

**Texas Forensic Science Commission
Minutes from February 11, 2016 Bite Mark Analysis Panel Meeting in Austin, Texas**

The Texas Forensic Science Commission's Bite Mark Analysis Panel met at 1:00 p.m. on Thursday, February 11, 2016 at the Omni Austin Southpark Hotel, 4140 Governor's Row, Austin, Texas 78744.

Panel Members Present: Kessler (Chair), Di Maio, Mozayani, and Alpert

Panel Members Absent: None

Staff Present: Lynn Garcia, General Counsel
Nick Vilbas, Assistant General Counsel
Leigh Tomlin, Associate General Counsel
Kathryn Adams, Commission Coordinator

This complaint was filed by the Innocence Project Inc. (IP) on behalf of Steven Mark Chaney, a Dallas County man convicted of murder in 1987, based in part on bite mark analysis testimony. The IP requested the Commission investigate and make recommendations on "the integrity and reliability" of bite mark evidence.

Update on developments and status of Steven Mark Chaney case in Dallas

Panel members received an update from Chris Fabricant (IP) on developments in Mr. Chaney's case. Mr. Chaney had his conviction set aside pending further litigation and was released from custody on October 12, 2015. Fabricant explained Mr. Chaney's case is currently pending before the Texas Court of Criminal Appeals.

Review and discuss November 16, 2015 Bitemark Panel Meeting, observations resulting therefrom, and material received from stakeholders since the meeting.

Garcia introduced Dr. David Senn, Forensic Odontologist and member of the American Board of Forensic Odontology ("ABFO"), and invited him to give a brief update/presentation related to the ABFO's progress on foundational research since the Panel's November 16, 2015 meeting in Fort Worth.

Dr. Senn gave a presentation to commissioners addressing the ABFO's position related to the status of bitemark analysis research and validity. Dr. Senn explained the research related to bitemark analysis is slow going, but being developed.

Dr. Senn offered the assistance of all nine Texas ABFO-certified members in any multidisciplinary bitemark case review conducted by the Commission.

Discuss participation of ABFO in research and case reviews.

Members discussed forming a retroactive case review panel that would include scientists from the ABFO as well as other stakeholders.

Discuss statutory requirement to assess integrity and reliability of forensic analysis, best practices and recommendations, including discussion of subject areas and recommendations for final report.

Garcia provided a PowerPoint outlining the Commission's investigative jurisdiction as it pertains to bitemark evidence. Garcia discussed a threshold legal question regarding whether bitemark analysis is subject to the accreditation requirement under Texas law. Texas law prohibits "forensic analysis" from being admitted in criminal cases if the entity conducting the analysis is not accredited by the Commission. The accreditation requirement applies to forensic odontology unless an exemption is granted by the Commission. At this time, no exemption has been granted by the Commission. Garcia explained the most prudent course of action for the Commission is to confirm this statutory interpretation with the Texas Attorney General's Office ("AG").

Whether the AG agrees with the interpretation regarding the accreditation requirement, the Commission may still issue recommendations to the criminal justice system regarding the integrity and reliability of bitemark analysis pursuant to its investigative jurisdiction.

In her presentation, Garcia summarized actions taken and presentations given at each of the Bitemark Panel's prior meetings. Garcia explained Commissioners asked the ABFO and other stakeholders for scientific research and data supporting the integrity and reliability of bitemark evidence. Existing research does not support the use of bitemark evidence to identify individuals, and this has been recognized by the vast majority of forensic odontologists.

Garcia discussed the Pretty/Freeman study, also known as the Construct Validity Study, concerning intra-examiner agreement on whether a questioned mark is a bite mark. The results and lack of follow-up research were troubling to the Commission.

During Garcia's presentation, Garcia and panel members discussed the following recommendations to the full Commission:

1. Forensic odontologists must establish clear criteria/guidelines for identifying when a pattern injury constitutes a human bitemark on skin accompanied by empirical testing to demonstrate sufficient inter and intra-examiner reliability and validity when those criteria are applied.

2. Forensic odontologists must address the major issue in child abuse cases, and must establish clear criteria/guidelines for identifying when a pattern injury constitutes an adult bitemark versus a child bitemark accompanied by empirical testing to demonstrate sufficient inter and intra-examiner reliability and validity when those criteria are applied.
3. Forensic odontologists must submit a revised decision tree that contemplates the possibility of an “exclude” versus “cannot exclude” identification once injury is established as a human bitemark. Some Commissioners expressed concern that an exclusion can be used as a *de facto* inclusion for those not excluded. Members discussed the need to wait for results from the first two categories of research before discussing the possibility of exclusions.
4. The recommended additional research should be conducted by the community (academics, etc.) and supported by the ABFO.
5. Forensic odontologists should develop proficiency testing that is rigorous, meaningful and appropriately validated for bitemark evidence.
6. Commissioners should develop a collaborative plan for retroactive review of casework and implementation of the duty to correct and notify key stakeholders where examiners made statements that exceeded the limitations of science.
7. If foundational research can be established then the ABFO should:
 - a. Develop a process for peer/technical review of cases with a method for resolving discordance and expressing the same to triers of fact in a written report; and
 - b. Develop a model report with language and format that informs the trier of fact of appropriate conclusions and clearly expresses the limitations of bite mark analysis.

Dr. Frank Wright, forensic odontologist and ABFO member, addressed the Commission regarding the development of proficiency testing for bitemark analysis. Dr. Wright also discussed the need for foundational research using agreed upon criteria against which to test proficiency and reliability of bitemark analysis. Dr. Wright answered questions from commissioners on the status of reliability studies related to bitemark analysis.

Discuss retroactive case identification and review process, including case review criteria, current cast lists received, possible methods and resources for obtaining Texas case transcripts.

Members discussed ways to obtain bitemark cases for a retroactive case review. Inger Chandler suggested obtaining lists from the nine Texas forensic odontologists who have agreed to participate in the review. Members directed Vilbas to obtain transcripts from

cases that have been identified either through Lexis by the IP or through the National Museum of Health & Medicine.

Discuss action items/recommendations for full Commission meeting.

MOTION AND VOTE: Di Maio moved to recommend that the full Commission recommend a temporary moratorium on the use and admission of bitemark evidence in Texas courts until the appropriate research, criteria and guidelines are established. Alpert seconded the motion. The Panel unanimously adopted the motion.

MOTION AND VOTE: Mozayani moved to recommend the full Commission establish a retroactive case review team. Alpert seconded the motion. The Panel unanimously adopted the motion.

MOTION AND VOTE: Alpert moved to recommend the full Commission instruct staff to request an opinion from the Texas Attorney General on the admissibility of bitemark evidence in Texas courts in light of the statutory accreditation requirement. Mozayani seconded the motion. The Panel unanimously adopted the motion.

Members discussed that if the AG issues an opinion supporting the statutory interpretation that bitemark evidence is currently inadmissible, the Commission should consider granting an immediate exemption for certain forensic odontology sub-disciplines such as human ID's and age estimations. However, with respect to bitemark analysis, no exemption should be granted until research and quality recommendations discussed during the meeting are addressed.

Members discussed that if the AG believes bitemark evidence is currently admissible despite the statutory language, the Commission should still issue a recommendation to the criminal justice community in Texas that bitemark evidence not be admitted in criminal cases unless and until the research and other recommendations are addressed.

Assign staff follow-up tasks and action items.

Members will assign staff tasks pursuant to the recommendations and votes outlined above, including instructing staff to request an opinion from the Texas AG related to the admissibility of bitemark evidence in Texas courts.

Schedule next Bitemark Panel meeting.

The FSC's Bitemark Panel will tentatively meet again April 11 or 12, 2016 in conjunction with the Commission's next quarterly meeting.

Public comment.

The following members of the public provided comment throughout the session:

Inger Chandler, Harris County District Attorney's Office Conviction Integrity Unit

Frank Wright, Forensic Odontologist

David Senn, Forensic Odontologist

Chris Fabricant, National Innocence Project

Bernadette Feazell, a member of the public, read a request for clemency in the Anthony Melendez case, (the only surviving defendant in the Lake Waco Murders case). Feazell requested DNA testing and the Commission's assistance in Melendez's case.

Adjourn.