

ANALYSIS OF THE CALIFORNIA V. BOKIN TRIAL COURT DECISION CONCERNING THE INADMISSIBILITY OF STR EVIDENCE - THE LAW AND THE SCIENCE

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The Hon. Robert Dondero, Judge of the Superior Court of the State of California, County of San Francisco, issued a ruling on May 5, 1999, precluding the admissibility of PCR-based short tandem repeat ("STR") DNA typing in the unrelated trials of seven defendants, including Jack Bokin, an accused serial rapist. That decision was issued following an extensive pretrial evidentiary inquiry into the existence of scientific general acceptance of STR DNA typing, which included the consideration of extensive expert testimony and scientific literature.

Specifically, Judge Dondero concluded that the prerequisite California showing of "general acceptance" [*Frye v. United States* (D.C. Cir. 1923) 293 F. 1013; *People v. Kelly* (Cal. 1976) 17 Cal.3d 24] had not been established by the prosecution of "STR's as identified with the Green One Kit." The court relied heavily on its own determination that "developmental validation" of STR testing utilizing that kit, as described in "T.W.G.D.A.M." guidelines ("Technical Working Group on DNA Analysis Methods" [now Scientific Working Group on DNA Analysis Methods - "S.W.G.D.A.M."]) constituted a necessary prerequisite of a showing of general acceptance and, thus, admissibility. The court concluded that the prosecution had failed to provide sufficient proof of that validation.

Critical to the court's decision was the court's own preclusion of testimony from an expert witness employed by the manufacturer of the kit, itself. That witness, as a result of the manufacturer's refusal to provide court-ordered discovery relating to the manufacturer's own developmental validation, was prohibited from providing testimony about that internal validation. Absent any other competent proof of validation, the court concluded the evidence of validation - and subsequent scientific acceptance - was insufficient. The court dismissed as inconsequential the widespread use of STR DNA typing in the forensic community, its critical role in the Combined DNA Index System ("CODIS"), and the endorsement of STR testing in the 1996 report of the National Research Council, "The Evaluation of Forensic DNA Evidence."

The trial court misperceived the requirements of the *Frye* general acceptance rule and its specific application in California. Trial courts, in the context of an admissibility inquiry, are specifically directed not to determine the reliability of scientific evidence as a matter of fact. Rather, courts are vested with the responsibility to determine only, after a fair overview of expert testimony and the scientific literature, whether the scientific community generally accepts a scientific theory and technique as reliable. (*People v. Kelly, supra*). The court's determination of the existence or absence of developmental validation of STR typing exceeded the bounds of appropriate inquiry.

Further California authority provides that once a general scientific theory and technique has been admitted in evidence and approved by appellate case authority, the specific methodology and application of that theory and technique are not subject to pretrial scrutiny. Published precedent in California preceding the trial court's pretrial hearing in the seven San Francisco cases upheld the admissibility of PCR-based DNA testing, in the context of DQ-Alpha and Polymarker genetic marker typing. The necessity for pretrial admissibility inquiry regarding additional genetic markers tested following use of the PCR process strongly appears to be absent under California law.

Important information can be gleaned from the San Francisco experience. Appropriate scientific validation remains critical to the use of any forensic test to be utilized in casework. Unlike California - and

other *Frye* states - the admissibility standards applied in individual jurisdictions in the United States frequently require trial courts to examine the existence of "validation" in the determination of admissibility. If a demonstration of validation requires proof from kit, reagent or product manufacturers, compliance with discovery obligations may be essential for court admissibility.

Ironically, one month following the court's decision in *California v. Bokin*, an appellate court in California published an opinion upholding the admissibility of STR DNA typing. That decision became final law in California shortly thereafter, eliminating the necessity for further pretrial admissibility scrutiny in California cases.