



Are You Prepared?

By Gary W. Jones

On September 13, 1999, after hearing testimony from Government and defense witnesses, the Honorable J. Curtis Joyner of the United States District Court for the Eastern District of Pennsylvania upheld the admissibility of fingerprint evidence and rejected the challenge by the defense attorney to exclude that evidence in *United States v. Byron C. Mitchell*, Criminal No. 96-00407. The court ruled that the fingerprint evidence was admissible under Rule 702 of the Rules of Evidence and the Supreme Court's prior decisions in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U. S. 579 (1993) and *Kumho Tire Company, Ltd. v. Patrick Carmichael*, 119 S. Ct. 1167 (1999).



Most importantly, the court took judicial notice that:

1. Human friction ridges are unique and permanent throughout the area of the friction ridge skin including small friction ridge areas.
2. Human friction ridge skin arrangements are unique and permanent.

The court did not take judicial notice of the third requested factor: "Individualization, that is, a positive identification, can result from comparisons of friction ridge skin or impressions containing a sufficient quality (clarity) and quantity of unique friction ridge detail." The court ruled that this is an issue for the jury to decide. The fingerprint science is valid, but that does not preclude the defense from presenting expert testimony challenging a particular identification, which is the way it has always been.

This case was significant in that it was the first challenge as to the validity of the science of fingerprint identification in light of the standards for expert testimony as set forth in the 1993 United States Supreme Court decision of *Daubert v. Merrill Dow Pharmaceuticals*, in which the court discussed four factors in regard to scientific testimony: (1) testing (2) peer review (3) error rates and (4) acceptability in the relevant scientific community. Trial judges were given the responsibility of being "gatekeepers" to keep junk science out of the courtroom.

This hearing was also significant because I believe it signaled a change in the manner in which many attorneys will now approach experts in general and, in this instance, fingerprint experts in particular. I believe that although the defense position was disallowed, this hearing illustrated the many ar-

reas in which fingerprint identifications and the science itself can be attacked.

Don't get lazy

In my years of presenting courtroom testimony, I have had only a few instances in which I felt I was aggressively cross-examined and therein lies a problem. The average fingerprint expert may testify numerous times with the most challenging question being, "How do you determine the age of a latent print?" The expert tends to become complacent and one day it all come crashing down. The expert takes the witness stand expecting the usual run-of-the-mill questions and steps into a buzz saw.

Following the first *Daubert* hearing concerning fingerprints, I am beginning to see more vigorous cross-examination questions and techniques by defense attorneys. Today, in various seminars, lectures, continuing legal education (CLE) sessions, etc., attorneys are being encouraged to be much more aggressive when dealing with expert witnesses; to challenge the expert's results and even their qualifications. I believe the day is here when many attorneys will no longer just take for granted the expertise of the fingerprint examiner. A number of defense attorneys have indicated to me that in the past they always assumed that the person the law enforcement agency sent to testify was indeed an expert. The usual tactic then was to attempt to dispel or minimize the importance of the latent print identification, not the accuracy of the identification or the expert's qualifications. That may be changing.

Although the future may prove me wrong, I foresee requests for *voir dire* hearings to be more common; not that this will occur in each and every instance to every fingerprint expert. These hearings can take place either outside the presence or in front of the jury. During these hearings, the witness can be questioned in any or all areas of the fingerprint science to determine their competence to offer expert testimony. It would be very embarrassing professionally and personally, not to mention the effect on the case at trial, to be disqualified as an expert.

Attorneys have easy access to this information

Just reading the transcript of the aforementioned *Daubert* hearing will provide a wealth of fingerprint-related information, some of it highly technical. This information was the result of the testimony of a number of highly qualified international experts. It is "must reading" for criminal defense attorneys as it should also be for the fingerprint expert. Presently a transcript can be found at www.onin.com/fp.

Whenever attending a divisional IAI meeting, I am always impressed by the depth of knowledge of the fingerprint science displayed by those I meet there. Most of those with



whom I have had contact certainly have little to fear from an intensive cross-examination or *voir dire* hearing. It is those examiners who perhaps have let themselves stagnate or have become careless that concern me.

Study regularly - not just prior to trial

An examiner can be so busy just trying to keep up with the workload, that time for training, study and research can disappear. Thus, the science can pass the examiner by. Take the time to ensure that you are prepared to adequately defend your competence to present expert testimony.

Are you prepared?

Are you prepared to answer questions relative to the various areas of the science of fingerprints that an attorney might ask?

In depth questions concerning:

- The ACE-V comparison process and the exact manner it was utilized to identify the latent print.
- Error rates. What they are and how they are determined in your department. Error rates concerning the ACE-V process.
- Proficiency testing. How and when it was accomplished in your department. The results of your proficiency test (s).
- The American Society of Criminal Laboratory Directors, Laboratory Accreditation Board (ASCLD/LAB). The significance of being ASCLD/LAB accredited and your department's status.
- Exact protocols when comparing latent and known prints.
- The physiology of fingerprints. Questions regarding the formation of sweat glands and friction ridges; the exact causes of differentiation, such as bone growth and pressures; skin cell replacement and its effect on friction ridges.
- Your background: experience, training, research time, publications, etc.
- Your personnel record concerning any past disciplinary actions, erroneous identifications, missed identifications, charges of misconduct, etc.
- Disagreement with a colleague as to the identification of a latent print. Have you ever refused to verify another fingerprint examiner's identification or has anyone ever refused to verify one of yours?
- Ridge flow, ridge characteristics, ridge structure and

how each one was or was not taken into account in the latent print identification.

- The operating principles of latent fingerprint development techniques, including fluorescent dye stains, lasers and alternate light sources.

These are just a small sampling of the legitimate questions and lines of inquiry that can be extracted from a minimum amount of research time by the defense attorney or by hiring a fingerprint consultant.

Of course, no one expects an expert in any discipline to know the answer to every question that might be thrown at them. I know I certainly don't. The point is that while many fingerprint examiners do keep up-to-date and are prepared for aggressive questioning, there are others who have rested on their past qualifications and have not continued to study and keep abreast of the science.

Take responsibility for your career

"How can I have time for study and research when I don't even have enough time now to do my regular work? The budget won't allow my supervisor to send me to any schools, so how can I be expected to be current on everything?" Those are very good questions. Too bad I don't have some very good answers. All I can offer is that you must find the time and the resources. Take personal responsibility for your career, don't leave it all up to management.

If you have access to the Internet, there are a number of sites that will provide a wealth of fingerprint information. Ed German's site at www.onin.com/fp; www.scafo.org (Southern California Association of Fingerprint Officers); www.fbi.gov/library (FBI); the FDIAI site at www.fdiai.org; or www.theiai.org (IAI), which contains links to all other divisional IAI web sites, are just a few.

Take time and read the articles in the *Journal of Forensic Identification* and *The FDIAI News*. Don't forget the public library - it can be a gold mine of information.

Some examiners will, when necessary, take annual leave and pay their own expenses to attend divisional IAI conferences, training seminars or meetings. I'm not suggesting that anyone do that and in a perfect world no one should have to do that; it is just an illustration as to how motivated some fingerprint examiners are to improve their knowledge and/or skills - to be prepared. ■

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