



F36 What Should Counsel Do in a Bitemark Case? Competency of Counsel Issues in the Post-Conviction Context

Alissa L. Bjerkhoel, JD*, 225 Cedar St, San Diego, CA 92101

After attending this presentation, attendees will understand the prevalence of wrongful convictions in cases that contained bitemark evidence and guidelines for defense counsel who engage in seeking out and investigating these cases post-conviction.

The presentation will impact the forensic science community by serving to identify the very serious and continued implications of prior flawed bitemark evidence and providing those seeking to rectify wrongful convictions guidelines to do so in order to end the continued suffering of those convicted on the basis of such evidence.

The scientific validity of bitemark comparisons has been challenged for many years. In 1985, two researchers wrote: "crime-related bitemarks are grossly distorted, inaccurate, and therefore unreliable as a method of identification." Similar conclusions were reached in a study of wrongful convictions. Finally, those criticisms were echoed in the recently published study of the National Research Council entitled "Strengthening Forensic Science in the United States: A Path Forward" (NAS Report). Of the nation's 941 known exonerations, 225 involved false or misleading forensic evidence, including bitemark evidence. There are numerous examples of people who were convicted on the basis of bitemark analysis and later exonerated by subsequent DNA evidence. The DNA exonerations of Ray Krone, Bennie Starks, Kennedy Brewer, Roy Brown, Willie Jackson, James O'Donnell, and Calvin Washington provide clear evidence that bitemark evidence continues to be a cause of wrongful conviction across the nation.¹⁻⁴

It is important to note that, despite the documented problems with bitemark "matches," bitemark exclusions are still considered reliable and can be extraordinarily helpful in the post-conviction context. For example, the NAS Report states: "Despite the inherent weaknesses involved in bitemark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects." Similarly, Wilkinson's and Geroughty's article points out: "It is easier to conclude that a person's dentition and a bitemark do not match than it is to find a match. This is due to the fact that any unexplained inconsistency between the bitemark and the dentition means that the suspect could not have made the bitemark." One case currently pending in front of the California Supreme Court is that of William Richards. In 1997, Richards was convicted of killing his wife, Pamela. In his third jury trial (the other two resulted in hung juries), the prosecution, for the first time, introduced evidence which suggested that Richards was responsible for a bitemark found on Pamela's hand and that only 2% of the population had a dentition (like Richards') which could have made that bitemark. In a later post-conviction hearing, Richards proved that the bitemark evidence was false and that the statistics presented at trial had no factual basis. In addition, using new computer technology to correct for distortion, Richards proved that he could not have been responsible for the bitemark.⁵

The colossal injustices and failures in the U.S. justice criminal system which lead to the conviction of the innocent are becoming ever more apparent. The flippant use of bitemark evidence in the past has been troubling and the continued use of such evidence despite the known problems is worrisome. Defense counsel should critically evaluate any case in which bitemark evidence was involved and there is a potential for innocence. To adequately represent such defendants post-conviction, defense counsel should be cautious to collect all of the original documentation, photos, and notes relied upon by the prosecution's bitemark experts, evaluate the bitemark for possible exclusions, seek DNA testing on any swabs of bitemarks, and talk to the original prosecution experts to see if their position has changed. Further suggestions will be discussed.

References:

1. Wilkinson AP, Geroughty RM. Bitemark Evidence: Its Admissibility is Hard to Swallow. *W. St. U L. Rev.* 1984-1985;12:519, 560.
2. Garrett B and Neufeld P. Invalid Forensic Science Testimony and Wrongful Convictions. *Virginia L. Rev.* 2009;95(1):1-97.
3. National Research Council. *Strengthening Forensic Science in the United States: A Path Forward*. Washington, DC: The National Academies Press, 2009:173-76.
4. The National Registry of Exonerations. *A Joint Project of Michigan Law & Northwestern Law*; 2012, Ann Arbor, MI & Chicago, IL.
5. Jan Stiglitz. View from the Trenches: The Struggle to Free William Richards. *Albany L. Rev.* 2010; 73(4): 1357-78.

Defense Counsel, Post-Conviction, Wrongful Conviction