

TRANSCRIPT OF PROCEEDINGS
UNCLASSIFIED

AUSTRALIAN DEFENCE FORCE

AUSTRALIAN ARMY, VICTORIA BARRACKS, NSW

INQUIRY INTO THE DEATH OF
PTE JACOB BRUCE KOVCO

PRESIDING:

GPCAPT W COOK, President
COL M CHARLES, Board Member
MR J O'SULLIVAN, Board Member

COL M GRIFFIN, Senior Counsel Assisting
MAJ E JOLLY, Counsel Assisting
MAJ J HYDE, Counsel Assisting
MAJ A BELKIN, Counsel Assisting

LTCOL P WILKINSON, representing Soldier 2
LTCOL B GREEN, representing Soldier 14
LTCOL T BERKLEY, representing Next of Kin
LTCOL F HOLLES, representing PTE Kovco's Parents
COL L YOUNG, representing PTE Kovco

1051 FRIDAY 18 AUGUST 2006
DAY 24

The transcript has been checked and cleared for operational security issues.

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and correct

Signed.....  Date18/08/06.....(President)

Signed.....  Date18/08/06.....(Recorder)

Signed.....  Date 18/08/06.....(Transcriber)

Signed.....  Date 18/08/06.....(Transcriber)

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NTS

RESUMED

[1051]

5 PRESIDENT: Ladies and gentlemen, today of course is the 40th
anniversary of the Battle of Long Tan. I think we should pause to
remember the 18 people who died in that event, also the 509 people who
died serving Australia in Vietnam, also Jake who also died in the uniform
of Australia serving Australia. As a mark of respect to those people, may
10 I suggest that we observe a minute's silence. Thank you, Colonel, the
business of the day.

15 COL GRIFFIN: Good morning, Mr President, Members. First witness
today is Michelle Franco. I call Michelle Franco.

PRESIDENT: Thank you.

20 <MICHELLE ANNE FRANCO, sworn

[1055]

<EXAMINATION BY COL GRIFFIN

25 COL GRIFFIN: Ms Franco, I'm COL Griffin, Counsel Assisting the
Board of Inquiry. Would you state for the record your full name, please?
---Yes, my name is Michelle Anne Franco.

30 What is your occupation?---I work as a forensic biologist for the division
of analytical laboratories.

35 Have you read Annex F to the Australian Defence Force Publication
06.1.4 which sets out the rights and obligations of a witness appearing
before a Board of Inquiry?---Yes, I have.

40 What is your training and experience in your occupation, please?---My
formal training I have a Bachelor of Science Degree from the University
of New South Wales and I have a Bachelor of Science Management from
the University of Technology Sydney. I've been employed as a forensic
biologist since 1985 and I routinely am involved in the examination of
items for biological fluids. Then my main role is the interpretation of
DNA analysis from the DNA typing of those biological fluids. Most of
my work involves items received from the police and these are involved in
criminal matters. I also have to give evidence in Court as well.

45

A document is an exhibit in these proceedings and it's on the desk in front of you, Exhibit 85. Would you just look at that, please. Do you recognise that document?---Yes.

5 It's headed "A Certificate of Analysis"?---Yes, it's the first report that I made in relation to this Inquiry.

I'll show you two other documents. Do you recognise those documents?
---Yes, there is report number 2. This is the second report that I made.

10 Is that dated 11 August 2006?---Yes.

I tender that document, sir.

15 PRESIDENT: Is there any opposition to the tender of that document?

COUNSEL REPRESENTING: No, sir.

20 LTCOL GREEN: No, sir, subject to one matter. The copy that I've got - and I've only just received it - which is headed "Report 2" - talks of attached appendices for statistical and technical information. The copy I have doesn't seem to have that. I'm just wondering if that's a detailed document or a rather short document or is it something that could be master.

25 COL GRIFFIN: We may be able to deal with that in respect of the next document and the witness can assist. The second of the two documents that has just been shown to you, Ms Franco, what is that?---The appendix at the back of the document - yes, the appendix is a two-page information,
30 but is really the same document that's attached to all of the three reports. So if you have one of the appendix you really don't need three of them; they're only duplicates.

35 So if we come to the second document that's just been handed to you, if you could just look at that and identify what that is, please?---Yes, the second document is the second report that I produced in relation to this Inquiry.

40 That's the one dated 11 August?---Yes, that is.

That Counsel Representing has just asked about the statistical annex to?
---Yes.

45 Is it the case that the third document, the third report, has the statistical annex attached to it as does the first report?---Yes, that is correct.

That may satisfy Counsel Representing in respect of the tender.

PRESIDENT: I take it you're comfortable now?

5

LTCOL GREEN: Yes, sir.

10 **#EXHIBIT 150 - CLASSIFIED AND REDACTED VERSIONS OF
REPORT OF MS M A FRANCO DATED 11/08/06**

COL GRIFFIN: If we could return to the third report then. What date is that document, please, Ms Franco?---This document is 17 August 2006.

15

It is the third report you have produced in relation to your investigation and analysis of matters provided to you in the death of PTE Jacob Kovco?---Yes, that's correct.

20

I tender that report, sir.

PRESIDENT: Is there any opposition to that document being received?

COUNSEL REPRESENTING: No objection.

25

LTCOL GREEN: No, sir, subject to I have - my report mentions a list of males, reports 1, 2, 3. I'm just wondering what that's a reference to or is that the annexure that I'm missing.

30

PRESIDENT: Can you help us?---Yes, look, that just means the reports 1, 2 and 3 that have been generated, any males that we list in those.

Are you comfortable now?

35

LTCOL GREEN: Thank you, sir, yes.

40 **#EXHIBIT 151 - CLASSIFIED AND REDACTED VERSIONS OF
REPORT OF MS M A FRANCO OF 17/08/06**

COL GRIFFIN: Now, Mr President, in respect of each of the reports, because there are persons identified by name there is a classified and redacted version of each of the reports.

45

PRESIDENT: They will be marked in their classified and redacted versions.

5 COL GRIFFIN: Thank you. Now, Ms Franco, on the desk in front of you is a matrix that is an exhibit in these proceedings that sets up a series of numbers that correspond to soldiers who are deployed in the Middle East Area of Operations at the moment. To protect their identities we refer to them by the corresponding number next to their name. You'll see that the redacted version of each of your reports, those are edited and blocked out.
10 So if at any time you need to refer to any of those individuals, if you would do so by reference to that matrix of numbers. I'll attempt to assist you with that in my questioning?---Okay.

15 Would you please tell the Board how you came to be involved in providing this evidence in your expert capacity?---Yes, well, some items were delivered to the laboratory for analysis. The items were examined and once all the items were examined, then a report was made and I interpreted the DNA results. So that there were - the type of items that were received enabled me to recover DNA from those items and it was my
20 job to compare the DNA types that were gained to different people. So I received person samples as well that I could compare the DNA results to and determine if the DNA could have originated from these particular people and I made a report. I could go into more detail for all the items I've examined.

25 I'll take you through that now. Thank you very much. The first document that I'd ask you to refer to is Exhibit 85, which is your first report in the proceedings. You set out there on the first page, subparagraph (3), numbered 1 through to 10 a series of items that you had received and upon
30 which you conducted tests?---Yes.

That included serials 4, 5 and 6 swabs from the grip of a Browning pistol, swabs from the slide of a Browning pistol, swabs from the trigger of a Browning pistol?---Yes.

35 You received - is the correct pronunciation "buccal" - that is, a buccal or sample from a series of individuals?---Yes.

40 What is a buccal sample?---A buccal sample is a swab that is rubbed on the inside cheek lining of a person and it is used to enable to us to type a person's DNA by using the buccal cells from inside the cheek lining. That is brought to the laboratory in a sealed package.

45 You received those types of samples from a number of New South Wales Police investigators and forensic staff and from military investigators

named in that document?---Yes, that's correct.

At page 3 of your four-page report you then describe your opinions. As you say there:

5

These items have been examined and based on my specialised knowledge, I can report as follows.

10 And you describe some matters there. Now, if I draw your attention to the paragraph second from the bottom where you describe your results of the swabs of the slide of the pistol and you say there that it's a mixture and it appears to originate from two individuals. Would you describe what that is that you've discovered there?---Well, because - if I can just maybe explain about DNA. So DNA is a genetic information that incurs in people, in everyone. Half of your DNA is inherited from your mother and half is inherited from your father. So you should have at the maximum two DNA types at every position that we are looking for in the laboratory. If I can start again maybe about DNA and the type of systems that we are using in the laboratory to explain this answer.

20

If I can speak to that, if you would assume no knowledge and work from that basis - - -

PRESIDENT: I think that's very safe.

25

COL GRIFFIN: - - - on the part of your audience?---Good, let's start from the beginning. Okay. So DNA is present in all humans and it carries genetic information. It's often called the blueprint of life. Half your DNA is from your mother and half your DNA you incur it from your father. Identical twins will have the exact same DNA. So we can never identify one of identical twins. DNA occurs in most body fluids of the body. It occurs in white blood cells from blood. It occurs in semen, saliva and it occurs in skin cells. A more recent happening in the laboratory is to try and recover DNA from what we call touch DNA; from skin cells.

35

This DNA occurs in much smaller amounts than body fluids such as blood or semen. Now, in the laboratory we use a system which is a commercially available kit called the "Profiler Plus System". This system looks at areas of the DNA that differ between people. There are nine different areas of the DNA that it targets, plus the gender marker. So we can determine if the DNA originates from a male or a female individual.

40

Now, looking at the nine different locations that our system targets, at each of the nine different locations a person should have a DNA type which is represented by numbers. If they have one number it means that

45

the parents have given the person the same number. So it's represented by one number. If they have two numbers, that means that the father and the mother have given the person two different numbers. But if there is more than two numbers at a specific DNA location, that means there's too much DNA from just one person. I know then there is a mixture of DNA.

What I look at to interpret the DNA is like a graph. I have to interpret the graph and compare this graph to known DNA profiles. So the question was, how did I know that the swabs on the slide was a mixture. I know that because there was more - it indicated there was more DNA from one person because no-one could have that many or different DNA types at each of the nine different locations. So I knew that it had to come from two people. Does that make sense? Should I go into - if you have any questions, ask me.

No, I follow what you've said to date; thank you for that. Now, having determined as a consequence of that technical and scientific background that there was a mixture on the slide, you concluded that it originated from two individuals?---Yes.

You identified that the major profile present came from an unknown male individual and could not have originated from the deceased, PTE Jacob Kovco?---Yes, that's right.

But you were able to exclude all the other people named in that paragraph, the various investigators, military and civilian police, who had handled the material in its passage to you as contributing to that mixture?---Yes.

In the next paragraph you talk about the trigger, which is identified as item 6, and again you discovered a mixture originating from two individuals? ---Yes.

In this mixture you're of the opinion that PTE Kovco had the same DNA profile as the major component of that mixture?---Yes.

And that this was a profile expected to occur in fewer than one in 10 billion individuals in the general population?---Yes.

Do we draw from that that that's a very significant indicator for you? ---Yes, it is a significant indicator, but any full profile that matches a person will give a very high statistic in that order, fewer than one in 10 billion or one in three billion. They're all rare profiles. So once you get a full profile that does match to a person, it is significant. It is where you don't get a full profile, you don't look at - where you don't get all the nine different areas of the DNA typed, that's when you have to give a statistical

weight to those findings. But in this case a full DNA profile was obtained and the frequency of that profile was fewer than one in 10 billion.

5 On the next page of your report you describe your opinion in respect of the grip, that is, the hand grip, of the pistol being item 4. Again you identify a mixture originating from more than one individual. You say:

Individual A could not be excluded as a major contributor to this mixture.

10

By individual A, are you referring to the same person that is mentioned as at individual A in respect of item 5 on the previous page?---Yes, that's right.

15 So the same person from the profile present on the slide could not be excluded as the major contributor to the profile present on the hand grip of the pistol?---Yes.

You went on to say that:

20

The deceased could not be excluded as a minor contributor to that mixture on the hand grip.

?---Yes.

25

But you were able to exclude again the investigators named in that paragraph as contributors to that mixture?---Yes, that's right.

30 I now take you to report number 2, please. In this document you describe receiving further buccal samples from again further Military Police. Then at paragraphs 19, 20 and 21 and 22 buccal samples received from individuals named on that matrix that you have, being Soldier 2, Soldier 19, Soldier 17 and Soldier 2 respectively - sorry, 14 respectively. So at paragraph 19 of report number 2 Soldier 2 appears?---Yes.

35

At paragraph 20 Soldier 19 appears. Is that right?---Yes.

At 21 Soldier 17 appears?---Yes.

40 And at 22 Soldier 14 appears?---Yes.

You also then go on to describe further physical items of evidence provided to you, being respectively at paragraphs 23, 24 and 25, a 9 mm bullet, a 9 mm cartridge and three magazine cartridges?---Yes.

45

Then you go on to determine at paragraph 4 again the statement:

These items have been examined and based on my specialised knowledge I can report as follows.

5

You did DNA tests for those buccal samples, particularly for the Military people that I have just described to you, and you go on to set out your findings in respect again of the various items. We'll start, if we can, please, with item 5 again, being the slide. You restate that this is a mixture from two individuals?---Yes.

10

You say that Soldier 14 has the same DNA profile as the major component of this mixture?---Yes.

15

Then you refer to a frequency. Would you describe that, please, what that is referring to there?---Yes, this frequency was a full profile and it occurs in approximately one in 8.3 billion individuals in the general population where a billion is defined as a thousand million.

20

So that's in fact more than the population of the planet as it currently stands?---Yes, approximately 6 billion people are on the planet.

25

Is this a rare finding or does it indicate strength of - for your purposes - interpretation?---Yes, it does. As I said before, every full profile is a rare profile.

So Soldier 14 having the same DNA profile as the major component on the mixture for the slide of the weapon?---Yes.

30

You then go on in the next paragraph to talk about the trigger, item 6. Again a mixture originating from two individuals. You say that Jacob Kovco has the same DNA profile as the major component of this mixture?---Yes.

35

Again you give a frequency and you say in the fifth sentence:

Soldier 14 could not be excluded as the minor contributor to this mixture, but due to the low levels of DNA recovered in the minor component, this finding is of low statistical significance.

40

What does that mean?---Yes, that means that of the nine markers that we're looking for, the nine different locations on the DNA molecule, I could see types matching Jacob Kovco; that was easy. But the extra types that couldn't be attributed to Jacob Kovco occurred in only three positions on the locations and were in tiny amounts. But yet these three positions I

45

could not exclude Soldier 14. So it doesn't have anywhere near the statistical significance of a full profile. But because there is DNA on another part of the weapon that matched Soldier 14, that is why I wanted to mention that it could not be excluded as this minor contributor. But it
5 doesn't have the statistical weight of a full profile. A lot of people in the population could also fit into this category. But I just wanted to mention that the other people that I had reference samples for I excluded those.

10 You could positively exclude Soldier 2, Soldier 19 and Soldier 17?---Yes.

If we could move on then to the grip or hand grip of the pistol, being item 4 described in the next paragraph. Again a mixture and you state that Soldier 14 could not be excluded as a major contributor to this mixture?
---Yes, that's right.

15 But you can exclude again Soldier 2, Soldier 17 and Soldier 19 as the contributors?---Yes, that's correct.

Jacob Kovco could not be excluded as a minor contributor to the DNA on the hand grip?---Yes, that's right.

If we could come now to your third report, please. This is a report that you completed yesterday?---Yes.

25 In it you describe receiving a further buccal sample from a person who has previously been a witness before the Board, Mr van der Walt, who was involved on the evidence we've received in the ballistic testing investigation?---Yes.

30 Reference is made to the bullet, item 23, and you've indicated that the DNA from the bullet originates from an unknown male individual and could not have originated from Jacob Kovco. Are you able to say anything about a bullet recovered in those circumstances as to its usefulness or otherwise in DNA testing?---Yes. Normally we don't accept
35 bullets for testing because if - especially if it's been through a person, there's not really any need. But I would have imagined that - I would have expected that we would have got DNA on the bullet that matched Jacob Kovco. But I have had information that the bullet went to ballistics first and they have washed the bullet and done things to it. So I - you
40 know, that's the normal - see, we normally wouldn't accept a bullet anyway. But I think on the request of the Military it was then sent from ballistics to us. So having the profile from an unknown male individual probably doesn't mean that much.

45 And the absence of Jacob Kovco's DNA from the bullet, it having been

washed and handled in ballistics, is not a cause of surprise for you?---No.

5 If we come to the next paragraph where you discuss the magazines, item 25A. You're referring there to the body of one of the magazines. I note in another paragraph you talk about the base plate. Could you just describe to the Board what it is that you did in respect of the magazine, item 25A? ---Yes. Item 25A was described and then the magazine was separated or tested as two different areas. The butt part of the magazine was treated as one area and the main body of the magazine was treated as the second area.

10 By the butt part, are you referring to the base plate at the bottom of the magazine and the body being the longer sides of the magazine?---Yes.

15 Thank you?---And what we were trying to achieve was to recover trace DNA. So the way that we do that is by double swabbing the area. One swab with water, distilled water, is swabbed over the area of interest, and this is followed by a dry swab over that same area. Then the swabs are cut out and put into a tube for the DNA process. Then the DNA is extracted and typed and the results then are interpreted by me for the report.

20 Your interpretation and your report appears there in the second large paragraph on the page. In respect of the body of the magazine, it appears to originate again mainly from two individuals. You indicate that the deceased, PTE Kovco, and Soldier 14 could not be excluded as the two main contributors to the mixture?---Yes.

25 A weaker profile was recovered from the butt or base plate of the magazine and is also a mixture from more than one and again both PTE Kovco and Soldier 14 could not be excluded as contributors to this mixture. You go on to say that:

30 *Due to the low levels of DNA recovered, the statistical significance of these findings could not be determined.*

35 What do you mean by that?---The amount of DNA was so low that it wasn't high enough to put any statistical weight to it. So the mixture on the main body of the magazine was much stronger than the base plate or the butt part. This mixture though was similar to the mixture of DNA types as on the grip of the gun. But I couldn't - it was so weak I couldn't isolate a DNA type, work out who were the individual profiles from the DNA mixture. Therefore, I couldn't give any statistical significance to these findings because it was just too low levels.

40 You did some further examination of the grip. Is that right?---Yes.

5 You describe that in the last large paragraph and you say that Soldier 14
could not be excluded as a major contributor to this mixture. You go on
to give a figure there, a frequency of one in 3.3 million individuals, which
is a different figure to that contained in your previous report, report
number 2, where you described in respect of item 4 that Soldier 14 could
not be excluded and you referred there to a frequency of one in 170
people. Would you tell the Board about that difference, please?---Yes.
10 The first test was done and I could only isolate certain areas of the DNA
to incorporate into my statistical analysis. Therefore, I couldn't
discriminate as well on that profile. I only achieved a very partial profile
to incorporate. Therefore, the statistical frequency was much smaller. So
I did an additional DNA testing and obtained a better profile and therefore
I could incorporate more DNA types in my frequency, which allowed the
15 figure to increase or become more rare; I was able to discriminate further.
Therefore, I recalculated the statistics and the statistic was approximately
one in 3.3 million individuals.

20 Is that statistically significant, that change from one in 170 to one in 3.3
million?---Yes, but it is like imagining if you were looking at a
photograph and on the photograph it's very blurred and you could only
pick out a few characteristics, but then you sort of redevelop the
photographs and a few more characteristics popped up. So it just gives
you more information and therefore you can discriminate further as to,
25 you know, who possibly could have left that DNA.

It's not apparent to me from report 3 as to whether or not your capacity in
the other reports to exclude the other personnel, particularly the soldiers
named therein, relates to the tests of the magazines. Are those other
30 persons excluded, that is, Soldier 2, Soldier 17 and Soldier 19 in
particular?---Well, there were trace amounts of DNA from a third
individual on the grip, but these were at levels too low to interpret. So I
couldn't exclude anyone from those because I couldn't even interpret
them. But as for the two major contributors, I could exclude all of the
35 people.

The result being that in respect of the grip on your further analysis Soldier
14 could not be excluded as a major contributor to that mixture?---Yes.

40 How long does DNA last?---Well, it depends on what sort of DNA you're
talking about. For example, say a DNA on a blood stain would last
indefinitely if kept in the right conditions. But there was no indication of
any blood from the swabs from the gun or on the magazine or even on the
bullet. So the type of DNA is most probably from contact DNA or skin
45 cells. So this trace DNA could last for - I mean, there's a lot of variables

5 which affect it, but the type of things that affects DNA is high heat and humidity and also like washing, washing would affect it, or if someone had cleaned the gun, that would remove DNA. So from the gun DNA could persist since the last washing. But you have to keep in mind that DNA is degraded also by UV light. The magazine though being kept in - if that was kept inside a cover, that would be kept away from environmental conditions.

10 For example, if it was inside the hand grip that it's designed to fit into and be used, that would provide that sort of cover; is that the case?---Yes, that's right, whereas something that's exposed to the environment would be more likely to be degrading. So trace DNA is affected by the environment and it is affected by many things. It's also affected by the type of surface that it is on. For example, clothing items are more likely
15 to retain DNA than non-porous items such as a gun. So it is more likely to recover DNA from material. And there is another very important point that I haven't actually brought out. Different people leave different amounts of DNA as well. Say I was to hold this glass and if I was what we call a "shedder", if I was the type of person that leaves lots of DNA
20 when I hold this glass, I might swab this and recover quite a high amount of DNA, whereas you might touch it and we won't recover any DNA because you might be a poor shedder. We don't know how to tell or there's no test to determine a person's shedder status. So that's another factor that can it can affect how long DNA lasts by how much was there to
25 start with.

The pistol that you tested, if you'd accept from me for the moment that the slide would in normal circumstances be operated at least once and possibly several times in the course of a day by the operator of that
30 particular weapon. Would typically the last person to operate the slide produce the major contributor to the mixture on the slide?---Well, I've read in trace DNA recovery papers that the last person to touch an item isn't always the person that you find in the greater quantities. It depends on their shedder type. That's right, you can't always tell the last person that's touched - like, as I say, with this glass. Then I touch it, I'm a very
35 good shedder, I pass it to you and you touch it. You might just recover my DNA . But it has been pointed out to me that the slide is a good place to recover DNA from the friction that you have to - I mean, it's a different scenario me touching this glass to a slide. So maybe - and I'm not a
40 ballistics expert. But I think it would depend if someone's skin could get even caught in that slide at some time. Maybe the last person that used the slide may not have had their skin get caught in there, if you can see what I'm trying to say.

45 Thank you. I just want to recap and distil, if I can for my purposes and

perhaps for the assistance of the Board, the contents of the three reports. Please correct me if I misstate any of these propositions to you. I understand it to be your specialist opinion that the DNA of Soldier 14 is the same as the major contributor on the slide of the weapon.

5

LTCOL GREEN: I object to that. Sir, I don't think this witness can say that it's the same DNA. I think she can talk of statistical probabilities, but that's all.

10 PRESIDENT: Can you talk about it being the same or do we need to talk in probabilities?--I think it is good to have the probabilities. When we say "same" we always say in the profiler plus system, because we're only looking at the nine different areas of the DNA, not the whole DNA molecule.

15

COL GRIFFIN: Perhaps if I rephrase the question. Again if I misstate the proposition or put it on a technical basis that you're not comfortable with, please correct me?---Okay.

20 As I understand your evidence, your specialist opinion is that the DNA of Soldier 14 in probability terms is the same as the major contributor on the slide. Perhaps you might care to refer to your report?---Yes, I think it would be good if I just read it.

25 LTCOL GREEN: Sir, haven't we already had this?

PRESIDENT: We have, but I can see what the Colonel is trying to do it and I'm going to let him do it.

30 LTCOL GREEN: As it pleases.

COL GRIFFIN: Perhaps report number 1 would be the proposition on page 3?---Yes. So the major profile from the swabs of the slide is the same in the profiler plus system as the profile - as the DNA profile of Soldier 14. The probability of obtaining that profile in the general population it's expected to occur in approximately in one in 8.3 billion individuals.

35

40 So it's the same as the major contributor on the slide and, as I understand it, it's the same as the major contributor on the grip.

LTCOL GREEN: I object to that.

45 PRESIDENT: I think we are heading towards an argument about as to whether one in 16 point something million is the same.

LTCOL GREEN: It's not.

PRESIDENT: I take the subtlety in what you're putting to me.

5

LTCOL GREEN: Thank you, sir.

PRESIDENT: I think if the Colonel uses the word "same" for the sake of brevity I don't think we're going to - - -

10

LTCOL GREEN: If we deal with it on that basis I have no problem.

COL GRIFFIN: I'm sorry, sir, I didn't quite follow.

15

PRESIDENT: When you use the word - when we're talking the difference between the same and a chance of one in one point six point something billion, I think if you use the words "the same" we'll understand the subtlety in the potential for error being one in 16 point something billion. Use the word "the same".

20

COL GRIFFIN: Thank you. Are you uncomfortable in saying that it's the same as, Ms Franco?---No, as long as we say "in the profiler plus system" and then give the statistic.

25

Perhaps if I might just go back and start again, sir, because there are various people identified in these reports that have gone through and my purpose is to clarify the position in respect of Soldier 14.

PRESIDENT: Indeed.

30

COL GRIFFIN: If that's a matter of objection, perhaps Counsel might say so, but the continuous interruptions for each time are just disrupting it. I'm more than happy if he has a difficulty with that proposition that he tells you. But I'm simply trying to narrow this considerable body of evidence in respect of Soldier 14.

35

LTCOL GREEN: Sir, just to recap, my first objection was the unnecessary step of going through a final time. You've overruled me there. My second problem was the word "the same as" when all this witness can ever talk about is - - -

40

PRESIDENT: I think the Board understands the subtlety between the difference.

45

LTCOL GREEN: But you, sir, have indicated that you're willing to treat

the words “the same as” as being synonymous with “statistical probability” and I’ve said on that basis I have no difficulty.

PRESIDENT: Very well.

5

COL GRIFFIN: I understand that the specialist expert witness is comfortable with that proposition as well. Is that right, Ms Franco, that it is in the context of the profiler plus system and the statistical body that bases the analysis, that within that framework you are comfortable with the proposition that the words “same as” can be used?---Yes. Can I just say the swabs from the grip that you asked me about, Soldier 14 could not be excluded as a major contributor. So there could be other - I think I’d probably just prefer the wording in my report.

10

15

PRESIDENT: What you’re really saying is you can’t say he is the contributor but you can’t say he isn’t. That’s in broad terms what you’re saying?---Yes, he could not be excluded as a major contributor and the significance of this finding that a major contributor - the probability - sorry, the occurrence of the profile of a major contributor in the general population would be approximately one in 3.3 million people that could be a major contributor in the mix from the swabs of the grip.

20

COL GRIFFIN: So if we go to page 3 of report number 2. Do you have that?---Yes.

25

I’m still on the first proposition that I was attempting to put to Ms Franco. But given what’s passed, I’d like to try and be sure for the record. At page 3 of report number 2 you there describe the DNA recovered from the swabs of the slide, item 5. Do you see what I’m referring to there?---Yes.

30

What I was attempting to put to you as a proposition was the next sentence, that Soldier 14 has the same DNA profile in the profiler plus system as the major component of the mixture?---Yes.

35

Am I right in saying that Soldier 14 has the same DNA profile as the major contributor on the grip?---Yes.

40

Am I right in saying that Soldier 14’s DNA result from your testing your opinion is that he cannot be excluded as the main contributor to the magazine body?---As one of the two main contributors.

At a low statistical significance?---Yes.

45

And that he cannot be excluded as a contributor to the magazine base?---Yes, but that’s a low statistic.

Again at a low statistical significance?---Yes.

5 He cannot be excluded as a minor contributor to the trigger?---Yes, at a low statistical significance.

But you can excluder all the other personnel, the investigators and Soldier 2, Soldier 17 and Soldier 19?---From the trigger.

10 Now, because you can exclude all the others that you've been provided with tests, therefore, I'm asking you about Soldier 14. I've just set those things out to you. Individually you've talked about various items having significant frequency appearance, that is, one in 8.3 billion, one in 3.3 million, one in 10 billion for his particular profile and for PTE Kovco's
15 profile and other matters of lower statistical significance. Put together, those individual pieces - and I'll use a metaphor of a mosaic - does the mosaic produce a picture about the DNA on that weapon that the individual parts support each other to produce a mosaic or a picture of the handling of that weapon that you can comment on?---Well, it seems
20 largely that the scenario is consistent with Jacob Kovco and Soldier 14's profile on that gun.

Thank you. I have no further questions for Ms Franco at this stage, sir.

25 PRESIDENT: Thank you. LTCOL Wilkinson.

LTCOL WILKINSON: No.

PRESIDENT: LTCOL Green.

30 LTCOL GREEN: Yes, thank you, sir.

<EXAMINATION BY LTCOL GREEN [1148]

35 LTCOL GREEN: Ms Franco, my name is LTCOL Green and I represent Soldier 14. I know a lot about water law, I know very little about DNA, as is going to become readily apparent. But there's a few propositions I'd
40 like to run through with you. As I understand it, the DNA standard kit is based upon the commercially available profiler plus system?---Yes, that's right.

45 You use the commercially available profiler plus system within the division of analytical laboratories?---Yes, that's right.

The profiler plus system is a measure of nine parts of DNA strands?---As well as the gender marker.

5 We'll get to the gender marker in a moment. Putting aside the gender marker, which I understand is the amelogenin?---Amelogenin, yes.

We'll put that to one side. Just for the benefit of the Board, as I understand it, that the nine markers or what are called nine loci are loosely found within a DNA strand that if one could picture the DNA strand for these purposes as a U shape with another U coupled on top; so a southern hemisphere and a northern hemisphere. Is that a fair rough assessment? ---I'm not sure if I know what you're referring to.

10
15 One of these parts of the chromosome strand is taken from the mother and the other part is taken from the father?---Yes, when the person inherits their DNA from their mother and their father and combined producing a person, yes.

20 That inheritance becomes relevant in the statistical probability about which I'll take you to in a moment. But if one could imagine that, loosely speaking, there are two hemispheres joining together, you look around the hemispheres for nine precise points or nine loci, don't you, and you take a reading of each of these precise points?---Yes.

25 Now, from each of these precise points, loci 1 through to 9, putting aside the amelogenin for the moment, two numbers are distilled?---Yes.

30 One number comes from the mother and one number comes from the father?---Yes.

To take a loci at random, say loci 3, the number distilled from the number might be, for instance, 13?---Yes.

35 Which for these purposes is based upon what might be called the statistical or the short repeat - short tandem repeat, as I understand it?--- That's exactly right, yes.

40 The mother in loci 3 might produce, for instance, 13 STRs and the father, looking along the father's half of the chromosome strand, might produce a figure of say 16 STRs or short tandem repeats?---Yes.

45 From that you will produce a table from loci 1 through to 9 of what might be called nine numbers from the mother and nine numbers from the father?---But we don't really - can't differentiate which is the mother's

and which is the father's.

5 But if for argument sake you manage to obtain from a DNA mixture a reading of STRs, for instance, at the third loci of 16 and a second reading of say 19, you could look at that to determine whether or not the 16 and 19 reading of the third loci came from a known source or an unknown source?---Yes.

10 If you have a known tissue sample you can take, loosely speaking, the 18 numbers, allocate them to all nine loci and come up with what might be called a profile in order to determine the DNA profiling of that known source?---Yes.

15 It's only when you get an extra number from the mixture do you realise that there may be a second or a third source into the chromosomal mixture?---Yes.

20 For instance, to use the example of the third loci, if your readings were 16, 19 and 18, straightaway that would tell you that there is a second source producing the 18 STR?---Yes.

25 If from the third loci, in addition to 16, 19 and 18, you got a 17, that would tell you one of two things. That would tell you that you have two known samples or three or more samples, some of which have common numbers?---Yes.

30 Putting that aside for the moment, as I understand it, when you receive your samples for testing in your laboratory unless there is a presumptive test which travels with it, you have no or little idea as to the source of the DNA?---Yes, that's right. If it doesn't have any staining and it doesn't indicate blood we can more exclude body fluids than know exactly what source the DNA did come from with the trace DNA type of analysis.

35 But, loosely speaking, unless there is a presumptive test which travels with the DNA sample, you can't tell whether the DNA has originated from skin tissue, semen, saliva or sweat?---No, but often the amounts of the DNA will help you to make some sort of a - give you an opinion on that sort of thing, because saliva does have quite a high amount of DNA.

40 Or have a high concentration of DNA within a very small area?---It could have.

45 Were you able to determine without presumptive tests the source of the DNA on the weapon that you were given to test?---Well, the swabs were looked at for blood. So blood was ruled out. We didn't do any semen

testing and no saliva testing. So there was no other type of testing done.

5 You would expect therefore that the source of the DNA on the weapon you were asked to test would have originated through either skin cell shedding or sweat and perhaps saliva?---Sweat doesn't generally yield much DNA, but it could perhaps facilitate the shedding of the DNA from a person.

10 You told us earlier that some people are good shedders and some people are poor shedders?---Yes.

15 Loosely speaking, as I understand it, every person on average sheds about 40,000 skin cells a day?---They do shed a large amount, but I'm not sure of the figure.

It is possible to recover DNA from a single cell?---It is theoretically possible, but it is not possible in our laboratory.

20 Loosely speaking, 30 or more cells are required in order to achieve a readable or substantial result?---Yes, it's a hundred cells in our laboratory.

Whether a person is a good shedder or a bad shedder would depend upon a lot of things, would it not?---Yes.

25 A good shedder might, for instance, be a good shedder because he's a person or she's a person of nervous disposition?---We don't know - as far as I'm aware, there have been no papers that explain how to tell a good shedder from a poor shedder, except testing things that they touch or whatever. Another thing that is important is the time since hand washing, because hand washing removes DNA as well.

30 I was going to suggest hand washing in a little moment. But a good shedder I would suggest to you is a person who might either have a nervous or a high disposition?---I'm not sure if that's quite correct because in our laboratory we have actually identified some good shedders because they seem to be able to leave DNA. They don't appear to have a nervous disposition.

40 A good shedder would be a person perhaps with psoriasis?---Yes.

A good shedder would be a person with dandruff?---Yes.

45 A good shedder would be a person working in hot and sweaty conditions?---Yes, but a good shedder with dandruff really doesn't mean that their hand is going to deposit more DNA, it just means that the DNA

might contaminate things with their dandruff.

In terms of the environment, the environment that a person works in would also affect the amount of skin shedding or shedding, would it not?
5 ---Yes.

Cold environments tend to reduce the amount of shedding compared to hot environments?---Well, as mentioned before, the sweating could facilitate the dislodging of skin cells onto objects.
10

You mentioned earlier that hand washing is a factor. Is it the case that a person who has not washed his hands is more likely to shed much more material than a person who has recently washed his hands?---It's not more likely to shed. I think you're more likely to recover DNA from items that
15 that person has touched if the time since hand washing is quite great.

Because that allows time for accumulation of what might be called partially dislodged skin cells ready to be dislodged?---That's right.

As an accumulation there. Also another factor which will affect the level of DNA left on an item will be the way in which the item was handled?
20 ---Yes.

An item which is handled very loosely or without a strong grip would not leave ordinarily as much DNA as an item which is handled very heavily or held tightly?---Yes.
25

That is because, is it not, that the abrasive quality which results from holding an item tightly is higher and more likely to rub or abrade off skin cells onto the item to be tested?---Yes.
30

It's the fact, is it not, that skin cells are highly mobile?---I'm not sure what you mean.

35 Secondary transfer does occur?---It has been noted to occur.

Where have you noted it to occur?---In several papers that I've read.

Would they be the papers including those by van Oorschot and his paper
40 "Systemic Analysis of Secondary Transfer"?---Roland van Oorschot?

I suspect that's him?---Yes, I think I have read that paper.

Because I think what that establishes through experimental studies that
45 DNA has been shown to transfer through a series of handshakes from one

person through to the second person through to the third person?---Yes, that's true.

5 The concept of secondary transfer is that DNA is moved through skin to skin or other contact?---It can be, yes.

The probability of DNA in secondary transfer would be increased depending upon the way that an item is handled?---Yes.

10 And secondary transfer is more likely to occur if an item is handled in hot, sweaty conditions and held or gripped tightly?---I'm not sure about the hot, sweaty, but it seems logical that could help remove the DNA from someone's cells. And grip tightly, that seems logical as well, yes.

15 In your second report you assess the probability of DNA in respect of item 4, the grip?---Yes.

From one in 170 to one in 3.3 million in your third report?---Yes.

20 That's a factor of about 25,000?---Okay.

25 What would occur or what would account for a factor of 25,000 changing between two separate testings?---Well, more DNA types in the DNA profile were incorporated in the statistics to enable a much higher figure to be obtained.

30 Which means, does it not, that in your loci are you telling the Board that you got less results from the various loci in your first test compared to more results for your second test?---I don't think that's necessarily the case, but the confidence of the first results were gained by doing the second repeat test.

35 What were your results for the first test from which you derived a figure of one in 170?---May I refer to my notes?

PRESIDENT: Yes, certainly?---The results from the first statistical interpretation only included two locations on the DNA; so two loci.

40 LTCOL GREEN: Which sites were they?---They were FGA and D8.

Was a test fully conducted and properly conducted?---Yes.

45 And you carried out a second test - how many sites did you recover on the second test?---The second test incorporated six different locations plus one half of a seventh location.

In those second tests did you include - the locations recovered, did you include site FGA?---Yes.

5 Did you get similar or different readings for the chromosomal numbers in the first test compared to the second test?---Yes, I recovered similar numbers. Actually, I did three tests in all on this item.

10 Just looking at the first test, what were the numbers recovered for the FGA site?---The numbers - I have a lot of numbers recovered but the ones that I incorporated in the statistics was 20,20 and 13,13.

15 Who was 20,20 and who was 13,13?---20,20 matched the unknown male and 13,13 matched the unknown male at that time.

In your second test of the FGA site, what readings did you get of the STRs?---Again, I got the 20,20 and the 13,13 as well as a lot of other numbers relating to the specific locations that I've used.

20 So, do I understand your evidence to be that in the first test you only recovered two sets of STRs but in your second test you recovered more than two sets of STRs for the FGA site?---No, that's not right. The first test, I received a profile that appeared to originate from two individuals, but the only types that I could be sure of that were produced by the major contributor, I put into the report. I had to repeat these results to see if I was getting a consistent type of results in order to incorporate more of the profile in the final statistic.

30 And you said you conducted a third test of the FGA site?---Yes.

35 What were the results for that?---Similar results to the first test but I seem to see more traces of a possible third person.

40 So in the third test at the FGA site, you again got 20,20 and 13,13?---Yes.

45 Plus an ever-increasing amount of traces of a third person. From no trace in the first test, some trace in the second test, to a larger trace in the third test?---In the first I got possible trace amounts of the third in the first test and the second and third it seemed like there was a third person.

Unidentified?---That's right.

From anyone within the soldier matrix or the police?---I think in my report it says, yes, that it was too weak to even interpret.

Looking at the D8 site in the first test, what readings for STRs did you get in that?---For the first test?

5 Yes?---Yes. 13,13.

Is that all?---No, I did get a weak 10.

10 And on the second test for D8?---Second test. I just obtained a 13,13 by itself.

And in the third test, if there was a third test for loci D8?---Yes. I obtained a 13,13 and a weak 10.

15 And site D8, who was 13,13?---Soldier 14.

In increasing - I withdraw that. In your report number 3, which is exhibit 151 - - -?---Yes.

20 - - - you've increased the statistical probability from 170 to about 3.3 million. As I've indicated to you, it's a factor of about 25,000?---Yes.

25 Is that increase to 3.3 million based upon the second test, as you've described, or the third test as you've described?---I never look - once I've got three tests, I look at the whole lot of three tests in conjunction, so it's based on the three tests.

30 Well, did not the test with the 170 statistical probability pull down to 3.3 million?---Yes. But when you're looking at low levels of DNA, a lot of it depends on actually being able to repeat the test, to make sure you're not getting any what they call stochastic effects, where you - so you really want to be able to repeat things to make sure what you're getting is a real reflection of the DNA types present in your sample.

35 You've indicated earlier that the 170 statistical probability has pulled down the figure to 3.3 million. What did you pull down the figure from?---I'm sorry, could you repeat that question?

40 I think I asked you earlier whether or not you took the figure of one in 170 statistical probability into account in arriving at 3.3 million?---No, I didn't actually take that statistic but I took the results, like the graphical results of the first testing into account.

45 What was different in the - I withdraw that. When you refer in exhibit 151 to the statistical probability of 3.3 million, are you referring to the first test, the second test or the third test?---The three tests in combination.

5 So how did the effect of 170 statistical probability affect the statistical
probability?---That was incorporated into the statistic. It's just like if I
was going to describe all the people in the world that had blond hair and
blue eyes or something, and worked out that that was one on 10 people.
Now, I've got more information about - now I'm looking at 12 people
with big ears. Now I can include - like, I've got my blonde hair and my
blue eyes in the statistic, but now I'm incorporating extra statistics to
narrow it down even further to a higher statistic because I can see more
10 information from those extra two repeats.

15 Was there ever a time in your mind when you were in doubt as to the
statistical probability when you arrived at your 3.3 million figure?---No. I
would not allow a report to go out if there was any doubt about a figure. I
would not sign the report. But apart from this - - -

20 You did say one was 170 in statistical probability?---Yes, that was at a
different date. That was a few - that was on the first report which is a
different date. Since that date I have got more information which has
enabled me to get a different figure.

But you've indicated you would not sign a report unless you were entirely
confident with the outcome?---Yes.

25 Yet you signed a report with a statistical probability indicating one in
170?---That's right, because that was on that date.

And you were confident at that time?---Yes.

30 Thank you, sir.

<EXAMINATION BY LTCOL BERKLEY [1215]

35 LTCOL BERKLEY: Ms Franco, I'm LTCOL Berkley, and I represent
Shelley Kovco, Jake's widow, and of course the family are very interested
in your evidence as well. LTCOL Green has asked you the questions
about the loci and the significance of the numerical matching. Tell me
40 about the database, profiler plus database in Australia. How many is on
it?---Now, are you referring to - we've got a few databases. We've got a
database of people that we have for matching. But we also have a
frequency database which we base our statistics on.

45 Do you know the composition of the frequency database?---No. I know

5 that there are 739 individuals that we have made our frequency database from. But the database is just a general New South Wales database and it involves people that are involved in crime. They can be victims, bystanders, suspects, offenders and - but we don't know of the actual make-up, of the ethnicity - - -

Would you agree there's probably about six or seven billion people in the world?---Yes.

10 I don't know how accurate the census is. It might be enough for Uzbekistan - and no offence to those people - so there's about six or seven billion people in the world; okay?---Yes.

15 And you're getting statistical probabilities of course greater than the number of people that exist in the world as to your profile; you concede that?---Yes.

20 You concede that the reason in the profiler plus system is based on an infinite number of possible matches from the nine loci that the system targets?---Yes.

Of course if you had say 20 million people in Australia, for example - do you agree with that roughly?---Yes.

25 Given that you are seeking a profile, can you explain to us how the numbers that you find match up as with say every person in Australia? How would you know that any one person could be excluded just on your general statistical database first, not with your primary database?---That's much easier when you're talking about excluding someone. They just have to not match the DNA - one of the DNA numbers in a profile and then that person is excluded from the profile. What else did - - -

30 Generally DNA is a better tool of exclusion than inclusion simply because of not only what you've just said but to include a person you've got to give a statistical probability of the likelihood of anyone else having those particular numbers that the loci has presented?---Yes.

40 Of course scientifically the greater the database, known database - in other words, the greater number of DNA profiles available to you at any one time would logically affect the certainty of your findings, wouldn't they? ---We only work with the frequency database of 739 individuals, yes. So this finding was - this number has been found to be adequate for the collection of data as to the frequency of DNA types in the general population. That ruling was given by Hung J in the Milat trial. So we feel confident with our 739 individuals that this amount of people are adequate

45

to give a reflection of the DNA - of the frequency of the DNA types in our general New South Wales population.

5 Could you explain to this Board - I mean, that was Hunt J in that and of course the opposition to the finding, as we all know, was because of what appears to be some false, the possibility of false fears because we simply have such a small database. Can you explain to the Court how you - can you draw it up on a board, given the matches that you found, how you came to that figure. Let's look at one part. Let's look at the slide. So that
10 the major profile of Soldier 14 is expected to occur in approximately one in 8.3 individuals in the general population, given that the world has only got six or seven billion people. You're saying on your profiler plus system that he's the only one or are you saying that?---No, well, identical twins have the same DNA profile. I mean, it's really saying that the
15 profile is extremely rare, just like any full profile is. It is unlikely to find another profile the same. But we do not ever say a profile is unique. It's because we are only looking at the nine different areas of the DNA molecule, not looking at the whole DNA molecule. I can just say it's a very rare profile and it's only expected to have one in 8.3 billion. But it
20 represents a possible different permutations of DNA types present. So the more people on earth that are present the more likely it is that this profile may be seen again another time. But you are right, there's one in six billion people on the earth. So it is less likely to see another profile.

25 Do you need a calculator to do your figures to come up with that statistical probability?---No, we have a special computer program that we use. I have the outputted sheets here. It calculates the frequency according to what DNA types that I put into the computer.

30 How many types are put into the computer, do you know?---Yes, well, a full DNA profile, there would be two different types at each of the nine positions. So I'll be plugging in 18 numbers. Of those 18 numbers a computer-generated statistic is obtained.

35 But we don't know the basis upon which the computer program is written?---Yes.

40 What's that basis?---I'll just quote this. The probability calculations are based on the random person probability and they're taken from the second NRC report, which is the National Research Council report into DNA testing. So it's based on that formula.

How does the computer calculate the probability?---Okay.

45 Now, just before you go on there, and I just will interrupt you. This is so

the people I represent understand what you're saying so they can make their judgments. So I'd be grateful for you going through this. It's not a test or an attack on your findings, it's simply I need the explanation? ---Okay. Well, each of the DNA types that it generated, from the 739 individuals that we have tested in our frequency database we've worked out how common or how rare each of the DNA types are. So these frequencies of the DNA types are used to assign a frequency for each of the DNA types that are plugged into the computer. It's based on the product rule. The frequency is based on the product rule which is a statistical concept. The product rule is able to be used because these nine different positions on the DNA are independent of each other. What you get in position number 1 will not affect what you get in position number 2. It's sort of like me saying actually with blonde hair and blue eyes, these things could be related to each other. So I couldn't use that in the product rule. But if I can give you an example, things like rolling a dice and tossing a coin, these are independent events. So what happens is if we want to work out the probability of throwing a head - tossing a coin and getting a head and throwing a dice and getting a six. Because we know we've got a coin that's a chance of one in two of throwing a head and we've got a dice and we throw a six, the chance of throwing a six is one in six. With the product rule tossing a head and throwing a six, we just multiply the statistic one over two times one over six; so we get one in 12. The chance of getting those two things occurring if you've got a coin and a dice will be one in 12. This is the basis of the product rule. So each of the frequencies for each of the DNA types at each different position are gathered using our frequency database. They're given frequencies of occurring in the general population. So when we get one frequency we multiple it by the second frequency at the next location, which reduces the figure even further. Multiplied by the third reduces it even further. So when we have nine positions calculated we have a very rare figure that we end up with.

Those nine loci are themselves selected by the manufacturers of the profiler plus system according to what they perceive to be their statistical value?---Yes, it's - they were selected because they were areas that differ between people. So the most information can be obtained from those.

If I can then just take you back to your report. You say in report number 2 that Soldier 14 had the same DNA profile in the profiler plus system as the major component of the mixture of DNA detected by you in your examination of the swabs from the slide?---Yes.

And you give a statistical probability for that occurring?---Yes.

Then you say the minor component of this mixture could have originated

from Jacob Kovco. Do you see that?---Yes.

What you're saying there, with respect to you, is a guess, isn't it?---What do you mean? With Jacob Kovco?

5

You said that the minor component of this mixture could have originated from Jacob Kovco. Is that a guess?---No, it's not a guess.

10 How is it not a guess?---Well, what happened is from the profile on the slide I can see that the profile originates from two people. I can isolate the major profile and determine that couldn't - that profile matches the profile of Soldier 14. Now, the remaining profile fits exactly the profile of Jacob Kovco. But I didn't choose to do a statistical calculation on it because I thought that was a more obvious thing if that was his gun, that you would
15 expect his profile to be there.

That's what I want to talk about. I think we talked briefly outside before you started giving your evidence. Perhaps I'm using the wrong word, but there's an assumption that because the pistol was issued to Jake that you
20 would find his DNA on it. Now, when you say that the minor component of the mixture could have originated from Jacob Kovco, just to make it clear, are you relying on that assumption or did you get a match between Jacob's DNA and the minor component of the mixture?---I did obtain a match, but I didn't give it any statistical analysis.
25

25

Is there a reason why?---I can if it's required. But the reason why was because I thought that it was obvious if it was his gun. But I can do one if it's required.

30

You've got a match between the minor component mixture and Jake and you said, "Well, I won't go any further because it's Jake's weapon and I would have expected that his DNA was on that weapon"?---Yes.

35

Again in relation to the trigger in report 2, you say that the DNA recovered from the swabs - the figures are mentioned as well - and that on the trigger Jake's DNA was the major component of the mixture. You've given an extremely large statistical probability to that; you see that?---Yes.

40

Then you say that Soldier 14 could not be excluded as the minor contributor to the mixture. I heard LTCOL Green's cross-examination. At that stage is that because you got some sort of match or again an expectation that since Soldier 14's DNA was found on the slide, that you may have expected it in another area?---Yes, a little bit like that. If I had
45 have just found that profile just as one profile in a case without any other profiles I would have reported it as too weak to determine a profile

because it can be more incriminating. But to assist the Court and because I can actually exclude people from this profile, it's up to the Court to decide if they want to accept this evidence without a statistic. It is low statistical significance because it's only - the DNA is only present in three
5 of the locations at very low levels.

What role did the finding of Soldier 14's - of the high statistical probability that it was Soldier 14's DNA on the slide, did that have any significance in report to - I've heard what you've just said. Did that help
10 to sway you to say that he couldn't be excluded?---From the trigger?

Yes?---Well, if I was - I suppose the worry is when using DNA evidence and interpreting it, if it isn't a full profile people can think because it's a DNA profile that you can't exclude someone from it's that person's
15 profile. So with very small amounts of DNA you have to be careful not to incriminate someone unnecessarily. So in a way that was part of it, that there was also Soldier 14's profile on other areas of the gun that allowed me then to just put in those findings that he wasn't excluded. But if that was the only thing that I had in this whole case, that - because this is of a
20 low statistical significance, that could incriminate someone for whatever reason wrongly, because a lot of people could produce this profile, even though I've managed to exclude a number of people already from the trigger.

A lot of people can be contributors, simply you didn't have any swabs from named individuals to compare them to. You didn't have those other people, you don't know who contacted them. So you're left a statistical probability?---I haven't given a statistical - - -

I know, it was too late for even that?---Yes.

It would have been scientifically unsound?---Yes.

Again the family is very interested in this. You say that in relation to the grip that Soldier 14 could not be excluded as a major contributor. You give a - you might agree that it's a very, very low statistical probability factor in relation to that one, the grip. This is the report 2. But you could exclude the people named?---That's true, yes.

Then you say that Jake could not be excluded as a minor contributor? ---Yes.

Let's talk about Jake. Was that based on the fact that there was an expectation that his DNA would be on the grip of the weapon or did you get a profile? What's your degree of certainty that you found any trace of
45

Jake's DNA on the weapon?---Well, I could not exclude Jacob Kovco because - and part of it is based on that I expected it was weapon. But I'm not sure if I could do a statistical calculation. But I'd probably have to sit with my file a bit longer to answer that question.

5

You keep referring to a graph, and I thank you for the courtesy of showing that to me before the evidence. Perhaps that could be arranged after the luncheon break to put the graph up on the document reader and you could actually take us through the explanation of the reports by reference to the graph, if you don't mind. I note the time, sir.

10

PRESIDENT: I was just thinking that, that might be an appropriate time for us to take the traditional adjournment. Quarter to 2 then.

15

COL GRIFFIN: Thank you, sir.

LUNCHEON ADJOURNMENT

[1238]

20

RESUMED

[1359]

25

LTCOL BERKLEY: Ms Franco, we have before us on the document reader two Forensic Biology Profiler Plus Result Summary Sheets. Do you see those, one sitting over the other?---Yes.

30

Under the heading, "DNA Type", there are nine columns and each column has its own heading and they refer to the nine loci?---Yes, plus the amelogenin, so that makes ten.

35

Yes, which is the XY, XY, XY which indicates that it's the DNA of males on those pages?---Yes.

40

On the bottom sheet, on the second row from the top, that one being indicated - thank you very much - that is the numerical values of the typing of a slide given to you with genetic material from Soldier 14?---Yes.

45

In the sheet above you have the row highlighted in yellow and they are, again, the numbers found from examination of the weapon, are they?---Yes.

And you say, your evidence is, that they correspond to the genetic material

analysed from Soldier 14?---Yes.

The correlation is as between the sites?---Yes.

5 Are these your original worksheets?---Yes. They're just working notes, yes.

I'm going to ask you - we've seen those numerical figures and I might indicate, Mr President and Members, that I'll be asking Counsel Assisting
10 - I'll be seeking to tender them through Counsel Assisting, subject to anything he says - to tender that material. It contains names, they've been blocked out for these purposes. It contains names so they'll probably end up in the classified area and we go from there.

15 Just so we all know, that's how you got the genetic material, the numerical values for the nine loci and then you compared them to the results taken from the pistol, is that what you're saying?---Yes, from my raw data, which are the graphs, it's easier to put the results in a tabulated form so that then all the results can be compared to each other.

20 Let's have a look at those graphs. Can we have a look at the graph that concerns itself - and you'll have to confirm this because I can't - I don't know, the graph that relates to the slide, the pistol slide - - -?---Yes.

25 - - - is that the one we're looking at?---Yes.

At the top of the graph there is a line and it runs horizontally. There are vertical lines above the horizontal and there are boxes and lines below the horizontal, do you see that?---Yes.

30 What are we looking at, say, in that first horizontal line with those vertical lines and boxes below them?---The top one on the very left-hand side is one of the DNA locations, and then in the middle - the top line still at the middle sections, there's another location, another DNA location, and on
35 the right-hand side of the top line that's your third DNA location.

Are they three locations of DNA from the slide?---Yes.

40 So when the DNA was taken the swab was applied to the slide itself, those locations were recorded?---Yes.

Do you know what parts of the slide those locations - sorry, where those three sites are located on the actual slide of the weapon?---Well, the sample, the DNA sample, was taken from the slide by the police so - and
45 this is - all the DNA that was obtained was from this sample. So I don't

know anything about the actual - - -

That's right, because they give it to you with some labelling and they tell you, "This is where we took it from"?---Yes.

5

So we need to go back to the police to find out exactly where?---Yes.

10 So what are we looking at? We've got these vertical lines above the horizontal?---The first DNA location on the very left at the top, there's three vertical lines - we call them peaks - and these represent the DNA types found. There's a number 15, a number 16 and a number 18. They're the three DNA types at this one location. As I said before, it's more than two types so it has to come from more than one person. And the height of the lines represent the quantity of the DNA. So the 15, the
15 DNA type 15 at this location is sort of a small - about half, less than half the size of the other two peaks. The other two peaks are sizes 16 and 18 and the 16 and 18 appear to be from one person whereas the 15 looks like it's from the other.

20 If we have a look at the earlier sheet that was shown, the work sheets, 16 and 18, how does that correspond to that work sheet?---Yes. Well, when you look at Soldier 14's DNA type, he has a type 16,18, as you can see from the graph, and Jacob Kovco, his type is 15, 16. So Soldier 14 and Jacob Kovco share the type 16. This is consistent with the graph because
25 the 16 is slightly higher than the 18, so it's possible that there's a 15,16 mixed in with a 16,18. But it definitely looks like the major part of this mixture originates from a person that's a 16,18, and that also is possessed by Soldier 14.

30 Is that suitable for your purposes?

PRESIDENT: I think so, yes.

35 LTCOL BERKLEY: Now if I could have a look at the graph that relates to the pistol grip. Do you recognise that graph there as relating to the pistol grip?---Is that item 5?

You'll have to satisfy yourself on that?---I think this is still the slide.

40 That's the previous slide, is it?

MAJ JOLLY: Yes, that's the previous one that's up, sir.

45 LTCOL BERKLEY: Do we have the grip?---I do have the grip.

Ms Franco, do you recognise that graph from any of the graphs that you have in front of you?---Yes.

5 What are we looking at?---Okay. The top line again, if we looked at the left-hand side, we have three peaks and they correspond to the DNA types of 15, 16 and 18, again looking like a mixture. It would have to come from more than one person and I could not exclude Soldier 14 or Jacob Kovco as being those two people in that position.

10 Again, from the 16,18, are the more pronounced vertical lines?---Yes.

15 What about the second horizontal line down?---The second horizontal line, the first two peaks - one is called X and one is called Y, and that just means similar quantities of DNA. It looks like it's from - the whole profile looks like it's from one person and it's male profiles, because it's an X,Y.

20 And what about on the third horizontal line down, what are we looking at there?---That's another DNA location and there are three peaks that are labelled, and those three peaks that are labelled are above our reporting threshold. There is another smaller peak that is below our reporting threshold. But anyway, the ones that are typed are called 9, 11 and 12. And 9 and 12, the first and third peak, are the same type as Soldier 14. And Jacob Kovco, he has a type 11,13. The 13 isn't typed on this sheet
25 but it looks like the 13 could be present but is below the reporting threshold. That was the bit that I've actually put a little dot next to the last line, if you can see that. So it looks like - in low-level DNA - often DNA in very small quantities can actually drop out of the profile, so it's consistent with Jacob Kovco, and it's look like he's just dropped out.

30 Those three horizontal lines, what do they represent? Why are there three lines there, for instance?---Well, the three lines - they're divided up because they are labelled with different dyes. If they weren't labelled with different dyes, we wouldn't be able to interpret the DNA results
35 because what is the DNA, when it's typed, it's run on a gel and it's sort of like a race in a way, because the small DNA molecules get to the end, the finishing line, quicker than the large ones. And so towards the beginning or the left-hand side of that profile are all the smaller DNA sizes and on the right-hand side of the profile are the larger DNA sizes. If you look at
40 the top left hand of the profile and go directly down to the next second line underneath, next to the gender marker, that next location on the right of the gender marker, those DNA sizes are quite similar, and if they weren't on separate horizontal lines I wouldn't be able to distinguish one location from the other. So the horizontal lines are put there, they have -
45 they represent different dye markers and just enable us to distinguish the

DNA types.

And those, like the three entries on the first horizontal - the top horizontal line, they relate to three sites?---Yes.

5

Or three loci?---That's right.

Then another three below that, and another three below that, plus the chromosome, the male/female?---That's right, on the second one at the left.

10

The last one, just for the purposes of explanation is the trigger - do you have your graph in relation to the trigger?---Yes. I have it here.

15

Do you have a copy that you can refer to?---Yes.

Again, they've got the nine plus the male/female?---Yes.

20

The top horizontal line, what does that tell us?---That tells us that there's a mixture of DNA, there's three DNA types present in the top left-hand side. The DNA types, there's type 15, 16 and 18, and there's large amounts of type 15 and 16, which is consistent with Jacob Kovco's type. There is a small amount, a very small amount, of type 18, as you can see, because the peak is not very high. It's very close to the baseline on the third number. That's it, yes, that one. And that's the one that I could not exclude
Soldier 14.

25

30

But that failure to exclude - sorry, inability to exclude is probably a nicer word, that inability to exclude was based on the fact that he had DNA on another part of the weapon?---The fact that I'm actually reporting it is that base, but I've actually looked at the other DNA people - sorry, I looked at the other profiles from other people involved in the case and on just this one position alone I couldn't exclude all the other people. But looking at the extra bits of DNA on just actually the two positions, this first one and the next location at the top, that's where I can't exclude Soldier 14 whereas I can exclude everyone else.

35

40

So you go through a simple process where you have all the people with their DNA profiles over the nine loci plus the - and you go along on your graph from the swabs and you see how the numbers fit, and the more numbers that you get, the more certain you are as to a match. Is that the simple process?---Yes. The more weight the match would have, yes.

45

Of course, in regard to the rider from earlier on, of course it's a statistical

probability for inclusion only, and that is basically how you arrive at your scientific opinion?---Yes.

5 Thank you, I've got nothing further for the witness, except for the - sorry, there is something. Primary and secondary transfer - primary transfer is defined as - well, how would you define it?---Primary transfer, as I would define it, is DNA from a person going directly onto an object, whereas secondary transfer would be transfer of DNA via a vector, whether it's another person as described to me before, where someone shakes a person's hand and then transfers the person's - that they shook hands with - DNA to another item. Secondary transfer might also mean a person touching an item that has DNA on it and removing the DNA from that item and touching another item.

15 Thank you. I now have no further questions.

PRESIDENT: Do I get from that that if I was to shake your hand, then I was to touch the glass, your DNA could end up on the glass?---Now, that could happen if it was an instantaneous touch, and it would also depend on our shedder status. If I was a very good shedder, and you were a poor shedder, that scenario that you suggest is more likely to occur. If I was a poor shedder and you were a good shedder, you may not find any of me on that glass after we shake hands and you touch it.

25 But it's possible for - again, I'm touching the glass, you've never touched the glass but your DNA could end up on the glass?---Yes.

COL Young?

30 COL GRIFFIN: Just before that happens, sir, as I understand it counsel intended to tender that series of documents that have just been put up but I'm not sure on what - or how they're to be identified and whether it's one bundle or individually. I'm not sure how to identify them.

35 LTCOL BERKLEY: My suggestion to both the President and Counsel Assisting is that the work sheets with the profiles, two sheets, they go together as a discrete exhibit and then the graphs of the slide and the grip and the trigger also go in as discrete exhibits. I also ask that if the graphs relating to the magazines are available, the testing of the magazines, and I understand from the witness that they are, that they would also be tendered. They haven't been put up, they'll obviously be the subject of objection, but I'd like them all to be tendered as a discrete exhibit. The basis of the evidence was simply to explain what we're looking at.

45 PRESIDENT: Is everybody comfortable with that approach, separate

exhibits?

5 COL GRIFFIN: I actually haven't see the documents, sir, so I can't - I don't want to comment, but if you were happy to accept them on that basis then I'm - - -

PRESIDENT: Any other comment?

10 COL YOUNG: Mr President, perhaps I could suggest that LTCOL Berkley and COL Griffin could get together afterwards and work out precisely what's to be tendered and then more clearly identify it. That might be one way of doing it.

15 PRESIDENT: I'm comfortable with that. I think I'd like, COL Griffin, to know what's been tendered before we go too far.

LTCOL BERKLEY: Yes, it's only through him of course.

20 PRESIDENT: Yes, of course. Well, he's Counsel Assisting of course, he's not - - -

25 COL GRIFFIN: I think I would need the assistance of Ms Franco then during an adjournment perhaps, sir, so I could get my head together with LTCOL Berkley and see the documents.

PRESIDENT: I think we can arrange that.

COL GRIFFIN: Is that okay with you, Ms Franco?---Yes, that's fine.

30 PRESIDENT: MAJ Young, do you wish to cross-examine now or would you prefer to wait?

COL YOUNG: I only have a few questions, sir. I could conveniently do that now.

35

<EXAMINATION BY COL YOUNG

[1420]

40 COL YOUNG: Ms Franco, my name is MAJ Young. I represent the interests of PTE Kovco. I just want to explore your discipline with a few questions. If I put a problem to three mathematicians, and that problem was, "What's the sum of 2 and 2", would you expect that the three of them would come back with an answer 4?---Yes.

45

So, mathematics at that level is fairly exact, would you agree with that?---Yes.

5 Is your science an exact science, would you say?---Yes, I would say.
With low level DNA I think people may interpret it differently but we follow standard procedures. We have procedures in place that allows us to recognise any errors. All of our cases, before they go out, are peer reviewed, so in our laboratory procedures we have protocols in place to reduce the risk of error. We're an accredited laboratory but we do have
10 defence experts that challenge us in court, so I do know with low level DNA there are differences of opinion. But, I mean, you would have to see a defence expert to get that difference. But as far as anything that leaves our laboratory, there is a consensus on the results, so it's not just me that has analysed.

15 You wouldn't describe yourself as a prosecution expert, would you?---We often are subpoenaed by the prosecution but I've actually got a subpoena for a defence case as well. So I do try and have an unbiased approach to a court case. I wouldn't like to be known as a prosecution witness because
20 that implies bias and I don't, you know, want to give any bias. I like to listen to each question objectively and give an honest answer.

That's what an expert is supposed to do?---Yes.

25 Could you offer an opinion on the testing that you've done, if that was given to another forensic biologist, from what you've said, as far as interpretation, they may come up with a different answer to what you've come up with?---Maybe only in the way of not reporting the minor person on the trigger, or, you know, it could not be excluded from there. But I
30 would say no, I'd say that I would believe that they would have the exact same conclusions because they are pretty straightforward interpretations.

They might be to you. So the evidence you've given and the reports you've prepared are based on your experience as a forensic biologist
35 - - -?---Yes.

- - - having commenced in 1985?---Yes.

40 Nothing further, thanks.

PRESIDENT: This might be an appropriate time to take that short adjournment.

45 COL GRIFFIN: Thank you, sir, yes.

ADJOURNED

[1424]

5 **RESUMED**

[1436]

PRESIDENT: Thank you, Colonel.

10 COL GRIFFIN: Mr President, in consultation with Counsel Representing and Ms Franco, I have a series of documents to tender to you. I understand even though they haven't been copied for Counsel Representing, they go in by consent. There are no concerns with the documents.

15

PRESIDENT: Thank you.

20 COL GRIFFIN: As I understand it, the first exhibit will be the two pages of the summary sheet. Are you confirming that?---Yes, they're the working notes.

I understand, LTCOL Berkley, that's correct.

25 LTCOL BERKLEY: Yes.

COL GRIFFIN: Those two pages as one exhibit, the working notes.

30 LTCOL BERKLEY: Yes, thank you, sir.

#EXHIBIT 152 - CLASSIFIED AND REDACTED VERSIONS OF WORKING NOTES OF MS FRANCO

35 COL GRIFFIN: Thank you, Mr President. Now, can I indicate that there are some protected identities on the document. So before it was put in as a public exhibit it would need to be redacted and we'll attend to that in due course.

40 PRESIDENT: So there will be a redacted and classified form.

45 COL GRIFFIN: Thank you, sir. The next document that I have to tender is the graph. Ms Franco has kindly marked on the bottom of each of these graphs what it's referring to. The first one relates to the body of the magazine.

LTCOL BERKLEY: In fact the first one in order of the evidence was the slide.

5 COL GRIFFIN: Very well. First one is for the slide then, Mr President.

PRESIDENT: Yes, very well.

10 **#EXHIBIT 153 - GRAPH PRODUCED BY MS FRANCO OF THE SLIDE OF THE WEAPON**

PRESIDENT: I take it that's got to be restricted and also redacted?

15

COL GRIFFIN: No, there's only Jacob Kovco's name appearing on it. As I led the evidence, I understand that the grip was the next. Is that your
- - -

20 LTCOL BERKLEY: Correct.

COL GRIFFIN: Thank you, LTCOL Berkley. The next one is the graph relating to the grip.

25

#EXHIBIT 154 - GRAPH PRODUCED BY MS FRANCO OF THE GRIP OF THE WEAPON

30 COL GRIFFIN: Trigger, and this one will need to have a redacted version as well, sir.

35 **#EXHIBIT 155 - REDACTED AND CLASSIFIED VERSIONS OF GRAPH PRODUCED BY MS FRANCO OF THE TRIGGER OF THE WEAPON**

40 COL GRIFFIN: Next comes the body of the magazine.

PRESIDENT: I'm presuming by the silence from the Bar table that nobody is complaining.

45 COUNSEL REPRESENTING: Yes.

**#EXHIBIT 156 - GRAPH PRODUCED BY MS FRANCO OF THE
BODY OF THE MAGAZINE**

5

PRESIDENT: Does that need to be redacted or otherwise?

COL GRIFFIN: No, sir.

10

PRESIDENT: Very good.

COL GRIFFIN: The final document is the graph relating to the butt or base plate of the magazine, and again no requirement for redaction.

15

**#EXHIBIT 157 - GRAPH PRODUCED BY MS FRANCO OF THE
BASE PLATE OF THE MAGAZINE**

20

COL GRIFFIN: That completes the exhibit materials.

PRESIDENT: Thank you. And your re-examination?

25

COL GRIFFIN: Yes, sir, I only have one question for Ms Franco.

<EXAMINATION BY COL GRIFFIN

[1440]

30

COL GRIFFIN: You've been with us for some time, Ms Franco. Is there anything that has arisen that causes you to change in any way the opinions and findings expressed in your three written reports?---No.

Thank you. I have no further questions, sir.

35

PRESIDENT: Gentlemen, anything arising out of - - -

COUNSEL REPRESENTING: No, sir.

40

PRESIDENT: Ms Franco, can I express to you the thanks of the Board. We appreciate that there's a tremendous amount of competition for your services and we're aware that you've given us considerable priority. The Board is very, very grateful to you for that. No doubt you're part of a team?---Yes.

45

I'd be grateful if you'd express those thoughts to the team. We've very, very grateful to you. Thank you. You may now stand down.

5 <WITNESS WITHDREW [1441]

COL GRIFFIN: Mr President, I call Detective Inspector Hayes.

10 <DETECTIVE INSPECTOR WAYNE GEORGE HAYES, recalled
and resworn [1441]

15 <EXAMINATION BY COL GRIFFIN

COL GRIFFIN: Detective Inspector Hayes, since you last appeared
before the Board you've conducted further investigative inquiries in
20 respect of the
death of PTE Jacob Kovco, which included the obtaining of further
samples. Is that correct?---Yes.

25 Would you tell the Board what you did in respect of Soldier 14, please?
---In respect of Soldier 14, I caused one of my staff to meet with him at a
police station and obtain a buccal swab for DNA sampling purposes from
him.

30 How is that process undertaken? Is it recorded in some way?---It's
recorded on video and audio tape.

Do you produce a video of that process?---I do, yes.

35 I ask that be played, sir?---This is actually a copy, it's not the original.
The original is retained in our record purposes.

Thank you.

40 PRESIDENT: Very well. Is everybody comfortable with that being
played?

COUNSEL REPRESENTING: Yes.

45 PRESIDENT: So be it.

VIDEO PLAYED

5

COL GRIFFIN: Mr President, there's been a technical failure in respect of the feed from this room to another place. Consequently, I'd ask for an adjournment while that technical failure is repaired.

10

PRESIDENT: It may indeed be repaired.

COL GRIFFIN: It may be.

15

PRESIDENT: The feed that we give to the other place, is that being recorded?

20

COL GRIFFIN: I'm sorry, I'm unaware of the answer to that. It certainly is when we use the bridge for the video hearings offshore. But to the other place I don't know.

MAJ JOLLY: Sir, my understanding is it records everything.

25

COL GRIFFIN: For videoconference offshore, but we're talking about just down the road here. It's all good. Thank you very much.

PRESIDENT: At a later time, subject to the convenience of you and the other people, to replay the proceedings of the last 10 minutes or so, I'm comfortable with that.

30

COL GRIFFIN: Thank you, Mr President. If I might ask for the standard direction in respect of the name.

35

PRESIDENT: Yes, we noticed that Soldier 14's name was used that during that interview, as indeed it should have been. But when the press report I'd be grateful and direct that they report him only as Soldier 14 and not by surname and not by name.

COL GRIFFIN: Thank you, sir. I tender the video, sir.

40

PRESIDENT: Any opposition to that course, gentlemen?

COUNSEL REPRESENTING: No.

45

#EXHIBIT 158 - VIDEO OF INTERVIEW OF SOLDIER 14

COL GRIFFIN: Detective Inspector Hayes, the Board has received into
evidence two further reports from the specialist at the division of analytic
5 laboratories, Ms Franco, in respect of DNA analysis that she has
undertaken, a report dated 11 August and another one of yesterday's date.
I understand that you have received those reports as well?---Yes.

10 Could you tell the Board what further investigative action, if any, you
have taken as a result of those reports?---I've requested through his
Counsel to conduct an interview with Soldier 14 in relation to the results
obtained. I was advised this morning that Soldier 14 had declined
interview.

15 There were some other testing of DNA conducted by yourself offshore
recently in Baghdad?---Yes.

20 Are you able to assist the Board with the current status of that
investigative - - -?---I'm told by DAL that due to the results on those
documents referred to before that they will not be analysing those results.

Thank you. I have no further questions for Detective Inspector Hayes at
this stage, sir.

25 PRESIDENT: Thank you.

<EXAMINATION BY LTCOL GREEN

[1459]

30 LTCOL GREEN: Detective Inspector Hayes, you yourself went over to
Baghdad to take those DNA samples?---My officer with me took them.
He's accredited, I'm not.

35 Notwithstanding not being accredited, you've undergone courses of
instruction of DNA?---Generic courses, yes.

40 You understand the nature, characteristics and modes of transfer of
DNA?---Yes.

You understand that DNA can be transferred from a person to an object to
a person?---Yes.

45 You understand DNA can be transferred from a person to an object to a
person to an object?---Yes.

Thank you, sir.

PRESIDENT: LTCOL Berkley.

5

LTCOL BERKLEY: None for me, sir.

COL YOUNG: No, sir.

10 PRESIDENT: Any re-examination?

COL GRIFFIN: Nothing, sir. Thank you.

15 PRESIDENT: Thank you, Inspector. The Board is again grateful to you.

<WITNESS WITHDREW [1500]

20 COL GRIFFIN: Sir, I call Soldier 14.

<SOLDIER 14, recalled and resworn [1501]

25

<EXAMINATION BY COL GRIFFIN

30 COL GRIFFIN: Soldier 14, you've previously given evidence that you read Annex F to Chapter 7 of the Australian Defence Force Publication relating to administrative inquiries that sets out the rights and obligations of a witness. Do you recall that?---Yes, sir.

35 Are you satisfied that you know your rights and obligations of a witness having seen that some time ago? Would you like to read that again?---I would like to read that again, sir.

You would?---Yes, please.

40 Madam Secretary, could you provide the annex to Soldier 14, please. Could Soldier 14 be shown Exhibits 19 and 20 in their classified and redacted forms and the matrices setting out the various positions and DOWR, please. Now, Soldier 14, before you are two statements that have been made by yourself, Exhibit 19 and 20, and which you previously
45 adopted. You've also given oral evidence to the Board previously on 20

June and 9 August. Do you recall giving that evidence or appearing to give that evidence orally and the two statements?---Yes, sir.

5 Is there anything contained in that material that you wish to change?---If I could speak freely on that, sir.

10 Please do?---I think the whole statement, the way it's written I could turn around and say that every single word is written differently because it is a shaped statement, sir.

15 Which one are you referring to?---Exhibit number 19, sir. What I tried to do with Exhibit number 20 was just try to clarify a few things that I didn't think were written how I wanted to express them, sir. I could do the same for the whole statement. Obviously when I made the statement and when I signed it I didn't realise that every single word was going to be looked at in the finest of detail and turned around. So I signed it in sort of in trust, sir, as probably did everyone else. So therefore, I could sit here all day and change it all around. But I know I can't do that now, sir.

20 You can tell the Board anything that you want to tell them. You are under no constraints and if there are matters that you wish to expand on or express in a different way, then here is your opportunity to do so.

25 LTCOL GREEN: Sir, can I adopt the usual course and be allowed to lead some evidence at this point which I suspect will shorten these proceedings by what could be a long time?

30 PRESIDENT: Subject to the approval or the acquiescence of Counsel Assisting. Perhaps you might like to have a short conversation.

COL GRIFFIN: It would assist me to know - normally one is given a statement of proof of evidence, which I've attempted to do with all the witnesses I've had. If we could have an adjournment.

35 LTCOL GREEN: I was just simply going to ask him what occurred at call sign D on the day in question relevant to the evidence we've just heard today. I suspect that's what Counsel Assisting is ultimately building to. But going through Exhibits 19 and 20 in fine detail challenging what colour uniform everyone wore is going to assist us one iota.

40 COL GRIFFIN: I wasn't aware that I'd been challenging - - -

45 LTCOL GREEN: I was talking about this witness being concerned about every word contained there, as to whether or not he was wearing DPCUs or - - -

PRESIDENT: I could see we could play, dare I say it, all sorts of funny lawyer games, and I don't think the Colonel intended to do that for a moment.

5

LTCOL GREEN: I'm not suggesting it for a moment. This witness is being overly cautious in the sense that there's no direction being given to him - - -

10 PRESIDENT: I'm content for us to focus on what I will call the real issues and I'm sure the real issues are paramount in everybody's mind.

LTCOL GREEN: That's what I'd like to do, sir.

15 PRESIDENT: But ultimately, Counsel Assisting has the call at this point of time.

20 COL GRIFFIN: Can I indicate, sir, I'd be more than happy if you were prepared to have a short adjournment while Counsel Representing indicates to me what it is he's proposing. I'm more than happy to adopt a process that speeds things up. I don't propose to do it unknown.

PRESIDENT: I can understand that. We'll leave the board room for five minutes.

25

ADJOURNED [1508]

30 **RESUMED** [1511]

PRESIDENT: Thank you, Colonel, what course is proposed?

35 COL GRIFFIN: It may be that LTCOL Green and I were at cross-purposes in what he was proposing to do.

PRESIDENT: We'll go for another short walk.

40

ADJOURNED [1512]

45 **RESUMED** [1515]

COL GRIFFIN: Sir, LTCOL Green and I were somewhat at cross purposes. I fully appreciate his well-intentioned intervention and I understand what he was setting out to do. But it doesn't satisfy the purposes that I had, which are somewhat broader than what he's outlined to me, so I will, with your leave, proceed, and I think he accepts that that's the position, that I will cover some broader areas in addition to the one that he wanted to go straight to.

5
PRESIDENT: Thank you. Any comment, LTCOL Green?

LTCOL GREEN: No, sir, nothing.

PRESIDENT: Thank you, Colonel, continue.

15
COL GRIFFIN: Thank you, Mr President.

Soldier 14, my purpose in putting to you the two statements and your previous evidence was merely to provide you with the opportunity to change or expand on any of the previous evidence you've given to the Board. That is the purpose. Is there anything else that you would like to say about that previous evidence that you've given to the Board?---Just that, sir, just - just the fact that it doesn't 100 per cent represent my exact feelings. I mean, it is generally how I feel except just this - the smallest details just - you know, a word here and there doesn't accurately reflect and I want to get into that argument again later, sir.

20
I'm going to cover some of the matters set out in there and it may be that in the course of that you'll want to add or say other things. Please feel free to do so?---Yes, sir.

25
I'm also going to ask you to refer to the matrix that sets out the various security positions in the area and the other one that deals with the degrees of weapon readiness. Do you have those in front of you? You know what I'm talking about?---Yes, sir.

30
I want to do most of this in open session, in public, so I'm going to speak in general terms about those areas, but I'd ask you just to bear in mind if there are any matters of operational security that come up that you tell me, "No, I can't answer that, sir, in open forum". Do you understand?---Yes, sir.

35
Would you have a look at exhibit 19, your statement, and turn to paragraph 17, please? In that you referred to an instant a few days before 40
21 April where you saw PTE Kovco having his pistol trying to silently

cock the weapon. Do you see that?---Yes, sir.

And you say:

5 *I can recall that he brought his weapon to -*

a particular condition there?---Yes, sir.

10 Do you see that? How did he actually do that? What steps did he
take?---First he proceeded to strip the weapon, sir. Once the weapon -
once the slide was off and the barrel was off, he put the round into the
chamber and then proceeded to put the weapon back together.

15 He physically forced the round into the chamber, did he?---Yes, sir.

Did you see him do that?---Yes, I was watching him, sir.

Did he put it back together, the whole weapon back together?---Yes, sir.

20 Did you observe it close up with a round - that is, fully put back together
- - -?---Yes, the - - -

- - - the 9 mm pistol?---That's correct, sir.

25 Where was the hammer?---I can't recommend looking at it, sir. If I was to
answer that I would just be guessing, sir.

Did he have to force it closed?---It didn't look like he forced it at all, sir.
Actually it looked like it was pretty smooth action.

30 You'd never seen that done before, is that right?---With a pistol, no, sir.

Had you ever done it yourself?---No, sir.

35 Had you ever heard of it being done?---With a pistol, no, sir.

40 What did he do with it after he'd put it back together with a round in the
chamber?---That's when I mentioned to him, "What are you doing?". He
then - he said something back to me. It was - I'm not sure what he said. It
was just an acknowledgement of what I'd said and he quickly unloaded
the weapon.

45 How did he do that?---By manipulating - cocking the weapon and
observing the round come out, sir.

Did you see the round come out?---Yes, I did, sir.

You had a 9 mm pistol when you were at, is that right?---Yes, sir.

5

But you didn't have one at the Embassy?---No, sir.

Had you used a 9 mm pistol prior to your deployment on this operation?---Yes, sir.

10

How often? Had it been a weapon that you carried for a particular time?---No, sir. I've never carried the pistol for a set period of time, just mainly range practices, sir.

15

Do you still have that page of your statement open before you where I took you to paragraph 17?---Yes, sir.

If you just go up the top of the page you'll see that you said:

20

I can recall that PTE Kovco walked ahead of me about 10 metres and entered the door to exit the roof. I did not see PTE Kovco clear his weapons at the clearance point and I'm sure that he could not have done as he entered the doorway as I walked around the corner and began to clear my weapons.

25

"Weapons" plural. Did you have weapons on you at that time?---No, sir, just a F88, sir.

30

You go on three lines down from that:

After clearing my weapons -

plural:

35

- I tried to enter the door.

Do you see that it says plural again for your "weapons"?---Yes, sir.

40

But you are sure you only had one weapon?---Yes, sir.

And that was your F88 Styre, is that right?---Just my rifle, sir.

45

Would you go back to the previous page to paragraph 14, please? You'll see that there are some areas that are referred to here that are in the matrix, but you say there, "On the 21st", the first time that you saw PTE Kovco,

was at about 1000 hours when you were both at a particular security point. Do you see that?---Yes, sir.

5 You say in brackets after that PTE Kovco was actually doing another duty but had come to assist you at that security point, is that correct?---Yes, sir.

10 Is it the case that there's a particular degree of weapon readiness at that security point that you were manning from 1000 that appears on the matrix, and would you say what it is, please?---Newport, sir.

Newport?---Yes, sir.

At that point, and what's the point on that matrix?---Callsign I, sir.

15 So that's the condition you were at while you were on that point?---Yes, sir.

And he came and joined you?---Yes, sir.

20 Do you recall how long on the shift he was with you at the time you spent there?---I can't recall, sir.

25 Do you recall if he adopted the same degree of weapon readiness with his two weapons at that point that you were at?---I can't recall, sir.

30 Did he conduct a buddy clearance of you when you took - sorry, when he took over that point from you, because I understand you to say there at 1100 you went to your next point and he took over from you at that point?---Yes, sir.

35 Do you recall if he cleared you under a buddy system at that time?---I can't recall, sir, but I'm sure he would have followed me over to the actual unload bay and observed me doing my drills but I can't recall, sir.

40 And you don't recall whether or not he went to the same condition you were at when he came out to help you there?---Yes, I can't recall, sir.

45 That's at 11 o'clock that he's taken over at that position and at that position it required to be in Newport?---That's correct, sir.

With both weapons?---Yes, sir. If he had the pistol, yes, sir.

One gap in the evidence that the Board has at the moment is what happened during the course of that day in respect of breaks. What lunch break would happen for you working on a shift like that?---There weren't

any breaks, sir.

There weren't any breaks?---Not at that time, no, sir.

5 You didn't go away to a meal facility where there was a requirement to
clear weapons to go into that meal facility during the day?---There were
no breaks as such. Obviously at different stages with having different
numbers in the different sections would depend on whether there would be
10 a break or not. At that time I'm pretty sure there wasn't so we were being
- another member from either another section or one post where two guys
were stationed, one would run off and grab some lunch for the rest of the
guys, sir.

15 So, rather than going somewhere else for lunch you would eat in the
Embassy premises where you were working?---Wherever you were at the
time, sir, whenever you got brought your food you'd eat it.

20 No other place to go to where there would be requirements for another
clearance during the course of the day?---If you were that person that went
to get the food from the mess then you would unload your weapons.

Did you do that on that day?---No, it was not me, sir.

25 Do you know who did?---Actually, sir, I can't recall. I can't say.
Actually, on that, sir, it couldn't have been me because of where I was at
the time. Obviously, I know how the rotation works so, yes, it wouldn't
have been able to be me, sir.

30 Are you able to say who it would have been?---No, sir.

The Board has just seen a video of you meeting with some members of the
New South Wales Police for sampling of your DNA in which you are
recorded as saying that, to your knowledge, you didn't handle - your
words were:

35 *To the best of my knowledge*

40 you did not handle the weapon on the day and to the best of your
knowledge you hadn't handled it at any other time, that is, Jake's pistol?
---Yes, that's correct, sir.

That is what you said to the police?---Yes, sir.

45 You've sat and heard the evidence of the specialist who deals in DNA.
Did you handle Jake's pistol at any time?---No, sir.

Did you handle the magazine in Jake's pistol at any time?---No, sir. Can I say something on that?

5 Of course?---Obviously if range practices were being conducted, if guys were shooting and magazines were obviously empty, there's been occasions where they've just been sitting there. So guys just grab magazines. So I mean, there is a chance, but I've never touched his weapon or magazine, sir.

10

Did you silent cock Jacob Kovco's pistol?---No, sir.

Did you strip or assemble Jacob Kovco's pistol?---No, sir.

15 Are you able to account for the evidence from the DNA specialist about the probability relating to your DNA profile on that pistol and on that magazine?---Sir, sorry, are you asking me to say how that may have occurred?

20 Yes, if you have any knowledge?---Well, obviously, I mean, we're working in a - it's a pretty confined space up there. We're obviously always moving around. I'm not too - I don't really know anything about DNA. But, you know, obviously we would have made contact with each other on numerous occasions before that and at callsign D. Also on that
25 day in question I'm not too sure if this goes into operational security, sir, with regards - if - actually, I don't think it is, sir, sorry. If vehicles come in front of the location obviously one of our jobs to do is get on megaphone and we tell them to move away, no vehicles are allowed in front. Also there's actually a few kids that are located just to the right of
30 our location. So there are numerous times when we're on the megaphone either yelling at the kids to get away because they're always in front, harassing people walking by and that, and vehicles in general, just telling them to move away. Obviously we take turns in doing that. So that's - and on that day I remember that happening because those kids were there.
35 So that's probably I think maybe considering the shape of the - how the megaphone is shaped, to hold it like a pistol grip, I think that's maybe a possibility, sir.

40 Are you suggesting that by using the megaphone that has somehow possibly placed your DNA on the slide, grip, perhaps trigger and magazine inside the pistol grip?---Well, I don't know about the magazine, sir. I've never touched his magazines. That's the only - I mean, it could have come from me passing my camera to him saying, "Can you take a photo of me?" or vice-versa, sir. I think maybe the - considering it is hot
45 over there, sir, that the megaphone maybe is the best possibility I think,

sir.

Do you recall using the camera that afternoon with him?---No, I don't remember using the camera, sir.

5

I have no further questions for Soldier 14 at this stage, sir.

PRESIDENT: Thank you. LTCOL Wilkinson.

10 LTCOL WILKINSON: No, sir.

PRESIDENT: LTCOL Green.

LTCOL GREEN: Sir, the convention is I go last in the circumstances.

15

PRESIDENT: LTCOL Berkley.

LTCOL BERKLEY: I apply for an adjournment till Monday, sir. I need some instructions as to the scope of cross-examination. I won't be able to get those instructions until tonight or tomorrow morning.

20

PRESIDENT: You can understand my enthusiasm to conclude this matter as quickly as possible on this particular issue.

25 LTCOL BERKLEY: I do, sir. I don't know whether the witness is available Monday.

PRESIDENT: I think he'll be available Monday.

30 LTCOL BERKLEY: Thank you, sir. Well, I'd renew my application. I don't think it will be long and it will be a fairly isolated area. But I still need instructions as to the form and to the nature of the cross-examination. I am unable to get that right at this moment. That is my application, sir.

35 COL YOUNG: Mr President, that would be my application as well. I certainly wasn't anticipating this witness would be giving evidence today. Given the brief that I hold, I would like some time to consider some evidence before I put any questions.

40 PRESIDENT: Any comment, Colonel?

COL GRIFFIN: No, I don't have any comment, sir. The witness is certainly available and any plans to return were not before Monday or indeed Tuesday in any event were the witness to be returned. So I have no comment and indeed I was proposing at some point to replay the CCTV

45

footage if Counsel wish to utilise that in their examination of Soldier 14 again. You may recall he saw that last time, which could perhaps, if you wish, be done now. We certainly have the facility to do that now and return on Monday.

5

PRESIDENT: Thank you. LTCOL Green, any comment you want to make?

10 LTCOL GREEN: No, sir, I think it's - notwithstanding my application that this matter be concluded with today, I think that would fall short of what's required in the circumstances.

PRESIDENT: We're going to take the adjournment and we'll recall the witness first thing Monday morning.

15

COL GRIFFIN: Very well, sir. Do you wish to play the CCTV footage at this stage?

20 PRESIDENT: I'm inclined to let LTCOL Berkley get his instructions and perhaps COL Young also their instructions before we do that because I don't know whether their instructions will be coloured or otherwise by that, unless you've got some particular - - -

25 COL GRIFFIN: No, sir, I do not.

PRESIDENT: 10 o'clock on Monday.

COL GRIFFIN: Thank you, sir.

30

<WITNESS WITHDREW

[1539]

35 **MATTER ADJOURNED AT 1539 UNTIL
MONDAY 21 AUGUST 2006 AT 1000**

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