that would promote "unwarranted applications being rejected at the outset; poorly presented applications with merit being more likely to be identified and accepted; and a reduction in the review timescales for both sentence-only and conviction reviews following acceptance." SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 24.

[43] The Commission's staff will generally try to meet with applicants in person at least once during the review process. *See Frequently Asked Questions*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/frequentlyaskedquestions.aspx (last visited Apr. 16, 2013). Nevertheless, the Commission can decide that meeting with the applicant is unnecessary. *See What We Can Do*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/whatwecando.aspx (last visited Apr. 16, 2013) ("We can choose not to interview witnesses that the applicant wishes to be interviewed if we feel that it is unnecessary. We can choose not to investigate grounds of review raised by an applicant if we are of the view that the grounds are unsubstantiated. We can refuse to accept an application for review where an applicant submits a second application or further applications after having had a full review conducted, where no new issues are raised.").

there is a basis for continuing to investigate.[44] They review all of the documents. What they are looking for is something new: some issue or fact that was not part of the prior adjudication process. So, for example, if an applicant simply claims he is innocent, the staff will explore possible legal issues that might explain why the jury convicted or potential sources of new facts that might establish that the conviction is a miscarriage of justice.[45]

Once an application is accepted the SCCRC will gather the relevant police and Crown documents and write all relevant parties informing them that the case has been accepted for review and that all documents must be preserved.[46] The case is then given to a legal officer and a Committee.[47] The legal officer reviews the case and prepares a case plan document setting forth the Crown and defense case at trial, the appeal, the grounds for review, and recommendations as to review and further investigation.[48] This is submitted to the Committee of two or three Board Members and the Chief Executive, who, along with the Legal Officer, decide how to proceed.[49] Once the Chief Executive and Legal Officer complete the review, the Committee decides whether to refer the case.[50] The Legal Officer then prepares a statement of reasons for the Committee's action.[51] Once the Committee is content with the draft statement, the Legal Officer will present it and the case to the Board with the Committee members available to answer questions.[52] The Board will then decide whether to refer the case.[53]

If the Board decides not to refer the case, the applicant has twenty-one days in which to submit any further materials to the Commission.[54] This period may be

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[44] During 2011–12, the SCCRC's average review time for an application increased marginally to 3.9 from 3.7 months in respect of sentence-only and reduced from 8.6 to 8.0 months in respect of conviction. Only one (0.7%) of the Commission's cases exceeded the twelve-month target whereby [the SCCRC] aimed to complete 98% of cases received before March 31, 2011, within this period. SCOTTISH CRIMINAL CASES REVIEW COMMISSION, *supra* note 39, at 4.

[45] Scottish Criminal Cases Review Commission v. H.M. Advocate, (2001) J.C. 36, ¶ 9 (Scot.) ("Parliament intended the petitioners to have the fullest investigative powers in reaching the decision whether or not a reference to the court should be made in any particular case and that in exercising these powers, in the performance of their investigative duties, they are to act independently and to be seen to act independently. There can be no question . . . of their powers of investigation being directed or circumscribed by any other person or body.").

[46] *How We Review a Case*, *supra* note 30.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *The Decision Process*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/thedecisionprocess.aspx (last visited Apr. 16, 2013).

[54] *Id.*

extended liberally.[55] If nothing is submitted, the decision is final.[56] If further representations are submitted they will be considered by the Board.[57] If the board continues in the position that there should be no referral, the decision will become final.[58]

The decision not to review may be appealed to the court.[59] This is in the nature of mandamus. A second or even third application may be made to the SCCRC,[60] but if no new issues are raised, review likely will be denied.

C. Power to Refer

The SCCRC may refer any case in which it concludes "(a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made."[61] A decision to refer or not to refer must be accompanied by a statement of reasons; if the case is not referred the statement is issued to the applicant and the parties' representatives; if the case is referred, the statement is also provided to the High Court and all potential parties or their representatives.[62] In neither case may the statement of reasons be made public.[63]

The first prong of the referral standard—finding a miscarriage of justice—is the sole ground of appeal in Scotland,[64] so to that extent the first part of the SCCRC's mandate—to refer a case where a miscarriage of justice "may" have occurred—reflects traditional appellate standards. Under this statutory standard, of course, the

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Appealing our Decision*, SCOTTISH CRIM. CASES REV. COMMISSION, http://www.sccrc.org.uk/appealingourdecision.aspx (last visited Apr. 16, 2013).

[60] *Id.*

[61] Criminal Procedure (Scotland) Act, 1995, c. 46, § 194C (amended by Crime and Punishment (Scotland) Act, 1997, c. 48, § 25(1)). Under Section 194B of the Criminal Procedure Act, any conviction or sentence passed on a person convicted on indictment or complaint can be referred to the High Court by the Commission irrespective of whether or not an appeal against the conviction or sentence has been heard and determined by the High Court. *Id.* § 194B(1).

[62] *Id.* §§ 194D (4), (5).

[63] *General*, *supra* note 12; *see also* Criminal Procedure (Scotland) Act, c.46 §§ 194J, 194K, 194L.

[64] Criminal Procedure (Scotland) Act, 1995, c. 46, §§ 106(3) (solemn procedure), 175(5) (summary procedure) (as amended by Crime and Punishment (Scotland) Act, 1997, c. 48, §17(2)). Expressing the need for the Commission's recognition of customary restraint in its referral process, Lord Emslie stressed that the Commission was obliged to apply the "correct legal test" in making a decision whether to refer a case to the appeal court. In the Petitions of BM, KK, and DP, [2006] CSOH 112 [43] (Scot.). To this end, Lord Emslie was impliedly critical of the claim that the Commission was not required to "second-guess" the appeal court. *Id.* ¶ 40.

SCCRC may not refer a case that has no chance of being quashed on appeal. However, as discussed above, unlike its U.K. sister, the SCCRC has no explicit obligation to refer only cases where it concludes that there is a "real possibility" that the appellate court will agree that a miscarriage of justice has occurred.[65] Indeed, the SCCRC need only find that "a miscarriage of justice may have occurred" to refer a case,[66] while the court, to quash a case, must find that a miscarriage of justice did, in fact occur.[67] Moreover, the proviso that the SCCRC find not only that a miscarriage of justice may have occurred but also that it is in the interest of justice to refer gives the SCCRC even more discretionary power to refer a case, regardless of how it thinks the court of appeal would decide it.[68] As of October 2010, the High Court has a new power to reject a referral from the Commission if it considers that it is not in the interests of justice that an appeal proceeds forward.[69] As of the end of the year 2011, this power had not been exercised, and a recent report recommended that this right of refusal should be repealed.[70]

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[65] *Id.* ¶¶ 13, 23. *See, e.g.*, Coubrough v. H.M. Advocate, [2010] HCJAC 32 [30] (Scot.) ("Unlike the English test of whether a conviction is unsafe, the Scottish test of miscarriage of justice permits the court to consider broader issues such as the public interest and the desirability of certainty and finality in the criminal justice system."). The issue of deference to the appellate courts has been subject to intense debate. *See, e.g.*, P.W. Ferguson, *Letter to the Editor*, 2001 CRIM. L. REV., 761–62; *see also* Peter Duff, *Reply to P.W. Ferguson*, 2001 CRIM. L. REV. 762–63.

[66] Criminal Procedure (Scotland) Act, 1995, c. 46,§ 194C(1)(a).

[67] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 20, at 12.

[68] *Id.* at 10.

[69] *See* Criminal Procedure (Scotland) Act, 1995, c. 48, § 194DA. The statute reads:

> (1) Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.
> (2) In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.
> (3) On rejecting a reference under this section, the High Court may make such order as it considers necessary or appropriate.

Id.

[70] *See* SCOTTISH GOV'T, REFORMING SCOTS CRIMINAL LAW AND PRACTICE: THE CARLOWAY REPORT, *available at* http://scotland.gov.uk/Resource/0039/00396483.pdf (last visited Apr. 16, 2013). Relevant to the SCCRC's functioning, Lord Carloway recommended that:

> [S]ection 194C(2) of the 1995 Act (as inserted by Section 7(3) of the 2010 Act) which introduces a requirement on the SCCRC to consider "finality and certainty" in considering a reference, should be retained. There should, however, be no further statutory listing of the criteria included in the "interests of justice" test for SCCRC references; section 194DA of the 1995 Act (as inserted by Section 7(4) of the 2010

1. Whether "a Miscarriage of Justice May Have Occurred"

Pursuant to the Criminal Procedure (Scotland) Act, 1995 Section 106(3) (as amended by Crime and Punishment (Scotland) Act, 1997 Section 17(1)), an appeal may be brought to the High Court based on any alleged miscarriage of justice.[71] While presumably a miscarriage of justice may be based on a prejudicial legal error,[72] such a miscarriage of justice may also be based on:

> (a) . . . the existence and significance of evidence which was not heard at the original proceeding [so-called "fresh evidence"]; and (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.[73]

Pursuant to Section (3A), fresh evidence will not be accepted unless: 1) it is in fact, new evidence;[74] 2) there is a reasonable explanation why it was not given at the trial;[75] and 3) it is of such significance that "[a] verdict returned in ignorance of it[s existence] must be regarded as a miscarriage of justice."[76] When the reason the evidence was not admitted earlier is that it was not admissible at the time but is admissible at the time of the appeal, the court may admit that evidence "if it appears to the court that it would be in the interests of justice to do so."[77] However, when the evidence is from a new witness or a person who gave evidence at the original proceedings that is different from, or additional to, the evidence already given, that evidence "may not found" an appeal unless the explanation for why the evidence was not

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> Act) which provides a "gate-keeping role" for the Appeal Court in relation to references from the SCCRC should be repealed; and when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be that: (a) there has been a miscarriage of justice; and (b) it is in the interests of justice that the appeal be allowed.

Id. at 53–54.

[71] Criminal Procedure (Scotland) Act, 1995, c. 46, § 106(3).

[72] *See* PETER DUFF & FRAZER MCCALLUM, GROUNDS OF APPEAL IN CRIMINAL CASES 22 Tbl. 7 (1996). For example, a sample of 250 appeals against conviction under solemn procedure were provided, which produced 350 grounds of appeal, 147 of the grounds related to alleged misdirection by the judge. *Id.* Likewise, in the sample of 350 appeal grounds, only four related to alleged jury irregularity. *Id.*

[73] Criminal Procedure (Scotland) Act, 1995, § 106(3) (amended by Crime and Punishment (Scotland) Act, 1997, c. 48, § 17(1)).

[74] *Id.* § 106(3)(A).

[75] *Id.* § (3A); *see also* McCormack v. H.M. Advocate, [2005] HCJAC 38 [8]–[9] (Scot.) (holding that the defendant's recovery of memory after trial may be grounds to explain earlier absence of evidence).

[76] Gilmour v. H.M. Advocate, [2007] HCJAC 48 [75] (Scot.).

[77] Criminal Procedure (Scotland) Act, 1995, c. 46, § 106(3B) (amended by § 17 of the Crime and Punishment (Scotland) Act, 1997, c. 48, § 17(1)).

given earlier "is itself supported by independent evidence."[78] "Independent evidence" in this context means evidence not heard at the original proceedings and from a source different from the person offering it, that is "accepted by the court as being credible and reliable."[79]

2. Whether It "Is in the Interest of Justice to Refer a Case"

The SCCRC has broad discretion to determine whether it is in the interests of justice to refer a case, even when there may have been a miscarriage of justice. A single statutory directive states: "In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings."[80] In practice, the kinds of factors that might militate against referral in the interests of justice might include the age of the case, whether the applicant has died, evidence that the applicant is in fact guilty (whether admissible or not), or the applicant's sentence having been served.[81]

II. STATISTICS: APPLICATIONS, REFERRALS, AND DECISIONS

As of March 31, 2012, 1493 cases had been received and 1436 concluded.[82] Eighty-one percent were from solemn proceedings (more serious charges) and nineteen percent from summary proceedings (less serious charges).[83] Seventy-nine percent involved review of convictions and twenty-one percent involved review of sentence only.[84]

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[78] *Id.* § 106(3C).

[79] *Id.* § 106(3D); *see also* Kidd v. H.M. Advocate, [2005] HCJAC 13 [23]–[24] (Scot.); McCormack v. H.M. Advocate, [2005] HCJAC 38 [9] (Scot.) (noting the Crown's argument that although fresh evidence can arise where the defendant had suffered amnesia after the crime and that evidence only became available following his recovery, such evidence must still be credible and reliable).

[80] Criminal Procedure (Scotland) Act, 1995, c. 46, § 194C(2) (as amended by Crime and Punishment (Scotland) Act, 1997, c. 48, § 17(1)).

[81] *See, e.g.*, Cochrane v. H.M. Advocate, [2006] HCJAC 27 [3], (2006) J.C. 135 (Scot.) (refusing to refer a case in which the defendant was convicted of a charge that did not constitute a statutory crime, but he was clearly guilty); Duff, *supra* note 20, at 362 (suggesting that a commission is neither restrained from undertaking an independent review of the evidence set before it or acting "outwith and independent of the criminal justice process, not as further rungs on the ladder of the formal legal process"); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1160 (3d ed. 2000) ("Courts are naturally skeptical of claims that a defendant, fairly convicted, with proper representation by counsel, should now be given a second opportunity because of new information that has suddenly been acquired.").

[82] SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 9, 15.

[83] *Id.* at 10 tbl. 2.

[84] *Id.* Although beyond the scope of this Article, the main grounds of referral in sentence-only cases were: improper punishment part calculation (48%); sentence inconsistent with

The largest group of applications involved defendants convicted of murder, which accounted for 20.96%.[85] The next largest group, sexual offenses other than rape, was 15.70%.[86] Rape convictions amounted to 12.12%, which makes the combination of sexual offenses 27.82% of the total.[87]

The main ground for referral[88] was evidence not heard in the original proceeding (36%),[89] followed by insufficient evidence (16%), failure to disclose (16%), defective representation (14%), other irregular proceedings (8%), misdirection on evidence (omission, value, weight) (9%), wrongful admission of evidence (6%), misdirection on law (corroboration) (5%), other misdirection on law (5%), unreasonable verdict (5%), wrongful exclusion of evidence (3%), conduct of judge (3%), conduct of jury (3%), miscellaneous errors in law (3%), conduct of prosecutor (2%), refusal of no case to answer submission (3%), and lurking doubt (2%).[90] If one combines all categories of cases that together challenge the reliability of the verdict of guilt, then 57% of referrals involved a challenge to the substantive finding of guilt.

As of March 31, 2012, of the 1436 applications the SCCRC had completed, it had referred 107 cases,[91] for a 7.5% referral rate.[92] Ninety of the 107 cases had been decided.[93] The overall rate of referral for convictions was 5.6% (63 of 1135 conviction cases).[94] In fifty-eight of the ninety decided cases, the appeal had been granted and the conviction quashed; in thirty-two cases the appeal had been refused.[95] This

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precedent (23%); incompetent sentence (23%); sentence calculated on an inaccurate factual basis (2%); and inappropriate weighting of certain factors (4%). *Id.* at 14 tbl. 6.

[85] *Id.* at 11 tbl. 3.

[86] *Id.*

[87] *Id.* Other applicants sought the SCCRC's review for convictions relating to drug offenses (9.18%); assault offenses (14.73% combined); other statutory offenses (5.83%); breach of the peace (4.69%); attempted murder (4.42%); road traffic offenses (3.35%); other crimes of dishonesty (2.41%); robbery (2.21%); theft (1.88%); culpable homicide (1.61%); and all other offenses (1.21%). *Id.*

[88] *Id.* at 12 tbl. 4. To the contrary, the comprised percentages relating to the main grounds for review set forth by applicants were: defective representation (17.82%); excessive sentence (14.20%); unfair trial (10.98%); credibility or reliability of evidence (9.58%); new evidence (8.17%); misdirection by trial judge (4.89%); *Cadder* (*v. H.M. Advcoate*) violations (3.62%); wrong sentence imposed (3.35%); credibility or reliability of witness (3.01%); wrongful conviction (2.34%); police misconduct/wrong procedure (2.41%); perjury (1.74%); and all other reasons (18.75%). *Id.*

[89] *Id.* at 13 tbl. 5; SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 20, at 60 ("Although fresh evidence is a ground of referral (not necessarily the sole ground) in half of all cases referred to the appeal court by the Commission, referred cases encompass a broad range of grounds of appeal.").

[90] SCOTTISH CASES REVIEW COMM'N; *supra* note 39, at 13 tbl. 5.

[91] *Id.* at 15.

[92] *Id.*

[93] *See Id.*

[94] *Id.* The referral rate for convictions during 2011–12 was only 3.8%. *Id.* In 2010, the overall referral rate was a mere 2.8%. *Id.* at 3.

[95] *See generally id.*

represents an overall success rate of 64%. Eleven appeals were abandoned following referral.[96] Omitting these abandoned cases, of the cases decided the success rate is 76%. The average time from referral to judgment was 21.7 months.[97]

III. THE CASES

Examination of the referred cases shows, first, that the SCCRC will not take a case if there is nothing new, that is, new evidence that was not presented in the process before or a legal issue that has not been raised before. These are the two broadest categories by which to analyze the referred cases and how the SCCRC carries out its statutory mandate.[98]

A. "Fresh Evidence" Referrals

To date, 36% of the referred cases (twenty-three cases) involved a review of evidence that had not been presented at the original proceedings.[99] Sixteen of those cases resulted in written decisions. Of those sixteen cases, six were successful and ten were not.[100]

While there has been much discussion about the various prerequisites for the admission of fresh evidence on appeal,[101] almost none of the fresh evidence cases actually focuses on the admissibility question. In fact, in many cases, the Crown conceded the admissibility of the fresh evidence.[102] Instead, the court almost always

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[96] *Id.* at 15.

[97] *Id.* From 2011 to 2012, the average time from referral to judgment increased 0.4 months. *Id.*

[98] The Commission is authorized to refer a case to the High Court if it determined: "(a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made." Criminal Procedure (Scotland) Act, 1995, c. 46, § 194C(1) (amended by § 25 of Crime and Punishment (Scotland) Act, 1997, c.48, § 25(1)).

[99] SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 13 tbl. 5.

[100] *Id.*

[101] *See, e.g.*, Neeson v. H.M. Advocate, [2006] HCJAC 68 [6] (Scot.); *In re* Kelly, (2004) App. No. XC458/03, ¶ 20 (Scot.).

[102] *See e.g.*, Gair v. H.M. Advocate, [2006] HCJAC 52 [13] (Scot.) ("In the appeal the Crown conceded that P's statements should have been disclosed but submitted that the failure to disclose them had not led to a miscarriage of justice . . . ."); Allison v. H.M. Advocate, [2006] HCJAC 30 [103] (Scot.) ("The Crown concedes that there is a reasonable explanation why it was not given at the trial. The question is whether it is of such significance that we may reasonably conclude that a verdict returned in ignorance of its existence 'must' be regarded as a miscarriage of justice." (citations omitted) (citing Criminal Procedure (Scotland) Act, c. 48, §§ 106(3)(a)(3A), Cameron v. H.M. Advocate, (1987) S.C.C.R. 608(Scot.))); Kidd v. H.M. Advocate, [2005] HCJAC 13 [19] (Scot.) ("While the Crown had conceded that the statements which Pamela Carlyle had made to the police should have been disclosed to the defence, the court would still have to be satisfied that the failure to disclose the statements had resulted in a miscarriage of justice."); *see also* McCormack v. H.M. Advocate, [2005]

focuses on the last step in a referral based on fresh evidence—whether such evidence is of such significance that a "verdict . . . , reached in ignorance of its existence, must be regarded as a miscarriage of justice."[103]

Several standards exist for the court in evaluating the significance of fresh evidence. First, the court will quash a conviction based on fresh evidence if it is "satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit."[104] This is obviously an extremely high standard and has rarely been met.[105]

But, where that standard is not met, the court may nevertheless quash a conviction where it finds that the fresh evidence is credible and also "of such significance that it [would be] reasonable to conclude that the verdict of the jury, which was reached in ignorance of its existence, must be regarded as a miscarriage of justice."[106] That is, the court must be satisfied that the fresh evidence "is important . . . and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial."[107] To reach this conclusion the evidence must be (a) "capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."[108]

Analysis and comparison of the successful and unsuccessful appeals clearly reveals two things about the fresh evidence cases: the SCCRC has erred on the side of referral where the significance of the fresh evidence presents a close question, and, in those referrals, the court has been quite conservative about quashing a conviction based on fresh evidence.

HCJAC 38 [9] (Scot.) ("The Crown concedes . . . that the preconditions of section 106 are made out. But it contends that the appellant's recovered recollections are neither credible nor reliable, and that in any event his new evidence, if accepted, could not justify a conviction of culpable homicide on the basis of provocation.").

[103] *See* Casey v. H.M. Advocate, [2011] HCJAC 19 [46] (Scot.) (considering whether fresh evidence, in the form of DNA evidence, "would have been of such significance that it would be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.").

[104] Uttley v. H.M. Advocate, [2009] HCJAC 95 [26] (Scot.) (quoting Al-Megrahi v. H.M. Advocate, (2002) J.C. 99 [219] (Scot.)).

[105] *See* Johnston v. H.M. Advocate, [2006] HCJAC 30 (Scot.); *Kidd,* HCJAC 13; *Al-Megrahi*, J.C. 99; Higgins v. H.M. Advocate, (1956) J.C. 69, 83 (Scot.) (holding that additional evidence must have been sufficient to produce a different verdict had it been given at the trial); *cf.* Gallacher v. H.M. Advocate, (1951) J.C. 38, 48 (Scot.) (holding that additional evidence was not material because it would not have produced a different verdict).

[106] *See In re* Kelly, App. No. XC458/03, ¶ 20 (stating that new evidence must not only be relevant, but "of such a kind and quality that it was likely that a reasonable jury properly directed would have found it to be of material assistance in its consideration of a critical issue at the trial").

[107] *Id.*

[108] *Id.* (citing *Al-Megrahi*, J.C. 99, ¶ 219).

As noted above, only sixteen decisions on referred cases have involved fresh evidence. Nevertheless, it is possible to break these down into two main categories: those involving fresh evidence 1) bearing on the credibility of the trial witnesses; and 2) based on new scientific procedures.[109]

B. Fresh Evidence Bearing on Credibility

The more complex set of fresh evidence cases involves fresh evidence that is offered to impeach the trial proof. These cases are more complex for several reasons. First, they present serious questions about why the evidence was not produced at trial.[110] Second, their credibility and reliability is often seriously in issue, particularly when the same witness has testified differently at different times.[111] Third, the court is substantially less likely to second-guess a jury verdict that was properly based on the testimony before it.[112] New scientific evidence that was concededly not available at the time of trial due to the state of science at the time is clearly an easier basis on which to second-guess a jury.

Nevertheless, in an extreme case, the court has been willing to quash when new evidence demonstrates that an essential or central trial witness can no longer be considered credible. A good example is *Gair v. H.M. Advocate*.[113] Gair was accused of murder based largely on the identification evidence of one Morrison.[114] While there were other eyewitnesses who identified him, Morrison's testimony was the strongest.[115] The Commission produced fresh evidence of Morrison's prior contradictory statements that revealed he was subject to "fantasy" and was prepared to tell lies and change his story when it suited him.[116] It also produced evidence that he had

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[109] *See, e.g.*, Coubrough v. H.M. Advocate, [2010] HCJAC 32 [2] (Scot.) (addressing fresh evidence founded upon memory expert opinion); Gordon v. H.M. Advocate, [2010] HCJAC 44 [46] (Scot.) (addressing fresh witness evidence); *In re* Steele, (2004) App. No. XC956/03, ¶ 51 (Scot.) (addressing fresh evidence founded upon psychological studies).

[110] *See, e.g.*, Gair v. H.M. Advocate, [2006] HCJAC 52 [9] (Scot.) ("[E]vidence would be relied on to support the explanation why these witnesses did not give the evidence at trial that they now wish to give.").

[111] *See, e.g.*, *id.* ¶ 11 ("[P]revious statements to the police given by witnesses . . . were at variance with the evidence that they gave at the trial relating to their identification of the appellant.").

[112] *See, e.g.*, *id.* ¶ 13.

[113] [2006] HCJAC 52 (Scot.).

[114] *Id.* ¶ 39.

[115] *Id.*

[116] *See id.* ¶ 17. It was revealed by the Commission's investigation that Morrison had given four divergent statements to police when interviewed. *Id.* In his third statement, Morrison admitted his prior statements to police were false, and his identification of the defendant was unsound and motivated by his personal interests. *Id.* ¶ 19 ("I have come up here to sort out the matter and I have to tell you that a lot of what I have already told the police is not the truth . . . . I said it was [the defendant] because of all the trouble he has caused me and I knew he always did the poofs up at the toilets.").

been in a psychiatric hospital.[117] This new evidence presented powerful, reliable impeachment of a key witness. In quashing the conviction, the court explained:

> Of course, even if the jury had had a fuller picture of Morrison as revealed by this information, they might still have convicted the appellant. One cannot tell what the effect of the additional information would have been. Morrison was not an essential witness for the Crown. But he was a very important one and the fact that his evidence and, particularly his identification evidence, interrelated with the evidence of the other eye-witnesses was a point which the Advocate depute [the prosecutor] at trial quite naturally founded upon in his closing speech to the jury. Without Morrison's evidence that point could not have been made, or at least could not have been made so cogently. In our view, therefore, the Advocate depute before us was not correct in saying that the best that the defense could hope for if they had had the non-disclosed information about Morrison was the destruction of him as a witness. It is not possible to say that without his evidence the jury would nevertheless have convicted. . . . So the possibility that the jury might have reached a different verdict if the police statements and other information about Morrison had been disclosed is in our view real and certainly cannot be excluded.[118]

Short of this kind of powerful impeachment, and despite the SCCRC's belief that such fresh evidence is credible, the court has not been willing to quash based on fresh credibility evidence unless the case also presents 1) some sort of government misconduct; or 2) an accompanying new legal issue.[119] *McPhee v. H.M. Advocate*[120] and *Neeson v. H.M. Advocate*[121] demonstrate this reluctance. Both cases involved fresh evidence impeaching the credibility of the Crown's main trial witness who, in both cases, claimed the defendant had confessed to him.[122] Both cases involved convictions for murder.[123] In *McPhee*, the applicant was successful and his conviction was quashed.[124] In *Neeson*, the applicant was unsuccessful.[125]

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[117] *Id.* ¶¶ 21, 29, 38, 40.

[118] *Id.* ¶ 39.

[119] *See, e.g.*, McPhee v. H.M. Advocate, [2005] HCJAC 137 [39] (Scot.) (government misconduct); Neeson v. H.M. Advocate, [2006] HCJAC 68 [23]–[24] (Scot.) (new legal issue).

[120] [2005] HCJAC 137 (Scot.).

[121] [2006] HCJAC 68 [6] (Scot.).

[122] *McPhee*, HCJAC 137 [24]; *Neeson*, HCJAC 68 [16].

[123] *McPhee*, HCJAC 137 [1]; *Neeson*, HCJAC 68 [1].

[124] *McPhee*, HCJAC 137 [5], [40].

[125] *Neeson*, HCJAC 68 [24].

In *McPhee*, the defendant had interposed a defense of alibi.[126] However, after the trial testimony of one Hawkins—who testified he went into the victim's home with the defendant but that defendant was the killer—the defendant changed his defense and accused Hawkins of committing the crime.[127] After that, McPhee's cellmate, Trevor Proudfoot testified that when he shared a cell with the defendant, the defendant confessed to him.[128] A police officer also testified that footprints inside and outside the house matched the defendant's shoes and, in addition, that the lab test confirmed this match.[129]

In its referral, the Commission expressed serious concerns about the credibility and reliability of all three pieces of the Crown case.[130] As to Hawkins, it noted that he had substantially changed his position in five statements to the police.[131] The Commission also produced fresh evidence that Proudfoot had been on drugs when he had been arrested and had made a deal concerning pending drug trafficking charges.[132] Indeed, the Commission expressed the view "that it is arguable that Northern Constabulary offered Mr Proudfoot inducements to give evidence and that he was given information about the murder . . . by them."[133] The Commission also produced forensic evidence of the unreliability of the footprint evidence of which the police, although not the Crown, had been aware.[134] This last concern led to the Crown's concession of the appeal.[135]

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[126] *McPhee*, HCJAC 137 [4].

[127] *Id.*

[128] *Id.* ¶ 7.

[129] *Id.* ¶¶ 8–12. The officer in charge of the enquiry, the late Detective Superintendent (D. Supt.) Andrew Lister, offered opinion testimony alluding to the fact that the footprints excluded Hawkins and pointed to McPhee as the maker of the footprint. *Id.* ¶ 18.

[130] *Id.* ¶ 24.

[131] *Id.*

[132] *Id.* ¶ 24.

[133] *Id.*

[134] *Id.* ¶ 32–33. The Crown indicated that the prosecutor was not aware of the contents of the letter and, if he had been, he would not have allowed the police to give the evidence he gave. *Id.* A report indicating that "nothing to be gleaned from the cast in terms of size etc" was countersigned by the police witness less than three weeks before he testified. *Id.* ¶ 30. There is no evidence that the Crown had this letter in its possession. *Id.* The court held:

> D Supt Lister's evidence that the laboratory confirmed his view that the footprints inside and outside the house were made by the same person was simply untrue. His evidence as to the size of the footprint was untrue . . . . He certainly knew of the laboratory report . . . .
>
> The advocate depute submitted to us that . . . D Supt Lister was not acting in bad faith. We find that difficult to accept.

Id. ¶¶ 38–39.

[135] *Id.* ¶ 24. On this conceded point, the Commission found that evidence relating to "the footprints . . . presented to the jury by the Crown in the absence of the available evidence from the forensic scientists as to its unreliability resulted in unfairness to the applicant." *Id.*

The court quashed for several reasons: it was clearly distressed by the police misconduct in the case, found Hawkins unreliable, and stated that the inducements to Proudfoot were vital to the jury's determination.[136]

Neeson was a different kind of credibility case and was not successful. In *Neeson*, the defendant's conviction rested on the testimony of Gerald Sharpe, who identified him as one of three people to emerge from a car near the murder scene, return to the car, and drive off at high speed.[137] The second, and more significant, witness was John Elliot, the brother of the co-accused, who testified that four days after the murder the appellant confessed to him.[138] The Crown case rested on the credibility and reliability of Elliot's testimony. At trial, the defense suggested Elliot gave false testimony in return for immunity on certain charges, including drug and firearms charges.[139]

The fresh evidence uncovered by the SCCRC consisted of affidavits[140] from three people that purported to establish that Elliot was lying to frame the defendant.[141] William Gronan asserted that he was also present when Elliot admitted setting Neeson up and expressed his regret that he had done so.[142]

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[136] *Id.* Interestingly, one of the police officers involved in that case has been sentenced to five years in prison for attempting to subvert police procedures. Another case, *Allison v. H.M. Advocate*, [2006] HCJAC 30 (Scot.), demonstrates the court's reliance on police misconduct in what is really a fresh evidence case. There, while the defendant admitted he had assaulted the deceased on a given day, his defense was that he had not killed him, and there were several trial witnesses who testified to having seen the deceased alive after the date on which the Crown claimed he had been killed. *Id.* ¶¶ 14–20. The Commission produced fresh evidence from additional, credible witnesses, who had seen him alive after the alleged date of death, and who had even talked to him in some instances—evidence more compelling than the evidence at trial. *Id.* ¶¶ 32, 108–10. The court quashed the conviction, agreeing with the Commission that it appeared the police had improperly filtered out any evidence that was inconsistent with their theory that the defendant had committed the crime. *Id.* ¶¶ 120–28.

[137] *See* Neeson v. H.M. Advocate, [2006] HCJAC 68 [2] (Scot.).

[138] *Id.*

[139] *Id.*

[140] *Id.* ¶ 6. By the time the case was heard, two of the witnesses had died. *Id.* ¶ 6, 7. The Court reasoned that the acceptance of this evidence in the form of affidavits was appropriate given that two of the declarants were now deceased and given the possibility that such declarations may assist the defendant in his petitioning and may be used "for what [they are] worth." *Id.*

[141] *Id.* ¶ 6. One witness, Alexander Hardie, stated that Elliot had told him he framed the defendant. *Id.* ¶ 8 ("I observed that John Elliott was in what appeared to be a state of nerves and anxiety. He was rubbing his hands. . . . He eventually said that he had done 'a bad thing.' I simply asked him what is it . . . and his reply was that he had to 'frame wee Ronnie.'" (quoting Affidavit of Alexander Hardie, ¶ 2 (Feb. 17, 1993)). An affidavit from James Charles Coyle who was with Elliot on the day he confessed to Hardie asserted that Elliot said he was going to retract the statements he had made about the defendant and was going to the solicitor to do so. *Id.* ¶ 9.

[142] *Id.* ¶ 12. In his declaration, Gronan stated that Elliot said "he had done a wrong thing and had put the appellant and his own brother . . . in for a murder." *Id.* ¶ 12. He was waiting

The Court was not persuaded that this evidence was credible or reliable or capable of impacting the jury's verdict.[143] As to Gronan, the court pointed to 1) the 13 year delay in coming forward; 2) the fact that Gronan did not say that Elliot admitted that the information he gave about appellant and his brother was untrue; and 3) the fact that Gronan had not clearly stated that Elliott regretted anything more than blaming the two men.[144] As to the other witnesses to Elliot's statement, who were dead by the time of the hearing, the Court noted there was no reason offered for the extensive delay in coming forward and, again, the testimony about Elliot did not indicate specifically that his testimony against the appellant was false.[145]

Even if credible, however, the court was clearly of the view that the fresh evidence was not significant enough to require quashing, in essence, that it was cumulative. It seems that new credibility evidence must be extremely powerful to avoid being dismissed as cumulative. Elliot had been cross examined extensively as to his credibility,[146] and denied that he had fabricated evidence in return for immunity.[147] The fresh evidence was not significant enough to change the verdict.[148]

As it did on the same subject in *Neeson*, the court has repeatedly relied on the cumulativeness of fresh credibility evidence in refusing to quash a conviction, which is generally the approach of U.S. courts addressing newly discovered evidence claims that attack the credibility of trial witnesses.[149] It also has upheld convictions

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for the appellant's brother to take him to the solicitor's office. *Id.* He had stuck Ronnie and his brother to get himself out of a firearms charge. *Id.* He had heard a lot of talk about the trial and had heard threats, so he had gone to London and the next time he was back he heard that the appellant and Elliot were serving life sentences. *Id.* ¶ 13. Later, he was threatened and then attacked and told to "stay out of it." *Id.* ¶ 11 (quoting Affidavit of William Gronan, (Feb. 20, 2002)).

[143] *Id.* ¶16.

[144] *Id.* ¶¶ 17, 20.

[145] *Id.* ¶ 23.

[146] *Id.* ¶ 22.

[147] *Id.*

[148] *See also* Thomson v. H.M. Advocate, [2009] HCJAC 11 (Scot.) (noting that although evidence of the circumstances surrounding prior statements of complainer, indicating a threat to make up a false accusation, was not available, and even assuming the evidence's reliability, it would still not be material); Bishop v. Procurator Fiscal, [2005] HCJAC 40 [15] (Scot.) (expressing that the victim's prior instances of making false allegations of rape against a third party were not material—as they "can have little bearing on her credibility and reliability when speaking to witnessing an entirely different episode of sexual abuse on another person a decade later"); McCormack v. H.M. Advocate [2005] HCJAC 38 [7, 19] (Scot.) (rejecting both (1) the allegations that the cause of the quarrel leading to the murder was the deceased informing the defendant that he might not be the father of her child and (2) that she had bitten him, and holding that the defendant's purported recollection that the bandage wound around the deceased's neck by chance when engaged in a scuffle not credible or reliable in light of the pathologist's testimony that the bandage was most likely intentionally wound twice around the deceased's neck with the ends crossed over in a tie).

[149] *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1282 (2001).

based on its conclusion that the defense would not have presented the fresh evidence as a matter of strategy at trial, had that evidence been available. Thus, for example, in *O'Donnell v. H.M. Advocate*,[150] the evidence against the defendant came from the testimony of a longtime friend, but the Crown did not disclose his prior police statements and evidence from a third party contradicting his trial testimony.[151] The court held that the substance of these statements was known to the defense, but, in any event, their use on cross-examination would have presented a danger to the defense (because the witness and defendant had been close associates). Thus, to prove that the witness was a liar would have harmed the defendant.[152] In any event, he had been extensively questioned, and nothing would have been gained by further cross-examination.[153] This second-guessing of defense strategy seems a bit of a reach as a basis to avoid quashing a conviction.

C. Scientific Evidence

The SCCRC referred several cases on the basis of new scientific evidence. Two of those cases involved the results of a sophisticated method of DNA testing that had not been available at the time of trial and had become available as a result of scientific developments.[154] Three cases involved fresh psychological evidence from Dr. Gisli Gudjonsson,[155] whose scale of suggestibility and compliance is used to evaluate

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[150] O'Donnell v. H.M. Advocate, [2011] HJAC 84 (Scot.).

[151] *Id.* ¶¶ 15, 25. The Crown failed to disclose to the defense that the witness's girlfriend had made statements to the police that were contrary to the claims made against the defendant, including that the witness had told his girlfriend that he had assisted in covering up the murder at issue. *Id.* ¶ 25.

[152] *Id.* ¶ 73 (noting that "the statements which were disclosed following upon the trial would not have enabled the extensive cross-examination . . . to go beyond the scope that it originally possessed[, and] those statements would not have added anything material to the defence case").

[153] *Id.* ¶ 80. *Cf.* Affleck v. H.M. Advocate, [2010] HCJAC 61 [20], [28], [31], [40] (Scot.) (explaining that a showing of the defendant's actual knowledge of the undisclosed material would undercut any claim of miscarriage of justice); Gordon v. H.M. Advocate, [2010] HCJAC 44 [82], [85] (Scot.) (stating that the defense's knowledge of suppressed evidence is not determinative, but that what is done with such knowledge may be decisive); McCormack v. H.M. Advocate, [2005] HCJAC 38 [20] (noting that changing the guise of old evidence is not the same as proffering new evidence).

[154] *See, e.g.*, *In re* Kelly, (2004) App. No. XC458/03 (Scot.); *see also* Ian Johnston, *DNA Flaws Set to Clear Officer Jailed for Rape*, THE SCOTSMAN, Nov. 23, 2003, at 5 [hereinafter Johnston, *DNA Flaws*]; Ian Johnston, *Judges Clear Policeman Convicted of Rape on DNA Evidence*, THE SCOTSMAN, Aug. 7, 2004, at 5 [hereinafter Johnston, *Judges Clear Policeman*].

[155] *See generally Gisli Gudjonsson Awarded CBE*, KING'S COLLEGE LONDON, http://www.kcl.ac.uk/iop/news/records/2011/june2011/Gisli-Gudjonsson-awarded-CBE.aspx (last visited Apr. 16, 2013); Bob Woffinden, *Confessions of a Forensic Psychologist*, THE GUARDIAN, Dec. 17, 2002, at 16.

the reliability of a confession.[156] Dr. Gudjonsson's scientific analysis had not been developed until about 15 years ago and thus was not available at the time of the relevant trials.[157] Generally, in the cases involving his testimony, the basis of the reference was that Dr. Gudjonsson's fresh evidence established that the applicants were so vulnerable and compliant when questioned by the police that the statements they made were unreliable.[158] Since the statements in all of these cases were the basis of the Crown's evidence, the resulting convictions would be a miscarriage of justice.

As noted above, as it generally does with fresh credibility evidence, the prosecution conceded in all of these cases that there was a reasonable explanation for why the evidence had not been presented before and did not contest its receipt on appeal.[159] Ultimately, as with the other fresh evidence cases, each case turned on the significance of the fresh scientific evidence, i.e., whether the jury would have been "bound to acquit" having heard the evidence, or, if not, whether their "verdict reached in ignorance of its existence must be regarded as a miscarriage of justice."[160]

Here are a few examples. In *Gilmour v. H.M. Advocate*,[161] the court held that new psychological evidence was credible and sufficiently important to require that the conviction be quashed.[162] Significantly, however, the corroborating evidence of the statements' unreliability was strong, even without the fresh scientific evidence.[163] The defendant had twice confessed, but, as is the hallmark of unreliable confessions, both confessions had immediately been retracted.[164] Moreover, there were inconsistencies between the appellant's confessions and the facts, other possible sources of the defendant's alleged special knowledge of certain facts, and testimony from police that they had not believed his first confession and that he had been in distress

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[156] *See* Woffinden, *supra* note 155.

[157] *See id.*

[158] *See, e.g.*, Wilson v. H.M. Advocate, [2009] HCJAC 58 [38] (Scot.); *see also* Woffinden, *supra* note 155.

[159] *See supra* notes 101–02 and accompanying text.

[160] *Wilson*, HCJAC 58 [73, 74] (quoting Kidd v. H.M. Advocate, (2000) J.C. 509). To this end, the court was quick to make clear that the issue was not one of guilt or innocence. Gilmour v. H.M. Advocate, [2007] HCJAC [82] (Scot.) ("The critical question is as to the effect that the new evidence might have had on the minds of the jury." (citing Johnston v. H.M. Advocate (2006), S.C.C.R. 236)).

[161] *Gilmour*, HCJAC 48.

[162] *Id.* ¶¶ 119–21 (noting that the evidence now adduced before the court shows that in the aggregate the results of a newly founded psychological evaluation of the defendant, the factual errors in his statements and the lack of forensic evidence against him, cast doubt on the reliability of the confessions that were essential to the conviction and would have been of great consideration to the jury had it been presented).

[163] *Id.* ¶ 87 (noting that the expert's review of the results on the Eysenck Personality Questionnaire (EPQ) and the Minnesota Multiphasic Personality Inventory (MMPI) tests used at defendant's trial, and prior to new scientific advancements, although of limited value in themselves, indicated the defendant's vulnerability).

[164] *Id.* ¶¶ 43, 67, 104, 115.

when he confessed.[165] There was no forensic evidence linking the defendant to the crime and no eyewitnesses.[166] Accordingly, given the substantial evidence of unreliability and the importance of the confession, the court quashed the conviction.[167] Presumably, under the statutory standard for fresh evidence, this scientific evidence was not considered cumulative evidence of unreliability because it was powerful, based on scientific expertise, and did not come from a witness who had already testified at trial.

The court reached the opposite result in *Beattie v. H.M. Advocate*,[168] and *Wilson v. H.M. Advocate*,[169] in which it held that Dr. Gudjonsson's fresh evidence was not important enough to warrant quashing the conviction.[170] In *Beattie*, the Commission had referred the case because it believed the confession was unreliable based on Dr. Gudjonsson's results.[171] However, no record of the actual police interrogation existed, so it was impossible to know whether there had actually been any threatening, coercive, or leading conduct by the police.[172] At the same time, there was evidence that the defendant had special knowledge of the location of the murder, the murder weapon, and the deceased's body and belongings, and a finding of blood matching

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[165] *Id.* ¶ 101 ("The first and most serious problem that the confessions raise is that the appellant described numerous details that were inconsistent with the facts."). For example, the defendant stated that "he hit the deceased three or four times on the head with a piece of wood," when the "police officers present at the post mortem could recall no sign that the deceased had been struck in that way." *Id.* Similarly, he claimed that "he had strangled the deceased with 'her tie or the strap of her bag' (first confession) or 'her tie or belt from her bag' (second confession), whereas she was strangled with a piece of rough twine." *Id.*

[166] *Id.* ¶ 16 ("Both D Supt Brown and DCI McMath concluded that he had lied when he confessed to the murder. D Supt Brown decided to release him.").

[167] *Id.* ¶¶ 121, 123.

[168] Beattie v. H.M. Advocate, [2009] HCJAC 22 (Scot.).

[169] Wilson v. H.M. Advocate, [2009] HCJAC 58 (Scot.).

[170] *Beattie*, HCJAC 22 [87] ("While, accordingly, the test results. . . were evidence which was not heard at the trial . . . they are not, in our view, significant."); *Wilson*, HCJAC 58 [81] ("We consider that the jury would have found Professor Gudjonsson's evidence relevant; it was on the basis of the appellant's vulnerability that the defence was presented to the jury. But we do not think that it would be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.").

[171] *Beattie*, [2009] HCJAC 22 [74] ("The Commission has considered current judicial attitudes towards such psychological evidence in both Scotland and England. It appears to the Commission that, in light of developments and advances made in the area of forensic psychology since the date of Mr Beattie's trial, there should be a reconsideration of the evidence led, with particular reference to the statements made by him. Investigations carried out by the Commission, particularly into the reports from Professor Cooke and Professor Gudjonsson, suggest that, in terms of the scientific methodology which can now be applied in cases of this type, Mr Beattie's statements may be regarded as unreliable.").

[172] *Id.* ¶ 83 ("There was no suggestion at the trial that the appellant had been physically coerced into giving any part of the narratives which he gave. Although the appellant gave accounts to each of Professors Cooke and Gudjonsson that he had been bullied by the police, there is no evidence before us on which we could make a finding to that effect.").

the deceased's blood on tissues in the jacket that the defendant had worn on the night of the murder.[173] Thus, absent the expert opinion, there was no reason to reject the defendant's confession as unreliable.

In *Wilson*, two defendants had confessed and, fifteen years later were tested by Professor Gudjonsson.[174] But while the court accepted his opinion that the two were vulnerable when questioned, his findings were deemed not especially compelling. The test came many years after the confessions, and did not present a strong measure of vulnerability.[175] Even assuming that it did, again, other circumstances demonstrated that the confessions were reliable: they were not retracted and there was no explanation for the defendants' special knowledge of the crime.[176] In short, even conceding the credibility and reliability of the fresh scientific evidence, the court evaluated the entire case to determine whether the confessions were reliable and to decide whether it was a miscarriage of justice to rely on them.

These cases lead to several conclusions. First, the SCCRC is not afraid to refer a case based on real fresh evidence, even where the court ultimately concludes that the verdict should stand. Reading between the lines, there seems little doubt that the SCCRC thought there was a question of Beattie's guilt, but the real issue was whether presenting his confessions was unfair. Ultimately, the court concluded that they were reliable.[177]

A similar analysis applies to the DNA cases. In these cases, it was not contested that the evidence was scientifically unavailable at the time of the trials, so that the admissibility of the new scientific evidence was not contested.[178] Again, however, the court focused on the significance of the DNA evidence in the entire case.[179]

In re Kelly[180] is an interesting case in that regard. In that case, the SCCRC produced expert evidence about the possibility of cross-contamination of a DNA sample that was central to the case.[181] While the court held that the risk of cross-contamination was low, the fact that there would have been insufficient evidence to convict had the jury rejected the DNA evidence required that the conviction be quashed.[182]

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[173] *Id.* ¶ 48 (rejecting the contentions of the defense that the defendant could have come into possession of the relevant information through his contacts with police and media without having been at the scene at the time of the murder, either as the murderer or as an onlooker).

[174] *Wilson*, HCJAC 58 [37], [43], [76].

[175] *Id.* ¶ 54.

[176] *Id.* ¶ 80.

[177] *Beattie*, HCJAC 22, ¶ 87.

[178] *In re* Kelly, (2004) App. No. XC458/03, ¶ 23 (Scot.) (stating that the availability of new scientific evidence relating to DNA comparative techniques, which was at the heart of whether there was a reasonable explanation why that evidence was not heard at the trial, was not contested).

[179] *Id.* ¶ 22.

[180] (2004) App. No. XC458/03 (Scot.).

[181] *See id.*; *see also* Johnston, *DNA Flaws*, *supra* note 154; Johnston, *Judges Clear Policeman*, *supra* note 154.

[182] *In re Kelly*, App. No. XC458/03, ¶¶ 22, 24.

In *Casey v. H.M. Advocate*,[183] the court reached the opposite conclusion. There, the referral was based on new analysis of DNA evidence on a glove worn by one of the defendants during the crime. Whoever wore the glove would have been the lookout and not the murderer, so the identity of the glove wearer was central to the case.[184] While the new DNA evidence identified the defendant's DNA on the glove, there was no evidence about when the DNA on the glove was deposited, or how.[185] Thus, the court held that the fresh evidence would not have changed the verdict.[186]

D. New Legal Issues

1. Discovery

The failure of the prosecution to disclose exculpatory evidence is the legal issue on which the largest percentage of the SCCRC's referrals rested.[187] This statistic, and the kinds of discovery cases the SCCRC has referred, demonstrates that the Commission takes discovery violations quite seriously.

Under Scottish law, the Crown has an obligation to disclose all police statements of witnesses who are to be led at trial.[188] The underlying theory is "equality of arms

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[183] [2011] HCJAC 19.

[184] *Id.* ¶ 37. According to defense counsel:

> [t]he fresh evidence about DNA was consistent with the appellant's having worn the white gloves. That DNA evidence would have assisted the appellant's defence counsel at the trial: both accused had a motive to lie about who was wearing the white gloves, and the appellant's counsel was actively seeking forensic evidence which would support the appellant's evidence. Accordingly the fresh DNA evidence was indeed significant, and was powerful material with which to attack McNairn's account of events and to provide support for the appellant's account.

Id.

[185] *Id.* ¶ 48 (stating that "the fresh DNA evidence does not categorically establish that the appellant was wearing the white gloves at the time of the attack—far from it").

[186] *Id.* ¶ 49 ("In the result we consider that the DNA evidence, with its limitations, is not of such significance that it is reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.").

[187] *See supra* notes 88–89 and accompanying text. What makes this an interesting issue is that the SCCRC has the authority to get documents from anyone or any public body, so that it has access to much that the Crown may never have seen, including police records, social services records, and the like. Accordingly, the SCCRC may well uncover police records that should have been disclosed to the defense but were not, but of which the Crown was unaware. This is in contrast to what occurs in the United States, where a document that is not disclosed by the police to the prosecution is for all intents and purposes, lost.

[188] *See* McInnes v. H.M. Advocate, [2008] HCJAC 53 [21] (Scot.) (holding that "[t]here is no duty on the defence to ask for witness statements; it is the duty of the Crown to disclose them"); Gordon v. H.M. Advocate, [2010] HCJAC 44 [63] (Scot.) ("The Crown had a duty, both at common law and in terms of Article 6 of the European Convention on Human Rights and

between the two sides."[189] When such disclosure is not made, the court must determine whether this resulted in an unfair trial.[190] The duty is breached if access to the statement "would have been of material assistance to the defense."[191] It will also be breached "if, having regard to the realities of the trial and viewing the matter realistically, the denial of access might have prejudiced the defence."[192] This assessment must be made on a case-by-case basis.[193]

As with the fresh evidence appeals, in most of the discovery cases, the question of whether material evidence should have been disclosed was either conceded by the Crown or not contested. Again, the real issue for the SCCRC and the court was whether the information that was not disclosed was significant enough to the verdict to change the result (what we in the United States would call "materiality"). Examination of the decisions reveals that the SCCRC takes a broad view of this question and is willing to refer cases in which the degree of materiality is debatable. In turn, the court dismissed several of these appeals. As with the fresh credibility evidence cases discussed above, those dismissals were based on a detailed analysis of what took place at trial and a conclusion that the non-disclosed materials would have been cumulative,[194] would not have been of help to the defense or jury,[195] or, in fact, for strategic reasons, would not have occurred since the materials would not have been used by defense counsel in any event.[196] On the basis of this very specific

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Fundamental Freedoms, to disclose, in advance of trial, information in their possession which was capable of either weakening the prosecution case or strengthening the defence case[.]").

[189] *McInnes*, HCJAC 53 [18] (quoting Sinclair v. H.M. Advocate, (2005) S.C. 28).

[190] *Id.* ¶ 17 ("[F]ailure by the Crown to disclose a prior statement of a witness does not of itself give rise to an infringement of an accused's right to a fair trial. It is the significance of that non-disclosure in the context of the actual trial which is of importance to whether the right is infringed.").

[191] *Id.* ¶ 20.

[192] *Id.*

[193] *Id.* ("Whether there has been or may have been such prejudice will be a matter for assessment by the appeal court in the circumstances of each case. Such an assessment will not always be a straightforward or easy task.").

[194] *E.g.*, Neeson v. H.M. Advocate, [2006] HCJAC 68 (Scot.); *supra* notes 137–47 and accompanying text; *see also* O'Donnell v. H.M. Advocate, [2011] HCJAC 84 [73] (Scot.) ("In our view, the statements which were disclosed following upon the trial would not have enabled the extensive cross-examination . . . to go beyond the scope that it originally possessed. Putting the matter in another way, those statements would not have added anything material to the defence case."); *cf.* Al-Megrahi v. H.M. Advocate, [2002] HCJAC 99 ¶ 219 (Scot.) ("In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.").

[195] McInnes v. H.M. Advocate, [2008] HCJAC 53 [15] (Scot.) ("The proper question was not whether disclosure of that material would have made a difference to the outcome of the trial, but whether it could have made a difference.").

[196] *See supra* note 108; *see also O'Donnell*, HCJAC 84 [84] ("First, it may be that the appellant's then advisers did not appreciate the potential significance of the material concerned.

second-guessing of the impact of non-disclosure on the proceedings, the court refused to quash in several cases.[197]

Another observation about the discovery cases is that many of them arise out of old convictions that occurred in the 1980s, or before, when discovery obligations were not as broad as they are today.[198] For example, in *Gordon*,[199] the court noted that the practice at the time—2001—had been not to turn over prior statements of witnesses, as is currently required, but rather to give "lines of evidence," i.e., written synopses of the statements that excluded personal details.[200] In those circumstances, non-disclosure probably was more routine. Still, if the non-disclosure was material, the conviction would be quashed.[201]

2. Successful Appeals

Kidd v. H.M. Advocate[202] was one of the first successful discovery cases. Tried in 1996 and convicted of culpable homicide, Kidd was convicted of stabbing the deceased to death based entirely on the eyewitness testimony of two people, Pamela and Richard Carlyle.[203] The SCCRC received copies of all of the witness statements

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Secondly, it may be that they did appreciate the potential significance of the material and that they decided not to make use of it as a matter of professional judgment, having regard to the possible dangers inherent in its use. Thirdly, it may be that they did decide to use it in some way or other, but, in the event, omitted to do so.").

[197] *See, e.g.*, *O'Donnell*, HCJAC 84 [84] (Scot.).

[198] The Crown has an obligation to disclose to the defense all the police statements of all the witnesses who will testify at the trial. *See* McInnes v. H.M. Advocate, [2008] HCJAC 53 [18] (Scot.) ("It so helps because disclosure of such statements may, depending on how the trial develops, be of value to the defence for the purposes of cross-examination or otherwise, the prosecutor being assumed to have access, or the means of access, to them for the purposes of the presentation of his case. When such disclosure is not made, it will be necessary to assess, in the circumstances of the particular trial, whether this has resulted in the trial as a whole being unfair."); Sinclair v. H.M. Advocate, [2005] UKPC D 2 [49] (Scot.) ("This helps to ensure that there is equality of arms between the two sides."); *see also* Peter Duff, *Disclosure Appeals:* McInnes v. H.M. Advocate, 14 EDINBURGH L. R. 483, 483–87 (2010) (describing the development of disclosure obligations in the Scottish High Court).

[199] *Gordon*, HCJAC 44.

[200] *Id.* ¶ 43.

[201] *Cf. Gordon*, HCJAC 44, [72] ("[A]s a generality, even if there had been no deliberate action on the part of the police to suppress evidence, a trial could be unfair because of the loss of evidence caused by mere bungling. The test was one of oppression: were the errors so great that the appellant had been deprived of the possibility of a fair trial"); Beattie v. H.M. Advocate, [2009] HCJAC 22 [71]–[72] (Scot.) ("In the present case, the Advocate depute's concession allows us to look at a 1973 conviction through twenty-first century eyes and to conclude that, however the test is formulated, and even expressing it in terms most favourable to the appellant, nothing unfair resulted from the failure of the Crown . . . information . . . [that] would have made no practical difference to the conduct of the trial or the jury's deliberations.").

[202] [2005] HCJAC 13 (Scot.).

[203] *Id.* ¶ 5 (noting that eye-witness testimony was the sole evidence of the assault).

to the police and in precognition.[204] None of these statements had been revealed to the defense, but, as the court later explained, they "revealed such a degree of contradiction and inconsistency that they should have been disclosed to those representing the appellant."[205] The Crown did not dispute that Pamela Carlyle's prior statements should have been disclosed, but argued that this non-disclosure did not result in a miscarriage of justice.[206] The Crown did dispute its obligation to disclose the prior statements of Richard Carlyle.[207]

The court held that the failure to disclose the prior statements of Pamela Carlyle resulted in a miscarriage of justice.[208] In her prior statements, she variously identified both the defendant and the co-defendant as the killer and continually changed her version of what she had seen.[209] With the case in this posture, the court did not reach the question of the disclosure of Richard Carlyle's prior statements.[210]

Gair v. H.M. Advocate,[211] was referred based on prior statements to the police by three identification witnesses that had not been disclosed.[212] In one of these statements, the witness admitted he had lied before and identified the appellant as five feet six or five feet seven inches, when the appellant was six feet or six feet one inches tall.[213] As to the second witness, he had stated to the police that he had not

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[204] *Id.* ¶ 12 ("As part of the Commission's investigations, Crown Office provided to the Commission copies of the police statements and the Crown precognitions of the principal Crown witnesses. It is common ground that these statements and precognitions were never disclosed to those representing the appellant prior to, or in the course of, the trial.").

[205] *Id.* ¶ 13.

[206] *Id.* ¶ 19 (recognizing that "[w]hile the Crown had conceded that the statements which Pamela Carlyle had made to the police should have been disclosed to the defence, the court would still have to be satisfied that the failure to disclose the statements had resulted in a miscarriage of justice").

[207] *Id.* ¶ 18 (noting that the Crown did not recognize a duty to disclose certain witness statements).

[208] *Id.* ¶ 23.

[209] *Id.* ¶ 22 (noting inconsistencies in Pamela Carlyle's statements to the police).

[210] *Id.* ¶ 24.

[211] [2006] HCJAC 52 [11].

[212] *Id.* ¶ 11 ("[T]he Crown had failed to disclose material information to the defence prior to or at the trial. This information consisted of (I) previous statements to the police given by the witnesses Alan John Gillon, Brian Morrison and P.C. Shirley Marnock, which were at variance with the evidence that they gave at the trial relating to their identification of the appellant; and (ii) information of a personal nature in relation to Brian Morrison.").

[213] *Id.* ¶ 16. Setting up his discrepant accounts, he was first quoted by police, as referenced in the now unsuppressed notes, stating

> there are a number of things which I did not tell you about in my earlier statement because I was terrified. I would now like to tell the truth, not that I have lied to you previously, I just didn't tell you everything but it has been playing on my mind especially when the guy died.

Id.

seen who committed the crime and that he had made his story up for attention.[214] Also not disclosed was a note attached to the witness's precognition that indicated the witness had been hospitalized for psychiatric reasons and that "his vivid imagination certainly set the police off on the trail of a red herring initially."[215] As to the third identification witness, she had given a description that included a wrong estimate of height and weight for both suspects, and an erroneous identification of the co-defendant, although she had identified the defendant in a lineup.[216]

The Crown conceded that all four statements should have been disclosed.[217] As to the evidence of hospitalization, the court noted "[i]t would have painted a completely different picture of Morrison from the one the jury was presented with and would have tended dramatically to undermine the credibility and reliability of his evidence and, in particular, his identification evidence."[218] "Non-disclosure of the information meant that there was no equality of arms between the Crown and the defence in relation to Morrison . . . ."[219] The court concluded "[i]t is not possible to say that without his evidence the jury would nevertheless have convicted."[220]

In *Allison v. H.M. Advocate*,[221] the police had information that the deceased had been seen alive after the date on which he was allegedly murdered, but they did not disclose this information to the prosecutor.[222] In fact, the court concluded that the police had "obstinately rejected all evidence that did not fit their theory" that the deceased had been killed on November 3 and had deliberately attempted to mislead the Crown.[223] Accordingly, the conviction was quashed.[224]

Allison is an illustration of the importance of the SCCRC's ability to get documents from any source. In that case, the SCCRC was able to inspect police documents of which the Crown had been unaware. In the United States, if the police withhold documents from the prosecution there is no effective way to find them.

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[214] *Id.* ¶ 19.

[215] *Id.* ¶ 21.

[216] *Id.* ¶¶ 23, 27 (noting discrepancies in witness statements).

[217] *Id.* ¶ 13 ("[T]he Crown conceded that P's statements should have been disclosed. . . .").

[218] *Id.* ¶ 38.

[219] *Id.*

[220] *Id.* ¶ 39.

[221] [2006] HCJAC 30 (Scot.).

[222] *Id.* ¶ 123 (explaining that the police "suppressed and altered evidence casting doubt on their theory of the date of death").

[223] *Id.* ¶ 121, 126 ("On the fuller information available to us, we conclude that the police deliberately misled the Crown in a serious way. The result was that the procurator fiscal, and in consequence the defence, were kept unaware of evidence having a material bearing on a vital issue. The police thereby induced the Crown to adopt the police theory of the date of the murder and to challenge the credibility and reliability of any defence witness who cast doubt on it. That, in our opinion, was grave misconduct.").

[224] *Id.* ¶ 128.

3. Unsuccessful Appeals

Examination of the referred discovery cases that were not successful provides an interesting window into the workings of the SCCRC. These cases support the conclusion that the SCCRC is willing to refer a case in which there is a serious prosecutorial failure to disclose, even if the significance of the undisclosed materials may be arguable.[225]

For example, in *Affleck v. H.M. Advocate*,[226] the evidence against the defendant depended on two witnesses: 1) his former girlfriend, who claimed he confessed to her; and 2) an alleged eyewitness who claimed he saw the defendant running away from the fatal fire.[227] The witness continuously equivocated about whether he had seen the defendant running from the fire, or whether he could not remember who was running, but ultimately he stated he saw the defendant running from the scene.[228] During the course of its investigation, the SCCRC discovered that there had been two outstanding cases against the witness relating to his drug dealing, and that this information had not been disclosed to defense counsel.[229] In one of these cases, the defendant would have been a witness.[230] Evidence showed that the witness's solicitor met with the Crown prior to his testimony at defendant's trial. After his testimony, a formal offer from the Crown was sent, which resulted in a guilty plea to one set of charges, and the Crown's decision not to proceed with the second.[231]

The Court held that this information should have been disclosed to the defense[232] but found no miscarriage of justice because, "there was [no] *real* possibility that the

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[225] It is interesting that these cases were referred by the SCCRC even though there were reasonable arguments that disclosure would not have changed the verdict. One could argue that the SCCRC courageously referred the cases since it does not have to meet any so-called real-possibility-of-winning-the-appeal test, as does the CCRC. On the other hand, it may be that even with a real possibility test the cases would have been referred. Either way, what these cases do show is that the SCCRC is doing its job of submitting potential miscarriages based on discovery violations. One could suggest that such non-disclosure is something that should be brought to the court's attention and that the SCCRC is right to do so.

[226] [2010] HCJAC 61 (Scot.).

[227] *Id.* ¶¶ 6–9. The Crown relied on this witness, who was under the influence of heroin at the time of the event, to identify the defendant. *Id.* ¶ 9.

[228] *Id.* ¶ 9.

[229] *Id.* ¶ 20.

[230] *Id.* ¶ 21. It appeared that the witness had engaged in drug trafficking and had sold drugs to the appellant. *Id.*

[231] *Id.* Counsel for the defendant stressed this sequence of events. *Id.* ¶ 23. Counsel asserted that it "demonstrated that Devine gave his evidence, at the trial, before any offer had been made by the Crown . . . [and] [t]here was close proximity in time between the giving of his evidence at the appellant's trial and the dropping of certain of the drugs charges." *Id.* ("At the time of the trial, the appellant was a witness to one of those charges and therefore was someone against whom Devine fell to be regarded as hostile.").

[232] *Id.* ¶ 23 ("There could be no doubt that the existence of the outstanding charges against Devine ought to have been disclosed to the appellant's representatives.").

jury would have arrived at a different verdict."[233] In essence, the evidence of a deal was deemed cumulative. According to the court, the witness had already been shown to be unreliable and incredible.[234] Moreover, the witness had implicated the defendant before that the witness had been charged with the offense involving him[235] and the newly discovered crimes did not relate to credibility. Moreover, the court concluded, if he had been fabricating to curry a more favorable sentence, he would have done a better job.[236] These clearly were inferences that could have been drawn by the jury.[237] Thus, the court refused to quash the conviction.[238]

In *McInnes v. H.M. Advocate*,[239] the Crown failed to disclose a statement by a witness who identified another person in a lineup, because, according to the court, the witness had qualified his statement that he was unsure.[240] Also, since he identified two other people as familiar, and one clearly was not, the misidentification was itself clearly wrong.[241] Thus, the non-disclosed statement was weak additional evidence on reliability. In addition, the court again made assumptions about defense strategy, concluding that pressing the witness on identification would have brought out the fact that the defendant had changed his facial appearance.[242] Thus, given that the defendant probably would not have used the evidence, its absence could not establish a miscarriage of justice.[243]

Although the court rarely comments on the SCCRC's decision to refer, there have been discovery cases in which the court has taken the SCCRC to task for its referral. In *Kinsella v. H.M. Advocate*,[244] for example, the SCCRC first refused to refer a case, then after receiving additional materials from the applicant, changed its

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[233] *Id.* ¶ 39 (stating that the suppressed information did not involve those relating to the witness's "dishonesty or attempting to pervert the course of justice, [and] would . . . not have added materially to the jury's conclusion in relation to this witness's evidence where they knew that he had been a liar in the past and, in particular had told lies to the police").

[234] *Id.* ("As we have made plain it was clear that the witness Devine was a witness whose reliability and credibility were very much in issue before the jury, given the content of that evidence and the manner of its delivery. This was not a witness who would have presented to the jury as a potentially reliable and credible witness, until that credibility and reliability was undermined by material which showed that all was not necessarily as it seemed to be, by reason of outstanding charges against the witness, which touched upon questions of dishonesty.").

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* ¶ 42.

[239] [2008] HCJAC 53 (Scot.).

[240] *Id.* ¶¶ 4–6.

[241] *Id.* ¶ 22.

[242] *Id.*

[243] *Id.* (noting that if the witness was pressed on his identification it "was likely to bring out a potentially damning explanation" which related to the defendant's change of facial appearance); *see also id.* ¶ 24.

[244] [2011] HCJAC 58 (Scot.).

mind and referred it.[245] One of the bases for referral was the failure of the prosecution to disclose the photo lineup from which the eyewitness had identified the applicant, which showed that his photo was very old.[246] There was no other significant way for the defense to impeach this witness's testimony.[247]

The Crown conceded that disclosure was required, but argued that the failure to disclose did not make the conviction unfair.[248] The court essentially agreed, but took the opportunity to make clear that in cases where the issue is the significance of non-disclosure, the SCCRC had set the bar too low.[249] It chose to remind the SCCRC that the standard is, "whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair."[250] The test that should be applied is "whether there is a real possibility that if the material had been disclosed the appellant would have had a realistic prospect of acquittal, taking into account all the circumstances of the trial."[251]

Thus, the court rejected the Commission's speculation that the witnesses would not have identified the applicant if a current photograph had been contained in the array, noting that this approach failed to acknowledge the witness was clear that she concentrated on and identified him by his eyes.[252] There also was evidence corroborating her identification, including a description that matched the defendant, the similarity between his knife and the unusual knife used by the criminal, and the

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[245] *Id.* ¶ 2.

[246] *Id.* ¶ 4 ("The failure to disclose the photographs, in particular the fact that the photograph of the appellant was ten years old, deprived the appellant's counsel from considering whether the emulator sheet was itself significant by reason of the age of the photograph and also whether the image of the appellant on the emulator sheet was significantly different from his appearance on the date on which the offence was committed.").

[247] *Id.* The Commission reasoned that:

> the information contained in the photo-spread might have played a useful part in the defence effort to undermine the reliability of Ms Ray's identification of the applicant . . . . [T]he fact that counsel was unable to raise the age of the photograph as an issue of fairness before the trial judge and/or in his cross examination might [ ] possibly have affected the jury's (majority) verdict.

Id.

[248] *Id.* ¶ 7. The Crown argued that the failure to disclose did not result in a disadvantage to the defendant. *Id.* It "emphasi[z]ed that in determining the issue of the fairness of the trial it was necessary to assess the whole circumstances of the trial and [ ] submitted that, once that had been done, it was clear that there had been no miscarriage of justice in this case." *Id.*

[249] *Id.* ¶ 13 ("[A] finding of materiality relative to the disclosability of a document is not to be confused with a finding that it would actually have been of value to the defence nor regarded as pre-empting the defendant's need on appeal to establish that, but for the non-disclosure, he would have had a realistic prospect of a acquittal." (quoting McInnes v. H.M. Advocate, (2010) S.C. 28, ¶ 39 (Scot.))).

[250] *Id.* (quoting *McInnes*, S.C. 28, ¶ 20).

[251] *Id.*

[252] *Id.*

similarity of his clothes and the clothes worn by the assailant.[253] The court concluded that, even if defense counsel had been provided the photo lineup sheet, he might not have used it because it would have shown both that she had previously identified the defendant and that he had a police record, which would have supported, not weakened, her identification of him premised upon focusing on his eyes.[254]

In short, the court's approach to the SCCRC's referred discovery cases seems to underestimate the power of eyewitness identification and the jury's potential reaction to fresh impeachment evidence of eyewitnesses at trial.

4. Historic Cases

The CCRC and the SCCRC do not operate under statutes of limitations that would restrict review of an old conviction. An application to either commission can be made at any time and even more than once.[255] Therefore, one of the issues confronting the SCCRC—as well as the U.K.'s CCRC—has been how to handle old cases that may not have constituted miscarriages of justice under the then-current law but that would be considered miscarriages under current law.[256] The SCCRC and the court have both taken a liberal approach to this issue.

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[253] *Id.*

[254] *Id.* ("Indeed it appears to us that if the jury had been aware that Mrs Ray had identified the appellant from an old photograph, that was more likely to reinforce her identification of the appellant by the prominence of his eyes."). Likewise, the disclosure of witnesses as to other possible suspects, such as reports indicating a juvenile party as the possible assailant, was not material so that the Crown's failure to disclose that information was not a miscarriage since it was contrary to a prior statement of a witness that 1) the juvenile person did not match the assailant; 2) had the wrong clothes; and 3) had appeared prior to the defendant's entrance in the entered post office. *Id.* The court reasoned that disclosure simply would have revealed that the police investigated a third party and found no evidence that he was the assailant. *Id.* ¶ 16.

This more practical approach grounded in the specifics at trial was also evidenced in Beattie v. H.M. Advocate, [2009] HCJAC 22 (Scot.). In *Beattie*, the fact that the tests concluded that there was no blood in soil samples was deemed irrelevant. *Id.* ¶ 67. The Crown was aware of such facts, and knew such evidence would have been disclosed under current law but was not. *Id.* Nevertheless, the court reasoned that the "information contained in it about the soil sample would have made no practical difference to the conduct of the trial or the jury's deliberations." *Id.* ¶ 72.

[255] *See Frequently Asked Questions*, *supra* note 43 ("There is no time limit on a person applying to the Commission, nor is there any set limit on the number of times a conviction or sentence can be reviewed, although generally the Commission will not accept a case for review where the only issues raised are the same as matters it rejected in the previous review."); *Questions and Answers About the CCRC*, CRIM. CASES REV. COMMISSION, http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/ccrc-q-and-a.pdf (last visited Apr. 16, 2013).

[256] *See, e.g.*, R. v. Bentley, [1998] EWCA (Crim) 2516, (2001) 1 Crim. App. 21 (Eng.) (dealing with the Commission's approach to a challenged conviction over forty-five years old); R. v. Hanratty, [2002] EWCA (Crim) 1141, [2002] 3 All E.R. 534 (Eng.) (dealing with the Commission's approach to a challenged conviction over forty years old).

The court addressed this head on in *Coubrough v. H.M. Advocate*.[257] There, the court made clear that considerations of finality in the criminal process "are for the SCCRC to take into account under the heading of 'the interests of justice' when deciding whether to refer a case," and not for the court. Rather, the court's job is simply to determine whether a miscarriage has occurred under its current understanding of justice.[258] Thus, age may play an important part in whether the interests of justice warrant referral, but the court's present understanding of the law is to be applied to whether a miscarriage of justice occurred.[259] In determining whether there has been a miscarriage of justice, the court must consider the "practices and procedures" current at the time of trial and view the context "'in the round' . . . 'taking in to account all the relevant circumstances.'"[260]

In *Coubrough*, the court adopted the reasoning of the U.K. court's decision in *R. v. Bentley*,[261] in which it held that the fairness of a trial must be judged by the standards existing at the time an appeal is heard.[262] The risk that past proceedings will be judged by present standards, said the court in *Bentley*, is "inherent in section 194B which is specifically designed to allow this court to reconsider the soundness of a conviction even though it was subject to appeal."[263] The purpose of that section, it noted, is to permit reexamination of cases to see "whether, by the common law and standards of the time when the reference is considered, there has been a miscarriage of justice, even if . . . the appeal court would then have reached a different conclusion."[264]

In *Coubrough*, although it evaluated the case under current standards, the court held that the trial court's erroneous instruction in which it effectively imposed a burden of proof on the defendant did not result in a miscarriage of justice.[265] Because the instruction as a whole made clear that the prosecution bore the burden beyond a reasonable doubt, there was no miscarriage, even if the charge was erroneous.[266]

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[257] [2010] HCJAC 32 (Scot.).

[258] *Id.* ¶ 33.

[259] *Id.* ¶ 34 ("It follows also from what was said in these two cases that, with the exception of statutory amendments to the common law between the date of the original appeal and any subsequent appeal hearing, it is the Court's present understanding of the law which must be applied.").

[260] *Id.* ¶¶ 35–36.

[261] [1998] EWCA (Crim) 2516, (2001) 1 Crim. App. 21 (Eng.).

[262] *Coubrough*, HCJAC 32 ¶¶ [27]–[29], [34]–[36].

[263] Fraser v. H.M. Advocate, (2000) App. No. C158/00 [5] (Scot.) (describing *R. v. Bentley* [1998] EWCA (Crim.) 2516).

[264] *Id.* ¶ 5 (describing R. v. Bentley, [1998] EWCA (Crim) 2516, (2001) Crim. App. 21 (Eng.)).

[265] *Coubrough*, [2010] HCJAC 32 (Scot.) [147], [149].

[266] *Id.* ¶ 43. The issue on appeal, however, was whether the new psychological evidence concerning defendant's admissions constituted a miscarriage of justice. *Id.* ¶ 2. Richard Coubrough was convicted of murder in 1971. *Id.* ¶ 1. He was sentenced to life imprisonment and, in 1999, applied to the SCCRC. *Id.* ¶¶ 1–2. Although the case was not referred at that time, he applied

The court reached the opposite conclusion in another historic case, *Fraser v. H.M. Advocate*.[267] There, the defendant had been convicted in 1948 based on charges that he had assaulted his niece, took "indecencies" with her, and caused her bodily injury.[268] While there had been corroboration for the claimed beating, there was no corroboration for the claim of "indecencies" toward her.[269] In that regard, the trial judge's instructions to the jury, which allowed them to use the evidence that corroborated the beating to corroborate the evidence of indecencies, were erroneous.[270] While the court had originally found the error to be harmless when it reviewed the conviction in 1948, the court held that it should not have done so.[271] The harmless error proviso, which was removed in 1980, was at the time "exceedingly narrow."[272] The court should have quashed the conviction in 1948, and it took the current opportunity, in 2000, to do so.[273]

5. Defective Representation

Interestingly, while the SCCRC has referred nine of its 107 cases based on claims of defective representation, none has succeeded in court. The court is extremely inhospitable to this type of claim.

In Scotland, *Anderson v. H.M. Advocate*[274] established that an accused has a right to have his defense presented as part of a right to a fair trial.[275] However, given the interest in finality, the distorting effect of hindsight,[276] and the very broad scope of discretion afforded defense counsel to identify and execute a defense strategy, the standard established to sustain such a claim is extremely high: "There can be no miscarriage of justice if the advocate conducts the case within his instructions according to his own professional judgment as to what is proper for him to do in his

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again and the SCCRC referred his case in 2005 on the basis of fresh psychological evidence. *Id.* ¶ 2. With three credible eyewitnesses, the court held that the conviction did not constitute a miscarriage of justice. *Id.* ¶¶ 48–49.

[267] (2000) App. No. C158/00 (Scot.).

[268] *Id.* ¶ 1, 8.

[269] *Id.* ¶¶ 3, 6.

[270] *Id.* ¶¶ 7, 11–12.

[271] *Id.* ¶ 20.

[272] *Id.*

[273] *Id.* ¶¶ 20–21.

[274] (1996) J.C. 29 (Scot.).

[275] *Id.*

[276] *See* McBrearty v. H.M. Advocate, (2004) J.C. 122, ¶ 34 (Scot.) ("In general, a complete failure to put forward an important line of defence . . . will found a relevant ground of appeal, whereas a judgment made as to the manner of presentation of such a line of defence will not." (citing *Anderson*, J.C. 29).

client's best interests."[277] In essence, then, there can only be a miscarriage of justice based on defective representation when counsel fails to present a defense because he or she "disregard[s] . . . instructions or conduct[s] the defence in a way in which no competent counsel could reasonably have conducted it."[278]

In applying this standard, the court has found the defendant had been deprived of a failure to put in a defense by his attorney. In *Garrow v. H.M. Advocate*,[279] the consequence of erroneous advice by counsel was that the defendant's evidence and cross-examination lacked support which would have been provided by a defense expert.[280] In *Hemphill v. H.M. Advocate*,[281] a substantial part of the Crown's case—evidence by a pathologist—was not investigated, either by precognoscing the Crown's pathologist or hiring its own.[282] Finally, in *A.J.E. v. H.M. Advocate*,[283] defense counsel failed to challenge important inferences from the medical evidence and the information they had given in police interviews.[284] These show a serious failure of counsel to present a defense.

With respect to the SCCRC's cases, although nine cases have been referred that raised the defective representation by defense counsel as an issue, none have succeeded.[285] That may be because, in the court's opinion,[286] the SCCRC has applied a less stringent test than the failure to present a defense standard.[287] Indeed, as the court pointed out *D.S. v. H.M. Advocate*,[288] the SCCRC seems to have employed a failure to fully present a defense standard.[289] Why precisely the court is so inhospitable

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[277] *Anderson*, (1996) J.C. 29, 36 (Scot.); *see also* Gordon v. H.M. Advocate, [2010] HCJAC 44 [102] (Scot.) (deferring to counsel's judgment not to call a witness stating that "no competent counsel would have attempted to gild the lily by leading evidence to prove undisputed fact[s]").

[278] Grant v. H.M. Advocate, [2006] J.C. 205 (Scot.) [22] ("An *Anderson* ground cannot rest upon a criticism of strategic and tactical decisions reasonably and responsibly made by trial counsel. These are matters within the scope of counsel's legitimate judgment."); *cf.* Strickland v. Washington, 466 U.S. 668, 687 (1984) (assessing counsel's performance under a reasonably competent assistance standard, holding that constitutional deficiency will only be found if the defendant shows that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different).

[279] (1999) App. No. C591/97 (Scot.).

[280] *Id.* ¶¶ 13–14.

[281] (2001) App. No. 82/67 (Scot.).

[282] *Id.* ¶ 19.

[283] (2002) J.C. 215 (Scot.).

[284] *Id.* ¶¶ 28–29.

[285] SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 13.

[286] D.S. v. H.M. Advocate, [2008] HCJAC 59 (Scot.).

[287] *Id.* ¶ 41.

[288] [2008] HCJAC 59 (Scot.)

[289] *Id.* ¶ 42.

to these claims is not clear, except for the traditional reasons, i.e., inability to know what transpired between the defendant and counsel,[290] deference to defense counsel,[291] or fear of interfering with or of setting minimum or other standards for the performance of counsel.[292]

6. Police Failures or Misconduct

A handful of referred cases presented claims that the police had either failed to investigate leads that might have produced exculpatory information or deliberately committed misconduct.[293] In *McPhee v. H.M. Advocate*,[294] the court quashed the conviction based on the police witness's knowingly false testimony that forensic evidence confirmed his opinion that a footprint at the scene matched the defendant's

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[290] *See id.* ¶ 43 ("Many of the increasing number of *Anderson* appeals are based on allegations of breach of instructions that rest only on the say-so of the appellant himself; or on criticisms of decisions that are *prima facie* within the legitimate scope of counsel's discretion; or on speculative allegations which the appellant's advisers hope that they may be able to substantiate at a later date. . . . this court should not countenance the granting of leave to appeal in such cases." (quoting Grant v. H.M. Advocate, 2006 J.C. 205, ¶ 23 (Scot.))).

[291] *Id.* ¶¶ 52, 54 (deferring to counsel's decisions on how to present a defense and the scope of cross-examination utilized); McBrearty v. H.M. Advocate, (2004) J.C. 122, ¶ 55 (Scot.) ("These decisions were a matter for counsel's judgment. In every judgment of this kind there may . . . be a range of decisions that it would be reasonable to make. *Anderson* appeals are not to be decided on the counsels of perfection to which hindsight lends itself.").

[292] As Lord Justice-Clerk (Gill) explained:

> Those presenting such appeals should bear in mind the seriousness of what they allege. Criminal defence work, if carried out conscientiously, is demanding and stressful. All too often, convicted persons blame their counsel rather than themselves for their misfortune. An *Anderson* ground of appeal . . . constitutes a formal accusation against trial counsel that he failed to present a competent and responsible defence. An *Anderson* appeal puts trial counsel to the trouble of having to respond to the accusation, often when the ground of appeal gives less than fair notice of what the accusation is, or where counsel has limited recall of the case and limited access to the papers. These difficulties are especially acute where, as in this case, the *Anderson* allegations are tabled long after the trial. All such cases cause worry to counsel until the appeal is finally resolved.

Grant v. H.M. Advocate, [2006] HCJAC 42 [24], (2006) J.C. 205 (Scot.).

[293] Unlike its sister, the SCCRC has not dealt with widespread or systemic police misconduct. In this regard, the CCRC has quashed over thirty convictions based on police misconduct, which dealt with police acts of coercing confessions, fabricating evidence, and committing perjury at trial. *See* Griffin, *supra* note 3, at 126. The brunt of these cases arose largely from two police squads that engaged in various illegal methods to secure convictions in serious crime investigations. *Id.*

[294] [2005] HCJAC 137 (Scot.).

shoes.[295] The court found the Crown's assertion that the police superintendent "was not acting in bad faith . . . difficult to accept,"[296] but did not undertake to resolve the good or bad faith of the police witness. Because his evidence was vital to the jury's consideration, the court concluded that a miscarriage of justice had occurred. And in *Johnston v. H.M. Advocate*,[297] the court concluded that the police had deliberately "filter[ed] out the existence of witnesses whose evidence might point to the deceased having been alive after [the alleged date of the murder]."[298] Because the defense might have been presented differently had defense counsel been aware of this evidence, and because its verdict might have been different had the jury been aware that the deceased was alive after the alleged date of death, the court allowed the appeal and quashed the conviction.[299]

When there has been no basis to conclude that the police engaged in misconduct, however, the court has not allowed the appeal. Thus, for example, the failure to pursue certain lines of investigation (such as securing CCTC footage or failing to speak with certain witnesses) that resulted in the loss of that evidence has not been found to result in a miscarriage of justice. In *Kinsella v. H.M. Advocate*, for example, the court characterized as "speculation" the Commission's conclusion that the police failure to investigate deprived the defendant of a fair trial.[300] The court also cited Section 36 of the Criminal Procedure (Scotland) Act 1995, which requires that the prosecution investigate a defense "to such an extent as is reasonably practicable," to reject a claim that the police should have investigated further.[301] The court has also made clear that when the accused is represented by counsel, counsel's knowledge of allegedly overlooked information or counsel's own failure to investigate it will defeat any claim of miscarriage of justice.[302]

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[295] *Id.* ¶¶ 38, 40.
[296] *Id.* ¶ 39.
[297] [2006] HCJAC 30 (Scot.).
[298] *Id.* ¶ 120.
[299] *Id.* ¶ 128.
[300] Kinsella v. H.M. Advocate, [2011] HCJAC 58 [10] (Scot.).
[301] *Id.* ¶ 23 (citing The Criminal Procedure (Scotland) Act, 1995, c. 46, § 36(10)).
[302] *Id.* ("In the context of our system where accused persons are provided with state funding in the form of legal aid for the preparation and conduct of the defence we consider that the primary obligation of investigating and presenting a positive defence such as an alibi rests with the legal representatives of an accused. They are in the best position to pursue such enquires because they have access to the accused who can provide them with information which he is not obliged to provide to others, including the police and prosecuting authorities."); *see also* Gordon v. H.M. Advocate, [2010] HCJAC 44 [29] (Scot.) (holding that although the Crown had failed to turn over statements that could be useful to the defense, there was no miscarriage of justice because the defense had been fully aware of the content of such statements during trial).

E. What Happens When There Is Nothing "New"

1. Sufficiency of the Evidence

In the absence of fresh evidence or a new legal issue, the SCCRC can still refer and the court can still quash a conviction as a miscarriage of justice. One of the grounds on which it can do so is the legal insufficiency of the evidence pursuant to Criminal Procedure (Scotland) Act 1995 section 106(3)(b).[303] Under that standard, the conviction will be quashed if the Crown cannot establish guilt of all elements of the charge.[304]

This issue was the basis for referral in *Campbell v. H.M. Advocate*.[305] In that case, the applicant had been convicted of possession of a firearm that had been discovered concealed behind a water tank in a cupboard in a flat that did not belong to him but in which he had stayed overnight prior to the day it was found.[306] A number of other people had access to the flat; at least three of whom had keys.[307] The occupier of the flat was the applicant's girlfriend.[308] The sole evidence against the applicant was a single fingerprint and partial palm print on the plastic bag in which the firearm was wrapped.[309] There was no evidence that the applicant had ever seen the rifle.[310] The court held that the evidence was insufficient as a matter of law and quashed the conviction.[311]

The insufficient evidence argument was unsuccessful in *Gage v. H.M. Advocate*.[312] The issue in *Gage* was identification, and there was no direct identification evidence.[313] However, there was sufficient circumstantial evidence to support the conviction.[314]

2. "Lurking Doubt"

Next to *Al-Megrahi v. H.M. Advocate*,[315] discussed in the next section, *Harper v. H.M. Advocate*[316] may be the SCCRC's most cited case. It is the only reported

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[303] Criminal Procedure (Scotland) Act, 1995, c. 46, § 106(3)(b).

[304] Gage v. H.M. Advocate, [2012] HCJAC 14 [29] (Scot.) (quoting King v. H.M. Advocate, (1999) JC 226, 228 (Scot.)).

[305] [2008] HCJAC 50 (Scot.).

[306] *Id.* ¶ 6.

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.* ¶ 29.

[312] [2012] HCJAC 14 (Scot.).

[313] *Id.* ¶¶ 1, 2.

[314] *Id.* ¶ 3.

[315] [2008] HCJAC 58 (Scot.).

[316] [2005] HCJAC 23 (Scot.).

decision in which the SCCRC referred a case to the court based not on fresh evidence or a newly raised legal issue, but rather on "lurking doubt" about the applicant's guilt, i.e., a belief that the jury's verdict may have been wrong.[317] The appeal did not succeed.[318]

In *Harper*, the defendant was charged with and convicted of murder based on the robbery and murder of John Harris, an invalid, in his home on Saturday, January 25, 1992.[319] The defendant admitted that he had robbed Harris in his home the day before, but asserted that he had not killed him.[320] There was some evidence at trial that others had received goods stolen from the deceased on Friday,[321] which supported the defense because the prosecution claimed the murder and robbery had occurred together on Saturday.[322]

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[317] In the United Kingdom, appeals can succeed if the appellate court has a "lurking doubt" as to the veracity of the guilty verdict. *See R v. Cooper*, (1969) 1 Q.B. 267, 271 (holding that the court can "in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This . . . is a reaction which can be produced by the general feel of the case as the Court experiences it"). In Scotland, the court has been reluctant to take matters out of the jury's hands. *See* Rubin v. H.M. Advocate, (1984) S.L.T. 369, 370–71 (Scot.) (refusing to quash); *see also* Al Megrahi v. H.M. Advocate, (2002) J.C. 99, ¶ 25 ("[I]n order to demonstrate that there was a miscarriage of justice arising from the trial court's verdict, an appellant had to go the length of showing that no reasonable trial court could have reached that verdict, it made no sense if the appeal court could, by applying a lesser standard in reliance on the general power to review any alleged miscarriage of justice, review the inferences drawn by the trial court or could set aside the trial court's assessment of the reliability of evidence. . . . If evidence is capable of giving rise to two or more possible inferences, it is for the trial court to decide whether an inference should be drawn and, if so, which inference."). *But see* A.J.E. v. H.M. Advocate, (2002) App. No. 42/98 (Scot.); Findlay Stark, *A Perfectly Unreasonable Decision*: Jenkins v. H.M. Advocate, 16 EDINBURGH L. R. 86 (2012).

[318] Harper v. H.M. Advocate, [2005] HCJAC 23 [35] (Scot.) (noting that the court must only assess whether the verdict in the case, on the evidence before the jury, could have had a rational basis, and although questions of the defendant's guilt arise, it would be beyond the court's authority to disrupt rational jury findings).

[319] *Id.* ¶ 1.

[320] *Id.* ¶ 18 ("[T]he content of a tape recorded police interview with the applicant, conducted on 31 January 1992, in which the applicant had made certain admissions, including that he had been in the deceased's flat and stolen his video recorder on the Friday night. While in the flat he had pushed the deceased to the ground and kicked him once.").

[321] *Id.* ¶ 14 ("It is noted that all four witnesses consistently stated that the day in question was the Friday. This evidence is of course very relevant to the Crown's suggestion that the applicant had carried out the robbery of the video recorder on the Saturday night, at the same time as the murder of the deceased, as opposed to the Friday night." (quoting SCOTTISH CRIMINAL CASES REVIEW COMM'N, STATEMENT OF REASONS, ¶ 108)).

[322] *Id.* ¶ 12 ("The Crown was to argue that the theft and the serious assault on the deceased had been carried out in the course of one incident; hence the applicant was responsible for both. . . . The Crown's position was that the McSherrys and the Scotts had been mistaken as to the day of the week on which . . . the stolen articles had been taken.").

One witness who did not testify at trial but who had been interviewed by the defense was Joyce McMillan, who would have testified to the deceased's "apprehensions regarding his own safety and the integrity of his flat, apparently based upon the behaviour of youths in the area,"[323] who apparently visited the house to eat their takeout food and get money from the deceased.[324] About three weeks before the death, these youths had apparently assaulted her and the deceased in his flat.[325] Neither the prosecutor nor the defense had listed her as a potential witness at trial and she had not been called by either.[326] Unfortunately, McMillan was an alcoholic who was deemed unreliable at the time of trial, and who died prior to the court's later hearing, at the age of 39.[327]

According to the SCCRC's referral, the defendant's insistence of his innocence combined with McMillan's information led them to reexamine four additional witnesses, all of whom insisted they had received the stolen goods on Friday.[328] The SCCRC also found no confirmation for the Crown's assertion that blood found on a video recorder, which could have come from the deceased, meant that the death had occurred with the robbery.[329] Thus, the reason for the referral, as quoted by the court, was the SCCRC's view that "in light of the information available, some of which was not heard at the trial, that there is a reasonable doubt as to the applicant's guilt."[330] With respect to why Joyce McMillan was not called as a witness, the SCCRC accepted that, at the time of trial, the position of the Crown and defense counsel that she was not credible was "not unreasonable," due to certain inconsistencies in her statements, but the SCCRC believed that "there are clearly aspects of her evidence which are capable of being believed."[331] Finally, the defendant's confession to the robbery alone, which had not been in evidence at trial, indicated that he had stolen the deceased's video recorder on Friday night and had pushed and kicked him.[332] It was on the basis of his confession that he was charged, the police and crown believing at the time that the deceased was killed on Friday.[333] Despite their acceptance of the confession, when it became apparent later that the deceased had been alive on

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[323] *Id.* ¶ 13.
[324] *Id.*
[325] *Id.* ¶ 15.
[326] *Id.* ¶ 13.
[327] *Id.*
[328] *Id.* ¶ 14.
[329] *Id.*
[330] *Id.* ¶ 17 (quoting SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 321, ¶ 125).
[331] *Id.* (arguing that "had the evidence of Ms. McMillan been explored further (*sic*) at trial, the jury might not have been satisfied beyond reasonable doubt that the applicant stole the property on the Saturday night and in the course of this crime, assaulted and murdered the deceased" (citing SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 321, ¶ 140–42)).
[332] *Id.* ¶ 18.
[333] *Id.*

Saturday, the Crown disavowed the confession upon which they had earlier been willing to rely.[334] According to the SCCRC, the confession "suggests a scenario for the applicant's involvement in this case, which is more consistent with the evidence in the case, than the scenario put forward by the Crown."[335]

The Court held that it would only quash the conviction if it could find that there was no rational basis for rejecting the Crown's evidence.[336] That finding could not be made in this case. The defendant had the recorder, a plastic bag with blood smeared on it, and a camera case with blood.[337] It was clear the four witnesses had been drinking heavily on the weekend in question.[338] That was sufficient basis to uphold the jury's acceptance of the prosecution's case.[339]

As to Joyce McMillan, the Court held that there was no reasonable explanation for why she had not been called at trial except for the reasonable tactical decisions of both sides not to call her.[340] Thus, that evidence could not be considered by the appellate court.[341] The same analysis applied to the tape of the defendant's interview.[342] In concluding, the court made clear that it simply did not have the power

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[334] *Id.*

[335] *Id.* (quoting SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 321, ¶ 150).

[336] *Id.* ¶ 35. The court's strictness reflects the initial disdain that the Sutherland Committee showed towards the English Appeal Court's willingness to overturn a verdict on the basis of a "lurking doubt" or "gut feeling." *See* CRIMINAL APPEALS AND ALLEGED MISCARRIAGES OF JUSTICE, REPORT BY THE COMMITTEE APPOINTED BY THE SECRETARY OF STATE FOR SCOTLAND AND THE LORD ADVOCATE ¶ 2.66, 2.70 (1996). In this regard, the Sutherland Committee observed, the issue of overturning an unreasonable verdict must been taken with extreme caution as it "strikes at the heart of the role of the jury in Scottish criminal procedure." *Id.*; *see also* Crime and Punishment (Scotland) Act 1997, § 17.

[337] *Harper*, HCJAC 23 [25].

[338] *Id.* ¶ 35.

[339] *Id.*

[340] *Id.* ¶ 36 ("[H]aving regard to the provisions of section 106(3A), it is necessary to consider whether a 'reasonable explanation,' within the meaning of that provision, exists as to why [the evidence] was not so heard [before].").

[341] *Id.* In rejecting consideration, the court adopted and expressed Lord Sutherland's observations in relation to the word "reasonable":

> Plainly the word must have some significance as a qualification of the explanation. I do not consider that "reasonable" in this context can be equiparated with "rational". An explanation that it was decided not to lead evidence, the existence of which was known to the appellant's advisers, for tactical reasons, would undoubtedly be perfectly rational but it would be contrary to the interests of justice to permit the defence to keep some evidence up its sleeve only to be produced to the appeal court in the event of the verdict of the jury being unfavourable.

Id.

[342] *Id.* ¶ 37.

under Section 106(3) to reverse a jury decision on the sole basis that the court considered it "unsatisfactory."[343] Thus, the verdict was not disturbed.[344]

A case that was referred on the basis of the unreasonableness of the jury's verdict presented similar issues for the court. In *Ferrie v. H.M. Advocate*,[345] a murder case, the deceased had been attacked in a house during a drunken party and had then been taken through the window out to the yard, where the beating continued and he was killed.[346] The defendant had been identified as one of the people beating him in the house, but he was not identified as one of the people beating him outside.[347] Accordingly, the Commission argued that there was "a lack of evidence sufficiently substantial to permit the jury to infer that the appellant was involved in the latter stage of the attack."[348] Nevertheless, the court found sufficient circumstantial evidence to support the verdict.[349]

F. Two Extremely Notable, but Sui Generis, Cases

Two cases, *Cadder v. H.M. Advocate*[350] and *Al Megrahi*,[351] have played a large role in the SCCRC's work. Although these cases have generated tremendous

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[343] *Id.* ¶ 33 ("[I]t has never been recognised by the court that some general concern, or unease, in relation to a particular conviction, with no further specification, could be a basis upon which a conviction could be disturbed."); *see also id.* ¶ 38.

[344] *Id.* ¶ 38 (stating that "even if we had been persuaded, like it, that there was a reasonable doubt as to the applicant's guilt, it would not have been open to us to substitute our view for that of the jury, by disturbing the applicant's conviction"); *see also* Ferrie v. H.M. Advocate, [2010] HCJAC 62 (Scot.). In *Ferrie*, the SCCRC referred the case to the High Court on the ground that the evidence was insufficient and/or that the verdict was unreasonable. *Id.* ¶ 2. The SCCRC argued that the jury's conclusion that the defendant's prior participation in an earlier beating of the deceased meant he was also one of the participants in the charged murder was mere speculation. *Id.* ¶ 13 ("[T]here was in consequence 'a lack of evidence sufficiently substantial to permit the jury to infer that the appellant was involved in the latter stage of the attack.'"). In addressing the unreasonableness of the jury's verdict, the court rejected the Commission's findings and found sufficient support for those inferences reached by the jury. *Id.* ¶¶ 24–28 ("It cannot be said that the jury acted irrationally . . . ."). *Cf.* Hunt v. P. F. Inverness, [2008] HCJAC 57 [16] (Scot.) (holding that the sheriff's self-determination that certain photographic evidence did not undermine the witness's credibility was reasonable even though the jury's right of consideration had been obviated by the Crown's initial failure to disclose).

[345] [2010] HCJAC 62 (Scot.).

[346] *Id.* ¶¶ 4–5.

[347] *Id.* ¶ 10. The only evidence of Ferrie being outside was a finger print on the window sill. *Id.*

[348] *Id.* ¶ 13.

[349] *Id.* ¶¶ 16–28.

[350] [2010] UKSC 43.

[351] Al Megrahi v. H.M. Advocate, (2002) J.C. 99 (Scot.).

controversy and required extensive resources, in many ways they are so sui generis that they reveal little about the everyday work of the Commission in correcting miscarriages of justice. Nevertheless, they are important examples of the breadth and scope of the SCCRC's discretion under the controlling "miscarriage of justice" standard. Moreover, both cases have become talking points in the Scottish legal community[352] and have resulted in reforms to the criminal process.[353]

In *Cadder*, the defendant was suspected of assault and breach of the peace and was detained by two police officers and interviewed without the presence of a solicitor.[354] In Scotland, the police are allowed to detain and question a suspect in the absence of legal counsel for up to six hours prior to arrest.[355] The police obtained inculpatory statements from the defendant that were essential to the Crown's case at trial, after which he was convicted.[356] On appeal, the U.K. Supreme Court agreed with the defendant's claim that the statements were inadmissible because of the absence of counsel and that their admission resulted in a miscarriage of justice that warranted quashing the conviction.[357] The Court held that the questioning without the presence of a solicitor violated the European Convention on Human Rights.[358]

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[352] *See generally* Jason Allardyce, *Legal Doubt over Megrahi's Guilt*, SUNDAY TIMES (U.K.) Sept. 20, 2009 at 9; Auslan Cramb, *New Call for Lockerbie Inquiry as Abdelbaset Ali Mohmed al-Megrahi Dies*, TELEGRAPH, May 20, 2012, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9278639/New-call-for-Lockerbie-inquiry-as-Abdelbaset-Ali-Mohmed-al-Megrahi-dies.html; William Blum, *The Bombing of PanAm Flight 103 Case Not Closed*, TRINICENTER.COM (2001), http://www.trinicenter.com/oops/lockerbie.html.

[353] *See, e.g.*, *infra* notes 365–67 and accompanying text (describing changes inspired by *Cadder*).

[354] *Cadder*, UKSC 43 [5]. Cadder had been detained under Criminal Procedure (Scotland) Act, 1995, § 14(1). *Id.* Cadder was interviewed by two police officers of the Strathclyde Police at London Road Police Office in Glasgow. *Id.*

[355] *See* Criminal Procedure (Scotland) Act, 1995, c. 46, § 14.1. Section 14 of the 1995 Act allows the police to detain and question a person suspected of committing an offence punishable by imprisonment. *Id.* The police were not required to offer access to a solicitor to persons detained under section 14 of the 1995 Act, although detainees were entitled to have the fact of their detention intimated to a lawyer (and one other person). *See Cadder*, UKSC 43 [20].

[356] *Cadder*, UKSC 43 [2].

[357] *Id.* ¶ 64. The Criminal Court of Appeal rejected Cadder's claim that such statements were inadmissible under Article 6(1) (Right to a Fair Trial) of the European Convention on Human Rights (ECHR). *Id.* ¶ 14. The court held that there were sufficient safeguards within Scottish Law to ensure that there was no breach of Article 6(1). *Id.* ¶ 3 (citing H.M. Advocate v. McLean, [2009] HCJAC 97 (Scot.)). At the first sift stage, a High Court judge refused Cadder's appeal on the basis of the full bench decision, which was later followed by another refusal by a three judge panel at the second sift stage. *Id.* ¶ 9.

[358] *See Cadder*, UKSC 43 [3]. The Supreme Court's decision to review the matter was provoked by another similar case in the United Kingdom that had been settled, *Salduz v. Turkey*, 49 Eur. H.R. Rep. 421, which appeared to result in a contrary holding to the direction set forth in *McLean v. H.M. Advocate*. *See id.* The Supreme Court wrote:

> In *Salduz v. Turkey* the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of article 6(3)(c)

Notably, the Supreme Court acknowledged the possibility of this important decision applying retrospectively to completed prosecutions, and although adhering to principles of finality,[359] deferred to the SCCRC and the Scottish High Court's decision-making ability to determine whether some closed cases should be reopened and reviewed in light of its decision.[360] While a proven *Cadder* violation is not indicative

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> of the European Convention on Human Rights, in conjunction with article 6(1), because the applicant did not have the benefit of legal assistance while he was in police custody. In *McLean* the Appeal Court held, notwithstanding the decision in *Salduz*, that the fact that legal representation was not available to the minuter did not of itself constitute a violation of articles 6(1) and 6(3)(c) read in conjunction. In its opinion the guarantees otherwise available under the Scottish system were sufficient to avoid the risk of any unfairness. It approved its decisions in *Paton v. Ritchie* and *Dickson v. H.M. Advocate* (by a court of five judges) that the Crown's reliance on admissions made by a detainee while being interviewed in the absence of a solicitor was not incompatible with the right to a fair trial. The appellant seeks to challenge the decision in *McLean*. He submits that the decision in *Salduz* requires this court to hold that there has been a violation of those articles.

Id. (citations omitted).

[359] POLICY MEMORANDUM FOR CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS) (SCOTLAND) ACT (2010), [hereinafter POLICY MEMORANDUM], points out that the Supreme Court's decision in *Cadder* has been framed to protect finality and certainty in most completed cases. *See* GRAHAM ROSS, SPICE BRIEFING, CRIMINAL PROCEDURE: RESPONSES TO *CADDER V. H.M. ADVOCATE* 11 (2011) (quoting POLICY MEMORANDUM, ¶ 36) *available at* http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S3/SB_11-20.pdf. The memorandum concludes:

> For cases which have not been finally concluded, the 1995 Act makes provision for time limits in which appeals against conviction must be made. For example, in solemn cases appellants must note an intention to appeal against conviction within 2 weeks of the decision and specify grounds of appeal within a further 8 weeks. However, courts have discretion to waive these time limits in certain circumstances. There is currently no test in the 1995 Act for the allowing of such "out of time" appeals and there is no developed jurisprudence of the court which makes apparent when such extensions will be granted or refused.

Id.

[360] *See Cadder*, UKSC 43 [62]. The Supreme Court wrote:

> I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what

of the accused's innocence *per se*, the court recognized that the statement in deprivation of counsel may well indicate that a miscarriage of justice has occurred in the underlying proceeding—fully warranting the Commission's intervention.[361]

Following the decision, the SCCRC received fifty-four applications seeking *Cadder* review,[362] and as of March 2012, had referred two of those cases to the court.[363] Many pending criminal prosecutions implicating *Cadder* were voluntarily withdrawn by the Crown.[364]

Legislative changes have also been implemented.[365] In short, new legislation provides detained suspects a right to obtain legal advice; extends the six hour period

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> course it ought to take if a reference were to be made to it on those grounds by the Commission.

Id.

[361] *See id.* ¶ 67("Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6 . . . . The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention." (quoting Saunders v. United Kingdom, 23 Eur. H.R. Rep. 313, 337 (1997))).

[362] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 12 tbl. 4.

[363] To date, neither case has been decided by the High Court. *See id.* at 13.

[364] On February 9, 2011, the Crown Office and Procurator Fiscal Service announced that a total of 867 cases, consisting primarily of summary prosecutions, could not proceed as a direct result of the *Cadder* decision. *See* ROSS, *supra* note 359, at 8.

[365] *See, e.g.*, Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, 2010 (A.S.P. 15). Notably, the originally drafted Act had contained expressive direction that

> the Commission must have regard to finality and certainty in making referrals to the High Court. It also provide[d] that the court may reject a reference from the Commission if it considers that it would not be in the interests of justice for any appeal arising from the reference to proceed.

ROSS, *supra* note 359, at 12. However, after much debate, and following a division on this language, it was finally excluded before the Act's passage. *Id.* Some critics against the original Act expressed concern that the role of the Commission would be substantially changed if adopted. *Id.* During the passage of the bill, Christine Grahame, MSP, stated

> [t]herefore, the interests of justice can be outweighed by the need for finality and certainty. Finality for whom? Certainty for whom? In whose interest? Further to that substantial change to the SCCRC's remit, section 7(4) will introduce for the High Court the power to reject a referral if it is not in the interests of justice, having regard to "the need for finality and certainty"—that phrase again. The current position is that when the SCCRC makes a referral to the High Court, the court must accept it—it has no discretion in the matter. The approach in section 7(4) is a substantial change. The court of appeal will be able to reject the referral, even if the case has met the test in section 7(3)(b).

Id.

during which a suspect can be detained for questioning by the police; provides a mechanism that can be used (if necessary) to ensure that adequate legal aid arrangements are available for detained suspects; and reinforces the principles of finality as set out in the Supreme Court's decision in *Cadder*.[366] Although there was fear that there would be a floodgate of *Cadder* claims,[367] in light of these changes, the case and the reaction to it may well be a short-lived phenomenon requiring neither ongoing judicial nor SCCRC attention.

An extremely controversial and very public case that has required massive resources and SCCRC attention is the case arising from the Lockerbie airplane bombing, *Al Megrahi v. H.M. Advocate*.[368] Al-Megrahi was convicted of detonating

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[366] *See* Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, 2010 (A.S.P. 15); Cadder v. H.M. Advocate, [2010] UKSC 43 [61] (Scot.).

[367] *Cadder Provisions "Pull up Drawbridge" on Appeals—Pressure Mounts Against s7*, FIRM (Nov.4,2010), http://www.firmmagazine.com/news/2151/Cadder_provisions_%22pull_up_the_drawbridge%22_on_appeals_-_pressure_mounts_against_s7.html (quoting Solicitor Tony Kelly stating "[t]he only rationale I can see is that they are pulling up the drawbridge, making it more difficult for people to submit applications to the commission and for the commission to refer cases to the High Court."); Robbie Marwick, *Scottish Government v. Human Rights*, JOURNAL, Nov. 10, 2010, http://www.journal-online.co.uk/article/7129-scottish-government-v-human-rights ("The legislation's provisions also provoke concern over their impact on the appeal system of the Scottish Criminal Cases Review Commission (SCCRC)."); *see SCCRC Chair Warns of Risk from Cadder Response*, JOURNAL L. SOC'Y SCOT., http://www.journalonline.co.uk/news/1008973.aspx#.UPmJsyfXZyU.

[368] Al Megrahi v. H.M. Advocate, (2002) J.C. 99 (Scot.). The case of Al-Megrahi is known throughout the world as the "Lockerbie Bombing." As a result of the public's interest, the SCCRC released an extensive news briefing that detailed its summary of findings. *See News Release*: *Abdelbaset Ali Mohmed Al Megrahi*, SCOTTISH CRIM. CASES REV. COMMISSION (June 28, 2007), http://www.sccrc.org.uk/ViewFile.aspx?id=293 [hereinafter *News Release*] ("[G]iven the worldwide interest in this case, and the fact that there has been a great deal of press and media speculation as to the nature of the grounds of review, the Commission has decided to provide a fuller news release than normal."). Moreover, the *Al Megrahi* case has also influenced a movement towards changing the strict disclosure laws the SCCRC is currently laboring under. In 2011, however, the Scottish government proposed the Criminal Cases (Punishment and Review) (Scotland) Bill, 2011 (codified at Criminal Cases (Punishment and Review) (Scotland) Act, 2012, (A.S.P. 7)), which, among other things, would allow the Commission to "disclose information about cases it has referred to the High Court where the relevant appeal has subsequently been abandoned." SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 2. Jean Couper, SCCRC Chairman noted, however that the passage of Criminal Cases (Punishment and Review) (Scotland) Bill, 2011 may be "academic" given the leaking of the Commission's statement of reasons in *Al Megrahi* by media sources. *Id.* at 3. Speaking to the prospective passage of the Criminal Cases (Punishment and Review) Bill, which would allow disclosure of information pertaining to cases referred to the High Court, SCCRC Chairman Couper explained "[i]t was no secret that the Government's proposals in this area were prompted by the public and media interest in the Commission's statement of reasons in the case of Abdelbaset Ali Mohmed Al-Megrahi who was convicted of murder following the Lockerbie bombing." *Id.* at 2.

a bomb on a Boeing 747-121 aircraft that crashed over Lockerbie, Scotland, killing 243 passengers and 16 crew members.[369] On 31 January 2001, Al-Megrahi was found guilty[370] by a panel of three Scottish judges sitting in a special court at Camp Zeist in the Netherlands.[371] He was sentenced to life in prison, with parole eligibility after twenty-seven years.[372]

On September 23, 2003, Al-Megrahi filed an application for review with the SCCRC,[373] alleging that a miscarriage of justice had occurred.[374] After conducting its initial review, the SCCRC undertook a massive, worldwide investigation that

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[369] *Al Megrahi*, J.C. 9, ¶ 1.

[370] *Id.* As a result of the bombing, 270 people were killed. *Id.* The Court wrote: "The charge narrated that the appellant, having formed a criminal purpose to destroy a civil passenger aircraft and murder the occupants in furtherance of the purposes of Libyan Intelligence Services, while acting in concert with others, did certain acts." *Id.* ¶ 3. Notably, Al-Megrahi's co-defendant, Lamin Khalifah Fhimah, was acquitted. *Id.*

[371] *Id.* ¶ 6. The court wrote:

> In this case the trial took place before a court of judges sitting without a jury ('the trial court'), constituted under article 5 of the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 ("the Order in Council"). Article 5(4) provides:
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> > For the purposes of any such trial, the court shall have all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury in Scotland, including power to determine any question and to make any finding which would, apart from this article, be required to be determined or made by a jury, and references in any enactment or other rule of law to a jury or the verdict or finding of a jury shall be construed accordingly.

Id.

[372] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, STATEMENT OF REASONS UNDER SECTION 194D (4) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995, at 9–10 (2007), *available at* http://login.heraldscotland.com/SCCRC-Statement-of-Reasons-red.pdf ("At a hearing at the High Court in Glasgow on 24 November 2003 under the Convention Rights (Compliance) (Scotland) Act 2001, the punishment part of the applicant's sentence was set at 27 years, again backdated to 5 April 1999. On 18 December 2003 the Lord Advocate appealed against the sentence as being unduly lenient. On 31 May 2004, the applicant lodged an appeal against the length of the punishment part on the ground that it was excessive. These appeals remain outstanding.").

[373] *See News Release*, *supra* note 368, at 4 ("Between the initial submissions and the additional submissions received during the course of the review, the Commission identified a total of 48 principal grounds for consideration and review by the Commission. In addition, as a result of our own investigations the Commission identified some further potential grounds of review.").

[374] *See Megrahi*, J.C. 99 [370]. On March 14, 2002, Al-Megrahi's appeal to the High Court was denied. *Id.* Al-Megrahi's appeal was largely based on the misdirection of the court, and although mentioned, little was raised about the sufficiency of the evidence. *Id.* ¶ 369.

lasted three years and resulted in a referral to the high court.[375] However, that referral was mooted when he was released by the Scottish government on humanitarian grounds.[376] Later, in 2012, the legal stir surrounding the case was further fueled by the unauthorized release of the SCCRC's statement of reasons to refer to the public.[377] In an eight-hundred-plus page report,[378] the SCCRC detailed the depth of its investigation,[379] reviewed of the evidence at trial, and explained its reasons for referring the case.[380] Of significance, the Commission had found both that material findings of fact made by the trial court were simply incompatible with the evidence presented,[381] and that there were questions as to Al-Megrahi's guilt based upon new evidence that had not been presented at the time of his trial.[382] This included evidence

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[375] *See News Release*, *supra* note 368, at 2. Apparently, as his appeal was ongoing, Al-Megrahi sought its discontinuance on August 14, 2009, so that he could attempt to be moved to Libya under the Prisoner Transfer Scheme. *See* Rebecca Camber & Tim Shipman, *Cameron Dashes Hopes for Relatives of Lockerbie Victims by Rejecting Call for New Inquiry After Bomber al-Megrahi Dies*, MAILONLINE, May 20, 2012, *available at* http://www.dailymail.co.uk/news/article-2147110/Lockerbie-bomber-Al-Megrahi-dead-health-rapidly-deteriorates-Libya.html.

[376] Camber & Shipman, *supra* note 375. On compassionate grounds, the Scottish Government released Al-Megrahi on August 20, 2009, given that life expectancy was relatively short as a result of terminal prostate cancer. *Id.*

[377] *See generally* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 372.

[378] *Id.*

[379] The total cost of reviewing the case was approximated to be £1,108,536. *See News Release*, *supra* note 368, at 10 ("[T]he Commission's . . . enquiries were wide-ranging and took place in the United Kingdom, Malta, Libya and Italy from 2004 onwards. As well as examining the information provided to it, the Commission interviewed a further 45 witnesses, including the applicant and his co accused Mr Fhimah. Many of these interviews were conducted over several days and a number of the witnesses required to be seen on more than one occasion. Enquiries in Malta and Italy also involved the recovery of official records from various bodies.").

[380] SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 372; *see also News Release*, *supra* note 368, at 4–5 ("[T]he Commission has identified 6 grounds where it believes that a miscarriage of justice may have occurred and that it is in the interests of justice to refer the matter to the court of appeal.").

[381] *See News Release*, *supra* note 368, at 8 ("[I]n examining one of the grounds, the Commission formed the view that there is no reasonable basis in the trial court's judgment for its conclusion that the purchase of the items from Mary's House, took place on 7 December 1988. Although it was proved that the applicant was in Malta on several occasions in December 1988, in terms of the evidence 7 December was the only date on which he would have had the opportunity to purchase the items. The finding as to the date of purchase was therefore important to the trial court's conclusion that the applicant was the purchaser. Likewise, the trial court's conclusion that the applicant was the purchaser was important to the verdict against him.").

[382] *Id.*

that undermined eyewitness identification evidence[383] and had not been disclosed to the defense, as well as other evidence that undercut the Crown's theory relating to Al-Megrahi's conduct on certain material dates, which also had not been disclosed.[384] Consistent with its approach in other cases, the SCCRC's findings implicitly skirt the bounds of "lurking doubt" as to Al-Megrahi's guilt and focus, instead, on the issue of prosecutor non-disclosure.

IV. REFLECTIONS AND COMPARISONS

A. Miscarriages of Justice v. Wrongful Convictions

The SCCRC's focus, and the sole ground on appeal in Scotland, is whether a criminal conviction represents a "miscarriage of justice" as opposed to a "wrongful conviction" of an "innocent" person.[385] As the cases demonstrate, while this term includes convictions of the factually innocent, it is intended to encompass much more, i.e., those convictions that are fundamentally unfair under contemporary standards. It is also intended to focus analysis or discussion away from the question of purely factual innocence.

Review of the court's decisions on SCCRC referred cases shows that the court has been true to this mandate. The fact that an applicant who has been convicted may be innocent is not a ground for quashing a conviction. As demonstrated above,[386] the courts have refused referrals based on unease with the correctness of a conviction in the absence of new evidence or a new legal claim.

But that is not to say that doubts about the accuracy of a verdict play no part in the SCCRC's referral process. As to the first prong of its referral standard—whether there might be a miscarriage of justice—the SCCRC clearly focuses on the impact of the new claim or evidence on the jury's verdict. That is, only a new claim that might have led to a different verdict will constitute a miscarriage of justice. Clearly this is more likely to be found when evidence of guilt is weak. Moreover, the SCCRC

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[383] *Id.* at 9 ("In the Commission's view evidence of Mr Gauci's exposure to this photograph of [Al-Megrahi] in such close proximity to the parade undermines the reliability of his identification of the applicant at that time and at the trial itself.").

[384] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 372, at 370–72. While this case has received a disproportionate amount of attention by both the public and the SCCRC, it does reflect the SCCRC's general approach, as discussed *supra*, of identifying a legal issue that should be reviewed in light of the weakness of the proof at trial and the importance of the evidence relating to that issue. And, of course, it illustrates the SCCRC's commitment to thorough investigation. *See supra* notes 16–19 and accompanying text.

[385] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 20, at 10.

[386] *See supra* notes 18–19, 343–44 and accompanying text.

clearly has referred cases based on its own independent evaluation of the credibility and reliability of the victim-witness.[387]

The accuracy of the verdict also plays a part in the second prong of the test—whether it is in the interests of justice to refer a case. On the one hand, it is the SCCRC's position that it is not in the interests of justice to refer a case in which the defendant is clearly guilty. On the other hand, the fact that a defendant may be innocent is likely to matter under the second prong of the referral standard. Review of the cases leaves a clear impression that the potential innocence of the applicant plays a real role in the discretionary referral of cases. Whether it is in the interest of justice to refer a case is a subject that is totally within the SCCRC's discretion and not the business of the appellate court.

B. Nature of the Cases

In the United States, DNA exoneration cases reveal that factually erroneous convictions generally result from one of the following unreliable pieces of evidence: mistaken one-witness identification evidence, junk science, false testimony regarding jailhouse confessions, or coerced confessions.[388] Non-disclosure of exculpatory evidence and ineffective assistance of counsel are procedural failures that have resulted in wrongful convictions.[389] Scotland seems to have avoided wrongful convictions on these bases due to several aspects of its criminal process.

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[387] *See supra* notes 4, 10, 88, 109, 111 and accompanying text.

[388] *See* Brad Heath, *Justice in the Balance*, USA TODAY (Aug. 20, 2011), *available at* http://theadvocate.posterous.com/usa-today-justice-in-the-balance (recording an investigation of "201 criminal cases across the nation in which federal judges found that prosecutors broke the rules. The abuses put innocent people in jail, [and] set guilty people free."); Kevin Johnson, *Wrongful Convictions Shine Spotlight on Judicial System*, USA TODAY (May 20, 2012), http://www.usatoday.com/news/nation/story/2012-05-20/wrongful-convictions-exonerations/55098856/1 (according to the first national registry of exonerations compiled by university researchers, 873 faulty convictions in the past twenty-three years have been identified as a result of, among other things, perjury, faulty eyewitness identification and prosecutorial misconduct)*; The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Apr. 16, 2013) ("As the pace of DNA exonerations has grown across the country in recent years, wrongful convictions have revealed disturbing fissures and trends in our criminal justice system. . . . In each case where DNA has proven innocence beyond doubt, an overlapping array of causes has emerged—from mistakes to misconduct to factors of race and class.");.

[389] Michael Avery*, Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L. J. 439, 440 (2009).

First, and perhaps most importantly, in Scotland, a conviction may not be based on uncorroborated evidence.[390] While long controversial,[391] and currently targeted

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[390] A classic statement of Scotland's corroboration rule was pronounced by Lord Justice Clerk Aitchison, who declared:

> By the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged.
> . . . .
> This rule has proved an invaluable safeguard in the practice of our criminal Courts against unjust conviction, and it is a rule from which the Courts ought not to sanction any departure.

Morton v. H.M. Advocate, (1938) J.C. 50, 50, 55 (Scot.). Notably, the prosecution's failure to fulfill the corroboration requirement at trial will allow the defendant to contest the conviction, and levy a successful plea of no case to answer at the close of the prosecution's evidence. *See* SCOTTISH LAW COMM'N, DISCUSSION PAPER ON SIMILAR FACT EVIDENCE AND THE *MOOROV* DOCTRINE, 10 n.22 (2010), *available at* http://www.scotlawcom.gov.uk/download_file/view/596/ ("In considering a plea of no case to answer, the court will consider only whether there would be corroboration of every crucial fact if the jury were to accept the evidence; provided that there is evidence which, if accepted, would be capable of providing corroboration, the submission will fail." (citing Criminal Procedure (Scotland) Act, 1995, c. 48, § 97 (solemn procedure); *Id.* § 160 (summary procedure))).

[391] Addressing this controversy, Elish Angiolini, the Lord Advocate, spoke at a conference organized by Rape Crisis Scotland on March 4, 2008 stating:

> Any attempt to remove the requirement for corroboration in Scotland would be extremely controversial and rightly so—the requirement is one which may be regarded as a substantial challenge for the prosecutor but is equally regarded as an important safeguard for the accused, ensuring that where convictions are achieved they are secure and resilient to challenge. It is not for the Lord Advocate to decide on whether the requirement for corroboration should be retained but if we are serious about reforming the law in this area, the question is at the heart of that debate and is one which we cannot avoid—if we are to retain the requirement we must be certain that it continues to serve an important function in our legal system and that the Parliament and the community of Scotland are willing to accept that it will inevitably continue to limit significantly the number of cases which can be considered for prosecution and lead to a conviction.

Hector L. MacQueen & Scott Wortley, *(760) The Lord Advocate and the Law of Rape*, SCOTS L. NEWS (Feb. 18, 2008), http://www.law.ed.ac.uk/sln/blogentry.aspx?blogentryref=6709; *see also* Amanda MacMillan, *Controversial 'Corroboration Rule' Escapes Scots Law Review*, DEADLINE (Oct. 3, 2011), http://www.deadlinenews.co.uk/2011/10/03/controversial-corroboration-rule-escapes-scots-law-review/ (discussing Lord Carloway's review of the Scottish legal system, and the tensions that the requirement rule has aroused amongst the Scottish legal community, as some have considered the rule to be a necessary safeguard in Scottish Law, while others have rebuked the rule as it frustrates the Crown's ability to prosecute certain crimes); Ross Reid, *Rape Charity Welcomes Corroboration Proposal*, HOLYROOD (Nov. 28,

by the government for repeal,[392] Scotland continues to adhere to this requirement. As long as the corroboration requirement remains, it is extremely unlikely that a defendant would be convicted on the uncorroborated testimony of a single identification witness, as has happened in the United States, or, for that matter, on the uncorroborated testimony of a jailhouse snitch. In fact, charges may not be brought by a Scottish prosecutor if there is inadequate corroboration of the elements of any crime.[393]

Second, the prosecutors in Scotland do not have the kind of unlimited discretion to make deals with witnesses that U.S. prosecutors enjoy and that can provide incentives to testify falsely.[394] That is, jailhouse snitches, co-defendants, and other informers are not offered the kind of extensive benefits in exchange for testimony that could, and often do, lead to unreliable testimony under the U.S. broad-discretion regime. The same limited discretion exists with respect to plea bargaining. In Scotland, sentence bargaining does not exist. Sentencing is left entirely to the sentencing judge who is, in turn, bound by statutory ranges and discounts that may be offered and imposed in exchange for a guilty plea.[395] While so-called "charge bargaining" does

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2011), http://www.holyrood.com/articles/2011/11/28/rape-charity-welcomes-corroboration-proposal/. The Reid article discussed Lord Carloway's controversial recommendation to abolish corroboration rule in criminal prosecutions. Reid, *supra*. In response, Sandy Brindley, national coordinator of Rape Crisis Scotland, was quoted as saying, "[w]e welcome the proposal from Lord Carloway to remove the requirement for corroboration. This requirement has a particular impact on sexual offences, which often take place in private." *Id. See also* Gareth Rose, *Radical Overhaul of Scots Law Could Spell End for Corroboration*, SCOTSMAN.COM (July 3, 2012), http://www.scotsman.com/news/scottish-news/top-stories/radical-overhaul-of-scots-law-could-spell-end-for-corroboration-1-2389426 (describing that the Lord Carloway's review of the Scottish system, and "[s]ome of his proposals, such as the removal of the requirement for corroboration, are monumental and will overhaul many years of legal practice").

[392] The Scottish government has announced a bill (the Criminal Justice (Scotland) Bill 2012) that would abolish the corroboration requirement. *See Criminal Justice Programme for Government 2012–13*, SCOTTISH GOVERNMENT, http://www.scotland.gov.UK/About/Performance/programme-for-government/2012-13/criminal-Justice-Bill (last visited Apr. 16, 2013).

[393] *See* CROWN OFFICE AND PROCURATOR FISCAL SERVICE, PROSECUTION CODE (2001), *available at* http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/13423/0000034.pdf.

[394] According to the Innocence Project, "[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial. Often, statements from people with incentives to testify—particularly incentives that are not disclosed to the jury—are the central evidence in convicting an innocent person." *Informants*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Apr. 16, 2013); *see also* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 849–50 (2002) ("Many professional participants in federal criminal practice believe that the Federal Sentencing Guidelines, particularly by their ability to confer unprecedented and enormous rewards on cooperators who provide law enforcement with 'substantial assistance,' create a powerful incentive for cooperators to exaggerate and falsify information.").

[395] *See* Fiona Leverick, *Plea and Confession Bargaining in Scotland*, 10 ELECTRONIC J. COMP. L. 1 (2006), *available at* http://www.ejcl.org/103/art103-8.pdf.

exist, the prosecutor still has limited ability to provide the kind of incentive that would lead to false testimony.[396]

Third, prosecutors in general are much less adversarial and partisan than they are in the United States. As in England, the legal profession is divided into lawyers who work out of court (solicitors) and lawyers with rights of audience in court (in the U.K., barristers; in Scotland, advocates).[397] Advocates, being the only attorneys with rights of audience in the court, tend to have had experience in civil and criminal matters and, in criminal matters, on both the prosecutorial and defense side.[398] The sense of individual role is not tied to one side or the other institutionally. In fact, the simple division between solicitor and advocate, with the solicitor being the advocate's client,[399] allows advocates in criminal cases to distance themselves somewhat from the individual client or victim. Additionally, Scotland is a small country with a small legal community. As in England, professional, reputational, and ethical standards are likely to discourage partisan short cuts.[400]

Fourth, prosecutors have and comply with broad disclosure obligations—both formal and informal—concerning both inculpatory and exculpatory evidence that currently result in greater disclosure to the defense than in the United States. As to inculpatory evidence, for example, and unlike in the United States, the defense in Scotland generally has the right to precognose (depose) any of the prosecution witnesses pretrial.[401] As to exculpatory evidence, about five years ago, the law was

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[396] *Id.* at 14, 16.

[397] Harry Cohen, *The Divided Legal Profession in England And Wales—Can Barristers and Solicitors Ever Be Fused?*, 12 J. LEGAL PROF. 7 (1987).

[398] *See generally id.*; *Barrister: Job Description*, PROSPECTS (Oct. 2010), http://www.prospects.ac.uk/barrister_job_description.htm.

[399] *See* Cohen, *supra* note 397, at 7.

[400] For a comprehensive study, *see* Griffin, *supra* note 3, at 107 (observing that "[t]he U.K. criminal justice process is considerably less adversarial than that in the United States and thus much more tolerant of the fairness of do-overs. There is greater discovery, barristers switch from prosecution to defense, and the right to silence is more restricted" (footnotes omitted). In this comparative study, I also observed that "prosecutorial agreement to receive new evidence on appeal or a prosecutorial concession that the conviction could not be sustained" was far more prevalent than in the United States. *Id.* at 151. Notably, as discussed in the cases above, prosecutors in Scotland have demonstrated the same willingness to concede on appeal or abandon tainted prosecutions—as seen in its recent addressing of *Cadder* violations. *See Crown Publishes Results of Cadder Review*, J. L. SOC'Y SCOT. (Feb. 9, 2011), http://www.journalonline.co.uk/News/1009326.aspx (stating that the Procurator Fiscal Service abandoned a total of 867 cases as a direct result of the *Cadder* decision).

[401] *See* Criminal Procedure (Scotland) Act, 1995, c. 46, §§ 66(7), 67. The defense also receives copy lists of witnesses and productions to help achieve this investigatory right. *See id.* § 67(1) (providing that "the list of witnesses shall consist of the names of the witnesses together with an address at which they can be contacted for the purposes of precognition"). Heeding to the progression of this right, Lord Rodger of Earlsferry expressed in *McDonald v. H.M. Advocate*,

amended to require the police to complete schedules of exculpatory material that were to be sent to the prosecutors and that broadened the categories of items to be disclosed.[402] This is quite like the disclosure regime in the United Kingdom.[403] Many of the disclosure cases that were referred by the SCCRC were historic cases, in which the failure to disclose was more likely to have occurred under the past, much narrower disclosure regime.[404]

Another feature of Scottish law that may prevent some erroneous convictions is the fact that, in addition to verdicts of guilty or not guilty, a jury may return a verdict of "not proven."[405] Where it is a permissible verdict, however, the court may

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> Under the Scottish system, the defence has the valuable right to precognosce witnesses . . . . But the law imposes a duty on the Crown to disclose all the statements of these witnesses precisely because, in the nature of things, they may well contain information which even careful precognoscing by the defence would not uncover and which might materially weaken the Crown case or support the defence case.

McDonald v. H.M. Advocate, [2008] UKPC 46 [57] (Scot.).

[402] Criminal Justice and Licensing (Scotland) Act, 2010, (A.S.P. 13), §§ 117–20. In short, this provision of the Act mandates that the police provide information relevant to the prosecution of the accused to the Crown. *Id.* § 117(2) ("As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates."). Likewise, the duty to disclose information gathered by police continues during all relevant periods of prosecution. *See id.* § 118.

[403] Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695 (2007).

[404] Recent court decisions leading to the progression of disclosure law in Scotland and the enactment of the Criminal Justice and Licensing Act are illuminative of the significant strides taken from ancient discovery practices in Scotland directing the disclosure of evidence between the Crown and criminal defendants before trial. *See* Holland v. H.M. Advocate, (2005) P.C. 3 (Scot.) (dealing with the disclosure of previous convictions and outstanding charges in relation to witnesses); Sinclair v. H.M. Advocate, (2005) PC 28 (Scot.) (dealing with the disclosure of previous statements by a witness); McLeod v. H.M. Advocate (No.2), (1998) J.C. 67 (Scot.) (dealing with the disclosure of material evidence relevant to the defense). Indeed, prior to the court's recent direction in such cases, the Scottish system was observed to have laboured under "the traditional assumption . . . that, fair notice of the case having been given, it was for the defence to investigate it and look for exculpatory evidence." RT HON LORD COULSFIELD, REVIEW OF THE LAW AND PRACTICE OF DISCLOSURE: IN CRIMINAL PROCEEDINGS IN SCOTLAND, ¶ 3.4 (2007), *available at* http://www.scotland.gov.uk/Publications/2007/09/11092728/0.

[405] SALLY BROADBRIDGE, HOUSE OF COMMONS LIBRARY, THE "NOT PROVEN" VERDICT IN SCOTLAND 2 (2009), *available at* http://www.parliament.uk/briefing-papers/SN02710.pdf ("Scots law is unusual in allowing three possible verdicts in a criminal trial, guilty, not guilty and not proven. The move towards the current three verdict system began in the 1720s. . . . The verdict of not proven is essentially one of acquittal. In all respects the verdicts of not guilty and not proven have exactly the same legal effects."); Peter Duff, *The Scottish Criminal Jury:*

not instruct the jury that they have the power to return it. To return a "not proven" verdict, the jury does not have to reject the law, and nullify, as it would in the United States, but rather simply applies the law to the facts to determine if the prosecution has proved its case.[406] Presumably, given three explicit alternatives, Scottish juries probably resolve some close cases—and avoid a wrongful conviction—simply by returning a "not proven" verdict.[407]

Another frequent contributor to wrongful convictions—ineffective assistance of counsel—remains a problem in creating miscarriages of justice. While the SCCRC referred several cases to the court on that basis, the court has set the bar incredibly high so that none of the cases referred on this basis succeeded.[408] Indeed, in one of those cases, the court strongly admonished the Commission for referring the case.

The court seems extremely protective of the bar. It may be significant that, as in the United Kingdom, the bar has been historically and continues to be considered an elite, highly trained professional guild and is a close, tightly knit professional community. There is no doubt that the kind of extreme partisanship that exists in the United States' adversary system does not exist in Scotland, and that U.S.-style extreme adversarialness certainly lies at the root of some of the wrongful conviction cases, particularly, for example, the prosecutorial non-disclosure cases here. As in the U.K., a Scottish advocate's sense of professional role is much less aggressively adversarial than that of his or her U.S. counterpart. Moreover, the advocates who represent the Crown do not tend to be young and inexperienced, as prosecutors frequently are in the United States.[409]

A Very Peculiar Institution, 62 L. & CONTEMP. PROBS. 173, 173–201 (1999) ("[T]he Scottish criminal jury is of particular interest because it embodies several unique characteristics which might seem very peculiar to those familiar with other versions of the institution. In particular, it comprises fifteen persons; its verdicts may be reached on the basis of a bare eight-seven majority; and it has a choice between three different verdicts—guilty, not guilty, and not proven—which even many Scots regard as illogical and unprincipled."). In 1964, Lord Justice General Clyde stated that "for upwards of 200 years a not proven verdict has been available and no convincing argument has been advanced to justify its elimination from our law." BROADBRIDGE, *supra*, at 2.

[406] *See* James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIGATION 6 (1996); *see* Duff, *supra* note 405, at 193.

[407] Jury research supports this conclusion. *See* L. Hope, et al., *A Third Verdict Option: Exploring the Impact of the Non Proven Verdict on Mock Juror Decision-making*, 32 L. & HUM. BEHAV. 241 (2008).

[408] *See supra* notes 274–92 and accompanying text.

[409] Interview with Dr. Fiona Leverick, Professor of Law, University of Glasgow School of Law, March 22, 2012. Robin White, University of Dundee, has observed that in Scotland "[t]here has . . . always been a cadre of professional, albeit temporary, senior prosecutors . . . Advocates-Depute have traditionally been members of the Scottish Bar, holding part-time three-year, appointments from the Lord Advocate, and the office has been seen as a stepping stone to the Bench." Memorandum from Robin White, University of Dundee, to The House of Commons Justice Committee (Jan. 2009), *available at* http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186we29.htm.

C. The SCCRC and the Court

One of the accusations against the SCCRC, and against the CCRC,[410] has been that it is too deferential to the court.[411] While the CCRC must consider whether the court is likely to quash,[412] the SCCRC is governed by the miscarriage of justice standard, which is the same standard the court will use.[413] It will refer if it concludes that a case "might" be a miscarriage of justice, and the court will quash if it determines that a miscarriage of justice has occurred. These differences imply that the two might not agree in all cases, and indeed, in 64% of the cases the SCCRC referred, the court agreed that a miscarriage of justice had occurred.[414] If the SCCRC were attempting to refer only cases that the court would agree were miscarriages, the percentage would be much higher.[415] Moreover, the SCCRC cannot refer simply because it finds that a miscarriage of justice might have occurred; a prediction about how the court would decide a case is only part of the referral test. The SCCRC must

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[410] Although empowered to act independently, both the CCRC and SCCRC have experienced times of judicial persuasion on how and when to act. *See* Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Reporting Success?*, 64 MODERN L. REV. 280, 292 (2001) ("[I]t is difficult to construct a workable relationship between the Commission and the Court of Appeal that does not routinely subordinate the former to the latter . . . ."); R v. Gerald, 1999 CRIM. L. REV. 315. Michael Naughton, senior law lecturer at Bristol University and founder of the Innocence Network UK, has lobbied for reform of the CCRC stating: "The CCRC was supposed to be the extra safeguard for innocent victims of miscarriages of justice that are failed by the court of appeal. . . . The CCRC needs to be independent of the court of appeal so that it can focus on whether applicants are innocent or guilty as was intended by the royal commission that recommended it be set up." Sandra Laville, *Criminal Cases Review Commission Must Be Reformed, Say Campaigners*, GUARDIAN, Mar. 27, 2012, http://www.guardian.co.uk/law/2012/mar/27/criminal-cases-review-commission-reform-campaign?CMP=twt_fd. According to case statistics, the CCRC rejects 96% of applications every year for applicants claiming actual innocence. *Id.*

[411] *See, e.g.*, Duff, *supra* note 18, at 718 ("I would argue that the Scottish Criminal Cases Review Commission is more independent of the appeal court than some commentators might suggest. . . . Admittedly, the relationship is 'asymmetrical': while the Scottish Commission is comparatively free to refuse to refer cases which might well succeed before the appeal court (as demonstrated by *Cochrane*), on the other hand, it is constrained by the self-referential world of law and cannot ensure that a referral is successful (as demonstrated by *Harper*)." (footnotes omitted)).

[412] *See* Griffin, *supra* note 3, at 111 (stating that "[t]he CCRC's mandate is to review the applications of convicted defendants and to refer cases to the Court of Appeal for review where there is a *'real possibility* that the conviction, verdict, finding or sentence would' . . . be found unsafe").

[413] *Id.* at 108.

[414] *See* SCOTTISH CRIMINAL CASES REVIEW COMM'N, *supra* note 39, at 20 tbl. 13.

[415] Illuminating this point, former member of SCCRC, Peter Duff stated "we—and not the judiciary—should determine that a conviction would be upheld." Duff, *supra* note 18, at 703.

also find that it is in the interests of justice to refer.[416] That standard guarantees the SCCRC's independence because the court has nothing to say about that. So, structurally, the two systems are different.

Analytically and impressionistically, too, the cases show a healthy independence. One sees that the SCCRC has not been afraid to refer cases in which a new claim of error was valid but where there was a real question about the error's impact on the verdict,[417] or to refer cases in which there might have been a dispute about the reliability or significance of new evidence.[418] And, although the court has made clear its unwillingness to quash a conviction based on a claim of deficient performance by counsel, the SCCRC has repeatedly sent cases raising that issue.[419] At least the court is being kept aware that this is a recurring problem.

CONCLUSION

In a small country, with a small staff, and struck by the *Al Megrahi* limelight because of factors beyond its control, the SCCRC is doing a remarkably good job. Its investigations are thorough, including a personal interview with the applicants in most cases, and include extensive efforts to find something new in the case that might warrant referral to the courts. Anecdotally, one is immediately struck by how seriously they exercise their role as an independent watchdog against miscarriages of justice. The extensive recitation in most of the decisions on referral about the kind and amount of new evidence presented to the court by the Commission confirms this.

Judicial treatment of SCCRC referrals is harder to evaluate, largely because the cases are small in number. Yet, again, the court's decision in cases that were referred but dismissed reveals that the SCCRC has referred cases in which reasonable minds might have and did differ about whether a miscarriage had occurred.

Should the SCCRC's mandate be changed? As has been argued with respect to the CCRC, criminal cases review commissions could appropriately be given the power to refer cases in which, although there is nothing new in the case, the Commission believes that the conviction is factually erroneous.[420] Certainly, such a

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[416] Gerard Sinclair, *Miscarriages of Justice*, J. L. SOC. SC. (Aug. 15, 2005), http://www.journalonline.co.uk/Magazine/50-8/1002079.aspx.

[417] *See supra* note 264 and accompanying text.

[418] See *supra* Part III.A.

[419] *See supra* Part III.A.

[420] *See* Duff, *supra* note 18, at 720–22 (discussing and expressing the SCCRC's review of referrals, the gravity of its attempt to determine each applicant's guilt or innocence, and the implicit rationalist model of adjudication of petitions it performed in the hopes of reconstructing the objective truth of what occurred). Duff explained that at times he "thought it was possible that the applicant was innocent but, as regards others, [he] had severe doubts as to their innocence but was not sure enough of their guilt to argue against a referral. In all such cases, however, [he] was convinced . . . a 'miscarriage of justice' [had occurred]." *Id.*

conviction would constitute a miscarriage of justice, and, values of finality notwithstanding, should be quashed. Yet, arguably the most important part of what these commissions do is investigate. After conviction and appeal, there is no other way for an applicant to have his claims investigated. The SCCRC takes this investigatory role seriously. Given their broad investigatory powers and watchdog role, even if their investigation reveals nothing new or admissible to contest the accuracy of the verdict, referral may still be appropriate. Perhaps cases like *Harper*,[421] that meet the "lurking doubt" standard ought to be referred, particularly because, in Scotland, given its particular criminal justice process and small population, the number of such cases would be extremely small.

A good argument can be made for amending the statutory disclosure restrictions constraining the SCCRC. While good reasons exist to limit disclosure of the results of an investigation that lead to a decision not to refer, it would be helpful to future applicants and others to know at least what the reasons were for the decision not to refer. As to the decision to refer, while the court frequently sets forth the reasons given by the SCCRC for referral, so they are frequently available despite statutory restrictions, full disclosure of the reasons supporting a decision to refer would seem to be relatively uncontroversial and would allow the SCCRC's critics to see more about the SCCRC's decision-making process.

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at 721. To this end he notes that there "remains the possibility that if the Commission is sufficiently convinced that an applicant is factually innocent, it is theoretically possible, in the wake of a first unsuccessful referral, to refer the case back to the appeal court and simply keep referring the case time after time." *Id.* at 722.

[421] Harper v. H.M. Advocate, [2005] HCJAC 23 (Scot.).