



E11 The Current State of the Admissibility of Bitemark and Other Pattern and Impression Evidence in Criminal Trials

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The goal of this presentation is to discuss the Innocent Project's (IP) highly publicized litigation around bitemark evidence over the past year and through that discussion offer insight on the admissibility of bitemark evidence and other pattern and impression forensic disciplines, now and in the coming years. More specifically, the presentation will discuss in detail a recent *Frye* challenge to the admissibility of bitemark evidence, focusing on the defense and prosecution litigation strategies and how this litigation will shape future challenges to the admissibility of all pattern and impression disciplines in the wake of the National Academy of Sciences (NAS) Report, *Strengthening Forensic Science in the United States: A Path Forward* and the FBI's unprecedented concession that its hair examiners have given scientifically invalid testimony in a still unknown number of cases over a period of decades.¹

This presentation will impact the forensic science community by elucidating current litigation strategies around pattern and impression evidence and the new limitations on the admissibility of such disciplines. A recent investigative report by the Associated Press, spurred by the IP's *Frye* challenge, documented 24 known wrongful convictions and/or arrests based at least in part on bitemark comparison evidence.² That report immediately preceded the FBI's concession that hair examiners had been overstating the probative value of an association between a known and a suspected hair for decades, leading to the re-examination of thousands of criminal cases.³ (Indeed, it was known prior to the concession that 72 innocent people have been convicted based on hair microscopy).⁴ The two hypotheses of both bitemark and hair comparison evidence — that: (1) a properly trained forensic analyst can make an association between a questioned sample and sample from a suspect; and, (2) a properly trained analyst can provide a scientifically valid estimate of the rareness or frequency of that association — have never been scientifically validated. The ever-increasing number of wrongful convictions based on bitemark, hair comparison, and other disciplines resting on essentially the same unvalidated hypotheses highlight the danger of admitting such evidence when life and liberty are at stake.

Over the past year, there has been a sea change in the way courts and the forensic science community must consider the admissibility and probative value of bitemark and other pattern and impression forensic disciplines. The impetus for this change has its roots in the NAS Report but has accelerated in light of continued DNA exonerations, the reexamination of thousands of convictions based on hair comparison evidence and the IP's litigation against the admissibility of bitemark comparison evidence.

The court's decision in the *Frye* challenge, which will be rendered September 5, 2013, and the decisions that will emanate from the inevitable post-conviction litigation in hair comparison cases will be a referendum on the current state of the admissibility of bitemark comparison evidence, and, by analogy, other pattern and impression forensic disciplines. That is, will such evidence continue to be admitted at all? Or will its admissibility be significantly limited in how it is presented to juries? This presentation will be an opportunity to learn and discuss the future of bitemark evidence litigation specifically, and, more broadly, all pattern and impression evidence litigation in criminal trials.

References:

1. National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United State: A Path Forward*, (2009) ("NAS Report").
2. Amanda Myers, *AP Impact: Bites Derided as Unreliable in Court*, Associated Press, (June 16, 2013).
3. Jack Nicas, *Flawed Evidence Under a Microscope: Disputed Forensic Techniques Draw Fresh Scrutiny; FBI Says It Is Reviewing Thousands of Convictions*, The Wall Street Journal (July 18, 2013).
4. See http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (discussing leading causes of wrongful conviction).

Forensic Odontology Bitemark, Hair Microscopy, Frye/Daubert Challenges