

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 INDICTMENT NO. 89/08

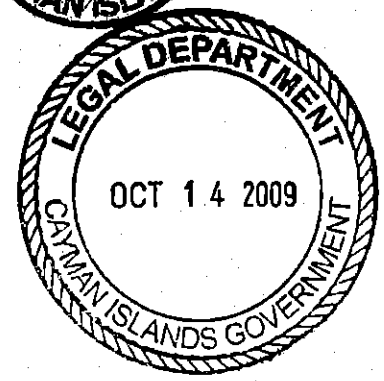
*Concluded by
Crown & Accused
17/9/09*

3
4 THE QUEEN



5
6 -V-

7
8 JOSUE ALEXANDER CARRILLO PEREZ



9
10
11 CORAM: ANDERSON J. (Acting)

12
13 **Appearances:** Mr. Trevor Ward and Mrs. Jenesha Borasingh-Simpson (A.G's
14 Department) for the Crown; Mr. Anthony Akiwumi for the
15 Accused

16
17
18 **Heard:** September 16, 2009

19
20
21 **APPLICATION TO EXCLUDE FINGERPRINT EVIDENCE**

22
23 1. On Wednesday September 16, I heard submissions from counsel for the accused
24 and for the Crown in respect of an application by the defence that the fingerprint
25 evidence which the Crown proposes to adduce in the instant matter should be
26 excluded. Having considered the submissions overnight on the 16th September,
27 on Thursday 17th September I denied the application and promised to put my
28 reasons in writing. In fulfillment of that promise, I now do so.

1 2. The defendant Josue Alexander Carrillo Perez (“the defendant”) is on trial for
2 murder. The indictment charges him with murder of Martin Gareau, a Canadian
3 national contrary to section 8 of the Penal Law of the Cayman Islands. By this
4 application, the defendant asks the court to exclude the fingerprint evidence with
5 respect to latent prints, (Exhibits RP 22 and RP 23) which prints the Crown says
6 are, by a process of comparison with Exhibit OM/1 JACP, attributable to the
7 defendant, and which it is seeking to adduce in this trial. Defendant’s counsel
8 submits that despite the almost universal acceptance of the infallibility of
9 fingerprint for a hundred years, recent scholarly writings and some decisions of
10 eminent courts in World-wide jurisdictions, have raised the question of whether
11 fingerprint identification is in fact a science and whether it really is as reliable as
12 presumed. The defendant relies upon four propositions in support of the
13 submission that the court should exercise its discretion to exclude the evidence in
14 question. These are as follows:

- 15
- 16 (i) *Fingerprint evidence is an unreliable technique for determining, to the*
17 *criminal standard the Defendant’s guilt;*
- 18
- 19 (ii) *Furthermore, by reason of its proved fallibility, its unscientific foundation*
20 *and its lack of objective review, evidence purporting to identify a*
21 *defendant by the examination of latent prints is inherently unreliable and*
22 *prejudicial such as it should not be admitted; and,*
- 23
- 24 (iii) *By reason of (i) and (ii) neither William McKay nor Claire Elizabeth*
25 *Hasart are credible as experts upon whom reliance can be placed to the*
26 *requisite criminal standard in order to establish the Defendant’s guilt;*
- 27
- 28 (iv) *In the event that the Court disagrees with either of the propositions*
29 *advanced in sub-paragraphs (i) and (ii) heretofore, then, neither William*
30 *McKay nor Claire Elizabeth Hasart should be entitled to express an*

1 *opinion on the ultimate issue, namely whether the latent fingerprints*
2 *allegedly found at [insert address] are attributable to the Defendant.*
3

4 3. With respect to the qualification of the witnesses being called by the Crown,
5 counsel for the defendant questions whether they qualify to give expert evidence
6 and relies largely upon a decision of the Supreme Court of the United States of
7 America *Daubert v Merrell Dow Pharmaceutical Inc. 509 U.S. 579 (1993)*. On
8 the limb of the reliability of such evidence, he also calls in aid decisions of
9 United States courts in *United States v Llera Plaza*; *United States v Mitchell*
10 and *State of Maryland v Rose*.

11
12 4. The evidence in respect of the prints is to be derived from the evidence of Claire
13 Hasart and William McKay and the defendant says that the court in its role as
14 “gatekeeper” ought to exclude the evidence. He submits that Ms. Hasart (who
15 was not called at the Preliminary Enquiry) has not indicated the basis upon which
16 she has concluded, as she does, that the prints at exhibits RP 22 and RP 23 are, in
17 fact, the right middle and right forefinger respectively, of the defendant. He also
18 submitted that the evidence of William McKay that he was also able on a
19 verifying examination, using what is known as the ACE-V technique, to reach a
20 similar determination, ought similarly to be excluded. The defendant challenges
21 the reliability of the ACE-V methodology. Further, based on McKay’s finding in
22 relation to one exhibit, he had demonstrated at least a 25% error rate. There was
23 accordingly, no reliable basis for determining how McKay had arrived at his
24 opinion.

1 5. The arguments on behalf of the defendant are directed to satisfying the
2 proposition that fingerprint evidence is not only inherently unreliable based upon
3 the methodologies used, but is, in any case, so unreliable that this court should not
4 hesitate to exercise its discretion to exclude it from the evidence to be led in the
5 instant case. In fact, according to the defendant's counsel, it may be that based
6 upon the test in R v Bonnython 38 SASR 45, fingerprint identification may not
7 even properly be a science.

8
9 6. It is clear that in giving fingerprint evidence, a witness purports to be giving the
10 opinion of an expert. It stands to reason that such evidence must first pass the
11 threshold of being "expert evidence" as that term is understood in law. The
12 defendant's counsel first submits that there are questions as to whether the
13 evidence is to be admitted as expert evidence at all.

14
15 7. In R v Bonnython, King C.J. stated:

16
17 *The general rule is that a witness may give evidence only as to matters observed*
18 *by him. His opinions are not admissible. One of the recognized exceptions to this*
19 *rule is that which relates to the opinions of an expert. This exception is confined*
20 *to subjects which are not, or are not wholly, within the knowledge and experience*
21 *of ordinary persons. On such subjects a witness may be allowed to express*
22 *opinions if the witness is shown to possess sufficient knowledge or experience in*
23 *relation to the subject upon which the opinion is sought to render his opinion of*
24 *assistance to the court. Before allowing a witness to express such opinions, the*
25 *judge must be satisfied that the witness possesses the necessary qualifications,*
26 *whether those qualifications be acquired by study or experience or both. But*
27 *when it is established that the witness is an expert in the relevant field of*
28 *knowledge, he will be permitted to express his opinion, however unconvincing it*
29 *might appear to be, subject always, of course, in a criminal trial to the discretion*
30 *to exclude evidence whose prejudicial effect is disproportionate to its probative*
31 *value. The weight to be attached to his opinion is a question for the jury.*

1
2 The judgment of King C.J. in Bonython continues in the following terms:

3
4 *"Before admitting the opinion of a witness into evidence as expert testimony, the*
5 *Judge must consider and decide two questions. The first is whether the subject*
6 *matter of the opinion falls within the class of subject upon which expert evidence*
7 *is permissible. This first question may be divided into two parts, (a) whether the*
8 *subject matter of the opinion is such that a person without instruction or*
9 *experience in the area of knowledge or human experience would be able to form a*
10 *sound judgment on the matter without the assistance of witnesses possessing*
11 *special knowledge or experience in the area, and (b) whether the subject matter of*
12 *the opinion forms part of a body of knowledge or experience which is sufficiently*
13 *organized or recognized to be accepted as a reliable body of knowledge or*
14 *experience, a special acquaintance with which of the witness would render his*
15 *opinion of assistance to the Court. The second question is whether the witness*
16 *has acquired by study or experience sufficient knowledge of the subject to render*
17 *his opinion of value in resolving the issue before the Court".*
18
19

20 8. It should be noted that in R v Bonython both Matheson J and Bollen J who held
21 that the appeal of the defendant should be dismissed, held that what counsel for
22 the accused was seeking to do, was not to attack the expert witness' methodology
23 but rather to criticize his opinions about the number of specimen signatures he
24 should have used to enable him to offer an opinion. Here, counsel for this
25 defendant is critical of the expert witness McKay not only on the basis of whether
26 the ACE-V methodology is sound, but also on the basis that he seemed unsure
27 about the number of matching ridges that are required under Cayman practice to
28 establish a match.

29
30 9. Mr. Akiwumi also submitted that two cases, both decisions of the Supreme Court
31 of the United States of America, were instructive in seeking to ascertain whether
32 particular expert evidence should be admitted. Those cases are Frye v The

1 United States of America (1923) 293 F 1013 and Daubert v Merrell Dow
2 Pharmaceuticals Inc. (1993) 509 U.S. 579. Frye initiated the test of “general
3 acceptance” which was adopted by most United States courts thereafter until it
4 was over-ruled by the Federal Rules of Evidence (1975) which seek to liberalize
5 the rules on admissibility of evidence. It is defendant’s counsel’s submission that
6 the test laid down by King CJ in Bonython as to whether there is a “specialized
7 body of knowledge or experience which is sufficiently organized or recognized to
8 be accepted as a reliable body of knowledge or experience”, so as to qualify the
9 subject matter of the evidence being given to be “expert evidence” has been
10 “amplified and modified” by the United States cases, and has been impliedly
11 accepted by courts in several jurisdictions across the World..

12
13 10. In any case, it should be noted that the Frye standard of “general acceptance” had
14 been explicitly rejected as early as 1985 in the case of United States v Downing
15 753 F 2nd 1224 (3rd Circ 1985). In that case the court made reliability of the
16 expert evidence its criterion for admissibility. The court also stated:

17 *“Subsequent developments of the Frye test eventually resulted in a conclusion*
18 *that the admissibility of expert evidence upon the application of a new scientific*
19 *technique involves a two step process – first, the reliability of the method must be*
20 *established usually by expert testimony and secondly the witness furnishing such*
21 *testimony must be properly qualified as an expert to give an opinion on the*
22 *subject. Furthermore the proponent of the evidence must demonstrate that*
23 *correct academic procedures were used in the particular case. “Reliability” was*
24 *still to be shown in terms of Frye “general acceptance”. {People v Kelly Cal 3rd*
25 *24 (1976)}*
26

27 The question whether the Frye test was the proper criterion for the admissibility of “novel
28 scientific evidence” was said to have been finally resolved by the United States in

1 Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579. It is noteworthy that
2 the test was not rejected by the United States Supreme Court for any lack of legal
3 principle: the judgment in Daubert turned entirely on the recognition that it had been
4 superseded by the Federal Rules of Evidence 1975.

5
6 11. In the English Court of Appeal in R v Dallagher [2002] EWCA Crim 1903,
7 Kennedy L.J., having discussed Frye, Daubert and the US Federal Rules of
8 Evidence, stated

9 *As to the English approach, we have found it necessary to refer, not only to*
10 *Strudwick and Merry, but also to a number of other decisions, especially Clarke,*
11 *from which, as it seems to us, the analogy with Rule 702 is clear. As is said in the*
12 *current Ninth Edition of Cross and Tapper on Evidence at page 523 after a*
13 *reference to Frye –*

14
15 *"The better and now more widely accepted view is that so long as the field is*
16 *sufficiently well-established to pass the ordinary tests of relevance and*
17 *reliability, then no enhanced test of admissibility should be applied, but the*
18 *weight of the evidence should be established by the same adversarial forensic*
19 *techniques applicable elsewhere.* (My emphasis)

20
21
22 12. Counsel for the defendant accepts the dicta of Rose L.J in the English Court of
23 Appeal in R v Buckley [1999] EWCA Crim 1191

24 *"Fingerprint evidence, like any other evidence, is admissible as a matter of law if*
25 *it tends to prove the guilt of the accused. It may so tend, even if there are only a*
26 *few similar ridge characteristics but it may, in such a case, have little weight. It*
27 *may be excluded in the exercise of judicial discretion, if its prejudicial effect*
28 *outweighs its probative value. When the prosecution seek to rely on fingerprint*
29 *evidence, it will usually be necessary to consider two questions: the first, a*
30 *question of fact, is whether the control print from the accused has ridge*
31 *characteristics, and if so how many, similar to those of the print on the item relied*
32 *on. The second, a question of expert opinions, is whether the print on the item*
33 *relied on was made by the accused. This opinion will usually be based on the*
34 *number of similar ridge characteristics in the context of other findings made on*
35 *comparison of the two prints.*

1 *That is as matters presently stand. It may be that in the future, when sufficient*
2 *new protocols have been established to maintain the integrity of fingerprint*
3 *evidence, it will be properly receivable as a matter of discretion, without*
4 *reference to any particular number of similar ridge characteristics. But, in the*
5 *present state of knowledge of and expertise in relation to fingerprints, we venture*
6 *to proffer the following guidance, which we hope will be of assistance to judges*
7 *and to those involved in criminal prosecutions.*

8
9 *If there are fewer than eight similar ridge characteristics, it is highly unlikely that*
10 *a judge will exercise his discretion to admit such evidence and, save in wholly*
11 *exceptional circumstances, the prosecution should not seek to adduce such*
12 *evidence. If there are eight or more similar ridge characters, a judge may or may*
13 *not exercise his or her discretion in favour of admitting the evidence. How the*
14 *discretion is exercised will depend on all the circumstances of the case, including*
15 *in particular:*

- 16
17 (i) *The experience and expertise of the witness;*
18
19 (ii) *The number of similar ridge characteristics;*
20
21 (iii) *Whether there are dissimilar characteristics;*
22 (iv) *The size of the print relied on, in that the same number of similar*
23 *ridge characteristics may be more compelling in a fragment of*
24 *print than in an entire print; and*
25
26 (v) *The quality and clarity of the print on the item relied on, which*
27 *may involve, for example, consideration of possible injury to the*
28 *person who left the print, as well as factors such as smearing or in*
29 *every case where fingerprint evidence is admitted, it will generally*
30 *be necessary, as in relation to all expert evidence, for the judge to*
31 *warn the jury that it is evidence opinion only, that the expert's*
32 *opinion is not conclusive and that it is for the jury to determine*
33 *whether guilt is proved in the light of all the evidence."*
34

- 35
36 13. It should be noted that in *Mallard v Regina [2003] WASCA 296* in the Western
37 Australia Court of Appeal, cited by the defendant in which Frye was considered,
38 the court stated:

39
40 *The question whether the Frye test was the proper criterion for the admissibility*
41 *"novel scientific evidence" was finally resolved by the United States Supreme*
42 *Court in Daubert....'*

1 *There the Supreme Court held that the Frye test (the "general acceptance test")*
2 *had not survived the institution of the Federal Rules of evidence (1978) which had*
3 *focused on whether scientific evidence would assist a trier of fact to understand*
4 *the evidence or determine a fact in issue' The court found unanimously found*
5 *that "a rigid general acceptance" requirement would be in conflict with the*
6 *"liberal thrust" of Federal Rules and their general approach in relaxing the*
7 *traditional barriers to expert opinion evidence. The Court of Appeal in Mallard*
8 *also described the more recent Daubert decision as being like Frye "highly*
9 *controversial in the United States".*

10
11 It seems to me that whatever the value of Frye, it relates to the question of whether
12 "novel scientific evidence" should be admitted. It is a fact that whatever else it may be,
13 fingerprint with over a hundred years of being used in the courts is not "novel".

14
15 14. As I understand the submissions of Mr. Akiwumi for the defendant, there is
16 considerable doubt that the ability to compare fingerprints so as to be able to
17 provide an opinion of a court on the ultimate issue of whether a particular
18 fingerprint ought to be considered as coming from a particular individual, has
19 risen to a "science" upon which the court can rely. Put another way, the Daubert
20 test of reliability is to be seen in the context of recent high profile cases which
21 have demonstrated that it is not infallible. Thus the defendant refers to the case of
22 Brandon Mayfield. In that case, latent prints lifted from the scene of a train
23 bombing in Madrid were wrongly attributed to Mr. Mayfield by three eminent
24 forensic experts and an independent expert. It was later confirmed that the prints
25 were those of an Algerian national and Mayfield was exonerated. The purported
26 identification was a misattribution. This case was the subject of a scholarly article
27 by Thompson and Cole entitled "Lessons from the Brandon Mayfield Case".
28 The criticism of the purported infallibility of fingerprint identification was further

1 developed by Cole, an assistant professor of Criminology at University of
2 California at Irvine, in another article, "More than Zero: Accounting for Error in
3 Latent Fingerprint Identification". In the article, the learned professor questions
4 whether fingerprint identification, far from being infallible, is even a science. In
5 that regard, he is particularly critical of the fact that latent fingerprint examiners
6 are by the rules of their profession ethically prevented from attributing any
7 probabilities as to the "likelihood" of the matching fingerprints. Rather, it is only
8 "confirmed" that a particular person is "the source" of the prints. The only
9 determinations which the fingerprint expert may make are individualization,
10 inconclusive or exclusion.

11
12 15. Defence counsel points out that the questioning of the reliability and fallibility of
13 fingerprint evidence has been the subject of numerous learned articles in which
14 the authors cite cases of misattribution and question the methodology and
15 scientific basis for ACE-V. Support for these criticism has been derived from
16 cases such as those cited below which were referred to by the defendant's counsel
17 in his submissions.

18
19 16. Based on the scholarship and the misattribution in high profile cases, counsel
20 concludes that it is open to the court to determine that fingerprint examiners do
21 not "possess the specialized knowledge that would enable a court applying the
22 criteria identified hitherto, to conclude that the proposed evidence is admissible to
23 prove identification", and to exercise its discretion to exclude it. In other words:

1 It is open to the court to exclude the evidence on the basis of essential
2 unreliability pursuant to Daubert.

3
4 17. In relation to the issue of reliability and fallibility, the defendant's counsel refers
5 to three cases in particular, of which two were cases decided in the United States
6 District Courts. The US cases are United States v Llera Plaza 1 Nos CR 98-362-
7 10 E.D. PA Jan 7, 2002; United States v Llera Plaza 11 188 F Supp 2nd 549
8 E.D. PA 2002, The State of Maryland v Bryan Rose.

9
10 18. In the first case, (US v Plaza) the judge at first decided to exclude the fingerprint
11 from giving opinion evidence on the "ultimate issue", that of whether the
12 particular latent prints were those of the particular person, this on the basis that he
13 was not satisfied that the ACE-V test used by the experts satisfied the "scientific"
14 tests laid out in Daubert. In the first decision the judge stated as follows:

- 15
16 • *However, as discussed above, the court finds that ACE-V does not*
17 *adequately satisfy the "scientific" criterion of testing (the first Daubert*
18 *factor) or the "scientific" criterion of peer review (the second Daubert*
19 *factor). Further, the court finds that the information of record is*
20 *unpersuasive, one way or another, as to ACE-V's "scientific" rate or*
21 *error (the first aspect of Daubert's third factor), and that, at the critical*
22 *evaluation stage, ACE-V does not operate under uniformly accepted*
23 *"scientific" standards (the second aspect of Daubert's third factor).*
24
25 • *Since the court finds that ACE-V does not meet Daubert's testing, peer*
26 *review, and standards criteria, and that information as to ACE-V's rate of*
27 *error is in limbo, the expected conclusion would be that the government*
28 *should be precluded from presenting any fingerprint testimony. But that*
29 *conclusion –apparently putting at naught a century of judicial*
30 *acquiescence in fingerprint identification processes–would be*
31 *unwarrantably heavy-handed.*
32

1 • *Accordingly, this court will permit the government to present testimony by*
2 *fingerprint examiners who, suitably qualified as "expert" examiners by*
3 *virtue of training and experience, may (1) describe how the rolled and*
4 *latent fingerprints at issue in this case were obtained, (2) identify and*
5 *place before the jury the fingerprints and such magnifications thereof as*
6 *may be required to show minute details, and (3) point out observed*
7 *similarities (and differences) between any latent print and any rolled print*
8 *the government contends are attributable to the same person. What such*
9 *expert witnesses will not be permitted to do is to present "evaluation"*
10 *testimony as to their "opinion" (Rule 702) that a particular latent print is*
11 *in fact the print of a particular person.*

12
13 The judge in that case, at first held that: "Despite the longevity of the practice, the
14 validity of the tests had not been verified by scientific testing".

15
16 19. In another case, *State of Maryland v Bryan Rose Case No: K06-545 (Balt Co*
17 *2008)*, the trial judge, Judge Souder, at first instance determined that based upon
18 the findings in *United States v Mitchell 365 F. 3rd 215* and the *Plaza* case the
19 fingerprint methodology based on the ACE-V methodology was unscientific and
20 unreliable and should be excluded. It is noted that this is a case that came on for
21 trial after the Mayfield incident referred to supra. In that case, upon excluding the
22 fingerprint identification evidence the court stated that "The lack of critical testing
23 might not be so disturbing were it not for the ACE-V methodology's use of
24 entirely subjective judgments". It was also stated that "The State did not establish
25 that there are any objective or universal standards that govern the application of
26 the ACE-V technique that would establish its reliability." The court also opined:

27 • *The trend away from a minimum-point requirement may not be*
28 *unreasonable because the requirement is not based on scientific study.*
29 *Epstein (quoting a fingerprint expert as saying that the point system is*
30 *based on "educated conjecture"). The criteria for absolute identification*
31 *are ill-defined and little more than "the product of probabilistic intuitions*
32 *widely shared among fingerprint examiners, not of scientific research".*
33 *Stoney; see also Cole.*

1 • *The safety check in ACE-V is supposed to be the Verification phase. Any*
2 *verification which does take place is not truly independent, since the*
3 *reviewer is usually colleague or supervisor in the same Forensic lab who*
4 *is told of the first examiner's identification. Moreover, the reviewer is*
5 *provided only the latent and the exemplar, that is the "match" to consider.*
6 *Mr. Meagher's testimony that this procedure is adequate to avoid*
7 *erroneous identification was neither credible nor persuasive.*

8
9 20. Reference was also made to the case of Scottish police Officer Shirley McKie
10 who was convicted of perjury after her latent prints were allegedly found at the
11 scene of a murder. It was later found to have been a case of misattribution.

12
13 21. In response to the submissions made on behalf of the defendant, Mr. Ward for the
14 Crown urged the Court to deny the application to exclude.

15
16 22. The Crown urges the Court to the view that as a general proposition the test for
17 the admissibility of expert evidence is properly set out in Archbold's Ninth
18 Edition citing the decision in R v Turner (T) [1975] Q.B. 834 in the following
19 terms:

20 In matters of science, or trade, the opinion of an expert or person intimately
21 acquainted with it is admissible to furnish the court with information which is
22 likely to be outside the experience and knowledge of a judge or jury. If, on the
23 proven facts, a judge or jury can form their own conclusions without help, then
24 the opinion of the expert is unnecessary.
25

26
27 23. With respect to the question of a witnesses' qualification to give expert testimony,
28 the Crown also relied upon the dicta of King CJ in the Bonython case cited by the
29 defendant. The submission by the Crown was that the limitations contemplated
30 by the Bonython dicta were applicable to a situation where the witness makes use

1 of "new or unfamiliar techniques or technology". Evidence in respect of
2 fingerprint identification is not "new or unfamiliar" and in that regard, the case of
3 **R v Buckley [1999] EWCA Crim 1191** pronounced what the Crown urges this
4 Court to hold is the "authoritative word on the subject". The Court of Appeal in
5 that case accepted that fingerprint identification is a proper matter for opinion and
6 expertise of fingerprint experts. The following guidelines were issued by the
7 English Court of Appeal:

8
9 *"If there are fewer than eight similar ridge characteristics, it is highly unlikely*
10 *that a judge will exercise his discretion to admit such evidence and, save in*
11 *wholly exceptional cases, the prosecution should not seek to adduce such*
12 *evidence. If there are eight or more similar ridge characteristics, a judge may or*
13 *may not exercise his or her discretion in favour of admitting the evidence. How*
14 *the discretion is exercised will depend on all the circumstances of the case,*
15 *including in particular: (i) the experience and expertise of the witness; (ii) the*
16 *number of similar ridge characteristics; (iii) whether there are dissimilar*
17 *characteristics; (iv) the size of the print relied on; (v) the quality and clarity of the*
18 *print on the item relied on, which may involve, for example, consideration of*
19 *possible injury to the person who left the print, as well as factors such as*
20 *smearing or contamination".*

21
22
23 23. Counsel for the Crown adverts to the cases of **United States v Plaza**, **United**
24 **States v Mitchell** and the **State of Maryland v Rose** cited by the defendant's
25 counsel as being supportive of the first of the propositions advanced in support of
26 exclusion. He submits that these cases upon which the defendant would have the
27 court take account, do not in fact support the defendant's position. In **Plaza**, the
28 learned judge who had at first refused to allow opinion evidence on the "ultimate
29 issue" of whether the latent prints were attributable to the particular accused in
30 that case, on a hearing to reconsider reversed himself when the English case of
31 **Buckley** was brought to his attention. Counsel also points out that even on the

1 first ruling, the judge had indicated that he would allow the witness to describe (1)
2 how the rolled and latent fingerprints were obtained; (ii) identify and place before
3 fingerprints and such magnifications required to show minute details; (iii) point
4 out observed similarities (and differences) between any latent prints and prints
5 attributable to the defendant.

6
7 24. In the subsequent ruling on the application to reconsider his earlier ruling, the
8 judge allowed the expert to give opinion evidence, and after having had the
9 benefit of consideration of Buckley (supra) the learned judge said:

10
11 **“Conclusion**

12 *Motions for reconsideration are not favorites of the law. It is an important*
13 *feature of a judge's job to arrive at a decision and then move on to the next issue*
14 *to be decided, whether in the pending case or the case next to be addressed on the*
15 *judicial convention has special force for trial judges, for if a trial judge's ruling is*
16 *mistaken it can, and if need arises will, be corrected on appeal. But there are*
17 *occasions when a motion for reconsideration has its uses. This is such an*
18 *occasion.*

19
20 *By agreeing to reconsider my prior ruling, I had the opportunity to acquire*
21 *information not previously presented, or that I had not fully digested, on the*
22 *record made in another courtroom more than two years ago. Through the efforts*
23 *of government counsel, Stephen Meagher, heretofore a name in a transcript,*
24 *became a real person, and through his live testimony I was able to get a*
25 *substantially more rounded picture of the procedure-the FBI's ACE-v process of*
26 *fingerprint identification-whose degree of reliability for expert evidentiary*
27 *purposes it is my responsibility to determine. And, through the efforts of defense*
28 *counsel, I had the opportunity to learn from Allan Bayle, a senior English*
29 *fingerprint specialist, that one aspect of the FBI's system-the annual proficiency*
30 *testing of FBI fingerprint examiners-may have shortcomings. But I also learned*
31 *from Allan Bayle's testimony two more important truths: namely, that the ACE-V*
32 *process employed by New Scotland Yard is essentially indistinguishable from the*
33 *FBI's ACE-V process, and that this formidably knowledgeable and experienced*
34 *veteran of the Yard-the legendary and actual source of the systematic and*
35 *comprehensive utilization of fingerprint identification as an instrument of law*
36 *enforcement-believes in ACER-v without reservation. Reopening the record also*

1 led me to educate myself about the legal framework with respect to the receipt in
2 evidence of expert fingerprint identification testimony that has just been put into
3 effect in England by Her Majesty's Government. That new legal framework-
4 which departs very significantly from the regime I had read about in the Mitchell
5 record-turns out to be substantially the same as the legal framework that our
6 government, in the case at bar, has contended is appropriate for FBI fingerprint
7 identification evidence.

8
9 Based on the foregoing considerations, I have concluded that arrangements
10 which, subject to careful trial court oversight, are felt to be sufficiently reliable in
11 England, ought likewise to be found sufficiently reliable in the federal courts of
12 the United States, subject to similar measures of trial court oversight. In short, I
13 have changed my mind. "Wisdom too often never comes, and so" – as Justice
14 Frankfurter admonished himself and every judge – "one ought not to reject it
15 merely because it comes late." *Henslee v. Union Planters Ban/c* 335 U.S. 595,
16 600, 69 S.Ct. 290, 93 L.Ed 259 (1949) (Frankfurter, J., dissenting); *ef, Wolf v.*
17 *Colorado*, 338 U.S. 25, 47, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) (Rutledge, J.,
18 dissenting).

19
20 Accordingly, in an order filed today accompanying this opinion, this court
21 GRANTS the government's motion for reconsideration of the January 7 order;
22 VACATES the January 7 order; DENIES the defendants' Motion to Preclude the
23 United States from Introducing Latent Fingerprint Evidence; and GRANTS the
24 government's Motion in Limine to Admit Latent Prints.

25
26 At the upcoming trial, the presentation of expert fingerprint testimony by the
27 government, and the presentation of countering expert fingerprint testimony by
28 any of the defendants (see *United States v. Velasquez*, 64 F.3d 844, 848-852 (3d
29 Cir. 1995)) will be subject to the court's oversight prior to presentation of such
30 testimony before the jury, with a view to insuring that any proposed expert
31 witness possesses the appropriate expert qualifications and that fingerprints
32 offered in evidence will be of a quality arguably susceptible of responsible
33 analysis, comparison and evaluation.

34 35 **ORDER**

36
37 For the reasons stated in the accompanying opinion dated today, this court
38 GRANTS the government's motion for reconsideration of the January 7 order;
39 VACATES the January 7 order; DENIES the defendants' Motion to Preclude the
40 United States from Introducing Latent Fingerprint Evidence; and GRANTS the
41 government's Motion n Limine to Admit Latent Prints."
42

43 Counsel for the Crown submits that this case clearly does not assist the defendant.
44

1 25. In the State of Maryland v Rose, characterized by the defendant as being
2 significant for being “post Mayfield”, Crown Counsel was of the view that there
3 the Maryland District Court had applied the Frye Test which is acknowledged to
4 be more stringent than the later Daubert Test preventing the expert witness from
5 expressing an opinion on latent fingerprints. Those cases had purported to be
6 based heavily upon the proposition that the ACE-V methodology was
7 “unreliable”. Crown Counsel also submits that despite the fact that Plaza had
8 been finally decided on the reconsideration before Rose, that case was apparently
9 not cited before the Rose Court in Maryland.

10
11 26. Counsel also cited another United States case, State v Rockingham , Docket No
12 05-5-1129 Sup. Court N.H. January 19, 2007. There a New Hampshire Court
13 held, in considering the reliability of the ACE-V methodology, that it was a
14 reliable method of fingerprint identification although its accuracy is dependent on
15 accurate application by the witness. In that case, the New Hampshire trial court
16 held that there was an insufficient basis for the court to find that ACE-V
17 principles were reliably applied. Consequently, the court refused to allow the
18 State’s expert to testify to her opinion regarding a single latent print recovered
19 because she had not documented her examination and there had been no “blind”
20 verification.

21
22 27. Counsel also pointed out to the Court that, in any event, the decision in Rose had
23 recently been reversed by a Federal Court, effectively over-ruling the decision

1 made in Baltimore Circuit County Court by Judge Souder. It has been reported in
2 various elements of the media that Federal Judge Catherine Blake in Federal
3 Court refused to exclude the same evidence which Judge Susan Souder had
4 excluded in State court, and while a written memorandum of reasons has as yet
5 not been given by the learned Judge Blake, this reversal severely weakened the
6 defendant's reliance on the proposition of unreliability of the ACE-V
7 methodology.

8
9 28. Crown Counsel also noted out that the defendant's counsel had placed heavy
10 reliance upon the opinions of an academic, Professor Cole, whose articles had
11 been critical of the ACE-V methodology and who questioned whether fingerprint
12 identification was in fact properly to be regarded as "scientific". However, the
13 Crown cited the New York case of The People of the State of New York v
14 James Hyatt Ind # 8852/200 where the court before whom Cole was called to
15 testify as an expert witness for the defence, rejected his testimony in the most
16 dismissive terms by the court, his views being characterized as "junk science".
17 In describing the evidence of Professor Cole, the learned judge said:

18
19 *"Under cross-examination Dr. Cole conceded he is not a scientist in the*
20 *traditional sense of the word but a historian and social scientist. He also*
21 *indicated he had not examined the actual fingerprints in this case and was aware*
22 *a latent print examiner hired by the defense had examined such prints and found a*
23 *match. Dr. Cole testified that he is not qualified to give an opinion on fingerprint*
24 *comparison and that his knowledge as to how latent fingerprints are examined*
25 *and compared is minimal and obtained from professional literature. Dr. Cole*
26 *conceded that his theories haven't been sufficiently tested to know whether they*
27 *could be considered science but rather his opinion is based on scholarly research.*
28 *Finally, Dr. Cole admitted he has never been accepted as an expert in this area in*

1 *either the State or Federal Courts and that his views were not generally accepted*
2 *in the mainstream scientific community.*

3
4 *After Dr. Cole's testimony the court took judicial notice that fingerprint*
5 *identification has long been recognized and accepted by all courts in the United*
6 *States and that expert testimony concerning its use is always admissible provided*
7 *the proffered witness is indeed qualified as an expert in the field...*

8
9 *Applying the Federal Courts Daubert Standard what Dr. Cole has offered here is*
10 *"junk science" Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.*
11 *Ct. 2786. To take the crown away from the heavyweight champ you must*
12 *decisively outscore or knock him out. Going twelve (12) rounds will just not do.*
13 *What Dr. Cole has offered here is interesting but too lacking in scientific method*
14 *to even bloody the field of fingerprint analysis as a generally accepted scientific*
15 *discipline. For these reasons the court precludes Dr. Cole from testifying as an*
16 *expert in this case."*

17
18 29. It was his submission that in light of the criticism by a court of the specific
19 arguments which Professor Cole had been advancing, this court should be
20 unwilling to give any credence to his theories in this application.

21
22 30. Counsel for the Crown also adverted to the case of R v Trochym [2007] 1 S.C.R.
23 239, a decision of the Supreme Court of Canada, this case also cited by the
24 defence. There the court held at paragraphs 31-34:

25
26 *"Not all scientific evidence, or evidence that results from the use of a scientific*
27 *technique, must be screened before being introduced into evidence. In some*
28 *cases, the science in question is so well established that judges can rely on the*
29 *fact that the admissibility of evidence based on it has been clearly recognized by*
30 *the courts in the past. Other cases may not be so clear. Like the legal*
31 *community, the scientific community continues to challenge and improve upon its*
32 *existing base of knowledge. As a result, the admissibility of scientific evidence is*
33 *not frozen in time.*

34
35 *While some forms of scientific evidence become more reliable over time, others*
36 *may become less so as further studies reveal concerns. Thus, a technique that*
37 *was once admissible may subsequently be found to be inadmissible. An example*
38 *of the first situation, where, upon further refinement and study, a scientific*

1 technique becomes sufficiently reliable to be used in criminal trials, is DNA
2 matching evidence, which this Court recognized in *R. v. Terceira*, 1999 (CanLII)
3 645 (S.C.C.) [1993] 3 S.C.R. 866. An example of the second situation, where a
4 technique that has been employed for some time comes to be questioned, is so-
5 called "dock", or in-court, identification evidence. In *R. v. Hibbert*, 2002 SCC 39
6 (CanLil). [2002] 2 S.C.R. 445, 2002 SCC 39, at para. 50, Arbour J., writing for
7 the majority, stated that despite its long-standing use, dock identification is
8 almost totally unreliable. Therefore, even if it has received judicial recognition in
9 the past, a technique or science whose underlying assumptions are challenged
10 should not be admitted in evidence without first confirming the validity of those
11 assumptions."
12
13

14 Counsel for the Crown also cited the case of *R. v. Luttrell* [2004] 2 Cr. App. Reports 520,
15 involving lip-reading evidence.

16
17 31. In *Luttrell*, the Court of Appeal of England and Wales rejected a submission that
18 lip-reading evidence should not be admitted unless it could be seen to be reliable
19 on the basis that the methods used were sufficiently explained to be tested in
20 cross-examination and so to be verifiable or falsifiable. The court stated:

21
22 "...In some cases, the reliability of the evidence might be relevant to whether the
23 conditions of admissibility are satisfied. Thus in *R. v. Gilfoyle* [2001] 2 Cr. App.
24 R. 57 at para. 25, it was observed that English Law will not consider expert
25 evidence properly admissible if it is 'based on a developing new brand of science
26 or medicine... until it is accepted by the scientific community as being able to
27 provide accurate and reliable opinion'. In *R. v. Robb* (1993) 93 Cr. App. R. 161,
28 a case concerning the admissibility of evidence of voice identification, which was
29 acknowledged to be an "expert field", the court had to decide whether the
30 particular witness's techniques were insufficiently recognized within his
31 profession for him to be properly qualified to give expert evidence. Similarly
32 evidence may be so lacking in "prima facie reliability" that it has no probative
33 force or its probative force is too slight to influence a decision: *R. v. Clarke*
34 [1995] 2 Cr. App. R. 425, 432.

35
36 However, while reliability of evidence can be relevant to whether the conditions
37 of admissibility are met, in itself reliability goes to its weight."
38

1 32. Not only is the reliability of fingerprint evidence well established and is therefore
2 admissible, but it has been treated as sufficiently reliable to support convictions in
3 cases of murder Culpepper v The State [2000] W.I.R. 421, a decision by the Privy
4 Council in a case out of Trinidad and Tobago, where there was only a single print.

5
6 33. Similarly in the Scottish case of Langan v. HM Advocate 1989 J.C. 132, a single
7 print was held admissible to support a conviction for murder.

8
9 34. It was accordingly submitted by the Crown that the tests which are applicable are
10 those delimited by Buckley and Bonython, and these are met in this case.
11 Fingerprint identification is not a novel technique or technology and to exclude
12 evidence of fingerprint identification would be wrong. Neither the authors of
13 **Archbold** or **Blackstone** have suggested any authority which casts any doubt on
14 the reliability of that evidence.

15
16 35. By the same token counsel says neither the authorities cited by the defendant nor
17 the academic writings have provided support for the defence's second proposition
18 about the fallibility and unscientific foundation of fingerprint identification. It
19 was further submitted this having failed to establish either the first or second
20 proposition on which the application for exclusion was based, proposition three
21 must itself fail.

22 36. Crown counsel also submits that the fourth proposition must also fail and the
23 court should reject any suggestion that the expert witnesses should be precluded

1 from expressing an opinion on the ultimate issue for determination, i.e. whether
2 the latent fingerprints allegedly found are attributable to the defendant.

3
4 37. It is contention of the Crown that the better view is that an expert may be allowed
5 to offer his opinion on such an issue.

6
7 38. In that regard counsel stated:

8 It is well settled that an expert is permitted to express an opinion on the ultimate
9 issue. At para. 10.66 of **Archbold** the learned authors state the following:

10
11 7.1 *"An expert is now permitted to give his opinion on what has been called*
12 *"the ultimate issue", but the judge should make it clear to the jury that*
13 *they are not bound by the expert's opinion, and that the issue is for them*
14 *to decide: R. v. Stockwell (declining to follow the former common law*
15 *rule)."*

16
17 7.2 *Clearly, there is no legal basis upon which this court could be properly*
18 *invited to preclude the fingerprint experts from expressing an opinion on*
19 *the ultimate issue. This has been the invariable practice over the years in*
20 *this and other commonwealth jurisdictions. No good or sufficient legal*
21 *basis has been supplied for inviting this court to depart therefrom.*

22
23 39. As noted when I gave my ruling. I am satisfied in light of the authorities cited by
24 learned Crown Counsel that in this jurisdiction there is no basis on which
25 fingerprint evidence should be excluded a priori.

26 40. I accept the authorities cited by the counsel for the crown. Indeed it ought not to
27 be overlooked that even in Daubert which is the *fons et origo* of the application to
28 exclude, was directed at evidence which was "novel" and which the court must,
29 *ex hypothesi*, look at with a very jaundiced eye.

1 41. In so ruling it ought not to be concluded that court will always continue to accept
2 uncritically all practices or technologies only because they have always done so
3 for a considerable period of time.

4 42. The dicta of King C.J. in *Bonython* (supra) which is properly the starting point of
5 this discussion was the subject of critical examination in a later South Australian
6 case, *R v Parenzee* [2007] SASC 143 (April 27, 2007). There the learned judge,
7 Sulan J. compared the King dicta with another formulation of the same principles
8 by Freckleton and Selby in "Expert Evidence: Law, Practice, Procedure and
9 Advocacy (2nd Edition, 2002)". The judge stated:

10 *The five principles governing the admission of expert evidence have been*
11 *expressed slightly differently by Freckleton and Selby in the text "Expert*
12 *Evidence: Law, Practice, Procedure and Advocacy (2nd Edition, 2002)*¹

- 13 1. *The "expertise rule": does the witness have knowledge and*
14 *experience sufficient to entitle him or her to be held out as an*
15 *expert who can assist the court?*
- 16 2. *The "common knowledge rule": is the information sought to be*
17 *elicited from the expert really something upon which the tribunal*
18 *needs the help of any third party or can the tribunal rely upon its*
19 *general knowledge and common sense?*
- 20 3. *The "area of expertise rule": is the claimed knowledge and*
21 *expertise sufficiently recognised as credible by others capable of*
22 *evaluating its theoretical and experiential foundations?*
- 23 4. *The "ultimate issue rule": is the expert's contribution going to*
24 *have the effect of supplanting the function of the tribunal to decide*
25 *the issue before the court? If so, it is likely to be rejected.*
- 26 5. *The "basis rule": to what extent can an expert's opinion be based*
27 *upon matters not directly within the expert's own observations?*
28 *Such reliance on material that cannot be directly evaluated by the*
29 *court falls foul of a fundamental principle of evidence*

¹ This work is also cited by the Western Australia Supreme Court of Appeal in *Mallard v The Queen* [2003] WASCA 296, (a case also referred to by counsel for the defendant) where Frye was discussed.

1 The judge continued:

2
3 *Rule 1 corresponds to the second part of King CJ's test and rules 2 and 3*
4 *correspond to the first part of King CJ's test. The final two rules are, as*
5 *Freckleton and Selby imply in rule 5, rules that in substance are*
6 *applicable to all evidence, expressed in terms relevant to expert evidence.*

7 ***Is the evidence of the applicant's witnesses' opinion evidence?***

8 *The first step in assessing the admissibility of the evidence of the witnesses*
9 *heard during the course of the application, therefore, is to consider*
10 *whether the evidence is the opinion of the witness, or matters of*
11 *observation to those witnesses. It is only if the evidence sought to be*
12 *admitted is the witness' opinion that it is necessary to consider the test*
13 *identified by King CJ in the second passage recounted above.*

14 The learned judge continued, in relation to the evidence he was considering in Parenzee:

15 *I consider that this is clearly opinion evidence. Consequently, this*
16 *evidence is inadmissible unless it is admissible as expert evidence. It is*
17 *therefore necessary to consider the other aspects of the test expounded by*
18 *King CJ in Bonython to determine whether the evidence can be admitted*
19 *as an exception to the general rule.*

20 ***Is the subject matter of the opinion within the class of subjects upon***
21 ***which expert testimony is permissible?***

22 *This part of the test has two aspects, described by Freckleton and Selby as*
23 *the "common knowledge" and "area of expertise" aspects.*

24 *I turn first to the question of whether the subject matter is such that the*
25 *court requires the assistance of an expert in order to form a sound*
26 *judgment. The issues arising during this application were all of a scientific*
27 *or technical nature. The issues gave rise to complex questions of*
28 *immunology, micro virology and epidemiology, to name but three of the*
29 *relevant disciplines. I consider that the subject matter is of a nature that*
30 *expert testimony is of assistance to the Court and therefore permissible.*

31 *The second question that must be asked is whether the evidence sought to*
32 *be led is credible, in the sense that it is accepted by those who are able to*
33 *evaluate its basis, or that it is "sufficiently organized or recognized to be*
34 *accepted as a reliable body of knowledge or experience. (My emphasis)*

35 *This second aspect has been the subject of differing judicial opinion. One*
36 *often-cited explanation of the test is that contained in Frye v United States*
37 *(1923) 293 F 1013.*

1 *"Just when a principle crosses the line between the experimental and*
2 *the demonstrable stages is difficult to define. Somewhere in this*
3 *twilight zone, the evidential force of the principle must be recognised,*
4 *and while the courts will go a long way in admitting expert testimony*
5 *deduced from a well-recognised scientific principle or discovery, the*
6 *thing from which the deduction is made must be sufficiently established*
7 *to have gained general acceptance in the particular field in which it*
8 *belongs"*.

9
10 The test proposed in *Frye* therefore includes the concept that not only
11 must there be an organised body of knowledge, *but that it must be*
12 *reliable*. Further, it also necessitates the consideration of whether the
13 particular opinion of the witness whose evidence is sought to be led is
14 sufficiently related to the general body of knowledge in the field. This is in
15 accordance with King CJ's posing of the question in *Bonython*: "whether
16 the subject matter of the opinion *forms part of* a body of knowledge or
17 experience which is sufficiently organized or recognized to be accepted as
18 a reliable body of knowledge or experience"

19 King CJ further developed this notion in *R v Runjanjic and Kontinnen,*
20 *[1991] SASC 2951; (1991) 56 SASR 114* a case dealing with the
21 admissibility of psychological evidence relating to battered women's
22 syndrome:

23 *"An essential prerequisite to the admission of expert evidence as to the*
24 *battered woman syndrome is that it be accepted by experts competent*
25 *in the field of psychology or psychiatry as a scientifically established*
26 *facet of psychology. This must be established by appropriate*
27 *evidence"*.

28 King CJ cited in support of his approach several cases from the United
29 States in which the general recognition and acceptance of battered
30 women's syndrome had been a factor in admitting evidence of the
31 syndrome.
32

33 However, in continuation, as noted by the Sulan J in *Parenzee*:

34
35 The Victorian Court of Criminal Appeal in *J (1994) 75 A Crim R 522,*
36 *535* took a different view to that taken by *Frye* which was followed by
37 King C.J. in *Bonython*. There it was held that:
38

39 *"Provided that the judge is satisfied that there is a field of expert knowledge to*
40 *which recourse may be had, it is no objection to the reception of the evidence of*

1 *an expert within that field that the views which he puts forward do not command*
2 *general acceptance by other experts in the field”.*

3
4 43. As noted in Trochym, as science and technology develops, the practices of the
5 law may change to adapt to the new developments.

6 I am satisfied that the statement by the court in Luttrell (*supra*) is correct.

7 “For expert evidence to be admissible, two conditions must be satisfied: first, that
8 study or experience will give a witness's opinion an authority which the opinion
9 of one not so qualified will lack; and secondly the witness must be so qualified to
10 express the opinion. The first was elucidated in Bonython (1984) 38 SASR 45,
11 where King CJ (at p.46) said that the question "may be divided into two parts: (a)
12 whether the subject matter of the opinion is such that a person without instruction
13 or experience in the area of knowledge or human experience would be able to
14 form a sound judgment on the matter without the assistance of witnesses
15 possessing special knowledge or experience in the area, and (b) whether the
16 subject matter of the opinion forms part of a body of knowledge or experience
17 which is sufficiently organised or recognised to be accepted as a reliable body of
18 knowledge or experience, a special acquaintance with which by the witness would
19 render his opinion of assistance to the court."

20 If these two conditions are met the evidence of the witness is admissible, although
21 the weight to be attached to his opinion must of course be assessed by the tribunal
22 of fact: Robb (1991) 93 Cr App R 161, 165; Dallagher [2002] EWCA 1903
23 [2003] 1 Cr App R 12 para 23. (We use the term "opinion" when referring to the
24 evidence of experts, although, as observed in Phipson on Evidence (15th Ed. para
25 37-01 and emphasised by Mr Guthrie, its use is simply one of convenient
26 terminology, and sometimes, as in this case and as is reflected in s.30(4) of the
27 Criminal Justice Act 1986, the expert's evidence can readily be regarded as
28 evidence of fact.) It might be added that, as with any evidence, expert testimony
29 will not be admitted unless it is relevant in the sense that "it is logically probative
30 or disprobative of some matter that requires proof": per Lord Simon in
31 Kilbourne, [1973] AC 729, 756D.

32

1 44. I am strengthened in my view that the admission of the evidence is correct by
2 dicta in two other recent cases. I refer to the judgment of the England and Wales
3 Court of Appeal in R v Robert McCheyne Robb (1991) 93 Cr. App R 161.

4
5 In that case P was kidnapped in March 1989 and telephone demands were made to
6 his wife and all but one of them were tape-recorded by the police. The calls
7 implicated Robb in the kidnapping. A Dr Baldwin was called to give evidence for
8 the prosecution as to the identification of the voice. Dr Baldwin was a very
9 experienced analyst having worked in the field for 30 years and taught at London
10 University. The techniques he used were according to other experts not reliable
11 unless coupled with other more recently developed techniques.

12
13 The Court of Appeal accepted that Dr Baldwin should be considered an expert,
14 after commenting that: "it might not be surprising if the answers given by Dr
15 Baldwin in cross-examination had led the jury to conclude that they should
16 receive his evidence with caution or that they should place little or no reliance on
17 it" the Court continued: "A defendant cannot fairly be asked to meet evidence of
18 opinion by a quack, a charlatan or enthusiastic amateur. But we do not consider
19 Dr Baldwin as falling anywhere near these categories. He was entitled to be
20 regarded as a phonetician, well qualified by academic training and practical
21 experience to express an opinion on voice identification".
22

23 In giving the decision of the Court, Bingham L.J stated at page 164 of the judgment:

24
25 *"The cardinal rule in English legal proceedings, whether criminal or civil, is that*
26 *witnesses may only give oral evidence of what they personally heard, saw, did*
27 *witnessed. They may not, in general, express opinions as to what happened or*
28 *may have happened. To this, as to most legal rules, there are exceptions.*
29 *Relevant for present purposes is the recognized exception which allows evidence*
30 *of opinion to be given by those whom the law, or the courts, accept as expert.*
31 *This appeal raises questions touched on but not discussed in depth in the*
32 *authorities; what characterizes a field as one in which expertise may exist, and*
33 *what qualities, or disentitles, a witness to give evidence of his opinion as an*
34 *expert?*

35
36 *The old-established, academically-based sciences such as medicine, geology or*
37 *metallurgy, and the established professions such as architecture, quantity*
38 *surveying or engineering, present no problem. The field will be regarded as one*
39 *in which expertise may exist and any properly qualified member will be accepted*
40 *without question as expert. Expert evidence is not, however, limited to these core*
41 *areas. Expert evidence of finger-prints, hand-writing and accident reconstruction*
42 *is regularly given. Opinions may be given of the market value of land, ships,*

1 pictures or rights. Expert opinions may be given of the quality of commodities, or
2 on the literary, artistic, scientific or other merit of works alleged to be obscene
3 (Obscene Public Act 1959, s.4(2)). Some of these fields are far removed from
4 anything which could be called a formal scientific discipline. Yet while receiving
5 this evidence the courts would not accept the evidence of an astrologer, a
6 soothsayer, a witch-doctor or an amateur psychologist and might hesitate to
7 receive evidence of attributed authorship based on stylometric analysis (see Dr.
8 Anthony Kenny's illuminating article "The Expert in Court," [1983] 99 L.Q.R.
9 197).

10 The text which the English common law has developed is characteristically
11 pragmatic. Lord Russell of Killowen C.J. laid down the essential requirements in
12 Silverlock [1894] 2 Q.B. 766, 771:

13
14 "We now come to the second objection, as to the proof of the handwriting, which
15 affords a good illustration of that class of evidence called evidence of opinion. It
16 is true that the witness who is called upon to give evidence founded on a
17 comparison of handwritings must be peritus; he must be skilled in doing so; but
18 we cannot say that he must have become peritus in the way of his business or in
19 any definite way. The question is, is he peritus? Is he skilled? Has he an
20 adequate knowledge? Looking at the matter practically, if a witness is not skilled
21 the judge will tell the jury to disregard his evidence. There is no decision which
22 requires that the evidence of a man who is skilled in comparing handwriting, and
23 who has formed a reliable opinion from past experience, should be excluded
24 because his experience has not been gained in the way of his business. It is,
25 however, really unnecessary to consider this point; for it seems from the
26 statement in the present case that the witness was not only peritus, but was peritus
27 in the way of his business. When once it is determined that the evidence is
28 admissible, the rest is merely a question of its value or weight, and this is entirely
29 a question for the jury, who will attach more or less weight to it according as they
30 believe the witness to be peritus."
31

32 45. The case of Robb is especially important in the context of the propositions as to
33 unreliability made by the defendant's counsel in this case for it shows that the
34 evidence (in that case of voice identification) by an expert well qualified by
35 academic training and experience will still be held to be admissible despite the
36 expert's reliance upon a technique accepted as unreliable by the majority of his
37 colleagues.

1 46. It is not insignificant that this case was also referred to in Luttrell cited supra,
2 where again the issue of the reliability of the evidence in the context of expert
3 evidence was also at large.

4
5 47. In the Lutterill case the Court discussed the issue of reliability at paragraph 35 of
6 that judgment cited above, and the succeeding paragraphs:

7
8 36. However, while reliability of evidence can be relevant to whether the
9 conditions of admissibility are met, in itself reliability goes to its weight.
10 In the Scottish case of Davie v Magistrates of Edinburgh, (1953) SC 34,
11 to which Mr Guthrie referred, Lord Cooper, President, rejecting a
12 submission that the court was bound to accept the evidence of an expert
13 witness in the absence of contrary evidence, put it as follows (at p.40):

14 "[Expert witnesses'] duty is to furnish the Judge or jury with the necessary
15 scientific criteria for testing the accuracy of their conclusions, so as to
16 enable the Judge or jury to form their own independent judgment by the
17 application of these criteria to the facts proved in evidence. The scientific
18 opinion evidence, if intelligible, convincing and tested, becomes a factor
19 (and often an important factor) for consideration along with the whole
20 other evidence in the case, but the decision is for the Judge or jury. In
21 particular the bare *ipse dixit* of a scientist, however eminent, upon the
22 issue in controversy, will normally carry little weight, for it cannot be
23 tested by cross-examination nor independently appraised, and the parties
24 have invoked the decision of a judicial tribunal and not an oracular
25 pronouncement by an expert. "

26
27 37. Lip-reading evidence from a video, like facial mapping is, in our
28 view, a species of real evidence (see per Steyn LJ in Clarke at 429).
29 Although at one time a more conservative approach had been adopted, the
30 policy of the English courts has been to be flexible in admitting expert
31 evidence and to enjoy "the advantages to be gained from new techniques
32 and new advances in science": Clarke, at p.430. (It appears that there has
33 been a similar trend elsewhere: see Cross and Tapper on Evidence (9th Ed)
34 p.523, but cf Ormerod, "Sounding out Expert Voice Identification", [2002]
35 Crim LR 771 at p.774, about the position in the USA) The preferred view,
36 and in our judgment the proper view, is "that so long as a field is
37 sufficiently well-established to pass the ordinary tests of relevance and
38 reliability, then no enhanced test of admissibility should be applied, but
39 the weight of the evidence should be established by the same adversarial

1 *forensic techniques applicable elsewhere": Cross and Tapper (loc cit).*
2 (My emphasis)
3
4

5 48. The issue of reliability has again been canvassed recently by the Courts of the
6 United Kingdom in Harris and Ors v The Queen ([2005] EWCA Crim 1980 –
7 21 July, 2005). In the appeals in these cases, the evidence called on behalf of the
8 appellants relied on recent research which it is said demonstrated that long held
9 medical opinion of the conventional signs giving rise to inferences of unlawful
10 assaults on infants and very young children was unreliable. The basis of this
11 challenge was a hypothesis based on recent research. The Crown's medical
12 witnesses did not accept that the hypothesis was correct or that it was supported
13 by the new research. The Court of Appeal refused to overturn the convictions.

14 There, the following was stated:

15
16 "We have been asked by Mr Horwell to give some guidance in respect of expert
17 witnesses in cases such as these. In his final submissions Mr Horwell submitted
18 that these appeals demonstrated that there had been a significant failure within the
19 criminal justice system to control and manage expert evidence. He argued that
20 there must be a change in approach and invited the court to consider giving
21 guidance.
22

23
24 Whether or not there has been a failure by the criminal justice system to control
25 and manage expert evidence we are reluctant to give any new guidance on expert
26 evidence arising from the facts of these cases. It may, however, be helpful to re-
27 iterate current guidance.
28

29 As to expert evidence generally, the evidential rules as to admissibility are clear
30 (see for example R v Bonython [1984] 38 SASR 45 and R v Clarke (RL) [1995]
31 2 Cr. App. R. 425 (facial mapping)). We see no reason for special rules where
32 medical experts are involved. There is no single test which can provide a
33 threshold for admissibility in all cases. As **Clarke** demonstrates developments in
34 scientific thinking and techniques should not be kept from the Court. Further, in
35 our judgment, developments in scientific thinking should not be kept from the
36 Court, simply because they remain at the stage of a hypothesis. Obviously, it is of

1 the first importance that the true status of the expert's evidence is frankly
2 indicated to the court.

3
4 It may be helpful for judges, practitioners and experts to be reminded of the
5 obligations of an expert witness summarized by Cresswell J in the Ikarian Reefer
6 [1993] 2 Lloyd's Rep. 68 at p 81. Cresswell J pointed out amongst other factors
7 the following, which we summarize as follows:
8

- 9 1. Expert evidence presented to the court should be and seen to be the
10 independent product of the expert uninfluenced as to form or content by
11 the exigencies of litigation.
12
- 13 2. An expert witness should provide independent assistance to the court by
14 way of objective unbiased opinion in relation to matters within his
15 expertise. An expert witness in the High Court should never assume the
16 role of advocate.
17
- 18 3. An expert witness should state the facts or assumptions on which his
19 opinion is based. He should not omit to consider material facts which
20 detract from his concluded opinions.
21
- 22 4. An expert should make it clear when a particular question or issue falls
23 outside his expertise.
24
- 25 5. If an expert's opinion is not properly researched because he considers that
26 insufficient data is available then this must be stated with an indication
27 that the opinion is no more than a provisional one.
28
- 29 6. If after exchange of reports, an expert witness changes his view on
30 material matters, such change of view should be communicated to the
31 other side without delay and when appropriate to the court.
32
33

34 49. It would seem to me that two things are clear from the dicta above. The first is
35 that in the view of the Court of Appeal in Harris, the gate-keeping functions of
36 the Court in relation to expert evidence as in this case have been delimited and
37 ought not to be changed merely because some new ideas have been canvassed by
38 academicians. Secondly, the approach of the courts to the issue the role of the
39 expert is the same whether the matter is civil or criminal. I particularly adopt the
40 views of their lordships from the above citation above in the following terms:

1 There is no single test which can provide a threshold for admissibility in all cases.
2 As **Clarke** demonstrates developments in scientific thinking and techniques
3 should not be kept from the Court. Further, in our judgment, developments in
4 scientific thinking should not be kept from the Court, simply because they remain
5 at the stage of a hypothesis. Obviously, it is of the first importance that the true
6 status of the expert's evidence is frankly indicated to the court.
7

8 This illustrates also that the court is not averse to considering developments in scientific
9 thinking even where this is at the level of hypothesis.
10

11 50. I am also satisfied that there is no basis for preventing the Crown to call Elizabeth
12 Hasart and Mr. MacKay from giving expert evidence including opinion evidence
13 on the ultimate issue whether the latent fingerprints to be put in evidence are those
14 of the defendant. In coming to that conclusion, I am fortified by the views
15 expressed in an article "The Forensic Scientist and the Law", which views I
16 adopt. There the author Roger Lewis states the following:

17
18 **The Forensic Scientist as Expert Witness**
19

20 The forensic scientist as an expert may not give evidence in every case but only in
21 those situations where his knowledge is beyond the power of the court to
22 understand unaided. In a trial before a jury it is the jury which decides which facts
23 they find proved from the evidence they have heard and upon those facts
24 determine the guilt or innocence of the defendant. An expert may give evidence
25 upon matters which are likely to be outside the experience or knowledge of a jury,
26 but if on the proven facts a jury can form its own conclusions without help then
27 the opinion of an expert is unnecessary. (R v Turner 60 Cr.App.R. 80). Thus an
28 expert will be able to give evidence and express an opinion only where his area of
29 expertise is beyond that of the ordinary man. In Turner, for example, the evidence
30 of a psychologist was inadmissible where its purpose was to show how an
31 ordinary person, not suffering from mental illness, was likely to react to the
32 strains and stresses of life, a matter clearly within the competence of the jury to
33 decide for themselves.
34

35 Not only must the expert's evidence be outside the knowledge of the lay jurymen
36 the area of expertise must be a recognised field of knowledge. In other words it

1 must be part of a body of knowledge or experience which is sufficiently organised
2 or recognised to be accepted as a reliable body of knowledge or experience, a
3 special acquaintance with which by the witness would assist the court. R v
4 Bonython (1984) 38 S.A.S.R.45).
5

6 Finally, the expert must be truly an expert. He must have acquired by study or
7 experience sufficient knowledge to render his opinion of value in resolving the
8 issues before the court. If this were not so the accused could be faced with the
9 difficulty of rebutting a case based on tenuous qualifications which should never
10 have been before the jury at all. An accused should not, in other words be asked to
11 meet evidence of opinion given by a quack, a charlatan or an enthusiastic
12 amateur.
13

14
15 51. In a recent case of R v Norman John Rose, (1993) 69 A Crim R 1 (1993) SASC

16 4679 Nov 5, 1993, there was an appeal against the decision of the judge at first
17 instance on the basis that the evidence of two podiatrists should not have been
18 accepted as "expert evidence". The Full Court of the Supreme Court of South
19 Australia, Court of Criminal Appeal, held that the field of podiatry is now
20 recognized as a field in respect of which expert evidence may be given as there is
21 now a recognized body of knowledge by reference to which evidence of feet may
22 be given. In that case the Appellate Court approved the decision and the
23 reasoning of the honourable judge at first instance where he had set out the
24 following, which I cite *in extensu*:

25 "The expert opinion evidence under consideration here is, as I have indicated, to
26 be given by two podiatrists from whom I heard some evidence during a voir dire
27 hearing. The Crown seeks to adduce this evidence, not on the subject-matter of
28 whether, by reference to a comparison of the accused's feet and wear marks in
29 some shoes allegedly found apparently dumped in a drain near the scene of these
30 crimes, these were shoes that had been worn by the accused, but on the limited
31 subject-matter of whether, by reference to such a comparison, those shoes could
32 have been worn by the accused. The subject-matter of the opinion evidence in
33 question is not identification evidence per se, or anything akin to fingerprint
34 identification, or voice print identification, but rather evidence of the
35 characteristics and points of comparison to be seen on both the foot and the shoes
36 from which circumstantial evidence an inference may ultimately be sought to be

1 drawn (in conjunction with other circumstantial evidence) that there was a
2 connection, a 'deductive conclusion', or a correlation, or a correspondence (such
3 as with handwriting comparison, traditional blood testing, speech patterns and the
4 like). The issue here is, therefore, quite different, in terms of how far it was
5 expected that the expert witness would go in expressing an opinion, from that in
6 R v Bonython (1984) 38 SASR 45, where the subject-matter of the opinion
7 evidence was the comparison of handwriting and the actual identification of
8 certain signatures, in R v Chaudhary (No.1) (1985) 122 LSJS 219 where the
9 subject-matter of the opinion evidence was the provenance identification of
10 carpets, in R v Carroll (1985) 19 ACR 410, where the subject-matter of the
11 opinion evidence was the identification of an accused by bruise marks on the
12 victim's thigh said to have been left by the accused's teeth, and in R v Lewis
13 (1987) 29 ACR 267, where the subject-matter of the opinion evidence was the
14 identification of an accused by matching of bite-marks to the accused's teeth
15 (These latter two cases were relied upon by Mr. Retalic.)
16

17 Though the issue here is quite different from that in the cases just referred to, the
18 principles are the same (see R v Bonython) (supra) and the cases that have
19 followed and applied it since that important case was decided).
20

21 The first thing that the Crown needs to do is pass, if it can, 'the threshold test', viz
22 to prove that the subject-matter of the opinion evidence in question, that is to say
23 (and I emphasize) the characteristics or points of comparison of both the feet and
24 the shoes (as opposed to the identification of the accused himself) are not, or are
25 not wholly, within the knowledge and experience of ordinary persons and are
26 such that a person, without instruction or experience in the specialized area of
27 knowledge or human experience to do with podiatry, would not be able to form a
28 sound judgment on the matter without the assistance of witnesses possessing
29 special knowledge or experience in that area.
30

31 The subject-matter of enquiry in this voir dire hearing is such that persons,
32 without instruction or experience in this area of knowledge or human experience,
33 are unlikely to prove capable of forming a correct judgment upon it without the
34 assistance of the opinion of witnesses possessing special skill.
35

36 The Crown, therefore, passes 'the threshold test'. It was not suggested on the
37 accused's behalf that "the threshold test" had not been passed here.
38

39 The next two things that the Crown must do are to establish, first, the relevant
40 field of expertise, viz. that the subject-matter of the opinion (that is to say, the
41 characteristics of the feet and points of comparison between wear-marks in the
42 shoes) of each of the so-called experts forms part of a body of knowledge or
43 experience which is sufficiently organized or recognized to be accepted as a
44 reliable body of knowledge or experience, a special acquaintance with which by
45 the witness would render her opinion of assistance to the Court, and, secondly, the
46 qualification of the witness, viz. that each witness has acquired by study or

1 experience sufficient knowledge of the subject-matter to render her opinion of
2 value in resolving the issue before the Court.

3
4 Both are established here, in my judgment, on the evidence of the two podiatrists
5 which I accept as credible and reliable.

6
7 There is nothing new or novel about the technique which the podiatrists have
8 purported to use to reach their conclusion that the accused 'could have worn' one
9 or more of the pairs of shoes examined. It may well have been otherwise if the
10 Crown had sought to identify the accused by adducing their opinion (the
11 podiatrists' opinion) to the effect that 'this shoe had been worn by that accused
12 person, whose feet I had examined'.

13
14 This is not a case in which a scientific principle relating to podiatry had entered
15 'the twilight zone' referred to in Frye v The United States 293 FR 2nd 1013 at
16 p.1014. The subject-matter of evidence here, it is important to note, is not directly
17 the identification of the accused. It is not put forward as providing, on its own, the
18 foundation for conviction. However, it is a strand of a rope of circumstantial
19 evidence, or "a link in a chain" of circumstantial evidence, of the type
20 contemplated by Muirhead AJ in R v Lewis (supra) at p.288.

21
22 There is clearly a chain here for the consideration of the jury. There is other
23 evidence in the prosecution case which purports to link the accused with the
24 crimes."

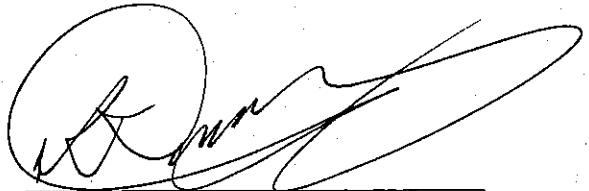
25
26
27 I respectfully adopt the statement of the law of the learned judge as endorsed by the Court
28 of Appeal.

29
30 52. Finally, while it is accepted that for the purposes of this type of evidence R v
31 Buckley (supra) represents the appropriate standards for fingerprint evidence in
32 this jurisdiction, it should be noted that there is an increasing acceptance that non-
33 numeric standards are more logical. Thus in England and Wales the numeric
34 standards have been disposed of since 2001 and this was extended to Scotland in
35 2006. It also now accepted and is used in Canada, America, certain states in
36 Australia, and widely throughout Europe.

1 53. Having considered all of the foregoing, I am satisfied that the application to
2 exclude the fingerprint evidence must fail, and I so rule.

3
4
5
6
7

Dated 17th September 2009



The Hon. Mr. Justice Anderson
Judge of the Grand Court (Acting)

