SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT ALLOA

[2019] FAI 2

ALO-B83-17

DETERMINATION

BY

SHERIFF DAVID N MACKIE

UNDER THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC (SCOTLAND) ACT 2016

into the death of

DANIEL McSWEENEY

Alloa, 11 December 2018

DETERMINATION

The Sheriff, having considered the information presented at the inquiry, determines in terms of section 26 of the Act that:-

Daniel McSweeney, born on 27 March 1960, late of Glenochil Prison, Tullibody, FK10 3AD, died within Devon Hall Cell Block, HM Prison Glenochil at 09:15 hours on 29 September 2014.

1. In terms of section 26(2)(a) of the 2016 Act, Daniel McSweeney died within Devon Hall Cell Block, HMP Glenochil at 09:15 hours on 29 September 2014;
2. In terms of section 26(2)(b) of the 2016 Act the deceased consumed a quantity of Diamorphine amounting to an accidental overdose during the evening of Sunday

28 September or morning of Monday 29 September 2014. It is likely that, at the same time, he consumed a quantity of Benzodiazepines in the form of Diazepam and Diclazepam. His consumption of these illicit substances resulted in his accidental death.

3. In terms of section 26(2)(c) of the 2016 Act the death was caused by:

    a. Multidrug toxicity

4. In terms of section 26(2)(d) of the 2016 Act the cause of the accident resulting in the death of the deceased was his consumption of a quantity amounting to an overdose of illicit substances comprising mainly Diamorphine but probably including Benzodiazepines in the form of Diazepam and Diclazepam.

5. In terms of section 26(2)(e) of the 2016 Act there are no precautions which could reasonably have been taken that might realistically have resulted in the death or the accident resulting in the death being avoided had they been taken.

6. In terms of section 26(2)(f) of the 2016 Act there are no defects in any system of working which contributed to the death or the accident resulting in the death.

7. In terms of section 26(2)(g) of the 2016 Act there are facts which are relevant to the circumstances of the death relating to the investigation and detection of drug crime within Scottish prisons and these are discussed in paragraphs [101] to [108] of the Note.

RECOMMENDATIONS

In terms of section 26(1)(b), for the reasons addressed in the body of the Note, there are no recommendations arising from this inquiry.

NOTE

Introduction

[1] The Procurator Fiscal for the district of Tayside, Central and Fife gave notice on 9 August 2017 under section 15(1) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 of the holding of an inquiry into the death of Daniel McSweeney who died within HM Prison Glenochil on 29 September 2014. The inquiry was mandatory in terms of section 2(4)(a) of the Act in respect that the late Mr McSweeney was in legal custody within HM Prison Glenochil at the time of death.

[2] The matter called before the Sheriff at a preliminary hearing within Alloa Sheriff Court on 16 August 2017 at which time the Court considered it not appropriate to fix the date for the inquiry and ordered that a preliminary hearing be held on 3 October 2017. A further preliminary hearing was held on 17 November 2017 when a date was fixed for the start of the inquiry on 11 December with further dates reserved on 13 and 14 December all 2017.

[3] The inquiry duly commenced on 11 December. It did not conclude by 14 December and was further continued to 21 February 2018. The hearing of evidence concluded on 21 February at which time the Sheriff adjourned the inquiry for a hearing on submissions on 2 May 2018. Parties were ordered to present written submissions.

[4] At the conclusion of the evidence on the third day of the inquiry on 14 December 2017 and in the exercise of the power conferred by section 20(2) of the Act I issued a Note requiring the Procurator Fiscal and Scottish Prison Service as participants to bring forward evidence about certain matters specified in my Note. Having already provided parties orally with some indication of the matters on which I considered further evidence was necessary at the conclusion of the second day, the Procurator Fiscal presented additional evidence on the third day. This went some way to addressing the points I had raised but for reasons I explained in a Second Note dated 15 December 2017 I considered that additional evidence was still required. The Notes are attached as Appendices.

Participants and representation

[5] The Crown was represented by the Procurator Fiscal Depute Ms Cook. The Scottish Prison Service was represented by Ms Phillips, Solicitor, the Prison Officers' Association by Mr Gillies, Solicitor, the National Health Service by Ms Watts, Advocate and the family of the deceased by Ms McGowan, Solicitor.

Witnesses

[6] I heard the evidence of the following witnesses listed in the order in which they gave evidence:

1. Joan Reekie, former Lifer Liaison Officer and Early Release Liaison Officer, Scottish Prison Service;

2. Andrew McNally, Reception Officer, HM Prison Glenochil;
3. Kenneth Miller, Prison Officer, Segregation Unit, HM Prison Glenochil;
4. John Rae, Prison Officer, HM Prison, Glenochil;
5. Victoria McDonald, Specialist Nurse in Public Health, Sexual Health and Addiction Team Manager, HM Prison Glenochil;
6. Fiona Parker, Nurse Practitioner, HM Prison Glenochil;
7. Christopher Cochrane, Prison Officer, HM Prison Glenochil;
8. David Hugh Ross, former Night Shift Officer in Charge, HM Prison Glenochil;
9. Iain Hill, Prison Officer, HM Prison Glenochil;
10. William O'Hare, Prison Officer, HM Prison Glenochil;
11. Paul James O'Flaherty, Security Manager, HM Prison Glenochil;
12. Aileen Margaret Kidd, Staff Nurse, HM Prison Glenochil;
13. Dr. Michael Blackmore, Portfolio G.P., Forth Valley;
14. Karen Marie Livesey, Forensic Scientist;
15. DC Jamie Hughes, Police Service Scotland, Pro-active CID;
16. Gillian Agnes Walker, Head of Operations and Public Protection, Scottish Prison Service;
17. Lesley McDowall, Health Strategy and Suicide Prevention Manager, Scottish Prison Service;
18. Andrew Morin, Staff Nurse, Acute Assessment Unit, Forth Valley Royal Hospital, Larbert;

19. Inspector David Simpkins, Force Custody Inspector, Police Service Scotland;
20. Dr. Ian Hugh Wilkinson, Consultant Forensic Pathologist, NHS Lothian;
21. Dr. Fiona Wylie, Forensic Toxicologist, University of Glasgow;
22. Deborah Carmichael, Criminal Justice Social Worker, Glasgow City Council;
23. Dr. Adrian James McInnes, former Accident and Emergency Clinician, Forth Valley Royal Hospital, Larbert;
24. Detective Inspector Kenneth McAndrew, Police Service Scotland, Stirling and Forth Valley CID;
25. Derek Marshall, Unit Manager, Scottish Prison Service;

[7] It cannot be said in relation to any of the witnesses from whom the inquiry heard evidence that any question of credibility arose. Limited observations regarding the reliability and content of the evidence of certain witnesses are contained within the summary to follow.

[8] Certain facts were agreed amongst the parties participating and the Crown and are set out in the Joint Minute of Agreement in Process.

The legal framework

[9] This inquiry was held under section 1 of the **Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016**, and its procedure governed by the **Act of Sederunt (Fatal Accident Inquiry Rules) 2017 (SSI 2017/103)**. The purpose of an inquiry under s 1(3) of the Act is (a) to establish the circumstances of the death and (b) consider what steps, if any, might be taken to prevent other deaths in similar

circumstances. This Determination sets out my findings as to the circumstances mentioned in **section 26(2)(a)** to **(d)** of the Act, that is to say, when and where the death occurred, when and where any accident resulting in the death occurred, the cause or causes of the death, the cause or causes of any accident resulting in the death. The Determination further addresses in terms of **subsection (2)(e)** any precautions which could reasonably have been taken which might realistically have resulted in the death or any accident resulting in the death, being avoided. The question whether any defects in any system of working contributed to the death or any accident resulting in the death is raised by **subsection (2)(f)** of the Act and is addressed in this Determination along with consideration of other facts relevant to the circumstances of the death (**subsection (2)(g)**).

[10] The inquiry was arranged by the Procurator Fiscal following investigation into the circumstances of the death of the late Mr McSweeney and in accordance with the responsibility conferred by **section 1(1)** of the Act. It was a mandatory inquiry in terms of **section 2(4)** of the Act as it concerned the death of a person who, at the time of death, was in legal custody, being a prisoner within HM Prison Glenochil. An inquiry is an inquisitorial process to address the matters specified above. It is not the purpose of an inquiry such as this to establish civil or criminal liability.

[11] A Fatal Accident Inquiry is an exercise carried out in hindsight and with the benefit of hindsight. The terms of section 26(2)(e) require the Sheriff, so far as they have been established to his satisfaction, to set out the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided. The Sheriff

should not try to determine what precautions if any 'would' have avoided the accident for that would be an inappropriate quest for certainty. Nor should he enter the realms of what precautions 'should' have been taken for that would be to trespass into the field of blame. I respectfully adopt the guidance to be found in **Carmichael** on **Sudden Deaths and Fatal Accident Inquiries, 3rd ed.** at **paragraph 5.75, page 174 (3rd ed)** where the author writes:

> "Certainty that the accident or death would have been avoided by the reasonable precaution is not what is required. What is envisaged is not a 'probability' but a real or lively possibility that the death might have been avoided by the reasonable precaution."

[12] In the final analysis my function is to give objective consideration to whether there were any reasonable precautions whereby the death and any accident resulting in the death might realistically have been avoided. I find myself applying the ordinary meaning of the words of the sub-section and to that end now proceed to consider the evidence surrounding the death of the late Daniel McSweeney.

Summary

[13] The late Daniel McSweeney (date of birth 27/3/60) was 54 years old when he died on 29 September 2014. He spent most of the last 13 years of his life in prison where he seemed secure and relatively at ease. At liberty in the community, by contrast, he seemed to struggle with independent life and was inexorably drawn to antisocial and criminal behaviour. The abuse of illicit substances played a significant part in his life and, ultimately, his death. He was characterised by those who knew him, mainly officers

and nurses working within HM Prison Glenochil, as a likeable and cheerful person who had developed an interest and not a little skill in playing the guitar and writing songs.

[14] At the time of his death Mr McSweeney was lawfully detained in custody at HM Prison Glenochil. He had pled guilty to three charges of assault and robbery at Glasgow High Court and was sentenced to 10 years imprisonment to run from 24 November 2004. He was, at the time of his offence, on licence from a 6 year sentence of imprisonment in HMP Shotts imposed in May 2001 but running from 2 February 2001 for two analogous charges of assault and robbery. He was released on licence on 31 August 2010 and within a week, on 6 September 2010, was recalled with charges of contravening the Emergency Workers (Scotland) Act 2005, s 5(1), making criminal threats and contravening s 5(2) of the Misuse of Drugs Act 1971. He was also reported to have been in breach of his licence conditions by refusing several directions to stay in approved accommodation. He was detained in HMP Barlinnie upon his recall on that occasion.

[15] A further opportunity of parole was offered to the late Mr McSweeney and he was released on licence on Tuesday 2 September 2014, only two months short of the end of his sentence. Within a matter of only a few days he was self-reporting that he was in breach of his licence and asking to be re-admitted to HM Prison Glenochil. The person who dealt with him was Joan Reekie, the Life Liaison Officer and Early Release Liaison Officer. She was the Home Detention Curfew co-ordinator, conducted parole tribunals for the Scottish Prison Service and oversaw the Multi-agency Public Protection

arrangements (MAPPA) for Glenochil Prison. She presented as a highly experienced officer, since retired, whose evidence was strong and compelling.

[16] Ms Reekie found herself with, for her, the unprecedented situation of a prisoner seeking readmission to the specific prison of Glenochil, self-reporting a breach of licence conditions. This effectively by-passed the normal process of a breach of licence conditions being reported to the Parole Board by the community based social work team resulting in the preparation of the appropriate recall papers providing the prison with the requisite authority to receive a returning prisoner. Mr McSweeney stated that he had not stayed at approved accommodation and had disengaged with his community based social work team. He said he was wandering the streets with no money.

[17] The Parole Board and the community based social work team were contacted and Mr McSweeney was formally recalled by Scottish Ministers although his recall papers specified that he was to be recalled to HM Prison Barlinnie and not Glenochil. Ms Reekie harboured a strong suspicion that Mr McSweeney intended to smuggle illicit substances into the prison concealed within his person.

Friday, 19 September 2014

[18] Mr McSweeney presented himself at HM Prison Glenochil during the afternoon of Friday 19 September 2014, ten days before his death. Notwithstanding that he was directed by his recall papers to present himself at HMP Barlinnie he would not be turned away at Glenochil in view of the unacceptable risk that he might commit an offence if at liberty after not being admitted. The prison reception officers were

instructed by Ms Reekie that she was to be notified when he arrived and he was to be taken immediately to the Segregation Unit. Mr McSweeney underwent a full body search before being taken to the Segregation Unit. The search was described by Prison Officer Andrew McInally, a Residential Officer on duty at reception at the time. It was conducted in accordance with the HMP Glenochil Standard Operating Procedure for searching prisoners within a search cubicle to which Mr McSweeney was escorted. He was asked if he had anything on him that could harm himself or others. He was informed that he was to undergo a full body search.

[19] The same procedure was followed for searching Mr McSweeney as in every full body search in accordance with the Standard Operating Procedure for such searches. The search was conducted by two officers of the same gender as the prisoner. He was asked to run his hand through his hair and both hands were examined. He was asked to remove his upper garments and his upper body examined including hands and armpits. He was asked then to remove his shoes, trousers and underwear and these were put to the side. As each garment was removed it was checked. He was asked to squat and his buttocks examined as also the soles of his feet and between the toes. Nothing was found. He was interviewed by Ms Reekie who challenged him as to how he had made his way to Glenochil despite having no money. It was noted by Ms Reekie that he stated that he did have money, then changed it to saying he received money from his family. He stated he had travelled by train but was unable to produce a train ticket or provide information as to the cost of the ticket. Glenochil is difficult to reach by public transport as there is

none and HM Prison Barlinnie would have been easier for the late Mr McSweeney to reach.

[20] Ms Reekie harboured a strong suspicion from the outset that the late Mr McSweeney's purpose in seeking re-admission to HM Prison Glenochil was to introduce illicit substances to the prison concealed within his person. The expressions 'packing drugs', 'banking drugs' and 'banked (with drugs)' are commonly used in this context though do not form part of the Scottish Prison Service corporate lexicon. She challenged him with her concerns stating to him that he deliberately breached his conditions to return to custody to bring in illicit substances knowing he only had two months left on his licence and had not committed any other offence. He denied that he was carrying illicit substances or under duress to bring such substances into the prison. He was admitted to the Devon Segregation Hall within HM Prison, Glenochil.

[21] It was Ms Reekie's impression that Mr McSweeney was under the influence of drugs on admission. This was based upon her observation of his pupils, his presentation and agitated demeanour. She was an officer of long experience, used to dealing with individuals with addiction problems and presenting under the influence of drugs. She was sure Mr McSweeney was under the influence of some substance and accordingly arranged for him to be seen by a nurse.

[22] He was seen by Staff Nurse Aileen Kidd. She spent ten minutes with him in private and had been informed by reception that there was a suspicion that Mr McSweeney was packing illicit substances. She explained that she looked for signs of intoxication such as slurred speech, eyes 'pin-pricked' or reacting to light. Her

impression was that he was not under the influence of any substance; his conversation was clear, he was orientated in time and space and there was no bizarre behaviour associated with being under the influence of a substance. A decision was taken, nonetheless, to place Mr McSweeney on an hourly watch having regard to the suspicion that he was carrying illicit substances inside his body. The arrangements concerning Health Markers and practice in relation to observations is discussed in more detail below. The arrangements for the late Mr McSweeney were that on the direction of the health practitioners he was to be observed on an hourly basis whilst in his cell. The observation would consist of the relevant officers observing him through the spy hole in the cell door. They were not expressly required to elicit a response from him. The arrangements for his observation remained the same for the remaining days leading to his death.

[23] The late Mr McSweeney underwent a second full body search before being admitted to his cell within the segregation unit and was provided with new clothing to replace his own civilian clothing; this was referred to as 'dual clothing'. The cell into which he was placed had been searched in advance of his admission and was described as sterile. There was, therefore, no possible external source of illicit substances and it was important to have regard to that in light of what was to follow.

[24] In addition to the examination by Staff Nurse Kidd the late Mr McSweeney was examined by a doctor, Doctor Iain Macdonald. He thought Mr McSweeney was under the influence of some illicit substances and noted that on examination he looked agitated yet drowsy, heavy eyed and with small pupils. One of the medical conditions that

affected the late Mr McSweeney was chronic obstructive pulmonary disease ('COPD') and his medication for that was re-instated, he not having consulted a doctor following his release and not having taken his medication for a number of days. Mr McSweeney was accustomed to having certain opiate pain killers prescribed to manage certain pain conditions he experienced but Dr Macdonald recorded that opiates, Gabapentin and Z-drugs were not to be administered in view of the risk that he might have dangerous drugs secreted in his gut. And so it was that the late Mr McSweeney successfully gained readmission to HM Prison Glenochil. His entire management was predicated upon a suspicion that he was packing illicit substances.

[25] It was unclear how long it was expected Mr McSweeney would remain within the Segregation Unit. Ms Reekie explained that in her considerable personal experience she had encountered prisoners being admitted under suspicion of banking illicit substances. She stated that it was very rarely that prisoners would give up the substances they had banked; not unknown but rare. It was unusual for them to use the substances personally. There was a limit as to how long a prisoner could be detained within the Segregation Unit. Eventually they would return to the Hall to join the main prison population. She explained quite graphically that "you'll see the usual suspects … round about his door and that night you'll see the hall's kind of bouncing with substances".

[26] Ms Reekie observed that it would have been easier for the late Mr McSweeney to have made his way to HM Prison Barlinnie than to travel to Glenochil and this led to her drawing an inference that he wanted to be readmitted to Glenochil for the purpose of

introducing illicit substances. She further inferred that he was doing so at the request of organised crime groups, possibly as a result of associations he had developed during his period in custody. The experience Ms Reekie had gained of dealing with prisoners packing illicit substances was that they did not consider it worth their recall on their licence conditions to try to introduce small quantities of substances but would endeavour to bring in large quantities worth thousands of pounds. These inferences strongly informed the manner in which Mr McSweeney was managed upon admission. They did little to inform any criminal investigation and at this stage there was no consideration given by any senior manager within HM Prison Glenochil to alert the police to the suspicions. That would change in the course of the following days but not to the effect of instigating the investigation of the operation of organised crime groups within the prison.

Sunday, 21 September 2014

[27] A search was carried out of the late Mr McSweeney's cell at about 10:30 on the morning of Sunday 21 September 2014. There was found in his pillow case a light brown coloured substance in clear wrapping. This was presumptively tested by DC Linda Honey and found to contain heroin.

[28] While Mr McSweeney denied that it was his it was reasonable to infer that it had been secreted within his body and that he had accessed it within his cell. He was placed on a misconduct report and on Tuesday 23 September placed on a Governor's order for removal from association for three days. This did not alter his status as he remained

within the Segregation Unit under hourly observations in any event under continuing suspicion of packing illicit substances.

Saturday, 27 September 2014

[29] On the morning of Saturday 27 September 2014 at around 10:00 am Mr McSweeney was found in his cell very drowsy and unresponsive. Victoria McDonald was a Specialist Nurse in Public Health who was also the addiction team manager in Glenochil. She knew the late Mr McSweeney well through his previous engagement with the addiction team and knew him as Danny. She recalled that his drug of choice was Heroin but that he would take anything. She saw him for the first time since his readmission to prison on the morning of Saturday the 27th and was shocked. She thought he looked terrible and had lost a considerable amount of weight since she had last seen him. He was lying on his mattress on the floor, not on the bed and described him as filthy. She took observations and saw that there was a large quantity of green coloured sputum that he had coughed up beside him on the mattress. She roused him and explained to him that she could not provide care to him there and he should go to hospital. He stated that he had been snorting Suboxone, a Heroin substitute. He was able to convey to her that he did not want to go to hospital but with some effort she persuaded him that he should.

[30] He was taken by ambulance to Forth Valley Royal Hospital where he was admitted at 12:20 pm. The doctor on duty, Dr Adrian McInnes gave evidence and spoke to the clinical notes he made at the time. The history of the patient was given to him by

the escorting Prison Officers who reported to the doctor that officers removed 32 g of Heroin "that the patient had put up his rectum". It was noted that the patient informed staff that he had banked drugs inside him. He was found on examination to be poorly responsive with poor respiratory effort. His assessment on the Glasgow coma scale of consciousness was 9/15, where normal is 15/15, and this was regarded by the doctor as a significant decrease in consciousness. It meant that he was opening his eyes only to painful stimuli to the eyebrow and was making only incoherent sounds by way of a verbal response. He was found to have pin point pupils and this reinforced the clear impression of a Heroin overdose. This impression informed the treatment given to Mr McSweeney being the administration of 1.2 mg of Naloxone (3 phials of 400 mcg).

[31] The doctor, who was a middle grade Junior Doctor locum with a supervisory role equivalent to a Registrar at the time, remembered the patient because of his behaviour upon regaining full consciousness in response to the Naloxone. His Glasgow coma scale quickly restored to 15/15 and his pupils ceased to be pin point. The late Mr McSweeney was annoyed and described as quite forceful about being taken to hospital and examined. He accused the doctor of assaulting him by taking a blood test. The doctor described the patient as verging on being angry and really not wanting to be admitted to hospital. Mr McSweeney insisted upon self-discharging from hospital and this happened at 14:38 pm against medical advice.

[32] The doctor explained to Mr McSweeney that he needed to be admitted to hospital at least for observations, that there was a danger of his becoming unwell and possibly dying if he went back to the prison. He described Mr McSweeney as not

seeming to be interested and that he just wanted to go back to the prison. It was the doctor's opinion that Mr McSweeney required observation in hospital and imaging to see what was in his abdomen. If he showed further signs of Heroin poisoning he could be administered with more Naloxone. This could happen if the Naloxone wore off before the Heroin and the effects of Heroin would recur. Mr McSweeney was left to dwell on his decision to discharge himself and to think about it.

[33] It was not until about 16:15 pm. that there was communication between the hospital and G4S regarding Mr McSweeney's transfer back to the prison. He was collected at 18:20 pm and arrived back at Glenochil at 18:50 pm. He was in a wheelchair as he was unsteady on his feet. A full body search was carried out and he was returned to his cell within the Devon Hall Segregation Unit.

[34] Notwithstanding that Mr McSweeney was already subject to hourly observations by virtue of the health care marker that was put in place upon his readmission to prison on 19 September, he was again placed on hourly observation with the same health care marker by the Security Manager, Paul O'Flaherty.

Sunday, 28 September 2014

[35] Sunday 28 September 2014 was Mr McSweeney's last day alive and it appears to have passed relatively uneventfully. He had returned from his hospital treatment for a Heroin overdose the night before and remained subject to a regime of hourly observations within the Devon Hall Segregation Unit. He was responsive during a check

at 07:30 pm but would be found dead, on his mattress on the floor of his cell the next morning almost exactly 12 hours later.

Monday, 29 September 2014

[36] The Officer in Charge of the night shift within the prison from 9:15 pm on Sunday 28 September until 8:15 am on Monday 29 September was David Ross. He was based within the main office area and oversaw a night shift staff of about 8 Prison Officers. Two officers were allocated to each of the two main blocks within the prison, Abercrombie and Harviestoun Halls, two to the control room known as the ECR Room and two on outside patrol duty. The overall prison population was of the order of 700 prisoners. The officers allocated to each of the two main blocks, Abercrombie and Harviestoun, were locked in to the respective blocks for the duration of their shift.

[37] The segregation unit in which the late Mr McSweeney was housed was a separate block known as Devon Hall. No night shift officers were allocated to Devon Hall. The officers responsible for checking on prisoners within Devon Hall who, like Mr McSweeney, were the subject of regular checks under Health Care Markers were the two officers on outside patrol duty. Devon Hall, the segregation unit, is a 12 or 13 cell block in which, at any one time, there might be one or two residents subject to observations.

[38] Mr Ross came on duty at about 9:00 pm and stayed at the vestibule until the last of the previous late shift officers and staff had left. Their supervisor was the last member of that shift to leave the prison and Mr Ross locked up the prison as soon as he left.

[39] The nursing staff finished at 5:00 pm and so there was no opportunity for Mr Ross to speak to them. It was different during the week as the nursing staff remained on duty until 9:00 pm and there was an opportunity for a handover. Mr Ross was aware from the night shift report sheet left by the nurses that Mr McSweeney remained on hourly observations, referred to by him as 'normal observations'. He was already aware that Mr McSweeney had been subject to such observations all week and that there was no change. He admitted that he did not see the care plan attached to the night shift report explaining that he was aware that Mr McSweeney was subject to hourly observations all week and there was no change. Mr Ross stated at first that he was unaware of the reason for the care plan and this was a normal state of affairs not least because patient confidentiality prohibited disclosure of information to him and his colleagues. His role was to ensure that the type of observation called for was carried out. He further admitted, however, under cross examination by Counsel for the Health Board that, although he had no memory of having done so, he would have seen the health care marker at the start of the week and would have seen from that the reasons for the observations, namely "suspected of swallowing an unknown package …". While Mr Ross played no part in conducting the observations he was in overall charge of the arrangement and explained that for the type of observation called for he would expect the relevant officers to carry out a visual inspection through the spy hole in the cell door, to turn on the light but not to elicit a response from the subject.

[40] The two officers on outside patrol responsible for carrying out the hourly checks on the late Mr McSweeney were both highly experienced and long serving officers.

William O'Hare was 72 years of age at the time he gave evidence and had 32 years' service as a Prison Officer. Iain Hill was 50 years of age when he gave evidence and an officer of 24 years' experience in 2014. They both started the night shift on Sunday 28 September at 09:15 pm and worked through to 07:30 am on Monday 29 September 2014. Mr O'Hare recalled that there were two prisoners within Devon Hall, the segregation unit, who were on hourly observations and they were in cells 1 and 13 respectively. The late Mr McSweeney was one of them and he was housed in cell number 1 located nearest the entrance to the unit. The other cell, 13, was at the far end. Neither he nor his colleague Mr Hill were aware as to why Mr McSweeney had been placed on hourly observations; they knew only that that was the case. They were not provided with any paperwork in relation to Mr McSweeney and did not see the health care marker. They both described the white board in the Manager's office from which they noted that Mr McSweeney was on hourly observations. If there was any relevant paperwork they would have expected the personnel of the previous, outgoing backshift to pass that on. In this case there was none.

[41] The officers described in similar terms the procedure they followed in carrying out their patrol of Devon Hall and the observations on Mr McSweeney. Upon entering Devon Hall they had no strict practice; one would go to the right and the other to the left, checking the respective cells on each side. On the outside of each cell there was a light switch and call point / alarm button. The pressing of the alarm reset button generated a computer record of that event. The practice in conducting a patrol of Devon

Hall was for one of the officers to press the alarm reset button of the cell furthest away in order to generate a computer record that the inspection of the hall had been carried out.

[42] The practice in conducting hourly checks where these were required was firstly to carry out a visual check through the spy hole in the cell door, a two by five inch glass aperture with a sliding cover. The movement of the spy hole cover often elicited a response from the prisoner under observation. If the prisoner was asleep there would be no attempt to rouse him unless there were specific instructions to do so. In the case of the late Daniel McSweeney there were no such instructions. Sometimes the officers would switch the light on and off. Both officers explained that in the absence of specific instructions to rouse the prisoner their purpose in carrying out the hourly observations was to check that the person was alright and that there was nothing untoward to report. Once the visual check was carried out the officer would press the alarm reset button outside the cell thereby generating a computer record that the check had been carried out. The actual computer records for the night in question were not produced or referred to in the inquiry but there was no reason to doubt the evidence of the two officers that they duly carried out hourly observations on the late Daniel McSweeney throughout the night of 28 to 29 September 2014.

[43] Both officers stated that at no time during the night until the end of their shift did they notice anything untoward in relation to the late Mr McSweeney and there was no cause for concern. Had they made such an observation they would have reported it to their Supervisor and that would lead to other officers being directed to open the door and go into the cell. Mr O'Hare explained that in the interests of officer safety certain

procedures were in place for entering a cell. He could not enter a cell without the support of at least two other officers at any time. He explained that even if through the spy hole the prisoner was observed hanging from a ligature he could not enter the cell without the support of other officers. He recalled that he had carried out observations on the late Mr McSweeney for four nights. On three of those nights, Thursday, Friday and Saturday, Mr McSweeney slept on his mattress on the floor and mostly he lay sleeping face down. It was suggested in the course of this Inquiry that Mr McSweeney chose to place his mattress on the floor because he had fallen off the bed in his sleep on other occasions. It was Mr O'Hare's recollection, however, that on the night of Sunday 28 September to Monday 29 September the late Mr McSweeney slept on his back and had his bedding drawn up to his waist, apparently in contrast to other nights when he had no cover.

[44] Mr McSweeney's duvet was observed to move at 03:30 am suggesting that he was breathing. The last check was carried out by Officer Ian Hill at 06:15 am on Monday 29 September 2014 at which time the late Mr McSweeney was observed to be sleeping peacefully lying on his back and was breathing. Mr Hill observed that his chest was seen to be moving. There was no reason to doubt Mr Hill's evidence on this.

[45] Neither officer was aware that Mr McSweeney was under suspicion of packing illicit drugs within his body. Mr O'Hare commented that if he had been aware that was the case he would probably have elicited a response from the late Mr McSweeney during the hourly observations. Neither officer knew the deceased and Mr O'Hare had only one short exchange with him at the start of the week from which he gained the

impression that he was dealing with an older man who was sometimes drowsy. He carried out observations on the late Mr McSweeney during four night shifts and on the night of 28 to 29 September 2014 there was no difference to Mr McSweeney's appearance and demeanour in comparison to the other nights except that he slept peacefully on his back with his bedcover drawn up.

[46] At about 07:20 am on the morning of Monday 29 September 2014 Mr McSweeney was found to be unresponsive. Officers entered his cell where Mr McSweeney was found to be lying on his back with the cover drawn up to his bare chest and his arms bent up over his chest. He was found to be cold to the touch. A call was immediately put out for the attendance of a nurse. The call was answered by Mental Health Nurse Doreen Doull. Another health care assistant, Carl Martin, was sent for the emergency resuscitation equipment. On arrival at the cell at about 07:25 am Nurse Doull was informed that Mr McSweeney was unresponsive and appeared dead. She asked for an emergency ambulance to be called. On entering the cell she observed Mr McSweeney lying on his back on a mattress on the floor, covered by a duvet pulled up to the middle of his chest. His arms were pulled up to the middle of his chest, he wore no upper clothing and he was cold and stiff to the touch. The nurse could detect no radial pulse at the left wrist or carotid pulse. There were no breath sounds. Petechiae were evident across the top of his upper chest and shoulders. The decision was made not to attempt resuscitation and the ambulance was stood down. The doctor was called.

[47] Dr Michael Blackmore knew the deceased professionally having attended to him previously during his time in custody within HM Prison Glenochil. He found the late

Mr McSweeney to be lying on his back, he was pale and making no respiratory effort. His pupils were fixed and dilated. There were no breath sounds for three minutes and no pulse or heart sounds for one minute. The doctor declared life extinct at 09:15 am although it can be inferred that death in fact occurred at some point between 06:15 am when he was last observed to be breathing and 07:20 am when he was found unresponsive and without signs of life.

[48] Dr Blackmore did not recall seeing any lividity. He explained that after death, *post mortem*, the blood in the body pools towards the back of the body or the part that is in contact with the floor and is indicative of the person having been dead for some time, that is to say for a few hours; more than an hour.

Post mortem examination and toxicology investigation

[49] An autopsy was carried out on the late Mr McSweeney on 3 October 2014 by Dr Ian H Wilkinson and Dr Robert Ainsworth at the Edinburgh City Mortuary and their findings were recorded in their report dated 27 November 2014 forming Crown Production 1. They were provided with a copy of the Police sudden death report from which they gleaned the background history. This was in keeping with the circumstances described above. They noted from the Police report that 'some substance thought possibly to be heroin was identified within the cell'. This last matter was not the subject of any other evidence in the Inquiry.

[50] A past medical history including asthma, chronic obstructive pulmonary disease ('COPD') and previous heroin use was noted. Pre-existing coronary artery disease was

identified along with the presence of bronchopneumonia and chronic changes of the lungs consistent with the history provided. The presence of bronchopneumonia was thought most likely to represent a terminal complication of profound central nervous system depression. Twelve foreign bodies were recovered from the alimentary system, eight within the stomach and four within the large bowel. These appeared to consist of material contained within condoms with no obvious evidence of breakage of the condoms identified. The items recovered from the stomach consisted of seven oval and one rectangular foreign body weighing 60 grams in total. Four oval foreign bodies were recovered from the transverse colon, part of the large bowel and these weighed 100 grams. There were no obvious ruptures to any of these foreign bodies.

[51] It was explained to the Court that the route of the alimentary canal following consumption through the mouth is through the oesophagus or gullet into the stomach. Whatever has been swallowed will then move into the next part of the alimentary system being the first part of the small bowel. From there it passes to the first part of the large bowel called the ascending colon to the transverse colon, that part of the large bowel that runs across the top of the abdomen. Items then pass to the descending or sigmoid colon leading to the rectum from where foreign material is expelled from the body.

[52] The foreign bodies recovered from the body of the late Mr McSweeney were sent for forensic examination. The Joint Drugs Report by Barry James and Karen Livesey, both Forensic Scientists with the Scottish Police Authority, was dated 9 February 2017, the items under examination having been passed to them in two evidence bags on

15 December 2016. The passage of time between the extraction of the foreign bodies from the body of the late Mr McSweeney and their presentation to the forensic scientists did not have a material bearing upon the toxicology findings other than to allow an inference of some breakdown of the contents during that period. The first evidence bag contained four packages, each consisting of an outer knotted condom layer with a combined weight of 109.41 grams, one of which was opened and its contents examined. This was found to consist of 28.12 grams of a compressed brown powder. Analysis disclosed the presence of Monoacetylmorphine and Diamorphine. It was explained to the Court that Monoacetylmorphine is the breakdown product of diamorphine after exposure to, for example, heat or liquid. The testing of diamorphine commonly discloses the presence, not only of Monoacetylmorphine but also codeine or morphine as these are produced from the plant or can be present as an adulterant in illicit heroin. The second evidence bag was found to contain eight packages, seven of which consisted of an outer knotted condom layer. The eighth consisted of an outer plastic film layer and was found to contain six SIM cards. Four of the packages contained a similarly sized quantity of compressed brown powder. One was sampled and found to contain 6.43 grams of a powder which, on analysis, was found to contain Morphine and Monoacetylmorphine. The fifth package was opened and found to be empty. The sixth package was found to contain 6.45 grams of a blue powder found to contain Diclazepam and the seventh 9.62 grams of blue powder and associated, eroded blue tablets containing Diclazepam.

[53] Toxicology was undertaken on the blood and urine samples retained at the time of the post mortem examination. This disclosed the presence of the opioids morphine

and its metabolite Monoacetylmorphine indicating the use of heroin. Codeine was found, a possible adulterant in illicit samples of heroin. A finding of Monoacetylmorphine, the breakdown product of morphine, in the urine reinforced the conclusion of heroin use. There was found in the urine only the opioid buprenorphine as well as metabolites of this. Buprenorphine was described by Dr Wilkinson as a medication for people receiving treatment for opioid addiction and can be a drug of abuse in itself. That it was found only in the urine suggested that it had been previously used and was of less significance in the post mortem examination.

[54] Another group of drugs was identified as a result of the toxicology and these were benzodiazepines including diazepam best known colloquially by its trade name Valium. A further benzodiazepine was identified, Diclazepam, a drug that is not licensed for use in the United Kingdom. Metabolites of both of these drugs were found.

[55] The evidence regarding the volume of these substances in the samples taken from the deceased was inconclusive but the Inquiry did hear evidence as to the effects of these substances. The effects of heroin, morphine and the benzodiazepines Diazepam and Diclazepam are similar in that they have depressant effects on the central nervous system by acting on certain receptors in the brain which are involved in the regulation of respiration. When toxic levels are reached an individual's breathing is slowed down to the extent that they eventually stop breathing. This will result in a respiratory arrest that will in turn precipitate a cardiac arrest because the heart will be starved of oxygen, the lungs being the vital organ necessary to bring oxygen into the body and this will ultimately result in death. The pathologists concluded that the death of the late

Mr McSweeney was related to the toxic effects of a number of drugs. The level of morphine present could have been responsible for death on its own and appeared to have played the most significant role in death but the presence of the other drugs, notably Diazepam and Diclazepam meant that some contributory role could not be excluded. The finding of Buprenorphine and its metabolite, in the urine only, suggested that these were less significant. This analysis led to a conclusion that the primary cause of death was multidrug toxicity.

Health Care Markers

[56] The late Mr McSweeney was placed on hourly observations upon his re-admission to HM Prison Glenochil on 19 September 2014 by virtue of a Health Care Marker issued by one of the prison nurses, Aileen Kidd. She saw him on his re-admission on 19 September and decided to call for the Doctor to attend. He arrived about 45 minutes later and examined the late Mr McSweeney. Nurse Kidd did not notice any signs of Mr McSweeney being under the influence of substances when she examined him but by the time the Doctor saw him there were such signs present. It was on the direction of Dr McDonald that Nurse Kidd placed Mr McSweeney on a basic care plan calling for hourly observations.

[57] The care plans were, at the time, pre-printed forms setting out brief reasons for the issuing of the plan and the signs to be noted during the observations. The care plans were also known as Health Care Markers and witnesses commonly referred to the one issued in respect of the late Mr McSweeney as a 'standard health care marker'. The care

plan for Mr McSweeney was produced as Crown Production 5. The wording for the reason for the health care marker was "Suspected of swallowing an unknown package on a visit". The plan contained the following directions:

"1 – Observe hourly for any signs of the following –

- **Over sedation**
- **Vomiting**
- **Loss of consciousness**
- **Abnormal behaviour**

2 – Any concerns contact the Health Centre or the on call MO"

The health care marker was marked by Nurse Kidd for review the next day, 20 September 2014. It was taken to Devon Hall by two of her colleagues who were going there anyway, otherwise she would have delivered it herself. Her expectation was that a member of the prison staff in Devon Hall, whether a Prison Officer or Manager, would be spoken to and advised of the concern leading to the issuing of the health care marker. She understood that on the overnight handover, that is to say the handover to the night shift staff, the health care marker would be noted so that the prison officers were aware that the prisoner was on a care plan and that a similar handover would occur in the morning to the nursing staff coming on duty so that they would be aware of the care plan and that it was to be reviewed. If Nurse Kidd happened to be on duty again in the morning it would be she who would conduct the review but she was not. It was explained by Nurse Kidd that three copies would be made of the health care marker, one for the nursing records, one for the hall and one for administration who scanned a copy into the prisoner's computer record.

[58] There was an expectation on the part of Nurse Kidd, an assumption, that any officer carrying out observations in order to check for the signs specified in the health

care marker would elicit a response from the subject and, if necessary, waken up the prisoner. She acknowledged that there was no such specific direction on the marker, but it was a standard marker that had been in use for some years. The current care plans now in use do specify the need to elicit a response where this is appropriate and necessary.

[59] The health care marker in respect of the late Mr McSweeney was extended on review on 20 September, again on 24 September following the discovery of illicit substances in the cell and being placed on a Governor's order on 23 September.

[60] One of the Prison Officers allocated to the Devon Hall Segregation Unit was Kenneth Miller who had little actual recollection of events but was familiar with the use of health care markers and the conduct of observations. He expected the marker to be placed on the staff desk for officers to see. He further indicated that it was his practice to elicit a response of some kind from prisoners when carrying out observations. Upon being asked what happened at night he responded that he did not do night shift and was unable to answer.

[61] The night shift Officer in Charge was David Ross. He demonstrated a straight forward, uncomplicated approach to his duties but gave the impression that paperwork was not his forte. He at first stated that he was aware that the late Mr McSweeney was on hourly observations all week and at the weekend handover there was no change. He was aware of this from the night shift report sheet left by the nurses. He professed little knowledge of the type of health care marker referred to in relation to the late Mr McSweeney but subsequently acknowledged under cross examination by Counsel

for the Health Board that in the course of his 20 or more years of service he had seen many such markers and accepted that, at the beginning of the week when he started on night shift, he would have seen the marker as it was attached to the daily handover sheet.

[62] Whether or not Mr Ross saw the marker made little difference to the practice to be followed in the conduct of observations. He explained that he took no part in the observations and that this was for the officers on duty. He might become involved if, during the shift, an issue arose in relation to a prisoner under observation, but otherwise he had no input. The marker and handover sheet were not shared with or shown to the officers on duty. They were simply made aware that the prisoner was subject to hourly observations. The Inquiry heard from those officers that they noted the requirement for hourly observations from the white board in the OC's office.

[63] Mr Ross drew a distinction between the general health care marker of the type issued in respect of the late Mr McSweeney and the ACT 2 Care System which provided greater specification of the type and frequency of observations to be conducted including, if necessary, the requirement to elicit a response and required to be signed off by Mr Ross at the end of the shift. The hourly type of observations to which Mr McSweeney was subject were regarded by Mr Ross as low risk, would not involve the eliciting of a response and would consist of 'just having a look'.

Current health care marker procedure

[64] The Scottish Prison Service healthcare marker policy was contained in a document promulgated in July 2009 entitled 'Health Care Markers – SPS Healthcare Marker Policy' and, at the time of this inquiry, remained in force. The inquiry heard evidence on this from Lesley McDowell, the Health Strategy and Suicide Prevention Manager for SPS.

[65] She explained that if, when a nurse interviewed a prisoner, they identified that the person had a health condition, they would raise a paper copy of a health care marker on which they would specify the condition. The prisoner's computerised records known as PR2 ('Prisoner Record 2') would be updated within a section entitled 'Risk and Conditions' and that would be passed to the residential staff. This was the procedure followed in respect of the late Mr McSweeney following his readmission to HMP Glenochil.

[66] The Healthcare Marker Policy was supplemented on 30 December 2014 by a further policy document entitled 'Management of an Offender at Risk due to any substance – Policy and Guidance' produced as number 7 in an Inventory of Productions lodged by the Scottish Prison Service. It was found in the course of an inquiry into the death of a prisoner in HM Prison Perth that there was a lack of consistency in the practices being followed by different Scottish Prison Service establishments in relation to the care of prisoners identified as being under the influence of illicit substances, who had ingested a package containing a substance or internally secreted a package containing a substance. Ms McDowell was one of the authors of the policy which

remains in place. The purpose of the guidance was stated to be to provide assurance that offenders were being appropriately managed and receiving an appropriate level of care to ensure preservation of life.

[67] The guidance introduced a consistent practice throughout the Scottish Prison Service whereby a nurse or Prison Officer who identified, by the presentation of the offender or through intelligence, that a person was at risk would ensure the attendance of healthcare staff. The individual would be assessed and, if appropriate, clinically tested to establish the substance taken. They would then put in place a Care Plan to include how often observations were to be carried out, the nature of the observations, either verbal or visual, the frequency and duration of the observations and arrangements for review by healthcare staff. A case conference would take place at which consideration would also be given as to where the prisoner was to be held whether in a separation and integration unit out of circulation or in their own cell.

[68] The document contains important guidance to SPS Officers during out of hours when healthcare staff are not available to carry out an assessment and provides for visual observations every 15 minutes and a verbal response every 60 minutes all to be recorded in the Observation Log. Any changes to the offender's ability to respond, his speech becoming slurred or incoherent or any other changes in presentation should result in the On Call Doctor being contacted. If necessary an emergency ambulance should be summoned.

[69] A care plan would be completed by healthcare staff and a review arranged within 24 hours. A record would be kept by SPS Officers of the individual's presentation

on observation whether visual or verbal. A flowchart for the guidance of staff was provided within the document.

[70] The healthcare plan under this policy guidance is recorded within the 'risk and conditions' section of the prisoner's PR2 computerised record and a copy held within the Hall in which the prisoner is held. Once finished the record is filed with the prisoner's records.

[71] This procedure was described as much more robust than the various procedures previously in place and is further enhanced by a process of central monitoring within Headquarters of every individual placed on the strategy with a requirement that updates must be received from establishments and recorded on the PR2 system such as specification of the substances involved, how long the person is kept on the plan, where they are held.

The Police

[72] The inquiry heard evidence from DC Jamie Hughes regarding the value of the substances found within the body of the late Mr McSweeney. He used the SPA Forensic Services Joint Drugs Report, number 2 of the Crown Productions, as a reference point. It disclosed that the findings were placed into two sealed police evidence bags. The first contained four packages with a combined weight of 109.41 grams one of which, weighing 28.12 grams was tested and found to be Diamorphine and its breakdown product Monoacetylmorphine[1]. Each package contained approximately one ounce of

[1] See para. 47 for a more detailed analysis of the forensic evidence

Diamorphine, a recognised quantity in the drug trade and one that would warrant a solemn prosecution for concern in supplying class A drugs. An ounce of Diamorphine, the inquiry was informed, has a street value of the order of £2,800. The whole quantity contained in the four packages could be said to have had a value of approximately £10,000 to £10,900 and on any view amounted to a good seizure from the point of view of the police.

[73] The second evidence bag contained eight packages, one of which contained SIM cards but the other seven contained substances. Four of these were Morphine and Monoacetylmorphine each weighing about the same, one weighed at 6.43 grams[2]. This constituted recognised quantities of just under a quarter ounce worth approximately £640 at a maximum street value of approximately £100 per gram of Diamorphine. One bag was empty and the other two were found to contain quantities of benzodiazepines consisting of Diclazepam and Diazepam of much less significant quantities or values, Diazepam having a known street value of approximately £1 per tablet or, commonly, £10 for 15.

[74] The officer explained that in the prison setting illicit substances have a value three to five times the regular street value. He estimated that the potential value in prison of the Diamorphine found within the body of the late Mr McSweeney was £48,500 to £81,000. He described the total quantity of Diamorphine found, approximately 160 grams, as a serious amount and explained that any quantity in excess

[2] See para. 47

of an ounce would normally lead to a solemn prosecution before a Jury. He viewed this as a serious case.

[75] These findings justify the suspicions that surrounded the late Mr McSweeney from the outset of his plan to gain readmission to HM Prison, Glenochil. It can be inferred that he lacked the financial resources to acquire the quantities of illicit substances and SIM cards found within his body after his death and that he was acting in collusion with unknown serious organised criminals. The inquiry heard evidence, though, that the Scottish Prison Service will not call in the police and the police will not investigate upon the basis of a suspicion. Gillian Walker was the Head of Operations and Public Protection for the Scottish Prison Service and explained this more fully.

[76] A prisoner under suspicion of having illicit substances secreted within his body may be isolated in the segregation unit and removed from association with other prisoners by virtue of a Governor's ruling under Rule 95 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331). That is what happened to Mr McSweeney. An Order made under this rule cannot last for more than 72 hours from the time it is made unless an extension has been authorised by Scottish Ministers and such an extension cannot exceed one month[3]. Scottish Ministers have delegated the responsibility for deciding whether criteria have been met for an extension of the Rule 95 order to certain senior officials within the Scottish Prison Service of whom Ms Walker was one and she was the person to sign off on any extension. It is provided that any number of extensions not exceeding one month may be granted but it was

[3] Rule 95(11) and (12)

Ms Walker's experience that in relation to a prisoner suspected of having secreted illicit substances within their body there had never been an extension for more than one month.

[77] It was explained by Ms Walker that there are limitations to the powers of search available to officers of the Scottish Prison Service where it is suspected that a prisoner has secreted illicit substances within his body. While there is provision for the carrying out of a strip search as described above there is a prohibition against any internal searching of an individual's body. A prisoner may be asked in the course of a strip search to bend over or squat in order to reveal whether they are concealing anything but such a procedure should not be a routine part of the search and should only be included where, for example, there is CCTV imaging of a prisoner concealing an item inside their clothing, there is reliable intelligence information, Officers see a prisoner attempting to conceal an item inside their clothing or the behaviour of the prisoner indicates that there is an attempt at concealment of an article[4].

[78] Notwithstanding the absence of any findings during a search, a prisoner might nonetheless remain under suspicion of having secreted illicit substances in his body. In answer to a question whether it was the duty of the Scottish Prison Service to report any suspicion of an individual either banking drugs or bringing drugs into the prison to the police Ms Walker responded in the negative explaining that such information would be recorded as intelligence until there were recoveries of drugs, telephones or such items. The Scottish Prison Service would only report a matter to the police where they had

[4] Prisons and Young Offenders Institutions (Scotland) Rules 1994, R. 88, Strip Search of Prisoners, Prisons and Young Offenders Institutions (Scotland) Rules 2011 R. 92;

recovery of an article. It was explained that until that occurred there was only intelligence.

[79] A person in police custody under suspicion of having secreted illicit substances about their body would have a different experience from such a person, like the late Mr McSweeney, in HM Prison Glenochil. The inquiry heard about this from Inspector David Simpkins of Police Service Scotland, a force Custody Inspector functioning as a point of contact and advice for all custody supervisors in Scotland. He helped write the Standard Operating Procedures in relation to custody supervision used by the Police Service of Scotland.

[80] A person under suspicion of having secreted substances could be strip searched on the direction of a Sergeant. He described a similar form of search to that provided for within the Scottish Prison Service whereby the individual would be searched by two persons of the same gender as the subject within a private room. Each item of clothing will be removed and checked starting with the top half of the body then the bottom half. A visual check of the person is carried out and they are asked to squat to reveal whether they may have anything hidden in their anus or, in the case of women, their vagina.

[81] If the intelligence regarding the individual's concealment of items within their body is reliable or, during a strip search, something is seen to suggest an item has been concealed internally, that person will become a medical emergency and will be taken to the hospital emergency department if they are willing to go. A person who refuses to go to hospital will be advised regarding their welfare and the advisability of attending at hospital. A continued refusal to go to hospital will result in the attendance of a doctor or

nurse to ensure their well-being and inform their continued management in police custody. The Inspector emphasised that a confrontational situation would be avoided having regard to the risk of items bursting internally leading to harm.

[82] An individual under such suspicion can be asked to submit to an intimate examination or x-ray. A refusal to consent to such an examination would lead to advice being given regarding the dangers to which they are subjecting themselves. At this point the police have the opportunity to take further steps not open to the Scottish Prison Service. There would be an opportunity to seek a warrant for an intimate search or x-ray to be carried out. This might be of little effect in respect that such procedures would require to be conducted by suitably qualified medical practitioners and such professionals would not be able to proceed without the informed consent of the subject. If there is no clinical need for the individual to remain in hospital they will be returned to police custody.

[83] The Inspector described further measures that might be taken to prevent the individual from accessing the concealed substances or harming themselves. The individual may be handcuffed within their cell and one or two police officers would sit with them to prevent them from accessing the substances. This was described as a top level of supervision. If the prisoner is fully dressed with no immediate access to cavities within their bodies the handcuffs might be dispensed with and a single officer present. Such individuals under suspicion of having secreted illicit substances within their body may require to go to the toilet; an obvious opportunity to access the hidden substances. In these circumstances they may be supervised at the toilet and controlled. If the person

has a bowel movement and there is nothing present that would suggest there is nothing within the anal cavity and the level of supervision might be relaxed. If suspected of having swallowed substances medical advice would be taken regarding the number of bowel movements the person would have before it could be inferred there was nothing within their system. This procedure would be followed until the next lawful day when the person would be taken to Court. In those circumstances the police would inform the prisoner escort service, G4S, that the individual was a suspected drug concealer. They would provide a three person escort in a special vehicle to ensure constant supervision. The Inspector confirmed to the inquiry that recoveries have been made from intimate searches and from examination of individuals' bowel movements under the sort of regime outlined above.

[84] It was noteworthy that the police would take the sort of action described above in searching and supervising a person believed to have concealed illicit substances within their body upon a suspicion in contrast to the Scottish Prison Service who would refrain from engaging the police without having physically recovered substances. The Inspector explained that suspicions might be aroused in a number of ways. The individual might have handed themselves in or there might be good intelligence that they had secreted illicit substances within their body. The sort of intelligence which might lead to a suspicion being raised might relate to previous times in custody, information from officers who might have attended a drugs operation and seen the person naked or squatting in an apparent attempt to conceal items or there are prepared packages nearby ready to be swallowed or if it appears that packages have been

swallowed. Sometimes witnesses will inform the police that a certain person has drugs concealed inside them.

[85] It was telling that the Inspector had no experience of having been notified by any prison in Scotland that there was a suspicion of a person having concealed items internally. It was something that did not happen. He indicated that if such a notification were to be received there would require to be careful consideration with investigators regarding the sufficiency of evidence to justify a search under the Misuse of Drugs Act 1971 or detention under section 14 of the Criminal Procedure (Scotland) Act 1995.

[86] It was explained by Ms Walker of the Scottish Prison Service that often a person being held in isolation under suspicion of having concealed substances within their body will pass them and they will be found within the cell. Others, though, might repeatedly secrete items again that they have passed until they reach the point at which they could not be kept out of circulation forever. In practice the Rule 95 conditions of isolation will not be used for more than one month and 72 hours.

[87] She affirmed that the Scottish Prison Service would not report a matter to the police until they have a production to provide to the police indicating that a crime has been committed. Even if the strongest possible inference could be drawn that an individual had illicit substances secreted about their body no report to the police would be made unless, in addition, a finding of a physical production was made to confirm the commission of a crime.

[88] The following passage of Ms Walker's evidence is instructive:

> "**SHERIFF MACKIE:** In this case, Mr McSweeney first of all was found to have one small package in his cell and that was found and reported. A day or two

> later, he was admitted to hospital and it was, in effect, a poisoning, an overdose of drugs of some kind that he was treated for. He discharged himself against medical advice with some medication to counteract the poisoning that he'd undergone, and at that point it appears that a very strong, possibly the only inference that could be drawn, was that he had somehow consumed drugs that he had secreted on himself, and so the scenario was emerging of one small package being found, his then succumbing to something like an overdose of drugs, and a very strong inference that he had other drugs on his person. In those circumstances, am I to understand that without a second production, as it were, the matter would still not be reported to the police?
>
> **THE WITNESS:** That's correct, my Lord.
>
> **…**
>
> **THE WITNESS:** It wouldn't be reported."

[89] These principles were affirmed by Detective Inspector Kenneth McAndrew of Stirling and Forth Valley CID. He emphasised that the welfare of the party suspected of having concealed substances within their body is the main priority and that the criminal aspect is secondary. He reiterated the limitations of intimate searches without the consent of the individual even in the rare circumstances in which the police might have obtained a warrant for such a search. He affirmed that the police are never contacted and will not carry out any investigation upon a suspicion of criminality; it is usually at the point of recovering something that the prison will report the matter to the police. He added that it was his understanding that the prison have their own search procedures.

[90] The Police Service of Scotland have a prison liaison officer within the Forth Valley area but notwithstanding this it did not appear that the Scottish Prison Service or HM Prison Glenochil have any special arrangements for direct communication. This means that if officers of the Scottish Prison Service wish to draw a matter to the attention of the police, like any other member of the public, they will dial 101 or in an emergency

999. It was beyond the scope of this inquiry to consider other aspects of co-operation and engagement between the Police Service of Scotland and the Scottish Prison Service regarding the management and rehabilitation of prisoners.

Discussion and Conclusions

[91] Mr McSweeney died of multi drug toxicity. The amount of Diamorphine and its breakdown products found within his system would have been sufficient to have caused death but other drugs were present, primarily Benzodiazepines comprising Diazepam (Valium) and Diclazepam, which may have contributed. While the late Mr McSweeney was found *post mortem* to have significant quantities of Diamorphine concealed within his body along with quantities of Diazepam and Diclazepam, there was no evidence to suggest that any of the condom packages containing these substances had either leaked or burst. It could be inferred, however, that in the days beforehand Mr McSweeney had accessed some of the drugs within his body for his personal use. A quantity of Heroin was discovered in his cell within the Segregation Unit on his second day following readmission in circumstances in which the only reasonable inference was that he had accessed the drug from within his own body. He experienced an overdose of Heroin some days later on 27 September 2014 and, again, the only inference could be that he had accessed drugs from within his own body for consumption. For reasons discussed more fully above, it was reasonable to infer that he had within his body a further quantity of drugs as his subsequent autopsy was to reveal.

[92] There is much to suggest, therefore, that the means by which the drugs which proved fatal to the late Mr McSweeney entered his bloodstream was by his consumption of those drugs by some means unknown but most probably through his nostrils by snorting and not from any leakage or other escape of substances from the packages inside him.

[93] Mr McSweeney had engaged in very risky behaviour to the point of recklessness towards his own personal safety and wellbeing. The very act of swallowing and / or inserting the quantity of illicit substances subsequently found at autopsy and maybe more having regard to the Prison Officer report to the Accident and Emergency clinician, was by itself an act of considerable risk to Mr McSweeney's personal safety. When he was found on 27 September 2014 incoherent and heavily intoxicated he had overdosed on Heroin and this too reflected an act of personal recklessness in regard to his own safety, matched by his then insisting upon discharging himself from hospital against medical advice including a warning about the risk of death. It can be inferred that on the night of 28 September or morning of 29 September 2014 Mr McSweeney had again consumed illicit substances, mainly Diamorphine, in such a quantity that it caused his death.

[94] It was submitted by the Solicitor for the Scottish Prison Service that Mr McSweeney's insistence upon discharging himself from hospital was a significant factor which contributed to his death. There was force in her submission that he would have been safer in hospital under the direct observation of medical staff and close to effective means of treatment. Similar submissions were made on behalf of the other parties

represented at the inquiry and by the Procurator Fiscal Depute. There was no suggestion, however, in the evidence that the death of Mr McSweeney was a consequence of the overdose of 27 September or that there was a link between that and the overdose that proved fatal. The Inquiry heard evidence regarding, not only the effective antidote effects of Naloxone, but also the risk of the beneficial effects of that medicine wearing off only to allow the toxic effects of Diamorphine in a person's system to recur. There was no evidence before the inquiry to suggest that was what happened to the unfortunate Mr McSweeney. I have concluded that death occurred as a consequence of a separate ingestion of substances, mainly Diamorphine on the night of 28 or morning of 29 September 2014. Upon this view of the evidence it cannot be said that the self-discharge from hospital contributed directly to the death of Mr McSweeney. It did, however, place him back in a situation of isolation in prison with access to dangerous substances and removed from immediate access to appropriate healthcare and, to that extent, was indirectly a factor contributing to the circumstances in which Mr McSweeney met his end.

[95] There was no evidence before the Inquiry to suggest that Mr McSweeney was in a clinically depressed state or suicidal. There was some evidence to suggest that he was not coping at liberty after many years of incarceration and that was spoken to partly by the community based Criminal Justice Social Worker allocated to him, Deborah Carmichael. He displayed behaviour that at first seemed unusual, even bizarre, in self-reporting a breach of licence conditions and requesting a return to HM Prison Glenochil. His success in that regard seemed to elevate his spirits. It emerged that there

was a very specific purpose to his strange behaviour and that was to bring a significant quantity of Diamorphine, some Benzodiazepines and SIM cards into the prison.

[96] I conclude that the death of the late Mr McSweeney was an accident caused by his consumption of an unintentionally excessive quantity, an overdose, of Diamorphine and possibly Benzodiazepines. The accident was of his own doing and did not involve the actions of any other party.

Precautions

[97] It is axiomatic to observe that if Mr McSweeney had not engaged in the highly risky behaviour of swallowing and / or inserting significant quantities of illicit substances into his body he would have had no access to such substances and death would have been avoided. This view was shared by all parties represented at the inquiry and advanced as a precaution that might have avoided death and, therefore, one to be narrated in the findings of this inquiry under section 26(2)(e). I respectfully consider that this would be inappropriate. Firstly, the evidence does not support the notion that death occurred as a direct consequence of the presence within Mr McSweeney's body of packages containing illicit substances. There was no suggestion that these had leaked or burst and for the reasons explained above I have concluded that it was Mr McSweeney's ingestion of substances that led to his death. Secondly, I respectfully consider that it would be disrespectful and unfair to the late Mr McSweeney to make such a recommendation in isolation without having a full understanding of the personal, social and psychological forces at work in his life that made him undertake such risky

behaviour. Were there better precautions that might have been taken in his throughcare after years of incarceration to support him in the community on his release? He was subject to certain quite stringent licence conditions about where he should stay and his contact with the community based social work team but his initial calls to Officer Reekie painted a picture, if there was any truth in what he said, of a man feeling isolated and lost. It can be inferred that in the few days he was at liberty those who paid him most attention were those who sought to exploit his weakness and vulnerability. There remains an unanswered question whether, during his time in prison, he had accumulated a drug debt that rendered him vulnerable to the influence of organised crime groups on the outside. This area was not, and may not have been readily capable of being, fully explored in the evidence. It would be too easy, however, effectively to put the whole burden of responsibility for his death on Mr McSweeney and for the reasons discussed here I have concluded that it would be inappropriate to make such a recommendation.

[98] The inquiry should address the question, however, whether during the night of 28 – 29 September 2014 there were precautions that could have been taken that would have avoided death. It was the submission of the Solicitor for the family that a regime that necessitated the eliciting of a response from Mr McSweeney as part of his hourly observations might have led to an earlier discovery of his having succumbed to a second overdose and possible life-saving treatment. It is instructive that on the morning of 27 September Mr McSweeney was found in an unresponsive and incoherent condition as the result of an overdose of Heroin. On that occasion he was rescued by being first of

all found by officers of the Scottish Prison Service and being admitted to hospital for emergency treatment. It is not unreasonable to suppose that if that intervention had not occurred the outcome for Mr McSweeney might well have been fatal. There was no evidence before the inquiry to indicate whether in fact that would have been the case and, if so, how close to death he came that morning. In essence, however, it was the act of trying to rouse him, of seeking a response, that alerted officers to the emergency.

[99] This puts into some relief the arrangements surrounding the hourly observations of Mr McSweeney by virtue of his Health Care Marker. This was, in 2014, an imperfect system. The pre-printed form that became the Health Care Marker was imprecise in its terms in relation to the person to whom it applied although it conveyed a concern that the subject was suspected of having swallowed an unknown package. The nurse who issued the Marker made an important and, as it turned out, mistaken assumption that in checking during the night for the signs specified in the Marker of over-sedation, vomiting, loss of consciousness and abnormal behaviour it would have been necessary to have roused the subject and that he would have been roused. The requirement to rouse Mr McSweeney was not specified and it is known that at no time was any attempt made to elicit a response from him during the night.

[100] The system for conveying the terms of the Health Care Marker to the officers who were to carry out the hourly observations was flawed in respect that neither of the officers conducting the observations ever saw or knew of the existence of the Marker. Their superior, the night shift Officer in Charge, was very vaguely aware of the existence of the Marker but had paid it no attention. This is because he had made his own

assumptions for the week of Mr McSweeney's hourly observation regime in the Segregation Unit that these were what he regarded as standard observations of the least intrusive nature. In the absence of specific instructions to rouse the subject if sleeping he considered that all that was required was to have a look. If there had been a specific instruction to rouse the subject there is no reason to doubt that he would have dutifully carried out that instruction and passed it on to the on-duty officers. What Mr Ross the Officer in Charge was not going to do was to carry out any kind of assessment or interpretation of the Health Care Marker or exercise a judgement. He and the officers of whom he was in charge operated only upon clear instructions.

[101] Mr McSweeney was observed on more than one occasion during the night to be breathing. He was breathing at 06:15 in the morning but apparently lifeless just over an hour later. There is a question whether an attempt to elicit a response from him at 06:15 am would have disclosed an unresponsive state necessitating emergency treatment but a lack of evidence to answer the question let alone to indicate what the consequences might have been and whether death might have been avoided. It would be speculative to suggest answers to these questions and the only proper conclusion can be that there was no evidence before the inquiry to suggest that a regime that included a requirement to elicit a response from Mr McSweeney might have resulted in death being avoided.

[102] It emerged, however, that the Scottish Prison Service was already reviewing the practices and procedures related to the issuing of Health Care Markers and the conduct of observations on prisoners and in this connection I refer to paragraphs [63] to [70] above for a detailed consideration of the new arrangements. In the most important

respects relevant to this inquiry the guidance to officers contained in the 'Management of an Offender at Risk due to any substance – Policy and Guidance' document addresses the points of possible concern. The current arrangements, which were implemented just months after the death of the late Mr McSweeney, provide for much greater clarity and precision as to the frequency and nature of observations to be carried out upon prisoners. The system is now more robust and supported by a coherent arrangement for record-keeping including an element of central oversight at Headquarter level. I am satisfied that any possible recommendations that might have arisen from consideration of the previously imperfect arrangements for the issuing of Health Care Markers have been more than adequately addressed by the comprehensive regime now in place. It is for this reason that I have no recommendations to make in this regard.

Other facts relevant to the circumstances of the death

[103] The elephant in the room in this inquiry has been the prison drug trade in which the late Mr McSweeney was a participant and, ultimately, its victim. The circumstances in which he engineered his readmission to HM Prison Glenochil and the discovery within his body of a significant quantity of Diamorphine with a potential prison value of up to £81,000 offered a glimpse into how this serious, organised crime occurs within Scottish prisons in plain sight of both the prison and police authorities.

[104] The inquiry heard evidence about a practice followed by both Police Service Scotland and the Scottish Prison Service that the Prison Service will not report a suspected drug crime to the police and the police will not investigate a suspected drug

crime within a prison upon the basis of a suspicion only, no matter how strong or reasonable the grounds for suspicion might be. The police will only investigate such a matter within a prison if there has been a physical recovery of illicit substances or related paraphernalia such as mobile telephones and SIM cards or both. This appears not to have been elevated to a formal protocol or other published statement of principle for the reporting of drug related crime within prisons, but it is a clear practice that was spoken to by more than one witness. It is one that has the merit of simplicity and clarity but it seems incongruous. This is because the basis of the law for detention and search of persons suspected of committing or having committed an offence punishable by imprisonment or of being in possession of a controlled drug in contravention of the Misuse of Drugs Act 1971 is one of suspicion, that is to say, reasonable grounds for suspicion[5]. Such reasonable grounds for suspicion will justify both the detention and search of a person and premises. The existence of reasonable grounds for suspicion is a matter of fact to be assessed in each case having regard to the whole circumstances; in the language of the Scottish Prison Service this means all of the available intelligence. This begs the question why, between them, the Police Service Scotland and Scottish Prison Service have raised the bar for the investigation of drug related crime within prisons to a higher and unnecessarily challenging level of requiring the physical production of substances or other paraphernalia. For a suspect like the late Mr McSweeney who has significant dealing quantities of illicit substances concealed within his body, inaccessible by any means of search, this approach becomes self-defeating

[5] See **s. 14 Criminal Procedure (Scotland) Act 1995; s. 23(2) Misuse of Drugs Act 1971;**

since the Scottish Prison Service protocol for intimate searches stops short of supervision in the cell or at the toilet thus offering suspects the opportunity of repeatedly concealing items by swallowing or insertion until released into the general prison population. The inquiry heard powerful, albeit anecdotal, evidence from a highly experienced officer, Joan Reekie, to the effect that the importation of illicit substances hidden within the bodies of prisoners was a well known and recognised means of getting drugs into the prison and made available to the general prison population. It was her experience that those detained in isolation under suspicion of packing illicit substances rarely give up their cargo and invariably make their way into the general prison population where the drugs can be distributed. This picture was reinforced by Gillian Walker, Head of Operations and Public Protection, Scottish Prison Service who referred in her evidence to the known phenomenon in the world of prison drug smuggling of repeated concealment.

[105] In the case of the late Mr McSweeney it seems that the temptation to use some of the drugs concealed within his body was too great and ultimately he paid the price with his life. There were ample grounds for suspecting that he was in possession of illicit substances including the recovery of drugs from him and his cell within the segregation unit. It transpires that Ms Reekie's early suspicions were well founded. Those were based upon the late Mr McSweeney's unusual behaviour in self-reporting a breach of his licence conditions, seeking and engineering readmission to HM Prison Glenochil.

[106] Two days after Mr McSweeney's readmission a quantity of heroin was found in his cell inside a pillow case. He had, by this stage, undergone two strip searches and his

cell within Devon Hall Segregation Unit was described as sterile having also been thoroughly searched before his admission. His entire management was based upon the suspicion that he was packing illicit substances and now some were found. There were no means by which drugs could have been introduced to his cell and so the obvious and probably only inference to be drawn was that he had accessed the drugs from within his own body.

[107] Six days after that, on Saturday 27 September 2014 Mr McSweeney was found to have taken an overdose of Heroin. Drowsy and unresponsive he was admitted as an emergency to Forth Valley Royal Hospital where he was treated successfully with the antidote Naloxone. It appears that Officers of the Scottish Prison Service reported to the receiving Doctor that 32 grams of Heroin were found "that the patient had put up his rectum"[6]. Mr McSweeney informed staff that he had banked drugs inside him.

[108] So now it was known that for a second time Mr McSweeney had accessed Heroin and the only inference could be that it was secreted within his body. The reference to 32 grams of the substance found by Officers of the Scottish Prison Service was not, at the time, further pursued nor was it the subject of further evidence in this inquiry. The Court is entitled to the view, nonetheless, that the history noted by Dr McInnes was an accurate record of the information provided by the officers and that a significant finding of Heroin or Diamorphine was made and not acted upon. In addition there was now a record of an admission by Mr McSweeney that he had drugs banked inside him. Here were the strongest possible grounds for suspecting that a serious crime related to

[6] See para. [25] *supra*

concern in the supplying of illicit substances was being committed and yet no consideration was given to reporting the matter to the Police.

[109] It would be speculative to attempt to reach any conclusion as to what the outcome might have been had the police been involved. The case of the late Mr McSweeney, however, raises many important questions that are beyond the scope of this inquiry to answer. At three to five times the normal street value how are prison drugs paid for? Is that burden of satisfying the demands of organised crime groups placed on families outside prison? Does it become a debt for the prisoner to settle on his release? To what extent is further crime committed by individuals under pressure to settle drug debts incurred during periods of incarceration? How often do prisoners, under pressure from organised crime groups, deliberately breach their terms of licence in order to gain readmission to prison with illicit substances concealed within their bodies? To what extent do individuals acquire a drug addiction problem whilst in prison?

[110] The prison drug trade has damaging consequences well beyond the prison walls into the wider community. It affects not only prisoners and former prisoners who have been directly involved in the trade but also their families and the victims of crime. The glimpse this case of the late Mr McSweeney has offered suggests that it is a thriving and lucrative trade for the organised criminals and crime groups who operate it and a safe one in which there seems little risk of prosecution. What effect does that have in sustaining those groups and enabling them to perpetrate other forms of organised crime within the wider community? There was more than a hint of complacency in the

evidence offered by the police witnesses to the investigation of drug crime within Scottish prisons. The prisons have their own search procedures, the inquiry was told, and so the police will not become involved unless and until a physical finding of evidence is made. And yet the officers of the Scottish Prison Service are not police officers or crime fighters. Their priorities in attending to the safety and security of prisoners may differ from those of the police investigating and reporting crime. That complacency is mirrored in the Scottish Prison Service who will not report a matter to the police unless and until a finding of physical evidence is made no matter how compelling the grounds might be for suspecting that an individual is concerned in the supplying of illicit substances within the prison estate. A situation appears to have been reached whereby reasonable grounds for suspicion of the commission of serious drug crimes that would be assiduously pursued in the wider community are not investigated inside the Scottish prison estate. To quote more than one witness from the Police Service Scotland and Scottish Prison Service, “It doesn’t happen”. The case of the late Mr McSweeney is but one example.

Appendix I

First Note by Sheriff David N Mackie

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT ALLOA

FIRST NOTE

by

Sheriff David N Mackie

in

INQUIRY

under the Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016

into the death of

DANIEL McSWEENEY

Further evidence – 1 – criminal investigation

[1] I have heard evidence in the course of the Inquiry so far which, if I accept it, would allow the following inferences to be drawn. The late Mr McSweeney under his own volition or some sort of coercion by others sought his re-admission to HMP Glenochil for the specific purpose of smuggling in a significant quantity of illicit substances and SIM cards. With the benefit of hindsight it appears that he had secreted within his person a significant quantity of illicit substances with a prison value of the order of

approximately £50,000 to £80,000. This confirmed the strong suspicions of members of the prison staff that he was 'packing'.

[2] There was an expectation that if he could survive the time in the Segregation and Reintegration Unit ('SRU') at Devon Hall without disgorging the load he was carrying he would be returned to the main hall and be able to engage in the distribution of the illicit substances to the wider prison population. In the long experience of at least one of the Prison Officer witnesses, smuggling prisoners packing drugs never gave them up and invariably took their supply into the main hall.

[3] A search of the late Mr McSweeney's cell within the SRU on Sunday 21st September 2014 disclosed a package of illicit substance concealed within a pillow case. A reasonable inference might have been drawn at the time that he had secreted the substance on his person. The initial suspicions were beginning to be confirmed.

[4] On 27th September 2014 the late Mr McSweeney was admitted to hospital with a drug overdose but discharged himself the following day against medical advice having been administered with Naloxone to counteract the drug poisoning which was noted at the time as being 'due to possible drugs concealed within (his) body' (see **Crown Production 7 Discharge Summary Report**). Again it could have been inferred by Prison staff that the drugs which had caused the poisoning had been secreted on his person. A highly experienced officer, Joan Reekie, expressed the commonly held view that no returning prisoner would take the risk of concealing drugs on his person for just a small

quantity. It was likely that he was carrying thousands of pounds worth; and so it proved to be the case following his death.

[5] DC Jamie Hughes made it clear that a finding of a fraction of the quantity of illicit substances found upon the deceased *post mortem* would have led to a solemn prosecution. He regarded the quantity found upon the deceased as highly significant.

[6] Relevant members of the Prison management and staff knew or ought to have known that there were grounds for the highest suspicion that a major, organised crime of concern in the supplying of illicit substances in contravention of the Misuse of Drugs Act 1971 was taking place within their establishment. Despite this the Police were never involved. It is not clear why.

[7] This may be relevant to the circumstances of the death of the late Mr McSweeney for the following reason. It appears that any personal search by Prison Officers of a prisoner may include a body search or strip search but the Prison Rules and SOP (see **Crown Production 6**) prohibit any internal or invasive search. By contrast the Police may have more extensive powers of search including physical search of the person albeit that this may be restricted to the obtaining of samples (cf. **Criminal Procedure (Scotland) Act 1995, ss. 14** and **18**). The Police otherwise have the widest powers of investigation. If the matter had been reported to the Police it will be relevant to the present Inquiry to know what action the Police would have been likely to take and whether it would have led to an earlier discovery of the concealed substances on the person of the deceased.

Requirement to bring forward evidence

[8] In the exercise of the power conferred by **section 20(2)** of the **Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016** I require the Procurator Fiscal and Scottish Prison Service as participants to bring forward evidence about the foregoing matters.

[9] In relation to the decision not to call the police or omission to do so I respectfully consider that the most senior officer within the Prison establishment who had knowledge of the circumstances surrounding the late Mr McSweeney's re-admission and responsibility for making decisions on such matters should be considered as a possible witness along with any other relevant officers. In case an issue of policy or general practice is raised by this line of enquiry the Prison Governor at the time may be a possible witness along with other members of the senior management staff.

[10] A relevant police officer will be a senior officer with experience in the investigation and prosecution of serious crimes related to concern in the supplying of illicit substances. It is likely that such an officer will have had experience of investigating the concealment of drugs on the person of a suspect and be able to describe the relevant methods of investigation and use of search powers. Such an officer might well take the advice of the Procurator Fiscal in the course of an investigation and so, if necessary or appropriate, a Procurator Fiscal having relevant knowledge and experience may be a possible witness.

Further evidence – 2 – reason for re-admission

[11] The late Mr McSweeney would not have died while in legal custody if he had not sought and been granted re-admission for a purported breach of his licence conditions. I will not undertake an analysis here of the evidence surrounding his re-admission; it suffices to observe that the circumstances were highly suspicious. I consider that it is relevant to the circumstances of the death to know more about the circumstances surrounding his re-admission. There is, for example, a hint in the discharge report (**Crown Production 7**) that he was under some duress in relation to a debt; there is doubt about his claim that he was homeless and without funds. The fact of disengagement from his community based Social Worker merits further investigation but also the level of engagement.

Further requirement to bring forward evidence

[12] I require the Procurator Fiscal to further investigate this aspect. The wife of the deceased and / or other family members or any person known to be close to the deceased are possible witnesses as also the Social Worker allocated to his case. The extent to which, if at all, the late Mr McSweeney had become dependent upon drugs may be a relevant factor and this may emerge from these further enquiries.

Alloa,

14/12/17 **Sheriff David N Mackie**

Appendix II

Second Note by Sheriff David N Mackie

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT ALLOA

SECOND NOTE

by

Sheriff David N Mackie

in

INQUIRY

under the Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016

into the death of

DANIEL McSWEENEY

Further evidence – 1 – criminal investigation

[1] The evidence on Day 3 of the witnesses Gillian Walker, Scottish Prison Service Head of Operations and Public Protection, and Inspector David Simpkins, Force Custody Inspector for Police Service Scotland, went some way to addressing the points raised in my First Note under this heading. I consider, however, that further evidence will assist the Inquiry.

[2] In relation to the decision not to call in the police or omission to do so Gillian Walker has given valuable evidence regarding the policy of SPS in this regard. It will

assist the Inquiry, nonetheless, to have the evidence of the most senior operational officer with responsibility at the time of the deceased's re-admission for deciding such matters.

[3] Similarly, Inspector Simpkins' evidence regarding the Police practices and procedures concerning the treatment and handling of persons suspected of having illicit substances secreted about their person was most valuable and insightful. The Inquiry will, nonetheless benefit from hearing from a senior operational, investigative officer experienced in dealing with the investigation and prosecution of drug related crime generally, including the activities of organised crime groups, and concerning such individuals suspected of having secreted illicit substances about their person. Such a witness might anticipate being asked to comment critically upon the SPS policy concerning the reporting of suspected drug related criminality, as spoken to by Ms Walker, and to inform the Inquiry of any agreement, protocol or understanding which may exist between SPS and PSS in this regard either locally or nationally.