

1

Thursday, 24th September 2009

2 (Afternoon session)

3 (1.50 pm)

4 PAT ALEXANDER WERTHEIM (continued)

5 MR MOYNIHAN: Sir, I think to the relief of all I have no

6 more questions and the suggestion is it be Mr Holmes who

7 cross-examines next.

8 THE CHAIRMAN: Mr Holmes, I imagine that there are a number

9 of questions you want to put and the normal practice

10 would be to ask you to say what the issues are you wish

11 to cover. Are you able to do that broadly?

12 MR HOLMES: I can give an outline. The first issue I would

13 like to cover is the issue of a single versus a multiple

14 touch and that's in relation to Y7.

15 THE CHAIRMAN: Yes.

16 MR HOLMES: The second issue relates to Mr Wertheim's

17 Inquiry statement. The third relates to Mr Wertheim's

18 evidence at the trial of Ms McKie. The fourth relates

19 to the images of Y7 that Mr Wertheim has seen. The

20 fifth relates to the comparator exercise he was required

21 to carry out for this Inquiry. The sixth relates to his

22 opinion on Y7 itself. The seventh relates to his

23 opinion on QI2. The eighth relates to XF. The ninth

24 relates to the distribution of material relating to Y7

25 and the tenth relates to allegations made against the

1 SCRO officers who identified Y7 and Q12.

2 THE CHAIRMAN: Allegations made by ...?

3 MR HOLMES: Mr Wertheim.

4 THE CHAIRMAN: Yes. Very good, I will allow those.

5 **Cross-examined by MR HOLMES**

6 Q. Mr Wertheim, I will start, if I may, with this issue of  
7 a single as opposed to a multiple touch and that's in  
8 relation to Y7.

9 A. Yes, sir.

10 Q. The starting point, if I am correct, for your opinion on  
11 Y7 is that it is a single touch and not an multiple  
12 touch; is that correct?

13 A. That's correct, with the slight modification that in the  
14 area I indicated (which was referred to in Shirley  
15 McKie's trial as the "blob") I find the detail  
16 unreliable and there could be some slippage or smearing  
17 in that area.

18 Q. What is it that brought you to the conclusion that it is  
19 a single touch with a continuous ridge flow?

20 A. In the instance of a double tap or an overlaid  
21 impression, it is virtually impossible that all of the  
22 ridges will align perfectly with no clue to the double  
23 tap or the overlay.

24 In my career, to the best of my knowledge, I have  
25 never seen ridges align perfectly in a double tap. I

1            have seen, I believe it would be safe to say, many  
2            thousands of examples of double taps, overlays in which  
3            the ridges crisscross, they are offset but there is  
4            always a clue to a double tap which can be discerned  
5            during the careful analysis of the latent print.

6                       In my analysis of Y7, I saw absolutely no such clues  
7            and thus concluded that Y7 is a single touch of one  
8            fingertip that represents the direct contact between the  
9            skin on a person's finger and the doorframe and then  
10          release.

11    Q.    Is it based on the premise that the ridge flow is  
12          continuous throughout the mark with the exception of  
13          this area that you have identified as the blob?

14    A.    Continuous, yes. Continuous, uninterrupted, no strong  
15          angularities, no offsetting, no overlaps, no breaks.

16    Q.    You did say on Tuesday that virtually no mark is without  
17          some distortion. Is that something with which you would  
18          agree?

19    A.    Absolutely.

20    Q.    How do you explain the presence of the fairly large area  
21          above the core if this is a single touch?

22    A.    I don't understand. Would you care to put an image up  
23          and ask me about the specific area to which you refer?

24    Q.    Could I have TS0006 up, please. Next page, please.

25                     This is the image that was submitted by Mr Kent. I

1 think you may already have seen this during your  
2 evidence-in-chief.

3 A. Yes.

4 Q. The area that you identify as the core of the mark is  
5 towards the top of that image; is that correct?

6 A. Yes.

7 Q. There is a fairly extensive area in this photograph to  
8 the left of the core, a very large area. How do you  
9 reconcile that with the fact that this is, in your  
10 opinion, a single touch?

11 A. Do you mean to the right of the core?

12 Q. That's correct, yes.

13 A. It's as I described: a series of parallel unbroken  
14 ridges. I see no disconformities; I see no ridge  
15 breaks; I see no overlaps; I see no smudging. I see an  
16 area of ridges flowing in concert without interruption.  
17 That leads me to conclude that it is uninterrupted by  
18 the presence of a double tap; therefore, I conclude that  
19 it's one single impression in that area.

20 Q. There are some fairly dark areas throughout the mark,  
21 not just in the blob area that you have described.

22 Again, is that something that you consider to be  
23 consistent with a single touch?

24 A. There's a fairly large dark area here (**indicated**)  
25 there's a fairly large dark area here, there's four

1 blobs right here, there's a dark area here (**indicated**).

2 For the record, I'm indicating areas all through this

3 piece of wood which have dark areas. My point is that I

4 have no expectation that the wood between the dark areas

5 I've indicated is blemish-free. Therefore, I would

6 expect to see dark areas within the print that are

7 completely unrelated to the print, as are the dark areas

8 that I've circled round the border of the print. I have

9 no problem with darker areas in that print. I think

10 they have little or nothing to do with the print itself.

11 Q. Do you see the area to the immediate right of the lower  
12 left-hand circle that you have drawn there?

13 A. Repeat the position again. Let me see if I can make  
14 sure I'm looking at the same spot.

15 Q. There is an area to the immediate right of the lower  
16 left-hand circle that you have drawn?

17 A. To the immediate left of this (**indicated**)?

18 Q. To the immediate right.

19 A. Are you referring to this area (**indicated**)?

20 Q. No, above that.

21 A. Above that. I'm afraid I will have to ask you then to  
22 mark it yourself.

23 Q. If I can show you with the cursor there is an area to  
24 the immediate right of the lower left-hand circle that  
25 you have drawn and it goes around what would be the

1 bottom of the mark if you were looking at it as it is on  
2 the door standard to the top left-hand circle that  
3 you've drawn.

4 Is that shape consistent with this being a single  
5 touch?

6 A. In my opinion, yes.

7 Q. Does it not bulge out beyond the boundaries of what a  
8 thumb would normally look like?

9 A. I used the analogy earlier in the week of a football  
10 deflating, being pressed against the wall and distorting  
11 and leaving an impression. The tip of a finger is a  
12 complex spheroidal shape. It is not a firm, hard shape.  
13 When pressed against a flat surface, you will get  
14 bulging. In most cases, you will get a smooth oval  
15 shape without concave or extraordinarily convex lines  
16 along the peripheral margin of the print. But I see  
17 nothing in this print to support the belief that the  
18 shape, in any way, indicates anything out of the  
19 ordinary with regard to a normal touching.

20 Q. Why then does this area at the bottom of the mark bulge  
21 beyond the boundaries of the top of the mark?

22 A. I don't see that it does. Would you please draw a line  
23 and show me what you're talking about? If you would  
24 rather I might suggest you let me draw a line around it  
25 and you tell me what part of the line you don't like;

1           it's your choice.

2       Q.    If you want to give it a try, Mr Wertheim, please go  
3           ahead.

4       A.    All right then. What I am going to do then is I am  
5           going to cut this. I appreciate it's Mr Holmes, isn't  
6           it?

7       THE CHAIRMAN:   Yes, Mr Holmes.

8       A.    The name tag is on the wrong spot so you will have to  
9           forgive me. I can appreciate that I've grown somewhat  
10          more adept at the use of this tool in the last several  
11          days than you might be at the initial start. I've  
12          enlarged the area which includes Y7 and the five yellow  
13          circles that I set to illustrate dark spots outside.  
14          I'm going to choose my magenta line tool and I'm going  
15          to trace roughly the outline of this print and then when  
16          I'm finished, I'd be glad to entertain  
17          any ... **(indicated)**

18                 Now, for your reference, Mr Holmes, if you wish to  
19          compare this on my phase 1 chart of Y7 you will find a  
20          yellow outline on Shirley McKie's inked fingerprint  
21          which represents the outline of the area in Y7. So if  
22          you have access to my phase 1 chart and Shirley McKie's  
23          print I would invite some discussion on whether the  
24          shape I have just traced on the screen corresponds to  
25          the shape in that presentation.

1                   For purposes here I think I might try to rotate this  
2                   to an upright position as seen to the eye of the  
3                   fingerprint examiner.

4                   Could you, please, rotate it for me because I'm not  
5                   sure that I know what I'm doing?

6                   There we go, we've lost the cut. I'll recut the  
7                   thing then. You going to cut it for me? Perfect, thank  
8                   you.

9       MR HOLMES: You have drawn a line round this mark and it  
10            would appear to me that at the bottom of the mark there  
11            is a significantly wider area than there is at the top.  
12            Is that not correct?

13    A.    If I'm not correct the bottom of the thumb is wider than  
14           the top of the thumb. I see nothing in there that  
15           causes me to reconsider my opinion that this is a single  
16           tap.

17    Q.    Is it not possible this could be made up of two ovals,  
18           one pointing north to south and one pointing east to  
19           west within that mark?

20    A.    No. In my opinion, that is utterly impossible.

21    Q.    How many ridges would you say there are above the core  
22           in this mark?

23    A.    Well, I haven't counted them but let's do so. I'm going  
24           to put a little green hash mark rather than try to trace  
25           the entire ridge. First up I will put a red circle to

1 indicate the area that I see as the core. The direct  
2 core is somewhere in the area or proximity of the red  
3 circle that I've drawn. **(Indicated)**

4 Now I'm going to go to my green hash marks and we  
5 will work our way up to the tip: 1, 2, 3, 4, 5, I  
6 believe we've got 6 right there, 7, 8, 9, 10, 11, 12,  
7 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

8 We may have some colour reversal. For the record  
9 I'm going through the blob right now, the area I  
10 highlighted as unreliable. 25, 26, 27. Now we're back  
11 on clear ridges. 28, 29, 30, 31, 32, 33, 34, 35.

12 So my count is 35. I will state that that is not an  
13 absolute number. If you were to do a ridge count on a  
14 line to either side of that -- I'm drawing a blue line  
15 from the core straight up through those ridges to the  
16 top and I've tried to keep it straight when I was doing  
17 the green. Perhaps I should have put the blue line  
18 first. If you were to take a line 10 degrees to either  
19 side of the one I've drawn **(indicated)**, the ridge count  
20 will vary because of ridge endings and bifurcations that  
21 occur within that cone or that angle that I've defined  
22 by the two outside blue lines. So the number 35 is an  
23 approximate count but I think it is reasonably accurate.

24 Q. How many ridges, would you ordinarily expect to be  
25 visible on an impression that you come across above the

1 core?

2 A. I've never counted them. It has no bearing on the  
3 identification. I've seen latent prints with no ridges  
4 above the core, everything below the core. I've seen  
5 other latent prints that will run from the core all the  
6 way up to the nail itself and have a greater ridge count  
7 than this. There is nothing in the number 35, the  
8 number 30, the number 20, the number 40 or the number 50  
9 that would indicate that there are any issues here.

10 Q. On inked impression how many ridges above the core would  
11 you normally expect to be visible?

12 A. I have never in my career known a fingerprint examiner  
13 to count the ridges from the core to the tip of a  
14 finger. Ridge count in the sense of inked prints is  
15 done between the deltas and the core. But, if you like,  
16 let's put Shirley McKie's inked fingerprint up there --  
17 we happen to have one -- and count the ridges from the  
18 core to the tip of that.

19 Q. Perhaps later, Mr Wertheim. My question really is with  
20 this number of ridges above the core, how far round do  
21 you think this fingerprint represents towards the nail  
22 of the person who deposited it?

23 A. I will make a very rough guess. Some people might  
24 criticise me for even speculating on this issue because  
25 there is no clear indication, but based on my training

1 and experience I would say the nail would subscribe an  
2 arc possibly in the location I've shown in red  
3 **(indicated)**. That is subject to interpretation. The  
4 nail may subscribe an arc in the area I'm drawing inside  
5 the first line or it may subscribe an arc in the area  
6 outside the first line ... let's try that one again.  
7 There may be a nail arc up where I've drawn the top red  
8 line now. It could be anywhere in that range.

9 Q. So is it possible for you to say, looking at this mark,  
10 how near the tip of the finger that last ridge at the  
11 top would be?

12 A. I'm sorry?

13 Q. Is it possible for you to say, upon looking at this  
14 mark, how near the tip of the finger that last ridge  
15 that is visible at the top would be?

16 A. How near in what respect, please, Mr Holmes? Do you  
17 mean how near in physical inches or millimetres or how  
18 near in ridge count?

19 Q. How near in a physical distance?

20 A. Well, we don't have a scale here to tell us what the  
21 physical distance is. I don't know.

22 Q. Perhaps by comparison to the remainder of the thumb  
23 then.

24 A. Well, we don't have the remainder of the thumb. The  
25 remainder of the thumb is somewhere down off the bottom

1 of this screen.

2 Q. What you have is what you have marked on there, the  
3 core, and a fairly significant number of ridges above  
4 it. Is that correct?

5 A. You will have to put the word "significant" -- or the  
6 phrase "significant number of ridges" in context. It's  
7 significant if you are considering ten ridges it's  
8 insignificant if you are considering 100. We've got 35  
9 ridges. There's nothing remarkable about that.

10 In relation to the bottom of the print and the tip  
11 of the nail, if I can demonstrate on my own thumb, some  
12 people will have a core in the very middle of the pad.  
13 Some people will have a core lower, closer to the  
14 knuckle. Some people will have a core higher towards  
15 the tip. There's nothing in this print that allows us  
16 to make any determination regarding the position of the  
17 core in relation to either the nail or the knuckle.

18 Q. Is there anything about the position of the core on this  
19 mark that allows you to -- I won't say determine but to  
20 tell anything about the way in which the mark was  
21 deposited?

22 A. The mark was deposited with the centre core area at the  
23 lower dimension of the touch, with the touch  
24 encompassing an area of skin above the core and to the  
25 right of the core. What that means -- and I will

1 attempt to demonstrate as I hold up the tablet -- is the  
2 thumb was not pressed flat as I am now demonstrating  
3 with my thumb (**indicated**). The thumb was rolled  
4 slightly to the tip and it was canted slightly to the  
5 right. So you have an impression in roughly that  
6 position (**indicated**).

7 Can you see sir?

8 THE CHAIRMAN: Yes, I can see, thank you.

9 A. Mr Holmes, can you see what I'm demonstrating here?

10 MR HOLMES: Yes, thank you.

11 A. I might comment because some issues have been raised  
12 criticising me for the fact that I took so many inked  
13 prints from Shirley McKie but when comparing  
14 fingerprints the best possible results will accrue when  
15 one compares like to like. Therefore, the tip of the  
16 finger when deposited in that manner (**indicated**) will  
17 not be recorded on rolled fingerprints nor will it be  
18 recorded on a normal plain impression such as used in  
19 the SCRO productions and such as we used in the Y7  
20 productions for purposes of this Inquiry. That was a  
21 plain impression taken at the bottom which did not  
22 include the inked print at the tip.

23 Therefore, when I took the inked prints from Shirley  
24 McKie, I had an ink pad and I had a virtually unlimited  
25 supply of paper. Therefore, I kept pressing the thumb,

1            trying to duplicate direction, pressure and rotation of  
2            touch in order to achieve an inked print that  
3            represented the same area of friction skin, the same  
4            direction, the same rotation along the axis of the thumb  
5            and the same upward cant that is represented in this  
6            inked print.

7        Q.    So for the print to be deposited in the way that you  
8            have concluded, what would have to happen is for the  
9            thumb to be rolled upwards towards the tip and to the  
10          right; is that correct?

11       A.    That's correct.

12       Q.    Is that an unnatural way for someone to deposit a  
13          fingerprint?

14       A.    I am not an expert in the natural way somebody touches a  
15          doorframe at 4 feet 10 inches off the ground. I would  
16          say I see nothing unnatural in walking by a doorframe  
17          and touching with your thumb aimed slightly upwards and  
18          possibly canted to one side. I see nothing unnatural in  
19          that.

20       Q.    Individuals who take inked printed impressions from  
21          donors have to be trained in how to do that, do they  
22          not? They have to be trained in how to roll the thumb  
23          and roll the fingers so as to get a clear impression.

24                    Is that correct?

25       A.    I'm having trouble with the accent. I sincerely

1           apologise. Did you say door knobs?

2       Q.    Donors?

3       A.    My apologies. I was distracted so, please, repeat the  
4           question.

5       Q.    Individuals, police officers and the like, who take  
6           inked impressions from donors have to be trained how to  
7           do that, do they not? They have to be trained how to  
8           roll an individual's finger so as to get clear mark on  
9           the fingerprint form?

10      A.    That is correct, yes, sir.

11      Q.    Do you not then consider it unlikely that an individual  
12           leaving a chance impression would roll their thumb  
13           towards the tip of the thumb and to the right leaving an  
14           absolutely clear impression with a clear ridge flow?

15      A.    That's correct. I've never seen it. Criminals don't  
16           roll their fingerprints at the scene of a crime.

17      Q.    But still the interpretation that you prefer is that  
18           this is a single touch and that it was deposited in that  
19           way?

20      A.    Yes. Now let me comment on your question regarding the  
21           way police officers are trained to take inked  
22           fingerprints. The purposes of taking inked fingerprints  
23           on a fingerprint form are primarily for the  
24           classification and filing of those fingerprints in  
25           criminal history records. They are taken to include the

1 largest area of friction ridge skin and document that  
2 area of skin. They cannot be taken to include every  
3 area of friction skin. But the primary purpose of  
4 taking inked fingerprints on a fingerprint form would be  
5 for criminal history purposes so that the fingerprints  
6 may be classified and filed by a classification formula,  
7 even though we now use AFIS, and so that a majority of  
8 the friction ridge skin is recorded.

9 In the vast, vast majority of cases inked  
10 fingerprints taken in that fashion are taken prior to  
11 the development of latent prints for comparison. A  
12 fingerprint expert -- not a jailer taking inked prints  
13 for a criminal history records file, but a fingerprint  
14 expert taking inked prints specifically for comparison  
15 purpose with a latent print that has already been  
16 developed -- will try to duplicate the area of friction  
17 skin and the direction and pressure of touch so he's  
18 comparing best possible inked print to the latent print  
19 that he has to work with.

20 Q. You will be aware that a number of Core Participants  
21 were asked to provide opinions concerning Y7 and Q12 to  
22 the Inquiry.

23 A. Yes.

24 Q. And the SCRO contributors are of the view that this is  
25 more than one touch. Are they wrong?

1 A. They are.

2 Q. You will be aware that Mr Swann considers this to be  
3 more than one touch. Is he wrong?

4 A. He is. If that's his position, he is but let me ask you  
5 as well, Mr Holmes, because in reference to your  
6 immediately previous question a number of SCRO experts  
7 have represented the opinion that this is more than one  
8 touch, is that your ...?

9 Q. I am speaking about my clients when I say that.

10 A. Okay. I beg your pardon because I don't know who your  
11 clients are specifically by name but it was my  
12 understanding that there were SCRO experts who had  
13 agreed that Y7 is a single touch. So if I'm wrong in  
14 that belief, I apologise.

15 Q. We've certainly heard no evidence of that, Mr Wertheim,  
16 and the nine officers that I represent all consider it  
17 to be more than one touch.

18 A. Very good, I stand corrected.

19 Q. Are these officers wrong in their opinion?

20 A. They are.

21 Q. Mr Swann, Mr Leadbetter, they are wrong in their  
22 opinion; is that correct?

23 A. They are.

24 Q. Mr Berry and Mr Graham are you aware of what their  
25 opinion is on whether it was a single or double touch?

1 A. No.

2 Q. If they are of the view that it is more than a single  
3 touch, again are they wrong?

4 A. They are.

5 Q. Mr McLeod, who agrees with you on the identification or  
6 the lack of an identification of Y7, states in his  
7 contribution to the comparative exercise that Y7 is most  
8 likely the result of a multiple touch with some  
9 rotation. Is he wrong?

10 A. I would have to know what you mean by multiple touch  
11 with some rotation. It is possible that when the finger  
12 contacted the surface during the contact it may have  
13 moved up and rotated to the side. So there may have  
14 been some movement of the finger during the deposition  
15 of Y7, but it was a single act of touch and release  
16 regardless of whether some rolling either from core to  
17 tip or side to side.

18 THE CHAIRMAN: This is one of the things I was going to ask  
19 you and I just want to get it clear now. When you say  
20 about a single touch, it can either, as I understand it,  
21 it can either mean that the person's finger has touched  
22 and been lifted and touched again, or can it mean that  
23 the first physical contact has continued but has changed  
24 position?

25 A. Yes, sir. If the finger touches, lifts and touches

1           again, that is what we would refer to as a double tap.

2           We might call it an overlay, we might call it two  
3           touches and that did not happen in this case and I would  
4           not refer to that as a single touch.

5                     A single touch can mean or can include an impression  
6           in which the finger touched and then rotated before it  
7           being lifted. That has to be considered a single touch.  
8           If that were not a single touch, no rolled impression  
9           taken in the history of the world is a single touch  
10          because every rolled impression taken on an inked print  
11          form is put with the thumb on one side, rolled across to  
12          the other side and lifted and we consider inked  
13          prints -- I'm glad, you find it funny, thank you -- we  
14          consider inked prints rolled impressions to be single  
15          touches and in that sense this is a single touch.

16    THE CHAIRMAN:   I just wanted to get it clear in my own mind.

17          Are you not ruling out the possibility that there has  
18          been that type of movement that you have just described  
19          with the finger remaining in contact?

20    A.    Oh no. I would not rule that out at all, sir, and I  
21          apologise to the Inquiry if I left the impression in the  
22          past three days that I was denying that movement  
23          occurred. I'm denying that a double tap or that a  
24          discontinuous impression was left and I'm also denying  
25          that twisting and smudging occurred. There may have

1           been some slight rolling either side to side or there  
2           may have been some rolling centre to tip and that  
3           rolling may have been diagonal, from core diagonally  
4           towards the tip. So there may have been movement, but  
5           this mark represents a single contact, possibly  
6           accompanied by some movement, and then removal.

7       THE CHAIRMAN:   It is just I want it to be clear what terms  
8           are being used.

9       MR HOLMES:   I am taking it that when Mr McLeod says multiple  
10          touch he refers to the former situation where the finger  
11          is lifted and then deposited again. If I am wrong in  
12          that, no doubt he will correct me.

13                 If his opinion is that this is a multiple touch,  
14          then you're saying that he is wrong. Am I correct in  
15          that?

16   A.   If Mr McLeod states that this fingerprint represents two  
17          discontinuous touches of the skin, then he is wrong in  
18          that assessment.

19   Q.   Mr Kent has also given evidence and he has also said  
20          that this is as a result of more than one touch.

21                 Do you disagree with that?

22   A.   I absolutely disagree with that because Mr Kent based  
23          his conclusion in part on the fact that the ridges at  
24          the top of this mark are thick and far apart and the  
25          ridges at the bottom are thin and close together and

1 using an inked printed impression taken by the Met and  
2 presented in their chart that was presented to us, the  
3 participants, we saw exactly that same ridge structure  
4 in that inked print, perfectly consistent with what we  
5 see here.

6 Q. Mr Kent gave evidence that your approach (that is to  
7 say, outlining a continuous ridge flow within this mark.  
8 For those using LiveNote it's on day 19) Mr Kent gave  
9 evidence that that approach was, as he described it,  
10 simplistic and potentially misleading to a lay jury.

11 Can I take it you would disagree with that?

12 A. Mr Kent is a brilliant chemist. Mr Kent is not a  
13 trained fingerprint expert. Mr Kent is not an  
14 experienced fingerprint expert. I would find any such  
15 statement to be outside the realm of Mr Kent's expertise  
16 but further I disagree with the statement on its own  
17 merits.

18 Q. On Tuesday you cited Mr Ashbaugh as the source of some  
19 authority on how to spot a double touch.

20 Would you agree with that?

21 A. Yes, I would.

22 Q. Mr Ashbaugh wrote an e-mail in 2000, I think the number  
23 is CO1752. It is on page 5?

24 MISS BAHRAMI: Would you like to save this image?

25 MR HOLMES: Yes, please.

1 MISS BAHRAMI: FI2409.10.

2 MR HOLMES: CO1752. It is on page 5 of the document, it may

3 be page 6 of the PDF. Can you move on a page again,

4 please, and again.

5 THE CHAIRMAN: Do you want to go back?

6 A. For the record I would like to state that I have heard

7 of the existence of this e-mail but I have never seen it

8 before. **(Pause)**

9 MR HOLMES: Apologies, Mr Wertheim, I think we now have the

10 correct page. If you look down to the fourth paragraph

11 on that page it says:

12 "The photograph of the fingerprint chart was of very

13 poor quality. It had 16 lines drawn into the mark but I

14 basically ignored it."

15 That's the paragraph that I am looking at.

16 A. Very good. My screen is very faint, broken up. Is that

17 true of everybody's screen?

18 Q. The document is not good. He goes on to say:

19 "I carried out a brief analysis of the crime scene

20 mark. Under normal circumstances a mark of this nature

21 may require an hour or more to analyse the various ridge

22 paths as the mark was at least a double tap, if not a

23 triple tap."

24 Again, Mr Wertheim, my question is: is Mr Ashbaugh

25 wrong about this being a double or even a triple touch

1 as opposed to a single touch with continuous ridge flow?

2 A. Yes, Mr Ashbaugh is. If that's Mr Ashbaugh's position,

3 I would love very much to hear his explanation why he

4 believes it to be so because I do not see it that way

5 whatsoever.

6 I would add that I have taken two or three courses

7 under with Mr Ashbaugh. I have studied all of the red

8 flags and Mr Ashbaugh coined the use of the term "red

9 flags" specifically in the analysis of a fingerprint --

10 of a latent print, the analysis phase of the latent

11 print. Mr Ashbaugh coined the term "red flags" to

12 indicate features which he saw that were an indication

13 of a double or triple tap or other problems in the

14 print.

15 The features defined by Mr Ashbaugh in the courses I

16 took under him included an angularity of the ridges

17 where they meet. It included ridges that didn't join

18 evenly. It included bulges in the ridges along a

19 certain line within the fingerprint. It included

20 overlapping ridges along a margin or a line through a

21 fingerprint. It included spurs on the edges of a

22 significant number of ridges in line with each other.

23 I see none of those clues that I was ever instructed

24 in any of Mr Ashbaugh's class present in Y7: none.

25 Therefore, I would say that unless Mr Ashbaugh has

1 discovered brand new red flags that he did not include  
2 in any of his courses, there are no such clues in Y7,  
3 there is nothing in Y7 which, in my experience,  
4 indicates a double tap.

5 I followed the analysis procedure enunciated by  
6 Mr Ashbaugh in which he says, "may require an hour or  
7 more to analyse the various ridge paths", because, as  
8 was seen in the presentation I used at Shirley McKie's  
9 trial I traced every single ridge path in that mark from  
10 the core all the way up to very tip, all of the ridges  
11 that we counted, which might be a good exercise for you  
12 to go through and look at that exhibit later and see if  
13 the number of ridges that I've drawn in that deviates  
14 significantly from the number of ridges I counted for  
15 you a minute ago.

16 But my point is I followed the accepted methodology,  
17 I followed the training that I have received from  
18 Mr Ashbaugh and any other expert that I've attended  
19 classes with, I followed my experience, 36 years, and I  
20 recognise that some of the SCRO experts have more than  
21 that, but I still maintain that there is nothing in this  
22 print to indicate a double tap and I would like very  
23 much for Mr Ashbaugh to demonstrate to me what he sees  
24 that leads him to that conclusion because I don't see  
25 it.

1 Q. On this occasion you are willing to differ from him?

2 A. Absolutely.

3 Q. I will move on just briefly to the topic of your Inquiry  
4 statement. The first paragraph of that statement says  
5 that you were approached in December 1998 by telephone  
6 by Mr McKie and that you thereafter say, as at  
7 March 1999, when you came to examine Y7 you had no  
8 further conversations with the McKies. Is that correct?

9 A. To the best of my recollection, that is correct. After  
10 that initial contact from Mr McKie, I asked him to have  
11 his attorney contact me. You'll appreciate that in the  
12 United States the distinction between solicitor and --

13 THE CHAIRMAN: Oh, yes, I am familiar with that, thank you.

14 A. I was contacted shortly thereafter by Angela McCracken  
15 and virtually all of the communication, all the  
16 arrangements that were made, were done between myself  
17 and Ms McCracken.

18 MR HOLMES: You will at some point, of course, have had  
19 contact with Ms McKie herself because you took inked  
20 impressions from her. Is that correct?

21 A. Oh, it's in my notes. Off the top of my head I don't  
22 remember the exact date and time.

23 THE CHAIRMAN: We have those.

24 MR HOLMES: How many impressions did you take?

25 A. Boy, I don't know the answer, Mr Holmes. If I had had

1           any idea that it would become controversial I would have  
2           counted them.

3       THE CHAIRMAN: I thought you did give us some figure between  
4           100 and 150.

5       A. I've on various occasions I have said 100/150. It's  
6           something in excess of 100, I'm sure. I had  
7           Miss McCracken arrange for me different styles of paper.  
8           I had her arrange for me the cheap copy paper that they  
9           used, I had her arrange for me the expensive stationery  
10          they use and don't mean one sheet of each I mean an  
11          unlimited supply, as much as I wanted. I had her  
12          arrange for me the tractor feed style computer printer  
13          paper that they use.

14                When I was printing Ms McKie, if I can stand and  
15          demonstrate, I had her standing to my right, I had the  
16          ink pad and I had -- there was a table, possibly  
17          slightly higher than this but maybe not, and I had my  
18          ink pad and I had all of the various papers and I would  
19          press her thumb over and over and over (**indicated**). I  
20          began with a complete set of rolled impressions taken in  
21          the fashion of a jailer fingerprinting a suspect being  
22          booked into gaol. Those were the rolled impressions and  
23          the plain impressions. I began that way.

24                But because the allegation was that it was McKie's  
25          left thumb, following the taking of all ten fingers one

1 time, then I proceeded to take just her left thumb.  
2 Because her left thumb was on my right side it was  
3 easier for me to just hold her thumb out and press the  
4 ink, press the paper, yeah right, it needs to be a  
5 little higher, press the paper, right, it needs to be a  
6 little more to the left now and I just went over and  
7 over and over and I repeated the process for two or  
8 three sheets of paper of each kind completely filling at  
9 least one edge of the paper with print after print after  
10 print.

11 So I had at my disposal three or four different  
12 types of paper and I filled, to the best of my  
13 recollection, two or three sheets of each kind of paper  
14 with numerous inked impressions.

15 Now the reason I did that is because, as I've  
16 stated, I want to compare like to like. I wanted to  
17 duplicate as exactly as I could the direction and  
18 pressure and rotation around the axis of the thumb  
19 sideways and I'm not talking about a rolled impression  
20 I'm talking about whether the thumb was canted to one  
21 side when I touched. So I took prints over and over and  
22 over trying to reproduce that.

23 If you were to put it to me that the number of  
24 prints that I took was only 50, I would say I can't  
25 disprove that. To the best of my recollection it was

1           100 to 150.

2       THE CHAIRMAN: I think maybe what you are being asked is you  
3           took a large number.

4       A. I took a large number.

5       MR HOLMES: Whatever figure you gave yesterday or previously  
6           the answer is, I take it, you are not sure how many you  
7           took, is that --

8       A. They are all wild guesses and approximations. They are  
9           not intended to mislead.

10      Q. Were you made aware by Ms McKie or by her solicitors or  
11         anyone that you had contact with in the course of this  
12         case that the mark Y7 had previously been examined by  
13         another expert?

14      A. Mr Swann himself told me that before I ever came to  
15         Glasgow. At the Fingerprint Society lectures in 1999, I  
16         was making a presentation and the week following the  
17         lectures I was due to come to Scotland and look at the  
18         prints here in Glasgow. So the week prior to my visit  
19         to Glasgow I was at the Fingerprint Society lectures.

20                 Mr Swann, who I barely knew at the time, approached  
21         me in the hall, between the lobby of the hotel and the  
22         main lecture hall, and I remember the moment clearly  
23         because I thought it highly improper. He approached me,  
24         introduced himself and said, "I understand you're an  
25         expert who's going to Scotland to look at the McKie

1 case", and I was slightly taken aback and I said, "Yes,  
2 I am". And he said, "Well, I've already looked at that  
3 case and I can assure you the fingerprint is not forged  
4 and it is Ms McKie's print. There can be no doubt of  
5 that".

6 And that final clause, "there can be no doubt of  
7 that", burned itself into my mind because I thought why  
8 in God's name is this man telling me this, knowing that  
9 I'm an expert going to examine that print? Is he trying  
10 to influence me?

11 I found the whole conversation uncomfortable and  
12 improper and at least a borderline breach of ethics on  
13 Mr Swann's part if he had viewed the print previously to  
14 approach me like that before I'd ever examined it, to  
15 tell me what his conclusions were and what conclusions I  
16 should reach. So, no, I did not hear that from Mr McKie  
17 or Shirley McKie or Angela McCracken. I heard that  
18 direct from the mouth of Peter Swann before I came to  
19 Glasgow.

20 Q. Is it something you discussed with anyone else before  
21 you gave evidence?

22 A. I believe I may have mentioned it to Angela McCracken or  
23 Donald Findlay. I have no direct recollection of a  
24 conversation involving that, although I cannot believe  
25 that something that significant would have gone

1 unmentioned. I did not note that. I'm not aware  
2 whether Ms McCracken or Mr Findlay made note of it.

3 Q. Did you express any view when Mr Swann approached you as  
4 to whether the mark was a good identification or not?

5 A. When Mr Swann approached me I hadn't seen the mark. I  
6 had no opinion of anything.

7 Q. When you did come to view the mark, you say in your  
8 statement to this Inquiry that within a few moments you  
9 had serious doubts about the accuracy of the  
10 identification.

11 Is that tantamount to saying that you knew that it  
12 was not or Y7 had not been deposited by Shirley McKie?

13 A. If I showed you a blurred, out-of-focus picture of Mike  
14 Tyson and a blurred out-of-focus picture of Madonna how  
15 long is it going to take you to realise they are not the  
16 same person? I stand firmly by my statement that it was  
17 a matter of some seconds, measured not in many minutes,  
18 that I realised it was an erroneous identification and  
19 as I stated, I believe on Tuesday, as soon as I reached  
20 that realisation I put the SCRO materials aside because  
21 I wanted to proceed with a very careful analysis of the  
22 latent print before I went to the inked print and then I  
23 wanted to look at my own inked prints of Ms McKie.

24 So, yes, it was a matter of seconds when I saw the  
25 two prints, Y7 and Shirley McKie's print on the charted

1 enlargements at the Procurator Fiscals' Office here in  
2 Glasgow, that I realised this was an erroneous  
3 identification.

4 Q. That's my question because your statement says that  
5 within moments you had serious doubts but it's not that  
6 you had your doubts you knew at that point that this  
7 was, in your opinion, an erroneous identification. Is  
8 that correct?

9 A. Both statements are correct because every human being is  
10 subject to self-doubt when he sees in front of him  
11 the impossible and, as a fingerprint expert, to me the  
12 thought that the SCRO could make a mistake and chart  
13 16 points was the impossible. So the human response of  
14 self-doubt was what compelled me then to close those  
15 productions and say, right, I have to have an original  
16 image of the inked print taken by myself so I know it's  
17 Shirley McKie's left thumb, and not some other finger  
18 from her or another person, and I have to have some  
19 crisp, clear, clean photographs of the mark and I want  
20 to work through the proper analysis and comparison and  
21 evaluation and reach my own conclusion.

22 In other words, what I'm saying is both statements  
23 are correct, Mr Holmes. I knew it was a bad  
24 identification but the human emotion of self-doubt  
25 compelled me to act in the way I did after that. This

1 is the gut-wrenching effect that I referred to earlier  
2 which the newspapers seem to have keyed in on as the  
3 only thing worthy of reporting from Tuesday's session.

4 Q. You have quantified these moments in the past in  
5 interviews you have given as 60 or 90 seconds. I take  
6 it you wouldn't disagree with that now?

7 A. I didn't have a stop watch. I'd say, yes, 60 seconds.  
8 If you were to tell me it was 30 seconds or 120 seconds  
9 because you were there with a stop watch, I'd say okay.

10 Q. My question is if you were carrying out an ACE-V  
11 analysis as you have described in your evidence so far,  
12 would you even have looked at the known print within 60  
13 or 90 seconds?

14 A. Oh no. No, that's why as soon as I had looked at that  
15 chart and had that feeling, I closed the chart and I  
16 said, right, I've got to back off and do this correctly.  
17 If I'm to challenge the British fingerprint profession  
18 with the first erroneous identification in the history  
19 of 100 years of fingerprints in Great Britain I have to  
20 do this right.

21 Q. By that stage you had already seen both impressions. Is  
22 that not correct?

23 A. Well, it was a little late to unsee the inked impression  
24 in the chart.

25 Q. On that basis the analysis or the examination that you

1 carried out of Y7 was not, strictly speaking, an ACE-V  
2 analysis, was it?

3 A. It was an ACE-V analysis but it was accompanied by that  
4 initial glance. But I scrupulously followed ACE-V and I  
5 scrupulously documented it in my notes. My notes will  
6 reflect the analysis I did.

7 Q. You said on Tuesday that what you do when you carry out  
8 your analysis is to assess the mark, you take in the  
9 number of details you would expect to see in the known  
10 print and you, at that stage, form an opinion as to what  
11 your level of tolerance might be, that kind of thing.

12 That's not what you were doing when you were looking at  
13 both the marked enlargement of the inked print and the  
14 marked enlargement of Y7, was it?

15 A. No, it wasn't.

16 Q. Again, this may be superfluous but you state in a  
17 letter, 4th February 2000, addressed to Lord Hardy that  
18 you glanced at Ms McKie's fingerprints and discovered  
19 much to your shock that the mark was not her print at  
20 all.

21 Again, are you content with the fact that this was a  
22 glance?

23 A. Yes. Let me go back to my earlier analogy, Mr Holmes.  
24 If I give you an out-of-focus photograph of Mike Tyson  
25 and an out-of-focus photograph of Madonna and you take a

1           glance at them and you say that's not the same person  
2           and you put them away, then the doubt that's going to  
3           creep in and the thought that's going to occur to you  
4           during the night is, well, you know, those images were  
5           out of focus and there were 16 points, they each had two  
6           eyes, two ears, too nostrils, a chin, two cheeks, a  
7           forehead, a nose. I've got 16 points maybe the exposure  
8           was wrong on one of the photographs, maybe it was  
9           Madonna with a dark tan in one of the photographs and so  
10          self-doubt will creep in and you say, okay, before I  
11          judge the two photographs I saw yesterday, I want to  
12          take two photographs myself that are in focus and I'm  
13          going to look at them really close to make sure I'm  
14          right, but you still know you're right. Mike Tyson and  
15          Madonna are not the same person. Y7 and Shirley McKie's  
16          left thumb are not the same fingerprint.

17    Q.    It's that obvious?

18    A.    To any true expert it is that obvious. I don't know how  
19          many thousands of fingerprint experts around the world  
20          have seen this mark. Perhaps you could do the survey  
21          but I know the number who have seen it and disagreed  
22          with the identification is overwhelming and the number  
23          who have seen it and agree with it could be put on one  
24          bus.

25    Q.    There are still fingerprint experts who are arguing this

1           some ten years or more later. If it is that obvious why  
2           are we having this argument, Mr Wertheim?

3       A.    Because I think all of those arguing are in this room,  
4           with the exception of Mr Leadbetter, Mr Swann and  
5           Mr Berry. The number who are maintaining that it is  
6           correct is a very small number.

7       Q.    You mentioned in your statement that you gave images of  
8           Y7 and of Ms McKie's fingerprint to Mr Grieve and  
9           Mr Ashbaugh. Why?

10      A.    The V part of ACE-V is "verification". In that regard,  
11           as I testified on Tuesday, blind verification is the  
12           strongest form of verification that exists. I made the  
13           statement on Tuesday that blind verification is  
14           virtually impossible to achieve unless you have a very  
15           large number of examiners so that it can be taken from  
16           one and given to another without any knowledge.

17                    This opportunity was perfect for blind verification  
18           because I had been contacted by Iain McKie and had a  
19           complete discussion with Angela McCracken regarding the  
20           issue of fingerprint forgery. I was deemed to be an  
21           expert in fingerprint forgery because I conducted  
22           extensive research into forgery in 1992, '93, '94 and  
23           published a paper on the topic in 1994 that is still  
24           considered probably one of the leading resources for  
25           fingerprint forgery in the world today. I believe

1 Mr Kent referred to my paper when he did the analysis of  
2 mark Y7 for forgery.

3 The point is both Mr Grieve and Mr Ashbaugh believed  
4 that I was only looking at Y7 for the single issue of  
5 whether the print was forged. There was no thought  
6 whatsoever that it was an erroneous identification.  
7 Therefore, I believe it was on the Friday of that week,  
8 I had been to Glasgow, I had returned to Edinburgh, I  
9 had not talked to Mr Grieve or Mr Ashbaugh at all, I  
10 returned to Glasgow then and obtained from Ms McCracken  
11 additional photographs of Y7 on a one-to-one scale. In  
12 other words, actual size.

13 In two envelopes, I placed a photograph of Y7 and a  
14 sheet of paper on which I had taken Shirley McKie's  
15 original inked prints so that each envelope contained  
16 both original photographs made using SCRO  
17 negatives ... let me re-track that because I can't say  
18 I'm absolutely certain of that. They may have been  
19 photographs taken using my own camera and my own  
20 negatives but I believe at that point I was still using  
21 photographs made from the SCRO negative.

22 Each envelope contained a photograph of Y7, a sheet  
23 of inked prints taken in the correct direction and  
24 pressure and orientation, and I believe at that point I  
25 had also obtained from Ms McCracken some extra

1 photocopies of the charted enlargements which I put in  
2 the envelopes.

3 That night when I returned to Edinburgh, it was late  
4 in the day and I was to meet Mr Ashbaugh and Mr Grieve  
5 down in the lounge of the hotel prior to going out to  
6 have dinner together. When I met them in the lounge, I  
7 had consciously planned this in my own mind to assure  
8 that I offered them no insight whatsoever into my  
9 conclusion.

10 When we met in the lounge, we sat, we had a drink  
11 and we're talking and when nobody was listening I leaned  
12 forward and I said to them, as I recall -- I'll try to  
13 repeat the words exactly, although I can't swear to the  
14 exactness of it, I looked at both of them and I said, "I  
15 need you both to do me a big favour". And they both  
16 said, "Sure, Pat". I said, "No, a really big favour",  
17 and they paused for a second and said, "All right", and  
18 I reached into my pocket and I removed the two envelopes  
19 and they were sealed. I had sealed the gum flap on  
20 them. I handed one to Mr Ashbaugh and one to Mr Grieve  
21 and I said, "In these envelopes you will find some  
22 fingerprints. I want you to do a thorough examination  
23 and talk to a lawyer next Sunday".

24 I had talked to Donald Findlay and he had agreed  
25 that Sunday, although inconvenient, would be possible

1 for him to talk to Mr Grieve and Mr Ashbaugh. They both  
2 accepted the envelopes and said, "All right", and then  
3 before they could say anything else I said, "Fine, let's  
4 go get supper", and I stood up. I wanted to make it  
5 absolutely clear to them that there was going to be  
6 absolutely no discussion of those fingerprints  
7 whatsoever, that they were to look at the contents of  
8 those envelopes knowing only that there were  
9 fingerprints in them and that they were requested to do  
10 an examination and talk to the lawyer two days later.

11 Those are the circumstances I think perhaps not  
12 exactly but very, very accurately reflecting the  
13 circumstances under which I handed those fingerprints to  
14 Mr Grieve and Mr Ashbaugh.

15 Q. At the time neither of them were instructed in  
16 Ms McKie's defence; is that correct?

17 A. No, they were not. At that point, they both thought  
18 they were looking at fingerprint forgery because that's  
19 what I had talked about earlier in the week. They had  
20 not talked to Mr McKie, nor Shirley McKie, nor Mr Angela  
21 McCracken. They had not been instructed. When I sat  
22 down I did not even name Donald Findlay. I said, "talk  
23 to a lawyer on Sunday".

24 Q. Mr Grieve did carry out a comparison; Mr Ashbaugh did  
25 not. Is that correct?

1 A. I think that's inaccurate. Mr Grieve stayed in  
2 Edinburgh. Mr Ashbaugh had left Scotland before  
3 breakfast the next morning.

4 Q. To your knowledge did Mr Grieve carry out a comparison?

5 A. Yes.

6 Q. To your knowledge did Mr Ashbaugh carry out a  
7 comparison?

8 A. Yes.

9 Q. Do you know when Mr Ashbaugh carried out a comparison?

10 A. I would presume that night because he was scheduled to  
11 stay with us in Scotland for a couple more days. I have  
12 never discussed the case in any great detail with  
13 Mr Ashbaugh.

14 Q. Can I be clear: by the time that you had given them the  
15 photographs, had you seen the original door standard or  
16 had you only seen the photographs?

17 A. Oh, yes, yes. As my notes will reflect, I received the  
18 doorframe itself on the very first visit to Glasgow.  
19 The dates are in my notes but, yes, I had seen the  
20 actual doorframe itself some two or three days before I  
21 gave those photographs to Mr Grieve and Mr Ashbaugh.

22 Q. In some of the text of your report you refer to a  
23 possible smear line in Y7. Can I be clear: are you  
24 referring to the fault line in the mark or are you  
25 referring to what you have described yourself as a

1 possible brush mark?

2 A. I'm referring to that -- we could call it a brush mark,  
3 we can call it -- you could call it a smear running  
4 through the ridges. I've been criticised heavily for  
5 it. I believe on one of the documents -- no, I did not.  
6 Did I highlight in yellow on a fingerprint that mark  
7 through the document? My notes show it clearly. If my  
8 notes are available we can put the page up.

9 I referred to that. There is no consistent word  
10 used throughout the last decade in the record referring  
11 to that mark but I believe we're talking about the same  
12 thing.

13 Q. I am just asking are you referring to the fault line  
14 that is in the mark itself between, as I would have it,  
15 the two portions of the mark or are you referring to the  
16 damage of whatever sort that has been caused to the  
17 mark?

18 A. With all due respect, Mr Holmes, to me the term fault  
19 line refers to a geological feature and I am not aware  
20 of the use of that word in any fingerprint textbook. It  
21 may be used informally between a couple of examiners as  
22 a descriptive method to describe something to each other  
23 during a consultation, but if you can put the image up  
24 and show me what you mean by "fault line" I'll gladly  
25 answer your question.

1 Q. What I am asking about is what you refer to in your  
2 statement as a possible "smear line" within Y7 and I'm  
3 asking if that is a feature of the mark or if that is  
4 the damage that has been referred to previously?

5 A. That would refer to the damage that was present on Y7  
6 when I received the doorframe, the damage on Y7 itself.  
7 We've seen it in some of the earlier images. It is  
8 recorded in my notes as I saw it on the very first  
9 examination or I should say on the first thorough  
10 analysis. It is an artefact of damage introduced by  
11 something rubbing across the doorframe after the powder  
12 had been applied to the print.

13 I have seen within the last few days a photograph  
14 with a piece of string wrapped around the doorframe and  
15 it was suggested to me that this piece of string might  
16 have resulted in that damage and I would say, yes, a  
17 piece of string could have caused that damage. There  
18 are any other number of things that might have caused  
19 that damage. It was present on the doorframe at the  
20 first instant that I observed the doorframe.

21 Q. In fact, you say in your statement at page 5 that one  
22 slight brush mark does show across the face of the  
23 latent being photographed by the police.

24 Would you accept that that's what your position is?

25 A. Could you repeat the last line?

1 Q. "... one slight brush mark does show across the face of  
2 the latent being photographed by the police."

3 A. Yes, I stand by that completely. One slight smear mark  
4 does show in the photograph ... can we put that  
5 paragraph in context? Do I have my statement here in  
6 front of me? I want to make sure that we're not  
7 referring to the blob, that we are referring to the same  
8 smear mark in the print. Okay, I have here my statement  
9 now. Which paragraph?

10 Q. It is on page 5.

11 MR MOYNIHAN: Sir, are we talking about Mr Wertheim's  
12 Inquiry statement?

13 THE CHAIRMAN: No, I was suggesting if we could put up a  
14 photograph of it, it might help but there is no need if  
15 you can deal with it your own way.

16 I thought if we were going to run on we would take  
17 the break a bit later; so we will do that about 3.30.

18 **(Pause)**

19 MR HOLMES: I think I can shortcircuit this matter by simply  
20 saying the brush mark cannot have been there at the time  
21 the mark was photographed by the police. Is that  
22 correct?

23 A. That's correct.

24 Q. Because in the photographs that were taken by the police  
25 it is not present.

1 A. That's correct.

2 Q. There are some photographs that I would like to show  
3 you, if you would not mind, that were taken by you.

4 There is a package of photographs that the Inquiry has  
5 that were submitted by you, all of them of Y7. **(Handed)**

6 A. Right.

7 Q. You can see there are quite a large number of  
8 photographs there in the package that was submitted by  
9 yourself to the Inquiry. All of these are of Y7.

10 Do some of those photographs show the damage and  
11 some others not?

12 A. Well, let me say that some of these are photographs that  
13 I took of the SCRO photograph. They are not all  
14 original photographs of Y7 itself. I photographed the  
15 SCRO photograph that I was provided numerous times as  
16 well as photographing Y7 numerous times.

17 Q. I see. Is it the position then that the photographs  
18 which do not show any damage are photographs taken by  
19 you of the photograph itself and the photographs taken  
20 which do show damage are photographs taken by you of the  
21 doorframe?

22 A. Yes, sir, and if I can explain the difference in these  
23 photographs, you'll find that some of them have a ruler  
24 in them, as this one does **(indicated)** because I laid a  
25 ruler down on top of SCRO photograph when I took it.

1                   The photographs that do not have a ruler, such as  
2                   this one (**indicated**), are the ones that I took of the  
3                   original Y7. Why then would I not include a ruler?  
4                   Because I did not want to lay anything on that surface  
5                   that could cause any damage to it.

6       Q.    If I can move on from this topic to your evidence during  
7            the trial of Ms McKie, you mentioned yesterday that you  
8            agreed with around four or five of the points that were  
9            marked by the SCRO officers during your evidence at the  
10           trial. Is that correct?

11    A.    Yes, I believe that's true.

12    Q.    You also said that given the different purposes of the  
13           trial and of this Inquiry, you now do not agree with all  
14           of the points that you did at the trial. Is that  
15           correct?

16    A.    That's correct. My position has changed based on the  
17           intent of the proceeding in which I'm testifying.

18    Q.    You said that you conceded these points at the time but  
19           that you were not really agreeing with them. Is that  
20           what your position is?

21    A.    I said that I conceded to them. I believe there's a  
22           subtle difference.

23    Q.    So when you say that you "conceded to them", you did not  
24           regard them as points in sequence and agreement but for  
25           the purposes of the trial, you were prepared to agree

1           that the SCRO interpretation of them was correct?

2    A.    I was prepared to concede that the SCRO interpretation  
3           of them was correct.

4    Q.    The reason that you gave for that was that your evidence  
5           was in fairly short compass at the trial. You said you  
6           gave evidence for a day and a half and Mr Grieve for  
7           half a day. Is that correct?

8    A.    That's correct. I must state that for purposes of that  
9           trial a day and a half was adequate. Obviously, for  
10          purposes of this Inquiry much more time is required and  
11          much more detail is sought.

12   Q.    Who is it that told you that your time at the trial was  
13          limited?

14   A.    Nobody. My purpose at the trial was single-fold. I  
15          simply had to demonstrate to the jury conclusively -- to  
16          the court, I should say, because I would include the  
17          attorneys and the Lord Johnston -- I had to demonstrate  
18          conclusively to the court that Y7 was not Shirley  
19          McKie's print. There was no question of what happened  
20          or how it did happened or when did it happen or who did  
21          it; simply that it was wrong. I believe the purposes of  
22          this Inquiry are somewhat deeper than that.

23   Q.    The evidence that you gave at the trial to the effect  
24          that you could concede a number of points marked by the  
25          SCRO that you did not really agree with but were

1 prepared to concede was given as a result of, as you saw  
2 it, the limited purposes of the trial. Is that correct?

3 A. That's correct.

4 MR HOLMES: Mr Chairman, the next question I am going to ask  
5 perhaps bears a warning from you on the witness' own  
6 position because what I am going to ask is if his  
7 evidence today is that during Ms McKie's trial he gave  
8 evidence on oath which he knew to be false.

9 THE CHAIRMAN: I think that does call for what we called  
10 before the Fifth Amendment, that you are not obliged to  
11 answer any question that may incriminate you in any way  
12 the suggestion being that, as I understand will be made  
13 in this question, that your evidence on oath on that  
14 occasion differs from your evidence on oath at this  
15 Inquiry and that, therefore, your evidence on a previous  
16 occasion is open to question in legal proceedings --  
17 could be, could be. So you are not obliged to answer  
18 the question if you do not want.

19 A. I have not perjured myself neither there nor here. If  
20 there is a discrepancy in my testimony which is  
21 irreconcilable, such as Mr Moynihan pointed out in my  
22 notes with regard to my observations related to Q12,  
23 I'll readily admit it. But I think we may be dealing  
24 with semantics and I'm perfectly happy to proceed and  
25 consider anything you want to put to me.

1 THE CHAIRMAN: It is entirely a matter for you whether you  
2 wish to answer the question or not.

3 MR HOLMES: I will formally ask the question then.

4 Mr Wertheim, is your evidence today that during  
5 Ms McKie's trial you gave evidence on oath which you  
6 knew to be incorrect?

7 MR SMITH: I wonder if I can interject for a moment?

8 THE CHAIRMAN: Yes.

9 MR SMITH: I think if this is adopting a course of an  
10 accusation like this, if Mr Holmes' position is there is  
11 inconsistent evidence being given he should put to the  
12 witness what he said here today. We have the  
13 transcript. This is not something that is  
14 unavailable --

15 THE CHAIRMAN: What the witness said on the previous  
16 occasion.

17 MR SMITH: -- on a prior occasion. That is the proper way  
18 it should be done under the Evidence (Scotland) Act --

19 THE CHAIRMAN: In other words put the precise terms.

20 MR SMITH: Absolutely and, indeed, the context of that is  
21 required.

22 THE CHAIRMAN: I think that is --

23 A. Mr Chairman, with all due respect to the Inquiry, I have  
24 come here to appear without legal representation because  
25 I have nothing to hide.

1                    This is the second allegation of criminality made  
2                    against me today in this courtroom. I wish now to  
3                    exercise my right to appoint counsel to represent me at  
4                    this Inquiry and I wish my appointed counsel to sit with  
5                    me through any further questioning.

6       THE CHAIRMAN: I was going to say that did occur to me that  
7                    you don't have separate legal advice and that I think if  
8                    you wish to have it you certainly should.

9       A. I see my position here as a friend of the court and I  
10                  resent the fact that I have to be represented by a  
11                  lawyer to defend myself against spurious charges but I  
12                  am exercising that right at this instant.

13       THE CHAIRMAN: I think that is perfectly legitimate.

14       A. I wish to appoint Mr Andrew Smith as my counsel.

15       THE CHAIRMAN: I think the first person you would need to  
16                  speak to would be Digby Brown possibly but I'm not sure  
17                  what the rules of the Faculty of Advocates are about  
18                  direct appointment.

19       A. My apologies for not knowing the difference.

20       THE CHAIRMAN: Don't worry.

21                  Maybe we should do is take the short adjournment now  
22                  and give you an opportunity to discuss the matter.

23                  Perhaps also we could proceed after it if they are not  
24                  ready to deal with this point to another point and you  
25                  could return to it if you wish to do so.

1 MR HOLMES: Certainly, sir.

2 THE CHAIRMAN: We will rise now until you are ready but not  
3 before 3.30.

4 **(3.22 pm)**

5 **(A short break)**

6 **(3.37 pm)**

7 THE CHAIRMAN: I am not sure how far advanced you have  
8 become in this but I have formally, as you know,  
9 appointed Digby Brown and you to represent Mr Wertheim's  
10 interest but what occurs to me, and will hear what you  
11 have to say about it, is that it seems to me that,  
12 rather than have this dealt with now, that Mr Holmes  
13 should be asked to put in writing the allegation that is  
14 being made against Mr Wertheim and that he should then  
15 be given an opportunity to respond to that in writing if  
16 he chooses to do so.

17 MR SMITH: Sir, I wonder if I could say this at the outset:  
18 the first thing that is important is Mr Wertheim had,  
19 prior to a few minutes ago, made it very clear in  
20 correspondence with the Inquiry team that he was not  
21 legally represented and, in fact, chastised the Inquiry  
22 team for communicating with him or attempting to do so  
23 via Digby Brown. However, things have changed, as has  
24 been indicated.

25 I am very conscious, sir, that listening to the

1 exchange more recently that Mr Wertheim, as he pointed  
2 out himself, has twice today been accused of two serious  
3 crimes without any prior notification that he is going  
4 to be so accused and there are undoubtedly significant  
5 Article 6 rights in play here.

6 I am still unaware of the precise nature of the  
7 allegations made, particularly regarding the question of  
8 perjury. You are right, sir, there has to be,  
9 effectively, a charge being made that he has prior  
10 notice of, he can give instructions on, he can think  
11 what his defence is, and I am sure there is one he  
12 wishes to present and explain the position fully. In  
13 the same way that if he was served with an indictment  
14 charging him with perjury. Sir, that is a practical  
15 issue.

16 I may say that I have been invited by him and I am  
17 happy to accept for present purposes the representation.  
18 There may be issues of conflict of interest here. I do  
19 not know and what I certainly do not know is whether --  
20 there clearly is no possibility of proceeding with that  
21 particular allegation at this time because I, although I  
22 have read the transcript of his evidence when he gave it  
23 in the trial, I am not in a position to read it now,  
24 take instructions, then in denial of it, and it has to  
25 be dealt with now. Now it's now a public allegation.

1 It has to be ruled on and disposed of in some way. I  
2 cannot do that and it may be Mr Wertheim, for all I  
3 know, or I may decide I cannot continue to act because  
4 of the theoretical appearance of conflict of interest.

5 I also observe, sir, that it is a matter of regret  
6 that when Mr Holmes sought leave to cross-examine, and  
7 on being invited to say what the issues were, he did not  
8 mention anything that could responsibly be suggested  
9 would be within the question of making a specific  
10 allegation there was a prior inconsistent statement on  
11 oath. That is a matter of regret but we are where we  
12 are.

13 My suggestion, sir, is this: we cannot  
14 realistically, even without this problem we would not be  
15 finishing this this afternoon. I would hope to restrict  
16 my questioning to half-an-hour but I think with prior  
17 circumstances that would be optimistic.

18 To deal with the allegations plural, I suppose, that  
19 have been made we are in a position where Mr Wertheim  
20 will have to give evidence on another occasion at some  
21 stage.

22 I am not convinced that can be done by video link,  
23 something that can be discussed with him no doubt as to  
24 where we are. I also, frankly, feel it a little unfair  
25 for Mr Wertheim to be expected just to put everything

1 behind him about what has been suggested and to then be  
2 questioned about things like bifurcations and ridge  
3 endings by Mr Holmes who has just made a very serious  
4 allegation against him that is going to be ringing in  
5 his ears and he clearly is very distressed and irritated  
6 about that allegation.

7 THE CHAIRMAN: Yes, I understand that.

8 MR SMITH: Sir, I regret to say it seems to me, in fairness  
9 and realism to all parties concerned we have to waken up  
10 to the fact Mr Wertheim is going to have to come back  
11 with perhaps separate legal representation in order that  
12 he can be in a position to respond to any other  
13 allegations which may be made without prior notice.

14 He has told me he is concerned what is going to  
15 happen next, "What I am going to be accused of?" Sir,  
16 we are where we are and I suggest we are realistic and  
17 make arrangements for him to come back at some stage in  
18 the future.

19 I agree with you, sir, that if allegations of this  
20 nature are going to be made, it is my submission they  
21 have to be made in advance, clearly, carefully and with  
22 sufficient notice in order that someone can decide  
23 whether they are going to have legal representation and  
24 what their response should be.

25 I may say if other allegations are going to be made

1 of a similar nature by any representative to any other  
2 witness, then I would suggest a ruling is made that  
3 advance notice is given of that to the party concerned  
4 so they know where they stand.

5 THE CHAIRMAN: I think I should say in fairness to Mr Holmes  
6 there was some indication given to me by Counsel for the  
7 Inquiry that I may at some stage have to give a warning  
8 to a witness. So to that extent I was aware that he was  
9 going to put some matter that might call for a warning  
10 but beyond that I can't say anything.

11 I still adhere to the view that it should be in  
12 writing, what is alleged against the witness, and then  
13 he should have an opportunity to be properly advised as  
14 to what answer, if any, he wishes to make to it.

15 On the second point that you make, which is that he  
16 does not, as I understand it through you, feel that he  
17 wishes to continue his evidence today, then I would have  
18 to accept that. I cannot ask him to do something that  
19 he does not feel able to do.

20 MR SMITH: I may say, sir, just to make it absolutely clear  
21 it wasn't entirely his decision. It seemed to me that  
22 looking at it as objectively as I can, that it is not a  
23 particularly attractive way of continuing when you know  
24 what has been said and then to engage in a technical  
25 discussion about fingerprints. So I don't think it's

1 necessarily entirely his own view. It certainly is one  
2 I share.

3 THE CHAIRMAN: Yes, I think your point about it being  
4 realistic that even sitting late and despite his  
5 accommodating us the way he has we are not going to  
6 finish his evidence today. I don't think it's  
7 profitable to have a debate about when he might be  
8 available or whether we can do it by link or what  
9 because I'm not whether on a link one could use the  
10 drawing system that you have been using. I think I must  
11 accede, in the circumstances, to your application.

12 There was one other matter brought to my attention  
13 which is quite different and that is that I gather some  
14 people -- and I wasn't aware of it -- have been, as it  
15 were, demonstrating their own reaction to answers that  
16 have been given and to evidence. I really do not expect  
17 that sort of behaviour and I find it unbecoming. If  
18 you happen to disagree with what a witness is saying  
19 that is all right but you do not demonstrate your views.

20 I am sorry about this when you have helped us,  
21 Mr Wertheim, but I think this is the fairest course that  
22 I can take for you at this time and so we will now  
23 proceed on Tuesday.

24 MR MOYNIHAN: We proceed on Tuesday with Mr Grigg. I think  
25 one of the matters that may be worth raising is that I

1           certainly, picking up what my learned friend, Mr Smith,  
2           has just said, plainly from -- there is the  
3           straightforward technical question of whether the  
4           fingerprints have been correctly identified or not. In  
5           addition to that, there is the 12 years of history, to  
6           some extent, in relation to this, that will without  
7           question bring in some attacks on character from both  
8           sides and I have raised in conversation the extent to  
9           which attacks on character will assist the Inquiry.

10                 Above and beyond that, it has to be said, in  
11           fairness, that the allegation that is made against the  
12           Scottish Criminal Record Office is that some of their  
13           officers engaged in a criminal conspiracy at some stage.  
14           That is an allegation that is being supported by  
15           reference to some of the technical fingerprint evidence  
16           and, accordingly, even I can anticipate, sitting where I  
17           am, that those who are attacked in that manner will feel  
18           the need to defend themselves in a similar fashion and  
19           though I have no reason myself to anticipate what may be  
20           asked of Mr Grigg, my concern is that we will encounter  
21           much the same difficulty with him and, indeed, with  
22           successive witnesses in relation to this matter.

23                 It is very much a question on which you, sir, would  
24           be asked to reflect because to give advance notice in  
25           writing of specific lines is something that may be just

1 a degree impractical and that we have to acknowledge  
2 there is a limit to which attacks on character may be  
3 relevant.

4 However, the contradiction, as I have indicated, is  
5 that I apprehend that there will be those who will be  
6 seeking to take from the fingerprint evidence  
7 allegations against the Scottish Criminal Record Office  
8 staff that they engaged in some improper conduct and,  
9 accordingly, there will have to be some means in which  
10 they can defend themselves as they see fit.

11 THE CHAIRMAN: I think consistent with the ruling that I  
12 have made that where an allegation of criminality is  
13 going to be made against anyone on the Inquiry there  
14 will have to be written notice given to them by the  
15 party who is seeking to make that allegation.

16 I am not critical of the way it has been dealt with  
17 to date, Mr Holmes, but I am sure you will be able to  
18 formulate as soon as possible the allegation that is  
19 being made and I would be obliged if you give it to the  
20 Inquiry, then the Inquiry in turn will pass it on to the  
21 party or any party affected.

22 MR MOYNIHAN: Sir, sorry, trying to think this through  
23 myself. The procedure of course that we have to give  
24 consideration to is the technical procedure of a warning  
25 letter.

1 THE CHAIRMAN: Oh, yes.

2 MR MOYNIHAN: Of course had a warning letter been  
3 appropriately framed then it could have given advance  
4 notice of this. As I've said, I assume that this is  
5 simply the first of a number of lines of  
6 cross-examination which for perfectly foreseeable  
7 reasons will raise these sorts of issue.

8 Perhaps Mr Holmes could reflect on the fact that we  
9 may need to give witnesses a warning notice that they  
10 may be open to challenge on various lines and that would  
11 bring it within the rules of the Inquiry.

12 THE CHAIRMAN: Yes. I hope it is reasonably clear now what  
13 approach we're going to take.

14 Again, I am sorry, that having accommodated us we  
15 have not been able to use the time fully but that is no  
16 fault of yours whatever, and so we will adjourn now  
17 until 10.00 on Tuesday.

18 **(3.50 pm)**

19 **(Adjourned until 10.00 am on Tuesday, 29th September 2009)**

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