

Monday, 23rd November 2009

1

2 (4.06 pm)

3 (The following evidence was taken via video link)

4 PAT WERTHEIM (recalled)

5 THE CHAIRMAN: Good morning, Mr Wertheim. Thank you for
6 coming back for the Inquiry. May I just say of course
7 that you remain under oath, as I am sure you recognise,
8 and I now ask Mr Holmes to continue his
9 cross-examination, please.

10 **Cross-examined by MR HOLMES (continued)**

11 Q. Thank you, sir.

12 Mr Wertheim, the first brief set of questions I have
13 for you relates to another presentation that we have
14 seen. We heard evidence from Ms McBride recently that
15 for an expert carrying out any sort of comparison by
16 being presented with an image in the witness box and
17 being asked about individual points is not ideal.

18 Would you agree with that?

19 A. I would agree that it's not ideal but if presented with
20 something in the witness box I would certainly take a
21 look at it to see if I was willing to comment.

22 Q. In fact, during your own evidence to this Inquiry you
23 marked up a ridge count on two images that had been
24 prepared by Mr Swann.

25 Do you remember that?

1 A. Yes, I do.

2 Q. Do you remember that you marked from the core of Y7 on
3 both those images to the characteristic that we have
4 been calling the Rosetta characteristic? Do you recall
5 doing that?

6 A. Yes, sir, I do.

7 Q. Having had some notice of the issues that you are likely
8 to be asked about, have you looked again at the images
9 that you marked up?

10 A. No, I have not. Let me explain because when I was shown
11 those marks in the Inquiry originally I believe
12 Mr Moynihan asked me to comment on the chart on page N
13 and as I was flipping through I saw the chart on page M
14 and then looked at the chart on page N and could see the
15 difference and at that point I asked Mr Moynihan if the
16 chart on page M and the chart on page N represented the
17 same chart, the same Rosetta point. I received an
18 affirmative response from Mr Moynihan that they did and
19 that's the point at which I did the ridge count and
20 showed that they were off.

21 Subsequently, I was advised that those charts
22 represent different or they are trying to show different
23 things and for that reason, obviously, I was counting to
24 different points on those two pages but before doing
25 that exercise I asked Mr Moynihan and he had confirmed

1 with me that they were supposed to be the same chart so
2 the error was somewhere in communication.

3 Q. So am I to understand that the difficulty is that on one
4 chart you have marked from the core to the Rosetta and
5 on the other chart you have marked from the core to
6 something other than the Rosetta? Is that why the ridge
7 count differs?

8 A. Apparently, that's correct.

9 Q. Would you agree then that it was a mistake to come to
10 the conclusion, as you did, that Mr Swann does not check
11 his own work on the basis of what you marked up?

12 A. Yes.

13 Q. Again, would you agree that it was probably also a
14 mistake for you to post on the Internet the evening
15 after you gave evidence, drawing attention to the
16 mark-ups that you had done, describing Mr Swann as an
17 expert, in inverted commas, and stating that you were
18 "gob-smacked" that the other expert had not checked his
19 own work?

20 A. I was proceeding on the assumption that Mr Moynihan's
21 information was correct that M and N represented the
22 same Rosetta point. They do not and I withdraw any
23 statements I made based on that erroneous assumption.

24 Q. If I can move on to asking questions about the mark XF,
25 firstly, can I ask is it your opinion that mark XF was

1 made by David Asbury?

2 A. XF is the gift tag mark?

3 Q. That is correct.

4 A. Yes, that is David Asbury's fingerprint on that gift
5 tag.

6 Q. Is it your position that XF, as stated in your own
7 notes, is "legit" -- it is legitimate?

8 A. If that was the word used in my notes then, yes, I stand
9 by that.

10 Q. Is that to say then that XF does not seem to you to be
11 forged, fabricated or mishandled in any way?

12 A. After reviewing my notes that were provided by
13 Mr Moynihan when I was there last, I note that my notes
14 reflect that the fingerprint identified to David Asbury
15 appears to have been developed with superglue on the
16 surface where it was found, which is to say the gift
17 tag. In that regard, then, that fingerprint represents
18 an actual touch of the skin on that finger to the gift
19 tag.

20 Q. You were aware of that when you first examined XF in
21 April 2000 when you went to visit the Procurator Fiscal,
22 were you not?

23 A. I believe my notes reflect that, yes.

24 Q. Why is it then that you have invited speculation in the
25 intervening years that XF was fabricated?

1 A. I never said that XF was fabricated. I said that some
2 of the components in the image needed explanation and
3 some of the components in that image were consistent
4 with fabrication. That was based on looking at the
5 image having forgotten my original examination in my
6 notes. I might explain -- **(interruption: phone ringing)**

7 I might explain that on my original examination
8 which is reflected in the notes I would have concluded
9 that the print was a legitimate print, a touch of the
10 finger on the surface where the print was developed, and
11 I would have then not thought any further about it.
12 Apparently, in the intervening decade I'd forgotten
13 about that.

14 Excuse me just a minute and let me turn this thing
15 off so I don't have it ring on us again.

16 So my apologies for forgetting about that. Having
17 looked at the image itself in the build-up to this
18 Inquiry and without benefit of my earlier notes, I
19 commented that there were components of that image that
20 I still had questions about.

21 Q. But do those questions still remain having had the
22 opportunity to see the gift tag again?

23 A. Oh no. I believe I withdrew all of those objections and
24 agreed with the legitimacy of that print when I was over
25 there testifying last time.

1 Q. You have made quite a number of comments in the
2 intervening years; is that fair?

3 A. That's fair.

4 Q. Did you give an interview to the Scotsman newspaper in
5 2006 regarding XF?

6 A. I probably did. I have no independent recollection of
7 it but if you've got the newspaper article I'd be glad
8 to consider that.

9 Q. If I can quote from that, did you say to the reporter
10 that:

11 "Marks on the photograph are highly similar to those
12 that show up when a print is faked and that unlike the
13 vast majority of fingerprints left at crime scenes,
14 which are smudged and incomplete, Asbury's was as clear
15 as those taken in the more clinical setting of a police
16 station."

17 A. I'm sorry, repeat that again, please. I was trying to
18 follow you there.

19 Q. Did you say to the reporter interviewing you that:

20 "Marks on the photograph are highly similar to those
21 that show up when a print is faked and that unlike the
22 vast majority of fingerprints left at crime scenes,
23 which are smudged and incomplete, Asbury's was as clear
24 as those taken in the more clinical setting of a police
25 station."

1 A. I might have said that, yes, and by -- what I meant or
2 what I would have meant by that is the fact that
3 normally when you're handling a surface you don't leave
4 a flat, well-centred impression of a finger. Most of
5 the fingerprints developed on evidence and other items
6 are smudged, they are a little sideways. For example,
7 Y7 is canted up towards the top right of the finger.
8 That's normal. It's not normal to see a fingerprint
9 flat and dead centre as XF is. That was one of a number
10 of factors but I will repeat again that having been
11 shown my notes by Mr Moynihan at the Inquiry and having
12 heard of the other -- I believe, actually, if I go back,
13 Mr Moynihan showed me the other report on XF and I
14 withdrew my comments even before he showed me my notes
15 but having seen my notes again, I withdraw the comments
16 and I would withdraw what I said at the interview there
17 with the Scotsman.

18 Q. Does that apply to the Internet comments that you have
19 made regarding XF as well?

20 A. I will withdraw all comments that I made regarding the
21 suspicious character of XF, no matter where those
22 comments were made, and apologise for having misled you,
23 Mr Holmes. I will state that I will confirm my notes as
24 presented by Mr Moynihan, which apparently agree with
25 the other report that the Inquiry has received on XF

1 also.

2 Q. So there are quite a number of Internet quotes that
3 appear to be authored by you. First of all, can I ask
4 if those bearing your name were, in fact, authored by
5 you?

6 A. I believe they probably were because I know of no-one
7 else using my name. If you'd like to go through them
8 one at a time, I'd be glad to withdraw them one at a
9 time and apologise for them one at a time.

10 Q. I don't think we need to go through them one at a time,
11 Mr Wertheim, but if I say to you that there are a number
12 of quotes from the CLPEX website which are attributed to
13 you between about 2006 and 2009, would you accept that
14 you posted on the subject of XF during that time?

15 A. If you say so, sir, I'm not going, argue with you. I
16 don't have the list in front of me that you do but I'll
17 withdraw every comment I made. I'll apologise for them.
18 If you'd like me to go on the Internet and post a
19 retraction, I'd be glad to do so.

20 Q. What I am concerned to discover, Mr Wertheim, is what
21 your position is on XF because you have said today that
22 you had forgotten having examined XF at all; is that
23 correct?

24 A. Yes, it is. It was the notes that Mr Moynihan showed me
25 at the Inquiry when I was in the witness box under oath

1 and the notes which I had forgotten about, the originals
2 of which I no longer own, and that refreshed my memory
3 and convinced me that I had said it, seen that print and
4 reached that conclusion.

5 So since you're still confused about my position,
6 let me restate it and I hope I get it clearly this time:
7 the fingerprint designated FX (**sic**) on the gift tag
8 represents and is an original touch by David Asbury on
9 that gift tag.

10 Q. Thank you for clarifying that, Mr Wertheim.

11 My confusion doesn't lie in what your current
12 position is but rather the changes that your position
13 seems to have gone through over the years. In 2006 you
14 post in answer to a question whether XF was examined by
15 Fingerprint Experts at the time:

16 "Yes, it was. I saw it in the Procurator Fiscal's
17 office in spring 2001. I notified David Asbury's
18 solicitor there was a serious problem with the gift tag.
19 I raised the issue of possible fabrication five years
20 ago when I first examined the evidence. I risk my
21 reputation by going public with this information."

22 So does it appear from that quote that you were
23 aware, at least at the time that you were making that,
24 that you had previously examined the gift tag?

25 A. You've got to separate the gift tag itself, the actual

1 gift tag, from the photograph of the gift tag and I
2 apologise for having an imperfect memory, Mr Holmes. I
3 have not remembered every detail from the last decade
4 and I'm trying to make it clear to you, based on the
5 photograph only, without reference to the image or
6 without reference to the original gift tag. Based on
7 the photograph and the image, there are questions that
8 arise. There are inconsistencies with normal prints and
9 consistencies with fabricated evidence.

10 Those questions were answered in my original
11 examination in 1999 and they are reflected in my notes
12 from 1999 because somewhere along the way I gave those
13 notes to someone else, probably one of Mr Asbury's
14 attorneys. Frankly, that's another fact I had
15 forgotten. I don't remember who I gave those notes to.

16 But without benefit of those notes I had forgotten
17 about that and relied on the image, that is to say the
18 photograph of the print, and those old concerns raised
19 themselves in my mind again. My position has changed.
20 I have an imperfect memory and I apologise sincerely for
21 confusing you over that.

22 Q. Mr Wertheim, it is a fairly important detail to forget
23 when you are inviting speculation that members of the
24 Identification Bureau have committed what is a fairly
25 serious offence, is it not?

1 A. I never alleged the offence. I said there were
2 consistencies with fabrication. I've never accused
3 anybody of fabricating evidence directly in this case.
4 I said there were questions that need to be answered and
5 you are right, it is a very serious question to raise,
6 just as the question of erroneous identification is a
7 serious question to raise.

8 Q. Again, have you ever made any accusation that the police
9 lied as a result of your failure to remember that you
10 had examined XF on the gift tag?

11 A. If you have such an allegation there, I'd be glad for
12 you to read it to me.

13 Q. On 28th June 2007 there is post from you that says:
14 "Let us hypothesise that the police investigators
15 interviewing David Asbury about Marion Ross's murder
16 lied when they told him that they had his fingerprint on
17 the gift tag. Now, let's assume, as many believe, that
18 David Asbury had not been in Marion Ross's house after
19 the fix-up project was completed months earlier. He
20 knew that the police could not have his fingerprint on a
21 gift tag, but he was cornered. And unlike Shirley
22 McKie, he was not strong enough to call the police liars
23 or tell them they were wrong about the fingerprint. In
24 the verbal tennis game that followed the police lie
25 about finding his fingerprint on the gift tag, Asbury

1 made up a lie of his own about how his fingerprint got
2 there. Then the police were placed in 'check'. So they
3 manufactured Asbury's fingerprint on a gift tag to
4 support their original lie used to encourage a
5 confession. But now, they cannot allow that gift tag to
6 surface, thus the rumours ..." and here you use the name
7 of another poster "... has heard about it having gone
8 missing. If that scenario is correct, and I believe it
9 is, why should the police lie and evidence fabrication
10 be completely ignored and Asbury's responding lie be
11 grounds to put him in prison for life?"

12 Those are fairly serious allegations, firstly, about
13 the Identification Bureau fabricating the fingerprint on
14 the gift tag --

15 A. I beg your pardon, Mr Holmes, the whole thing was
16 hinging on the first three words that you read.

17 Q. Yes?

18 A. "Let us hypothesise".

19 Q. Yes?

20 A. Again, I will repeat, having completely forgotten my
21 notes and having completely forgotten that I had seen
22 the original gift tag, I was offering speculation,
23 hypothesising, basing it on assumptions, and in that it
24 clearly says that it's based on hypothesis and it's
25 assumption and if this happened and if this happened,

1 and I withdraw all of that. If you want to go through,
2 I will withdraw every one separately. I withdraw it and
3 I apologise for it.

4 Q. You do say, Mr Wertheim:

5 "... if that scenario is correct, and I believe it
6 is ..."

7 A. And at the time I wrote that I did believe that it was.

8 Q. These are very serious allegations to make against the
9 police and against the officers who recovered XF on the
10 basis --

11 A. My sincerest apologies to them, Mr Holmes.

12 Q. You may have answered my next question already. It
13 appears that by 2007 you had forgotten not only that you
14 were of the opinion that the mark was legitimate but
15 that you had also forgotten that you had seen the gift
16 tag at all?

17 A. That's correct.

18 Q. You also posted the same year:

19 "The watch is a red herring. The piece of missing
20 evidence of great importance is the gift tag that
21 allegedly has David Asbury's fingerprints on it. That's
22 very significant because it would place Asbury in the
23 house about the time of Marion Ross's murder, months
24 after he had finished working on the home improvement
25 project."

1 What evidence did you have that there was any
2 evidence at all in the case missing?

3 A. I had no recollection of the gift tag. I had been told
4 by -- or at least as I recall I had been told by
5 Mr Asbury's solicitors that they had tried to locate the
6 original gift tag, XF, and that it had gone missing.

7 Q. You must have looked at the mark, the photograph of the
8 mark, in some detail in order to advance the theory
9 about how it could have been in some way fabricated. Is
10 that correct? You must have had more than a cursory
11 examination of it, surely?

12 A. Of the photograph, yes, but I've withdrawn that
13 allegation.

14 Q. How, during that process, during your examination, your
15 detailed examination of the photograph, did it not occur
16 to you that you had on an occasion previously examined
17 the original production?

18 A. Because I had an imperfect memory, Mr Holmes. Sometimes
19 a person sees a thing which has no significance at the
20 moment and several years later might be asked about it
21 and without having remembered the thing because it had
22 no significance at the time he saw it, he might
23 speculate on some other motive and that's apparently
24 what has happened in this case. I saw it in 1999. My
25 notes clearly reflect that in 1999 it was legitimate.

1 At some point after that I was asked about it. I had
2 forgotten about the 1999 examination. I no longer had
3 the notes and I commented on it and for that I apologise
4 and I withdraw the allegations.

5 Q. It would appear that in 2008 the position has moved on
6 further still because on 21st March there is a post
7 bearing to be written by you that says:

8 "Let's put something else on the table here,
9 although I think I've already put it on the table. It
10 is my belief that the finger mark on the gift tag bears
11 characteristics of fabrication. Could it be that the
12 plain impression of David Asbury's thumb print from a
13 fingerprint form was copied onto acetate, or lifted with
14 tape, and placed over the gift tag and then photographed
15 to make it appear that the print was on the gift tag?
16 Could it be that during a police interrogation, David
17 was shown such a fabricated photograph, which led him to
18 'confess' to being at Marion Ross's house a few days
19 before her murder, when in fact he was never there after
20 completion of the building project six months earlier?
21 Could that explain why the gift tag mysteriously
22 disappeared from the vaults at the PF's office years ago
23 when I went armed with a court order to allow me to
24 examine ALL of the evidence?"

25 Firstly, you seem to have forgotten at that stage

1 that you examined the gift tag and that you declared it
2 legitimate and that you are advancing a theory at least
3 that the mark was fabricated and that the police
4 officers interviewing Mr Asbury lied.

5 Is that a fair assessment of what is going on in
6 that post?

7 A. That would have been at the time. Withdrawn and
8 apologised.

9 Q. You also state in that post that XF is a thumbprint.
10 Clearly it is not. You would accept that?

11 A. Yes. Now, having been given the other things, I agree
12 with you.

13 Q. But in addition to that you seem to remember at this
14 stage that you went to the Procurator Fiscal's Office to
15 examine the mark. Is that fair?

16 A. Yes, sir.

17 Q. In fact, you go --

18 A. I don't know how many times I have to withdraw it,
19 retract it and apologise for it. If you really want to
20 go through and read every single time in the history of
21 the past decade that I have said it I will withdraw and
22 apologise for each one individually, if the blanket
23 withdrawal and apology that I made in September in
24 person doesn't do it for you.

25 Q. It is not the fact that you are simply repeating these

1 allegations, Mr Wertheim. It is the fact that your
2 position seems to move on and become ever more detailed.
3 You see, you state in that post that you had gone to the
4 Procurator Fiscal's Office with a court order.

5 A. I did that three times, yes.

6 Q. Is that correct though? Is that actually the position
7 or is that something else that you had forgotten about
8 until that stage? You did go with a court order; is
9 that what you're saying?

10 A. Yes, sir.

11 Q. Which court issued that order?

12 A. I don't know. It was in possession of Mr Asbury's
13 solicitor at the time.

14 Q. The only part that you don't remember at the stage
15 you're making this comment is that you have actually
16 seen the gift tag and that you found no evidence that
17 the mark was fabricated; is that right?

18 A. I'm sure there are many other little details that seemed
19 insignificant to me at those visits to the Procurator
20 Fiscal's Office that I will have forgotten. I'm sure
21 that's not the only one.

22 Q. It's hardly an insignificant detail though is it,
23 Mr Wertheim?

24 A. No, I agree and I apologise profusely. You can rest
25 assured, Mr Holmes, that if I had remembered that I

1 would have made none of those statements.

2 Q. Where does the allegation then come from that the gift
3 tag has gone missing?

4 A. The allegation is withdrawn, sir.

5 Q. There is another matter that you cover in a subsequent
6 post when again you repeat that the tag has gone missing
7 and that the fingerprint cannot be confirmed regarding
8 its circumstances on the tag in the photograph.

9 "Now for the heart of the matter: Iain McKie had
10 absolutely nothing to do with the quashing of the
11 conviction -- I did. I discovered the error, others
12 verified that it was an error, and the court quashed the
13 conviction based on my report."

14 What you are speaking about there is David Asbury's
15 conviction; is that correct?

16 A. I would presume so. I don't know the context in which
17 that was said. I believe what you're referring to is
18 the fact that Q12 is an erroneous identification, that I
19 discovered that, that others verified it and that
20 Mr Asbury's conviction was quashed based on the fact
21 that the identification of Q12 was wrong. Is that
22 correct?

23 Q. Firstly, the comment comes directly after another
24 repetition of your comment about XF, saying the tag has
25 apparently gone missing and the fingerprint cannot be

1 confirmed, et cetera but, secondly, what I am interested
2 in is your claim that Mr Asbury's conviction was quashed
3 on the basis of your report. That cannot be correct,
4 can it?

5 A. Could you explain that, please?

6 Q. Was Mr Asbury's conviction not quashed because his
7 appeal was unopposed?

8 A. Well, that may be then. I mean, you're asking me
9 questions from a public chat board five/six years ago,
10 four years ago, three years ago --

11 Q. Last year, Mr Wertheim.

12 A. -- which is --

13 Q. Last year, Mr Wertheim.

14 A. All right, last year.

15 Q. Finally -- and this is a post from this year -- you seem
16 to remember yet further details when you say:

17 "In 2000, I went to Scotland to view the fingerprint
18 evidence for David Asbury at the request of his lawyers.
19 There were two crucial pieces of evidence linking David
20 to the murder of Marion Ross. First, his thumb print
21 was found on a Christmas tag on an unopened gift, I
22 believe from Miss Ross's den ...

23 "What of David's fingerprint on the gift tag? We
24 have a photograph of that gift tag taken using a light
25 source. But in 2000 when I went to examine the gift tag

1 itself, the tag in the evidence envelope in the
2 prosecutor's vault was NOT the gift tag in the
3 photograph. David's fingerprint in the photograph
4 looked suspiciously like the plain impression of his
5 thumb from the bottom of an inked print card."

6 You go on to give a number of reasons why it
7 appeared --

8 A. And I withdraw and apologise for that comment also.

9 Q. Again, it appears by July 2009 your recollection of that
10 visit has again improved because you remember this time
11 again going to the Procurator Fiscal's Office, you
12 remember again having some form of court order, you
13 remember this time that there was a similar-looking tag
14 in evidence at the Procurator Fiscal's Office, you
15 remember what was on that tag, you forget again that XF
16 isn't a thumb but, overlooking that for now, your
17 recollection seems to have improved. It's very detailed
18 and yet you fail to remember at the time that you are
19 commenting and inviting speculation that XF is
20 fabricated, you fail to remember, again, that you have
21 examined it and you yourself were of the opinion at the
22 time that XF was a legitimate mark.

23 A. And I withdraw that comment and I apologise for it. Do
24 you have any more then?

25 Q. No, I don't think so, Mr Wertheim. All I can ask you

1 about this is: do you consider it to be productive to
2 encourage rumour and speculation about one of the marks
3 in this case?

4 A. Sir, that Internet chat board website is a discussion
5 area for fingerprint professionals. Questions were
6 being asked and questions were being answered. I might
7 point out that I have always posted under my own name in
8 that regard and as you clearly have there. The critics
9 use aliases, as do some of those who take my side and I
10 don't know who all of those people are but I do know
11 that the post you have attributed to me I have taken
12 credit for and if I've made a mistake in it I withdraw
13 it and I apologise for it. If you would like me to post
14 that on the Internet I would be glad to do that for you.

15 Q. I will move on, Mr Wertheim. Just a couple of questions
16 regarding the other experts that you aware of that have
17 seen Y7.

18 Of the experts to whom you sent images of the mark,
19 were those marked images or were those unmarked images?

20 A. All of the images that I sent out were unmarked.

21 Q. Did you in any way disclose the fact that your view was
22 that a mistake had been made at the time when you were
23 distributing these materials?

24 A. I know that when I gave the images to Dave Grieve and
25 David Ashbaugh in March 1999, I gave them original

1 images, unmarked, of Y7; I gave them original inked
2 prints that I had taken from Shirley McKie; and I gave
3 them each the marked-up chart or a copy of a marked-up
4 chart prepared by SCRO as if Y7 were a correct
5 identification. So when I gave those to Dave Grieve and
6 David Ashbaugh, I gave them unmarked images and I gave
7 them a copy of the SCRO chart and I gave them those
8 images without comment, except that I asked them if they
9 would look at those images and talk to a lawyer. They
10 both agreed.

11 Subsequently, Mr Ashbaugh found it necessary to
12 leave Scotland before he had a chance to talk to, I
13 believe, Donald Findlay but Mr Findlay, I believe, was
14 the one who talked to Dave Grieve.

15 At the time Mr Grieve and Mr Ashbaugh saw those
16 images, they had not a clue what my examination had been
17 nor what my conclusions were. Subsequent to that, I
18 should say, following Shirley McKie's trial and
19 acquittal, I mailed out a number of other copies of the
20 image to other experts who asked for them; I mailed a
21 number to England; I mailed a number of other copies
22 around the US; I mailed copies to Australia, copies made
23 from my negatives and my inked prints that I had taken
24 from Shirley McKie.

25 At that point I don't believe there was any need for

1 secrecy in saying that I believed it was an erroneous
2 identification because at that point I'd already
3 testified to it. It was a matter of public record.

4 Nonetheless the images I sent out were all unmarked.

5 Q. I take it you have not been present when any of the
6 individuals you sent images to examined Y7?

7 A. No, I was not present when the images which I mailed out
8 were viewed by the recipients of them. I discussed the
9 case in classes I taught and, of course, in those cases
10 I would have been present when people were examining the
11 prints.

12 Q. But so far as the individuals to whom you sent copies of
13 the images, you have no way of knowing what their
14 examination entailed?

15 A. That's correct.

16 Q. Finally, I would like to ask you about some of the other
17 comments that you have made. Firstly, you say in a
18 statement that you gave to the Mackay team when you were
19 speaking about Q12:

20 "As in the McKie print, these differences are either
21 gross incompetence or a clear attempt to pervert the
22 course of justice."

23 Firstly, is that accusation in relation to my
24 clients, the former SCRO officers who identified that
25 mark?

1 A. That comment is in regards to anyone who did an
2 examination, claimed that Q12 was in fact Marion Ross's
3 print and then refused to re-examine it or retract their
4 position.

5 There are only two explanations for why anyone would
6 call Q12 Marion Ross's fingerprint: one explanation is
7 that it was gross incompetence; the other explanation is
8 that it was fraud.

9 Now, if you have a third alternative I would be glad
10 to discuss that with you.

11 Q. No, Mr Wertheim, I just wanted to check that you were
12 going to stand by the accusation. Of course, the
13 accusation is that it is either gross incompetence or
14 fraud, in your opinion; is that correct?

15 A. Yes, sir.

16 Q. You made a presentation in which you ask whether the
17 mis-identification of Q12, if it is so, was done through
18 incompetence or something more sinister and you give
19 examples of indications of intent.

20 Clearly, your view was that this mark was
21 mis-identified intentionally. Is that still your view?

22 A. I don't know the full context in which you're reading
23 that.

24 Q. This is in the context of a presentation that you gave.

25 A. To whom and when and where and what was the full

1 comment?

2 Q. As I understand it, we're not going to be able to show
3 you the document.

4 A. I stand by my statement with Q12. It is not Marion
5 Ross's fingerprint. No competent Fingerprint Expert
6 would ever believe that Q12 was made by Marion Ross.
7 Therefore, if a person claiming to be a Fingerprint
8 Expert says that Q12 was made by Marion Ross, there are
9 two possibilities that occur to me: number 1, that
10 person is not a competent expert; or, number 2, that
11 person is not being accurate in what he says and you can
12 call that a lie if you want.

13 Q. Does that remain your view despite the fact that there
14 were independent experts who supported the
15 identification?

16 A. Yes, sir.

17 Q. You say elsewhere that there was clearly malicious
18 intent. What do you base that on?

19 A. I base that on the fact -- well, now wait a minute, let
20 me go back and say clearly malicious intent in what
21 sense? What is the context in which I made that
22 statement?

23 Q. This is, again, from a report, Mr Wertheim, authored by
24 you. I am afraid, again, we're not going to have the
25 facility to show you a copy today.

1 A. Okay, can you tell me the date of the report and to whom
2 I made it?

3 Q. **(Pause)** This is a PowerPoint presentation that bears to
4 have been authored by you. The beginning of it refers
5 to the mark on the sweets tin. There are several
6 photographs of the tin with Q12 on it. On page 9 of
7 that PowerPoint presentation, there are bullet points in
8 which you identify indications of intent. The third
9 bullet point down on that page is:

10 "Clearly, malicious intent was present in the
11 preparation and presentation of these two related
12 cases."

13 What do you base that on?

14 A. Well, you're asking me about one bullet point on one
15 slide in a PowerPoint presentation and I have no idea
16 what the previous slides or the bullet points or what
17 the whole point of that statement was. I mean, you sort
18 of pulled it out of context on me there, Mr Holmes.

19 THE CHAIRMAN: Would it assist if Mr Holmes read the whole
20 of that slide to you, just in case it brings back some
21 recollection?

22 MR SMITH: I don't know if I can assist, sir, but for the
23 purposes of Mr Wertheim I think the presentation is a
24 presentation that was prepared for the purposes of the
25 civil case involving Shirley McKie. There was a

1 PowerPoint presentation that Mr Wertheim did carry out.

2 I don't know if that assists in recollection.

3 THE CHAIRMAN: It may well do. Thank you.

4 A. That could well be then. I'm still lacking the complete
5 context there but I will repeat my statement that no
6 competent examiner would reach the conclusion that QI2
7 was made by Marion Ross and, therefore, if a person says
8 that QI2 was made by Marion Ross either he is not a
9 competent examiner, in which case he still may be of the
10 honest opinion that it was Marion Ross's print but he's
11 not competent to know the difference or if he is a
12 competent examiner he could not reach that conclusion
13 and honestly stay with it. I don't know how to make it
14 any plainer than that.

15 Now, in regards to -- would you read that bullet
16 point again?

17 THE CHAIRMAN: I think it would be better if he read all
18 three bullet points, Mr Wertheim, so that you can follow
19 it more clearly.

20 MR HOLMES: Okay. The three bullet points on that page
21 read:

22 "1. The circumstances and court presentation of
23 fingerprint evidence in the case of Shirley McKie lead
24 to a conclusion of perjury."

25 A. Can you repeat that, please?

1 Q. "The circumstances and court presentation of fingerprint
2 evidence in the case of Shirley McKie lead to a
3 conclusion of perjury."

4 A. Okay.

5 Q. "2. That the circumstances and court presentation of
6 the fingerprint evidence in the case of David Asbury
7 lead to a conclusion of perjury."

8 The third bullet point is:

9 "Clearly, malicious intent was present in the
10 preparation and presentation of these two cases."

11 My question is what do you base that inference on?

12 MR SMITH: I am sorry to interrupt, sir, but I think it's a
13 little unfair to the witness. There is a previous slide
14 that is headed, "Indications of intent".

15 THE CHAIRMAN: I think it should be read as well. It is not
16 very clear unless you read it within the context.

17 MR HOLMES: The previous slide, Mr Wertheim, has four points
18 on it. You say at the top of it "Indications of
19 intent".

20 The first bullet point says:

21 "Out of focus photograph of mark was used though in
22 focus photograph was available."

23 The second one says that:

24 "Points charted in inked print do not match
25 corresponding details in the mark."

1 The third point says that:

2 "Obvious ridge ending in mark above core clearly
3 does not exist in Marion Ross's print."

4 The fourth says:

5 "If done by a competent expert the final conclusion
6 must be that it was perjury."

7 So is your allegation that the SCRO officers who
8 gave evidence during both of these trials were lying?

9 A. My allegation is that either they are incompetent or, if
10 they were competent, they had to have known the
11 conclusion that they were testifying to was wrong.

12 Q. You appear quite certain there, Mr Wertheim, that the
13 conclusion is not one of a lack of competence but that
14 the conclusion is that these officers perjured
15 themselves, am I --

16 THE CHAIRMAN: I think in fairness to the witness, what he
17 has said is, if done by a competent expert, the final
18 conclusion must be that it was perjury. So it is based
19 on the assumption for the moment that it was done by a
20 competent expert and then, as Mr Wertheim said, then it
21 must be perjury.

22 MR HOLMES: Apologies, sir. That does indeed exist in that
23 last point there.

24 A. I believe Sir Anthony has summed up my position clearly.
25 Thank you, sir.

1 Q. On the first of this month and, again, we go back to the
2 Internet chat board, did you post in response to a
3 question about whether fingerprints lie:

4 "No, fingerprints do not lie. A fingerprint is what
5 it is. Sometimes humans make mistakes. Sometimes
6 humans lie."

7 Did you post that, first of all?

8 A. I believe I did.

9 Q. What is that intended to convey?

10 A. I believe it speaks for itself. A fingerprint is a
11 mark. It's ridges and furrows. It neither lies nor
12 tells the truth. It is simply there. The
13 interpretation of that mark can be correct or the
14 interpretation can be incorrect. The person giving the
15 interpretation can tell the truth or the person giving
16 the interpretation can attempt to deceive. It says
17 exactly what I meant it to say.

18 Q. So your position comes to this: if this Inquiry agrees
19 with you and finds that Y7 was not correctly identified
20 as the fingerprint of Shirley McKie and that Q12 was not
21 correctly identified as the fingerprint of Marion Ross,
22 then those who made that identification are either
23 incompetent or they are lying. Would that be correct?

24 A. Yes, sir, that's correct.

25 Q. On the other hand, if this Inquiry finds that Y7 was

1 correctly identified as having been made by Shirley
2 McKie and that Q12 was correctly attributed to Marion
3 Ross, you were just an expert offering his honest
4 opinion?

5 A. That is my honest opinion. Y7 is not Shirley McKie's
6 fingerprint. Q12 is not Marion Ross's fingerprint.

7 Q. So you can be incorrect but you are just an expert
8 offering your honest opinion but if someone of the
9 opposing view is correct(**sic**) they are either
10 incompetent or they are liars. Is that your evidence?

11 A. If I am wrong about Y7 and Q12, then you may call me
12 incompetent, sir.

13 MR HOLMES: Thank you, Mr Wertheim.

14 THE CHAIRMAN: Now if you will bear with us just a few
15 moments longer, perhaps, if I could ask, first of all,
16 Miss Grahame if she has any questions she wants to ask.

17 MISS GRAHAME: I would like to clarify just one very small
18 matter regarding the suggestion about a court order
19 having to be obtained by the defence.

20 THE CHAIRMAN: Yes, if you want to ask that you may.

21 **Cross-examined by MISS GRAHAME**

22 Q. Good afternoon, Mr Wertheim. I would like to clear one
23 thing up with you, if I may. You have explained how
24 your recollection of going to the Fiscal's office and
25 seeing the gift tag is perhaps slightly flawed and I

1 wonder if I can suggest to you that maybe another
2 element of your recollection may be flawed.

3 You have said in evidence today and it is something
4 that you have mentioned before, that the defence
5 solicitor for David Asbury told you that he had obtained
6 a court order to gain access to Crown productions and
7 labels.

8 Do you remember saying that?

9 A. Yes, ma'am.

10 Q. You see, the Crown policy is to allow access, once
11 suitable arrangements are made, for the defence and for
12 defence experts to see anything that is going to be used
13 in court and they are happy to make arrangements for
14 those documents and items to be viewed, either before
15 the case goes to trial or just before when it's in
16 court.

17 I am wondering if it's possible that you have maybe
18 misunderstood what the solicitor said when he said he
19 had a court order because we have nothing in the papers
20 to suggest that any court order ever had to be obtained
21 to allow access to those items?

22 A. I may be mistaken in the document. The solicitor -- and
23 I don't recall his name. He was a young man -- and I
24 went to the Procurator Fiscal's Office, as I recall, on
25 three separate occasions.

1 On the first occasion, I was denied access to
2 anything. On the second occasion, a couple of days
3 later I was given access to a limited number of items.
4 Then I returned to the US and returned to Scotland a
5 couple or three weeks later -- I don't remember the time
6 interval -- and on the third visit then I was given all
7 of the evidence in the case. Now, that's my
8 recollection. I know in the US it would require a court
9 order to do that. I don't know that that's the right
10 term in Scotland. I apologise.

11 Q. So it is perhaps a misunderstanding between yourself and
12 the solicitor; would that be fair to say?

13 A. Yes, ma'am.

14 MISS GRAHAME: Thank you very much. I have nothing --

15 A. I am sure the solicitor would remember it more
16 accurately than me because he knows the Scottish system.

17 MISS GRAHAME: Thank you. That clears that up for me.

18 THE CHAIRMAN: Mr Smith, have you any matters you want to
19 raise?

20 MR SMITH: Yes, sir. There are a few matters I would like
21 to raise. The question of Mr Wertheim's qualifications
22 and experience. I can deal with that just in a couple
23 of questions. Second, the methods used in the US
24 regarding expert testimony, in particular Daubert
25 hearings. He might be able to give some assistance with

1 that and also some questions I have relating to some
2 factual information. It may be recalled I asked
3 Mr Leadbetter if Mr Wertheim's position was X then what
4 was his position. I would just like to hear primary
5 evidence on that and also a couple of questions that
6 have been raised by Mr Holmes and, to a lesser extent,
7 by Miss Grahame, I would like to clarify a couple of
8 matters relating to --

9 THE CHAIRMAN: Very good. You have raised some matters
10 there and you may ask them.

11 **Cross-examined by MR SMITH**

12 Q. Mr Wertheim, when you were required to give evidence in
13 the Shirley McKie case in the High Court in Glasgow, at
14 that stage -- we have available your CV -- would I be
15 right in saying that at that stage had you approximately
16 200 hours training by the FBI in latent fingerprint
17 analysis? Would that be correct?

18 A. I believe that would be correct, without having the
19 benefit of my CV in front of me but I believe that would
20 be correct.

21 Q. In addition to that, I think we could see for ourselves
22 if we had it in front of us, that you had a number of
23 hours of training in other aspects of fingerprint
24 examination and also in other forensic skills, if I put
25 it that way. So a large number of hours of training by

1 a number of organisations at the time you gave evidence
2 in the McKie case; is that right?

3 A. That's correct. I might say that I'm at a little
4 disadvantage because obviously I don't have a screen in
5 front of me that displays the things that the Inquiry's
6 looking at. It would have helped considerably with
7 Mr Holmes' cross-examination and I would like to state
8 for the record that I was willing to return to Scotland
9 or I could have had this but it was the
10 Inquiry's decision to do this by video conference. So
11 with that as a sort of a foundation, I will say that if
12 you've got the copy of my CV in front of you and those
13 are the numbers reflected on that, then I will accept
14 that as accurate.

15 Q. Thank you.

16 I would like to ask you, if I can, a little bit
17 about what we have heard described as Daubert hearings,
18 where I think we understand from other evidence in the
19 Inquiry this relates to almost an examination, a
20 preliminary examination, by the courts in the
21 United States into not just the particular experts but
22 into the kind of expertise that they are speaking to.

23 Is that something that you have had any personal
24 experience of, giving evidence in a Daubert hearing?

25 A. Yes, sir.

1 Q. Could you explain to us what that experience was, what
2 your role was and what the court was trying to achieve?

3 A. The original intent of the Daubert hearing was to allow
4 a court to examine the basis for a new or novel science,
5 one that was not widely accepted. That was the original
6 intent of Daubert.

7 However, the US Supreme Court wording of the Daubert
8 decision allowed it to be expanded to attack --

9 Q. Hold on just one moment. There's something happening
10 with the line here.

11 A. Oh, on the screen?

12 Q. Just hold on.

13 THE CHAIRMAN: We just need someone to press "no", I
14 think. I think we are in business now. Sorry about
15 that.

16 MR SMITH: If you could continue with your answer, please,
17 you are describing the wording of the Supreme Court
18 decision.

19 A. To summarise Daubert, the original Daubert hearing was
20 held to determine the validity of statistical evidence
21 used to analyse birth defects as having been caused by a
22 specific drug. It was a civil case, it was not a
23 criminal case. The statistical method used by the
24 defence, or I should say by the plaintiff, by the
25 Daubert family, was challenged by Merrell Dow

1 Pharmaceutical. The Daubert family alleged that a drug
2 taken by Mrs Daubert had caused birth defects in the
3 baby. Merrell Dow alleged that their testing, their
4 phase 1, phase 2, phase 3 studies, showed that the drug
5 was safe and yet the Daubert family provided a
6 statistician who presented a statistical analysis of
7 Merrill Dowel's own evidence to show that there was a
8 significantly higher incident of birth defects among
9 women who used this drug.

10 Now, the problem was that the statistical
11 methodology used by the Dauberts' statistician was not
12 an accepted methodology, it had never been published
13 either in any textbook or in any articles, the
14 statistician hired by the Dauberts had not had any other
15 statistician review the work, and ultimately the Supreme
16 Court threw out the Daubert statistician and said that
17 did not meet the test of science. In that decision,
18 Merrell Dow was specifically addressing new and novel
19 techniques or methodologies such as the new and novel
20 statistical approach used by the Daubert statistician,
21 it never been used for any other purpose, it was
22 invented for that case alone, the methodology was not
23 peer reviewed, it was not validated. The Supreme Court
24 held that in a new and novel scientific methodology,
25 first of all, the court should ask: has this methodology

1 achieved general acceptance in the relevant scientific
2 community; secondly, what is the error rate of this
3 science; third, is the methodology tested and validated;
4 and, fourth, has it been published and peer reviewed.
5 Now, I may have those out of order but those were the
6 four criteria that the Supreme Court said should be used
7 to evaluate a new methodology.

8 Subsequently, when DNA came into its first usage,
9 the Daubert decision was used to challenge DNA evidence
10 on the grounds that it was a new and novel science.
11 There were a number of DNA decisions in most States and
12 most federal jurisdictions in the US before DNA became a
13 generally accepted science. At that point, Daubert
14 challenges began to be filed against other disciplines.
15 The first was against questioned documents or document
16 examination and the document examiners lost the first
17 Daubert challenge filed against document evidence.

18 Subsequently, when the first Daubert challenge was
19 filed against fingerprints, it was the Byron Mitchell
20 case out of Federal Court in Philadelphia and in the
21 Byron Mitchell case, the FBI had presented the evidence.
22 The FBI assembled a team of outside experts to assist in
23 defending the science of fingerprints. I was fortunate,
24 I was honoured, to have been chosen by the FBI as part
25 of the team and subsequently I attended the hearing in

1 Philadelphia in July -- as I recall, it would have been
2 the week of probably July 7, 8, 9, 10, somewhere
3 thereabouts in 1999 in Philadelphia -- and I testified
4 in that first Daubert challenge on fingerprints.

5 I have subsequently testified in, oh, one or two or
6 three other Daubert challenges to fingerprints as well.

7 Q. Can I ask you this: the challenge that was being
8 presented, was that a wholesale challenge against
9 fingerprint evidence or was it a particular aspect of
10 it?

11 A. The first one, the Byron Mitchell case, was a wholesale
12 challenge to all aspects of fingerprint identification.
13 Subsequent challenges have narrowed the focus but that
14 first challenge was a broad-based attack on everything
15 we do.

16 Q. Can I ask you this on a particular matter: there has
17 been a lot of evidence before this Inquiry relating to
18 distortion, movement, et cetera, as a justification for
19 differences between, for example, Y7 and the prints that
20 are Shirley McKie's. On that particular aspect, is
21 there published literature relating to any studies into
22 distortion and movement and so on and so forth?

23 A. Every training course deals with distortion. There has
24 been a recently published article on distortion, it's
25 been within the last year in the Journal of Forensic

1 Identification authored by Alice Maceo -- M-A-C-E-O.
2 Alice Maceo has done a tremendous amount of research
3 using a video camera mounted below a glass plate and
4 studying the deposition of the fingerprint with
5 twisting, with rolling, with pressure, with slippage,
6 from every kind of distortion she can devise and
7 watching it filmed and then comparing the final print as
8 it would be powdered and lifted to the motion as it can
9 be viewed which resulted in that deposition. I'm not
10 sure that Miss Maceo has ever applied her analytical
11 techniques to Y7 or Q12.

12 Q. I would like to ask you if I can just a little bit about
13 the differences in the methods of presentation in your
14 experience of fingerprint evidence in the United States.
15 Obviously we have all seen the comparison in the
16 charting enlargements that was presented to the court in
17 Shirley McKie's case and you looked at that yourself.
18 As far as that is concerned, have you ever seen anything
19 like that in your experience of evidence in the
20 United States, anything that is a comparison with a
21 number of lines, whether 16 or any other number, going
22 in to try and justify a position? Is that something
23 that is used?

24 A. In the history of fingerprints that has been, up until
25 the last few years, that has been the standard way of

1 demonstrating an identification to the court, a large
2 chart with a photograph of the crime scene mark or the
3 latent print on the one side and on the other side the
4 inked print and then each of the points, which is to say
5 ridge ending, bifurcation or splitting ridge, and dot.
6 Each of the points then has a line and is assigned a
7 number so that you can compare point 1, point 2 and
8 point 3. That is standard.

9 What was not standard about those productions is
10 that the top half of Y7 was chopped off. That's from
11 the earliest training I got. I was taught that you
12 don't crop the latent print. You include the entire
13 unknown, the crime scene mark and the latent print. In
14 some cases, you might crop off part of the inked print
15 because the inked print may be large rolled and you may
16 be comparing it to a small piece of latent so you are
17 only comparing the relevant portion of the inked print,
18 but you have to compare the entirety of the latent
19 print.

20 The other thing that was not standard was that the
21 charts prepared by SCRO dealing with Y7 were degraded.
22 The images were very unclear. Now, the inked prints
23 were very clear. That half of the chart of Y7 was
24 clear. The ridges, the furrows, the sweat pores,
25 everything in the inked prints was clear but everything

1 in the latent print had been degraded. Whether that was
2 intentional or not, I don't know, but I have to believe
3 that if the charting machine was capable of producing a
4 crystal-clear inked print, it should have been capable
5 of producing a clear latent print. So to present a
6 chart with an unclear print that has been cropped, that
7 is not acceptable.

8 Q. But the purpose of the kind of demonstration that you
9 refer to in the US I take it it was to try and
10 demonstrate to the jury how they could see a match
11 between the latent and the inked. Is that right?

12 A. That's correct.

13 Q. It is not a question of just saying, "Well, I'm an
14 expert, I can see it" or "This is just a demonstration
15 but we can't really see what's going on here, but I'm
16 telling you I have seen it and it's right". You see the
17 difference between the two?

18 A. Yes. If I'm an expert, I should be able to show you why
19 I see what I see and what I believe. Being an expert
20 does not allow me to see anything differently from what
21 you see. Being an expert allows me to understand and
22 interpret what I see but there's no way that training
23 will allow me to see something that's not there. Thus
24 when we prepare a chart for court it's not to show
25 things that I see that you can't see, it's to help me

1 explain to you how I've interpreted the evidence. But I
2 can't simply sit there and say, "I'm the expert.
3 Believe me". I have to be able to explain to you, to
4 educate you, if you will, to teach you how to be an
5 expert in just this one print. If I'm going to a jury,
6 I may not be able to make them fingerprint experts for
7 the whole science of fingerprints, but it's my goal to
8 make them an expert for that one fingerprint that they
9 have to evaluate in the jury room.

10 Q. In that regard, do challenges to a prosecution in the
11 United States, is that something that happens -- how
12 would you describe it -- regularly, frequently? Can we
13 get an idea of how experienced fingerprint experts are
14 to deal with challenges or to challenge the prosecution?

15 A. Without having ever kept track or done a survey, I would
16 say that I'm probably reviewed by a defence expert on
17 average two or three times a year. They'll come into
18 the lab, they will look at the evidence, they'll
19 photograph it or I'll meet them at an attorney's office
20 and present it to them. It's not uncommon.

21 Q. You see, what I am trying to do is compare the position
22 in Scotland as I understand it. The challenge that you
23 presented in your evidence in Shirley McKie's case was,
24 frankly, the first certainly in living memory that there
25 was a direct challenge being taken to court. Now, that

1 is something that clearly happens on occasion in the
2 United States in different States, that there are actual
3 challenges presented in court. That must be correct, is
4 it?

5 A. No, I would not say that that's common because those
6 cases are generally resolved ahead of time. I've never
7 known a case -- I've never had a case where a
8 Fingerprint Expert came to court and said I was wrong
9 and, while I have done other defence cases, in the vast
10 majority of those cases I have concluded that the
11 Fingerprint Experts were correct. Following the Shirley
12 McKie trial, I was contacted by other defence attorneys
13 or solicitors in Scotland to look at additional cases
14 that the SCRO had done and in the rest of the cases that
15 I looked at I concurred with the SCRO's conclusions in
16 those cases. So I would have never appeared against
17 them in those cases.

18 Having a situation like we did here where experts go
19 head-on in court is rare in the United States.

20 Q. I would like to ask you just a few very short questions
21 just to clarify some matters. The first of these
22 relates to the attack by Mr Leadbetter against you in
23 his statement. I am sure that you have read the
24 evidence in which I cross-examine Mr Leadbetter, so I am
25 guessing not much of this is a surprise to you, but he

1 accuses you in his statement of having misled the US
2 courts when you first gave evidence in the 1970s because
3 of, I think in summary, a failure to disclose to the
4 courts that you only had a couple of weeks' training
5 before giving evidence.

6 On the first occasion you gave evidence in a court,
7 did you disclose to the court that you had only had that
8 limited training and experience in latent fingerprint
9 examination?

10 A. Oh, yes. The state of training in the US back in the
11 1970s was not good. There were some police agencies
12 that had excellent training programmes. The police
13 agency that I worked for in the 1970s was the Kerrville
14 Texas Police Department -- K-E-R-R-V-I-L-L-E -- and they
15 sent me to a two-week course following which they
16 blessed me as their fingerprint expert. My job after
17 that included the classification, filing and searching
18 of fingerprints, as well as comparison of unknown prints
19 with known prints. But when I first testified, which
20 would have been 1978 or 1979 -- I had taken my training
21 in 1976, when I first testified, I did not mislead the
22 court. It's up to the court to decide whether to admit
23 my evidence. I have never inflated my qualifications.

24 Q. So it would be disclosed to the prosecution, to the
25 judge, to the defence?

1 A. And to the defence attorneys.

2 Q. Everyone. So they knew what the state of your training
3 and experience was?

4 A. Yes, absolutely.

5 Q. Can I ask you as far as Shirley McKie's inked
6 fingerprints are concerned, when you took fingerprints,
7 inked examples from her, do you recall if you took any
8 rolled prints from her?

9 A. My recollection is that I began with a full set of
10 rolled fingerprints taken in the way that a jailer would
11 normally fingerprint a prisoner; in other words, all ten
12 fingers rolled completely from side-to-side. I began
13 with that full set of fingerprints to document all of
14 the fingers and because I wanted to compare Y7 to each
15 of her fingers just to assure myself that maybe the
16 wrong inked print had not been used on the charts. So I
17 did take a full set of rolled prints. I don't believe
18 I'm currently in possession of that. I believe I must
19 have either given it to Angela McCracken or Donald
20 Findlay or somebody else down through the years, but
21 it's my recollection that I took a set of rolled prints,
22 but because the charted enlargement focussed on the left
23 thumb, then I took many impressions of the left thumb
24 trying to duplicate the angle and direction of touch and
25 pressure to match the angle and direction of touch and

1 pressure of Y7 to facilitate more comparison of similar
2 areas of the thumb.

3 Q. Can I ask you this, and this is to do with the question
4 of whether you discussed with Mr Grieve, and indeed
5 Mr Ashbaugh, your opinion before you gave them the
6 images to look at. As far as Mr Grieve is concerned,
7 both of you gave evidence in the High Court, I think, in
8 Glasgow relating to your respective opinions about Y7.
9 Did you discuss with Mr Grieve your opinion and what his
10 opinion was at any time prior to you giving evidence to
11 the High Court?

12 A. No, sir.

13 Q. I think you had a lot of hanging about to do in Glasgow
14 waiting for the trial to begin. Did you spend time in
15 the company of Mr Grieve?

16 A. I spent most of two weeks in the company of Mr Grieve.

17 Q. During that entire period of time that you were in his
18 company you tell us that you didn't once discuss with
19 him what his opinion was and you didn't tell him what
20 your opinion was about Y7?

21 A. No. I think we both assumed that we had reached the
22 same conclusion by virtue of the fact that Donald
23 Findlay had called both of us to testify, but we did not
24 discuss our conclusions nor how we got there. I might
25 add that when I first gave those images to Mr Grieve and

1 Mr Ashbaugh they thought, at least now in retrospect
2 having talked to them after Shirley McKie's trial, they
3 thought that I had been doing an examination for
4 fingerprint forgery and that I was asking them to review
5 the fingerprints for science of forgery, because that
6 was the original call from Iain McKie and that was my
7 discussion with Angela McCracken prior to my visit to
8 Glasgow, was that Shirley McKie was alleging that her
9 fingerprint had been forged on the doorframe.

10 Therefore, when I left Edinburgh and took the train
11 to Glasgow, the Ashbaughs and the Grieves remained
12 in Edinburgh. I went to Glasgow, I looked at the print,
13 I realised it was not a forged fingerprint, but I
14 reached a conclusion it was an erroneous identification.
15 When I returned to Edinburgh and gave them the prints, I
16 did not do anything to correct their belief that I was
17 looking at a fingerprint forgery. I intentionally left
18 them with only the impression they had had before I went
19 to Glasgow and I never -- Mr Grieve and I scrupulously
20 avoided talking about that case until after Shirley
21 McKie's trial was over. Only then did we discuss it.

22 Q. The final matter I wanted to ask you about was the
23 question of the quashing of Mr Asbury's conviction. If
24 you take it from me that, whilst Mr Holmes is right to
25 say that the prosecution did not resist, the Crown

1 didn't resist the appeal, the Crown were in possession
2 of a report which agreed that Q12 was wrongly identified
3 as being of the late Marion Ross. Before you examined
4 Q12 and said that it was an incorrect identification,
5 are you aware if anyone else had come to that conclusion
6 by looking at it?

7 A. I'm not aware of that.

8 Q. I am really trying to just understand what I think was a
9 veiled criticism against you for your suggestion that it
10 was your opinion that led to the acquittal, but I am
11 right in saying that you said, I think after being
12 funded by the Panorama programme I think to come across
13 and examine Q12, you said it was wrong. That was
14 communicated by the solicitors to the Crown. The Crown
15 then obtained their own report and, once they obtained
16 their own report, the conviction of David Asbury was
17 quashed by agreement of the Crown.

18 Is that your understanding of the sequence of
19 events, Mr Wertheim?

20 A. Yes, with a couple of minor points there. I believe the
21 funding for my trip to Scotland was not by Panorama but
22 was by the programme Frontline Scotland.

23 Q. I beg your pardon. You may be right about that.

24 A. But I was led to believe that my report alone was the
25 basis for the appeal and the quashing of his conviction.

1 "With regard to the mark labelled [and I will take
2 it short] XF in Crown production 98, I've compared that
3 mark to the inked prints I took from David Asbury. The
4 mark is clearly the print of David Asbury's right index
5 finger. However, the image of the mark on the gift tag
6 in the photograph of XF in Crown production 98 leaves
7 some unresolved questions. In order to evaluate that
8 mark fully, it would be necessary for me to examine the
9 gift tag itself with the mark still in place on it. To
10 this date, I have not been given access to that piece of
11 evidence."

12 Would you accept what I have read that that may have
13 been the position on 30th March 2000?

14 A. Yes.

15 Q. I happen to have seen, but I don't have on this
16 particular computer, some correspondence with the
17 defence solicitors, who were by then an Edinburgh firm
18 called Moore & Company, who set up with the Crown Office
19 the opportunity for you to see XF on 25th April and you
20 wrote the notes that I actually showed you in the
21 Inquiry on that day.

22 A. Yes, sir.

23 Q. I will come back to that particular period in 2000.

24 The next document that you lodged as part of your
25 statement to the Inquiry is at section 9 and is a report

1 dated 6th October 2003; so it was written three years
2 later. In that at paragraph 23 -- this is by now
3 page 67 of the document for us -- what you write in
4 October 2003, and I will take it shortly, is essentially
5 a repetition of what you had said in March 2000. What
6 you wrote is:

7 "With regard to the mark labelled [and I will take
8 it short] XF in Crown production 98 I have compared that
9 mark to the inked prints I took from David Asbury. The
10 mark is clearly the print of David Asbury's right index
11 finger. However, the image of the mark on the gift tag
12 in the photograph [and, again, I will take it short] of
13 XF and Crown production 98 leaves some unresolved
14 questions. In order to evaluate that mark fully, it
15 would be necessary to examine the gift tag itself with
16 the mark still in place on it. To this date, I do not
17 believe that any such independent examination of the
18 gift tag itself has taken place. In light of the issues
19 presented by Crown production number 99, I believe a
20 complete review of the gift tag itself is fully
21 warranted."

22 Then you sign. It would appear that your memory
23 lapse had occurred by the date of this report in
24 October 2003?

25 A. Yes, sir. You've narrowed it down very well. It must

1 have and again I apologise. There's no excuse for the
2 memory lapse, except that all I can suggest is that in
3 April 25th of 2000 it was insignificant enough that it
4 didn't make it back into long-term memory and I'd
5 forgotten about it.

6 Q. That's okay. One final thing I just wanted to ask you
7 about is we understand -- again, I haven't viewed it --
8 that in the BBC programme in May 2000 that brought to
9 light the Q12 that you may have been photographed or
10 filmed outside the Procurator Fiscal's Office making
11 some comments about XF. Do you have any recollection of
12 that interview to tell us whether that was before or
13 after the time that you, in fact, examined the gift tag?
14 Do you have any recollection of it at all?

15 A. I seem to remember Shelley Jofre and I believe Allan
16 Bayle went with me on at least one occasion to the
17 Procurator Fiscal's Office, but I don't recall whether
18 the interview was before or after the examination.

19 Q. We will leave it there. What I will do for the others
20 is I will show them the correspondence that in fact
21 comes after 30th March 2000 and plugs the gap between
22 30th March 2000 and 25th April when you actually saw the
23 gift tag and that may assist. As far as I can
24 understand from that correspondence, you gained access
25 as a result of correspondence between the defence

1 solicitors and the Crown and not as a result of a court
2 order.

3 A. I accept that.

4 MR MOYNIHAN: I have no further questions then. Thank you,
5 Mr Wertheim.

6 THE CHAIRMAN: That, I think, brings to an end your
7 evidence, Mr Wertheim. It only remains for me to thank
8 you for, first of all, coming to Scotland to give
9 evidence and for giving evidence in this way today.
10 Thank you very much for that.

11 I think I should also thank Digby Brown who have
12 made the facilities at this end available and beyond
13 that I am sure the sun is shining in Arizona, which it
14 certainly is not in Scotland. I wish you well.

15 A. I would gladly trade you some sunshine for rain.

16 THE CHAIRMAN: We could give you the rain. Thank you very
17 much. Goodbye.

18 **(5.40 pm)**

19 **(Adjourned until 9.30 am the following morning)**

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