

## G16 The Defense Expert Witness' Obligation to Silence and Its Consequence of Wrongful Conviction

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After attending this presentation, attendees will be familiar with the homicide of 16-year-old Brigitte Grenier on June 22, 1990, following a rock music festival near Roseisle, Manitoba. The victim was beaten, mutilated, bitten, received head injuries, and was strangled. Timothy Lawrence Houlahan and Kyle Wayne Unger were charged with first-degree murder, found guilty on February 28, 1992, and imprisoned. On appeal in 1993, Unger's conviction was upheld, while a new trial was ordered for Houlahan. The latter committed suicide before the new trial. On December 2, 1993, the Supreme Court of Canada denied Unger's application for leave to appeal the Court of Appeals decision to uphold his conviction.

This presentation will impact the forensic community by demonstrating the role of the defense expert witness. The defense expert witness has an obligation of silence if not called upon to testify by defense. If the defense expert witness informs the contracting attorney that his client is responsible for the bitemarks, the latter may be unwilling to place the expert on the stand for obvious reasons. Can this, on the other hand, lead to or contribute to the wrongful conviction of a co-accused? What are the ethical implications of silence?

Houlahan, a minor at the time, was the last person seen with the victim heading into a wooded area where her body was found the following day. His clothes and face were covered with mud, he had scratches on his hands and face and blood on his chin when he emerged from the woods the evening Brigitte disappeared. The forensic evidence against him was the victim's blood on his shoe, the suspect's hair on the victim, and unknown to the prosecution until now, bitemarks attributed to him. All of this was prior to the advent of DNA technology.

Unger, on the other hand, was unaccounted for between 3:30 a.m. and 4:00 a.m. the day of Brigitte's disappearance. He emerged with intact clothing and appearance, and the only forensic evidence found was a single hair on the victim's body attributed to him microscopically. Mitochondrial DNA analysis in 2004 demonstrated that the single hair did not belong to him. He was granted bail in 2005, pending a Ministerial decision for a new trial, which was granted. In 2009, Manitoba's Deputy Attorney General withdrew the charges against him without financial compensation; however, the story is more complicated than this brief abstract outline.<sup>1-5</sup>

The prosecution consulted three dentists regarding the bitemarks on the body. Unger voluntarily provided samples of his dentition. The opinions of the dentists were contradictory, and the prosecution decided not to use the evidence at trial. Two of the forensic dentists had no practical experience in bitemark analysis, while the third was a highly experienced bitemark expert and an American Board of Forensic Odontology (ABFO) board-certified forensic dentist. The third dentist's opinion was that the three bitemarks could not have been made by Unger.

In Canada at that time, an accused could legally refuse to provide dental models and impressions. Houlahan refused to provide the latter, and these were not supplied to the prosecution's expert witnesses. This study received three sets of marked, but unidentified as to source, dental models and impressions from the defense, as well as those supplied to the prosecution's expert witnesses.

Much has been written regarding discord in bitemark identification and comparison among bitemark experts. Had the prosecution known that two experienced board certified forensic dentists agreed that Unger could not have created the three bitemarks on the body, would he have spent 14 years in jail and 5 years in limbo? Many European systems of justice would have permitted opposing expert witnesses to consult each other, and the agreement between opposing bitemark experts may have avoided prosecution and incarceration in these jurisdictions. This case demonstrates that bitemark evidence could have contributed to freeing a wrongfully accused and the wrongfully convicted as it has in other cases in the United States, such as the Gregory Ralph Wilhoit case in Oklahoma.<sup>6</sup>

### Reference(s):

1. *R. v. Unger*, 1993 CanLII 4409 (MB CA) — 1993-07-07 Court of Appeal — Manitoba.
2. *R. v. Unger*, 2005 MBQB 238 (CanLII) — 2005-11-04 Court of Queen's Bench of Manitoba — Manitoba.
3. <https://www.aidwyc.org/cases/historical/kyle-unger/>.
4. <http://www.theglobeandmail.com/news/national/kyle-unger-sues-for-wrongful-conviction-in-murder-of-manitoba-teen/article4256694/>.
5. <http://www.cbc.ca/news/canada/manitoba/feds-deny-liability-in-kyle-unger-wrongful-conviction-1.1339338>.
6. *Wilhoit v. Oklahoma*, 816 P.2d 545, OK Crim. App. (1991).

### Bitemark, Expert Witness, Wrongful Conviction