

Thursday, 4th June 2009

1

2 (10.15 am)

3 THE CHAIRMAN: Mr Smith, if you would like to continue your  
4 opening.

5 **Opening address by MR SMITH (continued)**

6 MR SMITH: Good morning, sir. If I may continue, what I  
7 would like to say is this. Shirley McKie has always  
8 maintained that she was not in the house of Marion Ross.  
9 She has steadfastly adhered to that denial in the face  
10 of pressure that most people can only imagine.

11 It is to be hoped that the public in general will be  
12 given the opportunity to know the facts once and for  
13 all. It is therefore imperative that all evidence that  
14 is relevant to the issues is made available. It is also  
15 imperative that it is tested, to exclude the possibility  
16 of any claim that this Inquiry has failed to consider a  
17 material part of the evidence and loses its authority as  
18 the last word on the fact finding exercise.

19 It is a recurrent theme of the vigorous  
20 correspondence on the Internet throughout the world that  
21 in any prior inquiry or investigation, such an  
22 investigation has been flawed as it lacked the  
23 experience or expertise or failed to take into account a  
24 material fact. The conclusions have not been accepted  
25 by many. This includes the Black Inquiry, Mackay and

1 Robertson Inquiry, the Parliamentary Inquiry and the  
2 trial of Shirley McKie herself.

3 This Inquiry is an opportunity for many individuals  
4 to clear their name if they wish to try to do so. If  
5 matters are fully explored and findings are made, it  
6 will be the first step at least in the attempt to move  
7 on and restore faith in forensic science in Scotland.

8 Against that background, it is our submission that  
9 it will be essential that a ruling is made on whether  
10 QI2 or Y7 have the authorship that was claimed by SCRO.  
11 SCRO should be given every opportunity to seek to  
12 justify their position, but also be subjected to  
13 questioning by all parties represented if they so wish.  
14 Plainly if the identifications were correct, this will  
15 have cataclysmic consequences: it will mean that experts  
16 throughout the world who had positively stated that the  
17 identification was wrong were themselves wrong. It will  
18 mean that the Scottish Executive was wrong in the advice  
19 they have previously received. Although in a tiny  
20 minority it will mean that SCRO and those who Mr Russell  
21 indicated he wished to represent were like Shirley McKie  
22 admirable in their tenacity in sticking to their  
23 position in the face of immense pressure that we can  
24 only imagine. Of course there is another possibility:  
25 that SCRO failing to live up to what is expected of any

1 expert witness. That includes the ability to recognise  
2 that mistakes can be made.

3 We are obliged to the Inquiry team for their efforts  
4 so far in gathering the evidence. Important evidence is  
5 being made available to all participants on a rolling  
6 basis. Important evidence has been produced as recently  
7 as last week. We wish to make it clear that the task of  
8 considering this information and comparing it to already  
9 known evidence is proving to be a time consuming task.  
10 It cannot be assumed that issues will not arise that we  
11 consider to be of importance as more evidence is  
12 produced and as the significance of evidence already  
13 availability is analysed.

14 It is not intended to take a great deal of time in  
15 making this opening statement. The reasons for this  
16 include the fact that considerable quantities of  
17 evidence are still awaited. By way of example, as far  
18 as we are aware Mr Wertheim has not yet provided a  
19 statement and neither has Mr Zeelenberg. I raise the  
20 latter matter at this point as much reference was made  
21 yesterday to the events at Tulliallan. Serious  
22 allegations were made about Mr Zeelenberg's manner  
23 suggesting it was of a threatening nature. No doubt he  
24 can speak for himself but we note that as a matter of  
25 fairness his comment should be sought on this as a

1 matter of urgency. It will come as no surprise that it  
2 is our understanding from interviewing him for the  
3 purposes of the civil claim that his version of what  
4 happened at Tulliallan is very different to that stated  
5 here yesterday.

6 That having been said, there are certain issues that  
7 have already been raised in particular by Mr McKie in  
8 written statements to the Inquiry. We wish the Inquiry  
9 to know that Mr McKie has still not been interviewed and  
10 remains in the possession of considerable documentary  
11 and other evidence as we have previously indicated to  
12 the Inquiry team. It may assist to know in broad  
13 outline what we see as being the important issues to be  
14 considered at this stage.

15 If I can move on now to one particular matter which  
16 is the issue of Mr Gary Gray, until revealed in the  
17 context of this Inquiry referred to on page 64 yesterday  
18 it was unknown by those I represent that there was a  
19 suggestion that Gary Gray had perhaps deposited a  
20 fingerprint at about the point that Y7 was found.

21 It is clear that Mr Moffat who was assisting in  
22 moving Marion Ross' body thought that Y7 could in fact  
23 be that of Gary Gray. It was understood from other  
24 statements that Gary Gray's fingerprints were compared  
25 against Y7 by Charles Stewart. Mr Moffat was told by

1 Mr Hogg that that was so.

2 Gary Gray states that he did not provide elimination  
3 prints. Charles Stewart says he did not ever compare  
4 Gary Gray's prints against Y7. Mr Moffat says he felt  
5 threatened when he raised the issue.

6 In these circumstances there is a apparently a  
7 disagreement between Mr Gray, Mr Moffat, Mr Hogg and  
8 Mr Stewart as to the evidence. It is in our submission  
9 imperative that all these matters are investigated  
10 afresh. The issues arising are not limited to whether  
11 Y7 was deposited by Gary Gray. They include such  
12 matters as why Mr Hogg stated that the print had been  
13 checked by Mr Stewart. It is vital that fresh prints  
14 are taken from Gary Gray; that he be called to give  
15 evidence; and that his prints be compared with Y7.

16 Although it has been stated that fingerprints  
17 bearing to be those of Gary Gray were compared in the  
18 context of the Mackay and Robertson investigation  
19 against Y7 with a negative result, this is of such  
20 importance that it should be considered afresh by this  
21 Inquiry. It will be a simple matter to check it once  
22 again.

23 It has been stated that Ms McKie left fingerprints  
24 on a production in a matter predating the murder of  
25 Marion Ross. It is important to realise that she stated

1 at the time that she thought that she had been wearing  
2 gloves when handling production, but did not make an  
3 issue of the suggestion that she should be more careful.  
4 However, it was discovered that it was possible to leave  
5 prints through latex gloves and the standard procedure  
6 was to use double gloves in certain circumstances. It  
7 is a matter of interest that Mr Moffat speaks to knowing  
8 of the risk of leaving fingerprints through latex gloves  
9 and was careful at the **locus** of the crime not to do, so  
10 it is important, therefore, that the Inquiry places this  
11 in context. Much has been made of this in Internet  
12 traffic and the full facts should be made clear to and  
13 before the Inquiry.

14 Thus far it has been left hanging in the air, that  
15 somehow Shirley McKie has previous form for  
16 contaminating a crime scene. This myth must be explored  
17 in order that the facts become known to the public.

18 The interests of David Asbury and Shirley McKie  
19 require that close attention is paid to the issue of the  
20 relationship between SCRO and Strathclyde Police. If an  
21 organisation such as SCRO wishes to be regarded as  
22 independent it has to deal at arm's length from those  
23 who instruct it. It is apparent that that relationship  
24 was not that of an independent organisation. There was  
25 regular communication with SCRO by Strathclyde Police

1 officers advising of the progress of the investigation  
2 at large; of SCRO officers going to the **locus**; of advice  
3 on the importance of marks left to be analysed. There  
4 is also evidence of communication taking place on first  
5 name terms between the organisations. The overwhelming  
6 suspicion is that SCRO had a purpose in mind, which was  
7 to support the police in securing a conviction. If such  
8 a culture existed, SCRO should not have been portrayed  
9 as being in any sense independent. All communications  
10 should have been documented, all informal discussions  
11 should have been prohibited.

12 It is also important to consider the practice of the  
13 evidence trail of SCRO to ensure that any such agency  
14 has an audit trail that can be followed and thereafter  
15 be tested by any defence team at each and every stage.

16 It is vital that what happened in the Marion Ross  
17 Inquiry and in the subsequent prosecution of Shirley  
18 McKie is analysed to see if any objectively acceptable  
19 standards were adhered to. It is vital to see whether  
20 any doubts by any individual were disclosed to the  
21 defence in the Asbury and McKie trials. That disclosure  
22 should have been ultimately from the Crown, but systems  
23 ought to have been in place to ensure that concerns were  
24 communicated by SCRO to the Crown and by police to the  
25 Crown. Questions must be asked as to why the

1 presentation by SCRO to the jury in Ms McKie's trial  
2 failed to reveal the protracted consideration of the  
3 identity of the mark Y7. Questions must be answered as  
4 to why no such disclosure took place.

5 It has come to the attention of us, as  
6 representatives of David Asbury, that significant  
7 information was not communicated to those defending him.  
8 It is now known that there were witnesses who observed a  
9 man, not answering the description of Mr Asbury, close  
10 to the **locus** and who may have been there at the time of  
11 the murder. It is known that a number of other suspects  
12 were interviewed, including one man who has now been  
13 convicted of murder in similar circumstances to the  
14 murder of Marion Ross. None of that was disclosed to  
15 Asbury's defence team as it should have been.

16 It is also clear that there was no disclosure to  
17 those defending Shirley McKie of all the evidence that  
18 was available and may have assisted her defence team.  
19 In particular, it is clear that some individuals within  
20 SCRO were not able to identify 16 points on Y7 when  
21 compared to her prints. If, as they have said, a  
22 16-point standard should be used, the fact that there  
23 were individuals who expressed doubt about 16 points  
24 should have been disclosed. That it was not, requires  
25 an explanation.

1                   A system of identification should not be  
2                   identification by committee, by adopting only the  
3                   opinions that suit the purpose. A truly independent  
4                   system should be judged by its weakest link and not its  
5                   strongest. The weakest link should certainly not be  
6                   concealed.

7                   It is now clear from statements obtained that the  
8                   SCRO colluded with one another to decide which parts of  
9                   the mark Y7 and of Shirley McKie's print should be part  
10                  of the presentation. It is wholly unacceptable for any  
11                  such collusion to take place. It is wholly unacceptable  
12                  for a selected part of evidence to be presented. There  
13                  was no reason why the entire mark and print were not  
14                  produced. An explanation is called for for such  
15                  behaviour.

16                  A system of disclosure as required in Scotland that  
17                  is ignored is a system that is not worth having.

18                  The decision to prosecute Shirley McKie having been  
19                  taken, she was then subjected to the most appalling  
20                  treatment by her former colleagues. It is quite clear  
21                  that her failure to follow the line expected of her  
22                  resulted in her being ostracised and subjected to  
23                  punishment. She was arrested in the early hours of the  
24                  morning, stripped searched and marched into her on  
25                  police station in a state of considerable distress, all

1 under the orders of the Detective Superintendent John  
2 Malcolm, her senior officer. He was the immediate  
3 superior to the Senior Investigating Officer Steven  
4 Heath. The manner of Ms McKie's arrest was a matter  
5 which was subject to adverse comment and criticism by  
6 Lord Johnson, the trial judge. Although it is clear  
7 that the justification provided for this conduct that  
8 was suggested was that she was being treated as any  
9 other prisoner, it is vital that Mr Malcolm be called  
10 to account for his orders. If it is truly his position  
11 that every police officer that has been charged with  
12 perjury is subjected to strip searching, he should be  
13 required to say so on oath. It should be open to the  
14 Inquiry to hear evidence as to whether that is true.

15 There is an overwhelming suspicion that Mr Malcolm's  
16 conduct was motivated by an attempt to humiliate Shirley  
17 McKie. If that is so it is not without significance  
18 that Mr Malcolm was Mr Heath's superior in the murder  
19 investigation. Questions arise as to why he, having  
20 been involved in the investigation, was in charge of the  
21 arrest too. He plainly had a view of Ms McKie's conduct  
22 and if this affected his method of arrest it requires to  
23 be considered carefully. It may also instruct a view of  
24 the attitude throughout the investigation by all police  
25 officers.

1                   It is submitted that there is considerable evidence  
2                   that many within Strathclyde Police, as with SCRO are  
3                   incapable of objective view. There would appear to have  
4                   been a culture that presumed that Shirley McKie was  
5                   guilty, notwithstanding her acquittal. Media briefings  
6                   were provided (including one at which the journalist  
7                   Marcello Mega was present) which were designed on an  
8                   unattributed basis to destroy Ms McKie after her  
9                   acquittal. One such briefing made the suggestion that  
10                  she had been at the **locus** and engaged in what was  
11                  described in this is Inquiry as a romantic liaison.  
12                  False statements were made to the press to the fact that  
13                  Pat Wertheim was not suitably qualified to provide an  
14                  opinion on fingerprint analysis. The practice of  
15                  informal and unattributed communication with the media  
16                  in this way must be considered by the Inquiry. It is  
17                  submitted that it is wholly unacceptable following a  
18                  decision of a jury for the police or any other  
19                  prosecuting agency to complain at the result.

20                  This attitude continued in respect of David Asbury.  
21                  Recently, Strathclyde Police replied to a potential  
22                  employer of David Asbury in a disclosure application  
23                  that he may be a danger to vulnerable people. Such a  
24                  statement is utterly baseless standing the acquittal of  
25                  David Asbury. Such conduct by the police shows an

1 unwillingness to accept a verdict of a jury and is to be  
2 deprecated.

3 This culture of inability to recognise errors is one  
4 that ought never to have happened. It inevitably led to  
5 faith in the system of fingerprinting to be destroyed.

6 It is clear that from the early stages no thought  
7 was given to the possibility that there had been a  
8 mis-identification of the mark Y7. Quite why this now  
9 obvious point was not considered requires to be consider  
10 by the Inquiry. Fingerprints were considered by all to  
11 be, in effect, infallible. Fingerprint experts have  
12 acquired a reputation that was not capable of challenge.  
13 No other expert witness speciality has been accepted so  
14 easy in Scotland.

15 This position is all the more surprising when it is  
16 appreciated that no formal training system was  
17 apparently adopted which was capable of verification  
18 from outside SCRO.

19 In the context of Shirley McKie's prospective trial,  
20 the leading of evidence from abroad was a wake up call.  
21 As was commented on yesterday, whatever dispute one may  
22 have about the content of the evidence of Pat Wertheim  
23 and David Grieve, the Advocate Depute commented on the  
24 contrast between the quality and the presentation of  
25 that evidence.

1           In reaching the decision to prosecute Ms McKie,  
2           again there was a failure to follow-up repeated requests  
3           that the mark Y7 be independently verified for the Crown  
4           by an expert from England. It is a fair bet now that,  
5           had that been requested, the mis-identification would  
6           have been noted and life would have been very different  
7           for Shirley McKie.

8           The conduct of Peter Swann must also be considered  
9           in this is Inquiry with the utmost care. His support of  
10          SCRO was critical to them and had a bearing on the  
11          decision not to prosecute the experts. We have prepared  
12          a comprehensive analysis of Mr Swann's action for the  
13          attention of the Inquiry that will be submitted shortly.

14          We will continue to assist the Inquiry in any way we  
15          can. To date we have assisted the Inquiry by submitting  
16          hundreds of relevant documents, we have submitted lists  
17          of documents refused under the Freedom of Information  
18          Act by the Scottish Executive to allow the Inquiry to  
19          have access to them, submitting papers on 47 key issues  
20          that we feel are relevant to the Inquiry supported by  
21          relevant witnesses, submitting 15 papers on the analysis  
22          of the fingerprint evidence, submitting papers on the  
23          appointment of Professor Champod and other experts to  
24          the Inquiry and on the importance of the preparation of  
25          standard sets of images, and submitting responses to a

1 number of the published chapters.

2 Our submission of 47 issue papers was aimed at  
3 drawing the Inquiry's attention to matters and on first  
4 analysis might not be thought as having direct relevance  
5 to this Inquiry. We believe that the consequence of the  
6 mis-identification of prints Y7 and Q12 and the  
7 questions raised there should be answered. These  
8 questions include that ACPOS and the SCRO Executive  
9 Committee do enough to resolve matters in the wake of  
10 Shirley McKie's acquittal. Was the Black Report a  
11 vindication of the SCRO as they claimed? Were criminal  
12 acts committed and, if so, by whom? What were the  
13 implications of the letter sent by the SCRO experts to  
14 Lord Cullen? Why did it take 13 years to resolve  
15 matters at enormous cost to the public purse? How  
16 effective are current procedures for authorising expert  
17 witnesses? Why were the SCRO experts not prosecuted?  
18 Why is there no internationally recognised system for  
19 identifying fingerprints? Why did the Justice 1 Inquiry  
20 fail to resolve matters? What were the effects of  
21 political pressure and interference? Did the Lord  
22 Advocate compromise his independence from the political  
23 process? How effectively has the Scottish Police  
24 Services Authority responded in the aftermath of the  
25 mis-identification of prints Y7 and Q12? What lessons

1 have been learned and how have they impacted on the  
2 training of Scottish experts? How can the SPSA justify  
3 the treatment of Gary Dempster while at the same time  
4 continuing to support experts who they accept they made  
5 erroneous identifications?

6 It is our intention to continue to assist the  
7 Inquiry on witness assessments, lines of Inquiry and  
8 identify who we believe to be relevant additional  
9 witnesses.

10 In addition, we have submitted 15 comprehensive  
11 papers on purely fingerprint evidence which highlight to  
12 the Inquiry significant issues we believe require to be  
13 resolved. These are: the use of the 16 point standard  
14 for eliminating fingerprints in Marion Ross case; the  
15 flawed analysis of the Aberdeen report by Peter Swann  
16 and the others; the significance of the blind test; the  
17 use of charting machines by SCRO experts; the current  
18 status of the mark Y7; evidence of further disputes with  
19 SCRO; questions of forgery and transplant; was the  
20 mis-identification of Y7 an honest mistake; the practice  
21 of initialling productions in the Marion Ross case;  
22 analysis of Internet images of Y7; the actions of  
23 Malcolm Graham; the request for further fingerprint  
24 examinations; the use of so-called original material;  
25 the significance of fingerprint Y7; and SPSA training

1 regarding the mis-identification of Y7.

2 All in all, we believe that these papers point to a  
3 mass of contradictory evidence given over the years by  
4 the SCRO experts and their supporters. In addition, we  
5 have also submitted the following issues for  
6 consideration: to assess the reasons for the  
7 Lord Advocate, Crown Office, the Scottish Executive,  
8 SCRO management and the police in failing to take action  
9 before they were forced to do so by the 2000 broadcast  
10 of the BBC Frontline Scotland programme and by Iain  
11 McKie's complaints of criminality; given Sir David  
12 O'Dowd's and the Justice 1 Inquiry's criticism of HMIC's  
13 failure to effectively follow-up on the recommendations  
14 from the 2000 Taylor report; to assess why this happened  
15 and if the issues raised have now been resolved and to  
16 examine why the Scottish Executive and the Lord Advocate  
17 and Crown Office failed to respond effectively to the  
18 issues emerging from the Shirley McKie case; to assess  
19 why Malcolm Grahame was employed by the Crown Office in  
20 July 2000 to prepare a report given that in 1997 he had  
21 been a defence expert and stated that the print Y7 was  
22 an accurate identification and who, subsequent to the  
23 1999 trial, went public on his support for the SCRO  
24 experts and just as publicly apologised to Iain McKie;  
25 and, finally, to fully evaluate the Mackay report, the

1           Gilchrist report and associated documentary material to  
2           assess what will tell us about the causal factors and  
3           failures identified arising as a consequence of the  
4           mis-identification of prints Y7 and Q12.

5                     Thank you, Chairman.

6    THE CHAIRMAN:   Thank you very much.

7                     Mr Holmes, you are next.

8                                     **Opening address by MR HOLMES**

9    MR HOLMES:   Thank you, sir. The identification of the  
10           fingerprints attributed to Shirley McKie and David  
11           Asbury and Marion Ross took place over 12 years ago.  
12           Those identifications took place as a matter of routine  
13           in an office which has dealt with many thousands of  
14           similar identifications before and since. The  
15           consequences of those identifications, however, have  
16           been felt much more widely than would usually be the  
17           case.

18                     They have been felt by those identified certainly  
19           and by the family of Marion Ross who was a victim of a  
20           particularly violent murder. They have been felt also  
21           by police officers, scene of crime officers and  
22           fingerprint experts involved in the investigation of the  
23           case, by independent experts, by politicians, by the  
24           public and certainly by the public purse.

25                     Aside from internal investigations there have been

1 police investigations by Strathclyde Police and Lothian  
2 & Borders Fingerprint Bureau, there was the police  
3 investigation leading to the prosecution of Shirley  
4 McKie for perjury, there has been a police investigation  
5 leading to the Mackay report, there has been an HMCIC  
6 investigation, the ACPOS Presidential Review Group, a  
7 Parliamentary Inquiry and the Black Report.

8 Mr Wertheim has cryptically spoken in one of his  
9 many postings on the Internet of several other secret  
10 inquiries, each of which was meant to be the final word.  
11 Many thousands of hours have been spent and thousands of  
12 pages of reports produced and yet controversy over these  
13 fingerprints has been allowed to persist. This  
14 indicates that each investigation that has gone before  
15 has failed.

16 Such failure is rooted in the absence of a reasoned  
17 judicial determination as to who is the donor of each of  
18 these fingerprints based on analysis of all the  
19 available evidence. My clients presented themselves for  
20 interview with this Inquiry as with all previous  
21 investigations into this matter. They are prepared to  
22 give evidence; they are prepared to face  
23 cross-examination. They do so without fear.

24 They stand by their identification of Shirley  
25 McKie's fingerprint and those of the late Marion Ross

1 and David Asbury in this case. The evidence will show  
2 that every single identification made by them for a year  
3 before they identified Y7 and for a year after was  
4 independently checked and found to be 100 per cent  
5 accurate. The level of scrutiny experienced by them  
6 already is unparalleled in the fingerprint community.

7 Despite this, and despite the recommendation that  
8 they be restored to full operational duty, my clients  
9 with the exception of Mr Geddes and Mr Foley had their  
10 employment come to an end having been the subject of  
11 criticism in the media at the hands of Ms McKie and her  
12 supporters. They have been subjected to extraordinary  
13 pressures and they stand by their professional opinion  
14 despite what it has cost them to do so.

15 Despite the pressure, and in some cases threats,  
16 they have experienced, despite the effects of the last  
17 12 years on both their professional and personal lives  
18 and those of their families, they continue to stand by  
19 the opinions they came to on examination of the evidence  
20 before them and they look forward to this Inquiry coming  
21 to its own conclusions on the fingerprints after  
22 examinations of all the evidence before it.

23 My clients do not accept there was any error in  
24 their attribution of fingerprints Y7, QI2, QD2 and XF to  
25 Ms McKie, the late Marion Ross and Mr Asbury, nor was

1           there any deliberate misfeasance. Was there a  
2           conspiracy involving SCRO, the police, independent  
3           experts and others who were, in the words of Shirley  
4           McKie, "out to get her"? Did this huge machine move  
5           into action to thwart the actions of a police officer  
6           who was, according to DCI Heath, not bound for greatness  
7           anyway? No. The simple explanation for Y7 being  
8           attributable to Shirley McKie is that she was present in  
9           the home of Marion Ross during the investigation into  
10          her murder. She left behind a fingerprint. She denies  
11          this.

12                        That she denied it initially to avoid any adverse  
13                        effect that such carelessness would have had on her job  
14                        is understandable, having previously contaminated  
15                        evidence by leaving her fingerprints on it, may have  
16                        been significant for her. Less so is that she continues  
17                        to do so in the light of the serious and far reaching  
18                        consequences of that denial.

19                        It is Shirley McKie's denial that she was present in  
20                        the home of Marion Ross that has caused the careers of  
21                        my clients and others to come to an end. It is her  
22                        denial that has led to the failed investigations. It is  
23                        her denial that has cast doubt on the work of SCRO. It  
24                        is her denial that has affected the careers of other  
25                        professionals involved in this case, notably Peter

1 Swann, the first expert she hired to show that Y7 was  
2 not hers and one of a number of experts to independently  
3 confirm that it was hers, the first of these being the  
4 expert employed by Mr Asbury in his defence, Malcolm  
5 Graham.

6 Her denial has contributed on any view to  
7 Mr Asbury's conviction being quashed and his subsequent  
8 release without having to go to the trouble of  
9 successfully arguing an appeal.

10 My clients do not accept error in the attribution of  
11 QI2 and QD2. In the case of QD2 this has now been  
12 accepted by my clients' contradictors, the Danish  
13 experts. In the case of QI2 other experts will be led  
14 before this Inquiry but I invite the Inquiry to consider  
15 whether in light of a 100 per cent record of accuracy on  
16 thousands of identifications in the year before,  
17 followed by a 100 per cent record of accuracy of  
18 thousands of identifications for the year afterwards can  
19 be reconciled with the two errors that are claimed in  
20 one case.

21 The simple explanation for the attribution of QI2 on  
22 the tin found in Mr Asbury's bedroom to the late Marion  
23 Ross and QD2 on the money in that tin to Mr Asbury is  
24 that the tin and the money belonged to the late Marion  
25 Ross and was discovered immediately after her death in

1 the possession of David Asbury.

2 The tin contained around £2,000 money bundled in the  
3 way Marion Ross customarily used. Marion Ross was at  
4 the time a bank clerk with savings known to keep large  
5 quantities of cash in her home. David Asbury was an  
6 unemployed man with no visible source of income and no  
7 visible way to accumulate that amount of money. A  
8 disturbance in dust the same shape and size of the base  
9 of that tin is said to have been found in Marion's Ross  
10 home.

11 The simple explanation for the attribution of XF to  
12 David Asbury is that he was at the home of Marion Ross  
13 shortly before she was murdered and that he left it  
14 there. XF was found on the Christmas gift tag. The  
15 gift and the tag had been purchased during the Christmas  
16 period in 1996. That XF is the fingerprint of David  
17 Asbury is not disputed and, as a result, Mr Asbury has  
18 had to offer an explanation for his presence in Marion  
19 Ross' home at that time. Mr Asbury's explanation is  
20 that his car broke down. He was closer to a petrol  
21 station than to the home of Marion Ross but chose to go  
22 to her door and ask to use the telephone.  
23 After Miss Ross let him into the house but before he  
24 used the telephone he realised his car had not broken  
25 down after all but had run out of petrol. He decided

1 not to make a call but asked to use the toilet. After  
2 allowing him to do so, Marion Ross, a very private  
3 woman, jealous of her own space and nervous in the  
4 presence of strangers, invited him to tour the house he  
5 left his fingerprint on the tag of a Christmas gift  
6 before leaving. Mr Asbury's explanation for the  
7 presence of his fingerprint in the home of Marion Ross  
8 is inherently and wholly incredible.

9 Had the simple explanations been accepted as they  
10 seemed to have been by the jury in Mr Asbury's trial the  
11 consequences of the identification of these fingerprints  
12 may not have been so clear for all involved, with the  
13 possible exception of Mr Asbury himself. They certainly  
14 would not have been quite so enduring.

15 Not all involved in this case have lost entirely.  
16 Ms McKie's denial was accepted by a jury. She was not  
17 convicted of perjury though evidence is available to  
18 this Inquiry from which the conclusion can be drawn that  
19 she perjured herself during those proceedings. Counsel  
20 to the Inquiry referred to this in his opening  
21 statement, though he indicated he has yet to come to a  
22 view on whether Ms McKie's evidence was perjured.

23 Ms McKie has profited from her denial financially.  
24 She was paid £750,000 by the Scottish Executive to  
25 settle her action against them without a single day's

1 evidence led.

2 I have already referred to Mr Asbury's release and  
3 if it is accepted that the failure of the Crown to  
4 oppose his appeal was due in whole or in part to the  
5 controversy surrounding the fingerprint evidence in his  
6 case, he too as been a beneficiary of Ms McKie's denial.

7 This Inquiry was convened to look into the  
8 consequences of the steps taken to identify the  
9 fingerprints leading to the trial of David Asbury and  
10 Shirley McKie. For my clients, those consequences  
11 include attacks on their professional integrity, a  
12 lengthy investigation to which they have been subjected  
13 and distress to themselves and their families. For the  
14 general public, the consequences include: the release of  
15 David Asbury, an individual convicted by a jury of the  
16 murder of Marion Ross; the expense of 12 years of  
17 investigations; the expense of two High Court trials and  
18 one appeal so far; the expense of defending, albeit  
19 briefly, a civil action by Shirley McKie and one by  
20 David Asbury, and the expense of settling the action  
21 brought by Ms McKie.

22 The following issues therefore need to be addressed:  
23 first and foremost, the issue of whether the  
24 fingerprints with which this Inquiry is concerned, and  
25 in particular Y7, are those of the individuals

1 identified.

2 If the fingerprints are accepted by this Inquiry as  
3 being those of Ms McKie, the late Miss Ross and  
4 Mr Asbury, the issue of why Mr Asbury's appeal was not  
5 opposed falls, in my clients' view, to be considered.  
6 My clients are aware that the Chairman considers the  
7 Asbury appeal to be outwith the terms of this Inquiry,  
8 but they respectfully disagree. As the evidence  
9 unfolds, my submission will continue to be that the  
10 appeal of David Asbury was unopposed as a result of the  
11 controversy surrounding Q12 and Y7 and, as a result,  
12 falls squarely within the consequences of the  
13 identification of those fingerprints.

14 For the same reasons, if the fingerprints are  
15 accepted by this Inquiry as being those of Ms McKie,  
16 Miss Ross and Mr Asbury, the issue of why Ms McKie's  
17 civil claim was settled without proof falls squarely  
18 within the consequences of the identifications and, for  
19 the same reason, my submission as the evidence unfolds  
20 will continue to be that the reasons for settling the  
21 civil claim should be considered by this Inquiry,  
22 especially in the light of the opinion given by Lord  
23 Wheatley.

24 The issue of whether Ms McKie ought to have been  
25 charged with perjury in respect of the evidence she gave

1 during her perjury trial also arises. Counsel has  
2 indicated that a supplementary statement from Ms McKie  
3 will be published addressing her evidence during the  
4 trial. No statement from Ms McKie is yet available and  
5 I would therefore reserve any comments on this issue  
6 until I have seen a statement from her. I note  
7 counsel's indication in his opening statement that he  
8 has yet to come to a view on whether Ms McKie's evidence  
9 in her trial was perjured.

10           Regardless of whether the identifications can now be  
11 confirmed, the issue of why those who identified the  
12 fingerprints were suspended from service and why the  
13 recommendations of the Black Report recommending a  
14 return to full operational duties were not implemented  
15 arises, especially standing Mr Bell's apparent  
16 acceptance of those findings in his memo of 24th  
17 May 2002. The question must also be asked when  
18 considering this issue why was there a reluctance on the  
19 part of SCRO Director to restore the officers prior to  
20 the conclusion of Ms McKie's civil claim?

21           In the case of Y7, it was not only my clients who  
22 made the identification but a number of other witnesses  
23 within SCRO at the time. Who these individuals were and  
24 the effect, if any, on their own careers must also be  
25 examined.

1                   Following the identifications, my clients were the  
2                   subject of an investigation which eventually led to the  
3                   Mackay Report. Their treatment at the hands of the  
4                   officers conducting that investigation was, to say the  
5                   least, somewhat shabby and the terms of the report  
6                   itself will be subject to criticism if they are  
7                   discussed in evidence. It remains ostensibly  
8                   confidential, though the fact that it was leaked upon  
9                   its completion is within the public domain. The  
10                  Lord Advocate has commented that the release of the  
11                  report was unlawful. The conduct of the Mackay  
12                  investigation, who disseminated it, and what action has  
13                  been or will be taken against those responsible is an  
14                  issue which falls to be considered in assessing the  
15                  treatment of the officers who identified Y7.

16                  That the allegations of criminal conduct which led  
17                  to the investigation were made by Mr McKie was referred  
18                  to by Counsel to the Inquiry in his opening statement  
19                  yesterday. Whether such allegations persist and why,  
20                  despite the fact that the decision was made not to  
21                  prosecute any experts involved in the identification of  
22                  Y7 and QI2, is an issue which also needs to be  
23                  considered.

24                  There has been a significant degree of media  
25                  interest in this matter over the last 12 years and that

1 no doubt reflects the public interest. There have been  
2 a number of articles in the weeks leading up to this  
3 Inquiry. In the past, the coverage by the media of this  
4 matter has, from time to time, been inaccurate and  
5 misleading and I would urge the Chairman to recognise  
6 the detrimental effect that that inaccurate and  
7 misleading reporting has on the work of this Inquiry and  
8 to take action where appropriate. The public interest  
9 is not served by having an Inquiry in which the public  
10 do not believe and which has been undermined because of  
11 the way in which it has been reported.

12 Mr Smith expressed the hope that fair and balanced  
13 coverage would be afforded his client, Ms McKie, in his  
14 remarks yesterday. I would express the same hopes for  
15 those I represent, standing in tone with the press  
16 coverage so far. The media attacks to which my clients  
17 and others have been subjected over the last 12 years  
18 are a consequence of the identifications they continue  
19 to support and properly an issue for consideration by  
20 this Inquiry when considering the treatment of SCRO  
21 staff following the controversy over these  
22 identifications. The issue of whether anything can be  
23 done to prevent experts now working for the SPSA  
24 suffering the same treatment as a result of any future  
25 disputed identification ought properly to be examined

1 when considering the issues identified in chapter 10 of  
2 counsel's analysis.

3 Standing Ms McKie's position, it is necessary that  
4 the Inquiry reaches a decision on one question above all  
5 others: is Y7 her fingerprint? The only way in which a  
6 decision can be achieved is through expert evidence.  
7 The opinions of these experts are just that: opinions  
8 based on years of experience. They satisfy themselves  
9 that there are a sufficient number of characteristics in  
10 sequence and agreement to enable them to give an opinion  
11 attributing ownership of the fingerprint. Their skill  
12 is one of many years. Each of my clients underwent a  
13 period of training lasting several years before being  
14 certified to give evidence in court. Each of my clients  
15 had their work reviewed and checked constantly. Peer  
16 review was an integral and crucial part of their daily  
17 working life. Each of my clients was subject to annual  
18 competency tests which they had to pass to retain their  
19 certification. Competency tests set by Mr Mackenzie and  
20 Mr Dunbar were reviewed by the NTC at Durham and by the  
21 FBI. The FBI deemed them to be too stringent and noted  
22 that they would only be given to their most experienced  
23 examiners. They were said to be tests of excellence,  
24 rather than competency. Staff at SCRO find the testing  
25 regime at Durham to be easier. The consequence of that

1 was the high regard in which the experts in the Glasgow  
2 Bureau were held by fingerprint examiners elsewhere.

3 This stands in marked contrast to some of those who  
4 claim the identifications were incorrect. Mr Wertheim,  
5 for example, again in one of his many Internet postings,  
6 states:

7 "I was in no way qualified to testify to fingerprint  
8 identifications when I was first accepted in court as an  
9 expert in the late 1970s. I attended a two-week class  
10 in Henley classification which also touched on latent  
11 print development and latent print identification. Our  
12 comparison exercises were all inked to inked. After  
13 that there was no OJT [by which I assume Mr Wertheim is  
14 referring to on-the-job training] in my department and I  
15 had to teach myself. Within two years, I was testifying  
16 to identifications. I never had a senior examiner check  
17 my work and never had a single proficiency test."

18 My clients welcome the opportunity to speak to their  
19 qualifications and expertise and to explain their  
20 findings in public. They look forward to the other  
21 experts who have become involved in this case at one  
22 stage or another doing the same.

23 Fingerprint comparison is not an exact science. It  
24 may not be reduced to probability. What can be done is  
25 that each expert who comes to an opinion as to ownership

1 of a mark can adequately explain why they are of that  
2 view. My clients are satisfied that they can do so.  
3 The other experts who have seen these fingerprints must  
4 be asked to do the same. Any reluctance or inabilities  
5 to support their opinions when confronted with original  
6 material will no doubt be taken into account by the  
7 Chairman in evaluating their evidence.

8 My clients will each speak to the identification of  
9 Y7. Some did so as part of the investigation into the  
10 murder of Marion Ross, some did so as part of the test  
11 that took place after Ms McKie had been identified as  
12 the donor of Y7. All stand by their professional  
13 opinion reached at the time, which is that Ms McKie is  
14 the donor of Y7. In addition to the evidence of those  
15 involved in the initial identification, there is  
16 Mr Mackenzie's presentation prepared originally for the  
17 Tulliallan conference which represents the most  
18 comprehensive assessment of Y7 there has been so far and  
19 which will form part of his evidence and will  
20 demonstrate once again that Ms McKie is the donor of Y7.

21 It should be borne in mind that if their evidence is  
22 accepted, the implication must be that Ms McKie has  
23 been, through her denial that she was ever present in  
24 the home of Marion Ross, the principal cause of the  
25 damage to every individual involved in this case over

1 the last 12 years, including herself. If this Inquiry  
2 accepts that Y7 is hers, it must also accept Ms McKie,  
3 and Ms McKie alone, could have put an end to all of this  
4 at any stage. Ms McKie and Ms McKie alone chose not to.

5 In relation to the other three fingerprints with  
6 which this Inquiry is concerned, QI2 was a fingerprint  
7 found on a tin in the home of David Asbury. The  
8 fingerprint was identified by my clients as belonging to  
9 Marion Ross. This was viewed by investigating officers  
10 at the time as a strong piece of evidence pointing to  
11 the guilt of David Asbury and robbery as his motive.  
12 Mr Wertheim and Mr Bayle have questioned that  
13 identification. My clients will give evidence regarding  
14 their own identification of QI2 and Mr Mackenzie will  
15 give evidence as to his own assessment from 2001 which  
16 confirmed that identification. Those who wish to  
17 question the identification will, of course, have the  
18 opportunity to do the same. The identities of the  
19 authors of the NTC report on QI2 from 2001 are not  
20 apparent from the database copy: no names appear upon  
21 it. Again, my clients await the evidence of the authors  
22 of that report with interest.

23 QD2 was a fingerprint found on the money in that  
24 tin. It was identified by my clients as belonging to  
25 David Asbury. It is important to note that my clients

1 have, in some cases, not been made aware of reports in  
2 relation to these or other marks that criticise their  
3 work until long after the reports have been commissioned  
4 and acted upon. In some cases, these were revealed to  
5 them only during the Scottish Executive's preparation  
6 for the defence of Ms McKie's civil claim. An example  
7 is the report by the Danish experts, Mr Rokkjaer and  
8 Mr Rasmusson, in relation to QD2. The conclusions of  
9 the Danish experts in relation to QD2 were later found  
10 to be flawed, which is recorded in senior counsel's  
11 analysis of the evidence available to the Inquiry as  
12 having been discovered after Mr Zeelenberg intervened.  
13 My clients await with interest Mr Zeelenberg's account  
14 of this, standing his comments at Justice 1.

15 Their position is that the deficiencies in the  
16 Danish examination of QD2 were identified sooner than  
17 any intervention on the part of Mr Zeelenberg. The fact  
18 that Rokkjaer and Rasmusson's assessment of QD2 was  
19 erroneous may well have been discovered sooner had my  
20 clients had the opportunity to comment prior to the  
21 preparation for Ms McKie's civil case, which could have  
22 been done since the views of the Danish experts were  
23 known as at the date of the precognition taken by  
24 Mr Crowe at 31st July 2000.

25 My clients look forward to the opportunity through

1 this Inquiry to address any criticism and to avail  
2 themselves of a right of reply which has, in respect of  
3 some of the material produced to this Inquiry, so far  
4 been denied to them.

5 I have already mentioned the report in relation to  
6 QD2 and counsel has referred in his analysis to the four  
7 experts involved in the McKie trial not being told of  
8 the defence position until a later stage. Other  
9 examples include the productions firstly by Mr Mackenzie  
10 and Mr Dunbar at Tulliallan. The effect of having all  
11 material out in the open will be to ensure a fair  
12 hearing for my clients and for the experts who have been  
13 asked to produce these reports.

14 A reasoned comparison of the work of my clients  
15 alongside that of the other experts who examined the  
16 fingerprints involved in this case is the only way in  
17 which a fair and therefore hopefully final determination  
18 of the origins of Y7 and the other three fingerprints  
19 can be achieved. It is worth noting at this stage that  
20 not all the experts' statements are yet available. No  
21 statement appears on the Inquiry database from  
22 Mr Wertheim, nor from Mr Bayle (who criticised the  
23 identification of Y7 and QI2 and were prepared to take  
24 part in the Frontline Scotland programme in 2000 saying  
25 so), nor from Mr Rudrud and Mr Zeelenberg, who look part

1 in the HMIC review.

2 My clients provided very full statements to this  
3 Inquiry at an early stage and a mechanism exists to  
4 compel anyone to give evidence to the Inquiry from whom  
5 it is required, though the difficulty with experts from  
6 beyond this jurisdiction is acknowledged. In the event  
7 of reluctance on the part of those who have criticised  
8 the identifications to involve themselves with the  
9 business of this Inquiry or to speak to those  
10 criticisms, I would invite the Inquiry to make use of  
11 that mechanism in order to spare my clients the  
12 invidious position in which they have found themselves  
13 more than once before, having offered their full  
14 co-operation only to discover have not been so  
15 forthright.

16 Finally in the case of XF -- that was a fingerprint  
17 found in the home of Marion Ross on the gift tag of a  
18 Christmas present -- it was identified by my clients as  
19 that of David Asbury. Standing the age of the gift and  
20 of the tag itself, it shows David Asbury was in the home  
21 of Marion Ross shortly before her death. My clients  
22 will speak to the identification of XF, but in the  
23 meantime it is worth bearing in mind one very grave  
24 consequence of these fingerprints having been questioned  
25 with the exception of XF, which has never been disputed

1 (Rokkjaer and Rasmusson accept it was the fingerprint of  
2 David Asbury in their report of 7th August 2000), is  
3 that David Asbury, who was convicted by a jury of Marion  
4 Ross' murder, appealed that conviction, the Crown chose  
5 not to oppose that appeal, his conviction was quashed  
6 and he is at liberty today.

7 The effect on the proceedings against Mr Asbury on  
8 those against and at the instance of Ms McKie cannot be  
9 the only subject matter of this Inquiry given the effect  
10 on so many lives of the events in the last 12 years. It  
11 would seem wholly inappropriate in the light of the  
12 tragic death of Marion Ross and the devastation caused  
13 to so many other lives to make one or two individuals  
14 the focus of these proceedings. The effects in the  
15 proceedings, however, are, in the view of my clients,  
16 view of the principal consequences of the identification  
17 of these fingerprints and must be considered by this  
18 Inquiry.

19 The controversy that has been perpetuated in  
20 relation to these fingerprints is a source of distress  
21 not only to my clients but to many who have been  
22 involved over the years with the fingerprints which are  
23 the subject of this Inquiry. One contributing factor  
24 that has allowed the controversy to survive is the  
25 absence of any judicial determination as to their

1 origins. No judicial assessment of the evidence  
2 available in relation to these fingerprints has ever  
3 been carried out. The jury in Ms McKie's perjury trial  
4 did return a not guilty verdict and it is therefore  
5 acknowledged that they must have entertained at least a  
6 reasonable doubt as to the evidence before them, but  
7 that evidence is not all the available evidence in  
8 relation to these fingerprints and of course the jury's  
9 deliberations are in private and the reasons for their  
10 decision not subject to public scrutiny.

11 The decisions of this Inquiry are open to public  
12 scrutiny. The reasons for the findings made by the  
13 Inquiry will be public and the evidence on which those  
14 findings are based will be available to all via the  
15 sections of the Inquiry database eventually to be  
16 published. It is in the hope that a judicial assessment  
17 of the evidence available, with all the expert testimony  
18 given its due weight, with witnesses tested not only as  
19 to their expertise but the credibility and reliability  
20 of their accounts, will put an end to the speculation  
21 that has plagued this matter to date, that my clients  
22 present themselves to give evidence for what ought in  
23 any event to be the last time on this matter.

24 THE CHAIRMAN: Thank you very much.

25 Miss Grahame, have you any statement you wish to

1           make?

2       MISS GRAHAME:   My client does not wish to make any opening  
3           statement.

4       THE CHAIRMAN:   Thank you very much.

5           Mr Macpherson, I think you said yesterday you did  
6           not intend to outline.

7       MR MACPHERSON:   Thank you, sir. That remains the position.

8           The Chief Constable does not propose to make any  
9           statement at this stage.

10      THE CHAIRMAN:   Ms Jones?

11      MS JONES:       The SPSA does not wish to make an opening  
12           statement.

13      THE CHAIRMAN:   Thank you very much.

14           There are only two matters that I want to raise.  
15           The first was the question which was raised as to  
16           whether the Inquiry within its Terms of Reference would  
17           look at the exercise by the Lord Advocate of his or her  
18           discretion whether or not to prosecute.

19           I take the view that that is a discretion that is  
20           given to the Lord Advocate and that it is not for me to  
21           comment or to enquire into the way in which the  
22           discretion was exercised.

23           I think I should say that it may be inevitable that  
24           the material that may or may not have been in front of  
25           the Lord Advocate we will hear in the course of the

1 Inquiry but, beyond that, I do not intend to comment on  
2 that issue at all or to deal with it. As I say, I  
3 consider that is outwith my Terms of Reference.

4 The other point that I would like to make is that in  
5 the course of statements that have been made available  
6 to the Core Participants, there are matters that I would  
7 regard as irrelevant to the Inquiry. The fact that they  
8 have appeared in the statement does not mean that I am  
9 necessarily going to regard them as coming within my  
10 Terms of Reference.

11 Where there is material which I regard as  
12 scandalous -- and I use that I think as a term of art,  
13 perhaps the way it is used in this jurisdiction -- then  
14 I think a different consideration applies.

15 So far as that is concerned, one might ask the  
16 question as to whether why, for example, I would regard  
17 the allegations, which were very strongly refuted  
18 through Mr Smith, about Ms McKie were not treated or  
19 would not necessarily be treated by me as coming within  
20 the definition of scandalous, though in popular sense  
21 that is exactly what one might well describe them if  
22 there is no evidential basis. But the reason that I  
23 might regard that as something of relevance is because  
24 it could raise or be connected with the issue as to  
25 whether Ms McKie had an opportunity to be in the house

1 at the relevant time. That is one situation.

2 But where I come on material which I regard as being  
3 totally on an issue that may well be irrelevant to the  
4 Inquiry and equally is scandalous, then I do not see any  
5 basis upon which I should allow that to remain. So it  
6 is for that reason that I propose to redact certain  
7 paragraphs which appear in a statement of Leslie Brown  
8 and which appear at paragraphs 52, the last five lines,  
9 and paragraph 52A, the entire paragraph.

10 Those are the only matters that I wish to deal with.  
11 If there is any issue that any of the Core Participants  
12 wants me to deal with today before we rise, then,  
13 subject to that, I would intend to begin on Tuesday  
14 morning at 10.15 with the evidence of Mr Heath. I  
15 suspect that his evidence will last most of that day or  
16 all that day? Maybe you are not in a position to say.

17 MR MOYNIHAN: I am not the person directly responsible for  
18 that. Ms Carmichael will take the evidence next week.  
19 That will very much depend on the extent of suggested  
20 lines of cross-examination and I have agreed with my  
21 learned friends that what we will do immediately after  
22 we adjourn is have a private meeting amongst ourselves  
23 to discuss the arrangements of cross-examination and  
24 that will have an impact on timing. Certainly our  
25 understanding is it need not necessarily be the case

1           that Mr Heath's evidence will take all day but, for the  
2           moment, it is impossible to give an estimate.

3       THE CHAIRMAN:   It is just so everybody knows what the  
4           programme is and how many witnesses we might possibly  
5           deal with on Tuesday.

6       MR MOYNIHAN:   Again, sir, if I can just say that that is one  
7           of the topics I am going to discuss in the meeting  
8           because there are some issues to be raised among the  
9           various Core Participants as to quite who we will call  
10          and how long that will take.

11      THE CHAIRMAN:   I am sure with the co-operation which you are  
12          getting we will proceed as rapidly as possible. Thank  
13          you very much. We will meet again on Tuesday at 10.15.

14      **(11.12 am)**

15          **(Adjourned until 10.15 am on Tuesday, 9th June)**

16

17

18

19

20

21

22

23

24

25