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TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	) Case No. E049135
	)
WILLIAM RICHARDS	) San Bernardino Superior Court
	) Case No. SWHSS700444
Petitioner and Respondent,	) Criminal Case No.FVI00826
	)
On Habeas Corpus.	) Related Appeal Case No. E024365
	)
	)

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SUPREME COURT
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Deputy

PETITION FOR REVIEW

PETITION FOR REVIEW AFTER AN UNPUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, FILED NOVEMBER 19, 2010, REVERSING THE GRANT OF A PETITION FOR WRIT OF HABEAS CORPUS

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Appointed by the Court of Appeal under
the Appellate Defenders, Inc.
Independent Case System

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PETITION FOR REVIEW

TO THE HON. CHIEF JUSTICE OF CALIFORNIA AND THE HON. ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner William Richards, petitioner and respondent below, petitions for review after an unpublished opinion of the Court of Appeal, Fourth Appellate District, Division Two, filed on November 19, 2010, reversing the grant of a petition for writ of habeas corpus. (Copy attached as Appendix.)

ISSUES PRESENTED

I.

WHETHER UNFOUNDED EXPERT TESTIMONY LATER RECANTED BY THE EXPERT CAN CONSTITUTE "FALSE EVIDENCE" UNDER PENAL CODE § 1473(b)(1)?

II.

WHETHER THE *IN RE HALL* "NEW EVIDENCE" STANDARD SHOULD GOVERN A HABEAS PETITION BASED ON A CLAIM OF FALSE EVIDENCE UNDER PENAL CODE § 1473(b)(1)?

III.

WHETHER A COURT APPLYING THE *IN RE HALL*

"NEW EVIDENCE" STANDARD MUST CONSIDER THE CUMULATIVE EFFECT OF THE NEW EVIDENCE?

REASONS FOR GRANTING REVIEW

This case presents one question of first impression: whether expert opinion evidence can be false evidence under Penal Code § 1473(b)(1). If, so, this Court needs to determine whether its decision in *In re Lawley* (2008) 42, Cal. 4th 1231, was intended to change existing case law under Penal Code § 1473(b)(1) and apply the "new evidence" standard articulated in *In re Hall* (1981) 30 Cal.3d 408, to habeas claims based on "false evidence." Finally, this case shows the need for this Court to address the application of the new evidence standard and mandate that a court consider the cumulative effect of the new evidence presented. Accordingly, review is appropriate. (Cal. Rules of Court, rule 8.500(b)(1).)

SUMMARY OF THE FACTS

In July of 1997, William Richards was convicted of killing his wife, Pamela. The evidence against Richards was limited and circumstantial. In the first two trials, which ended in hung juries, the prosecution relied on blood spatter evidence, the absence of evidence indicating the presence of a third party at the crime scene, and a tuft of blue fibers found in a crack of Pamela's fingernail which was similar to the fibers in a shirt that Richards had worn on the night of the murder. In the third trial, the prosecution, for the first time, introduced evidence which suggested that Richards was responsible for a bitemark found on Pamela and that only 2% of the population had a dentition (like Richards') which could have made that bitemark.

In December of 2007, Richards filed a petition for writ of habeas corpus alleging claims based on new evidence and false evidence. At an evidentiary hearing on the petition, Richards proved that the bitemark evidence was false

and that the statistics presented at trial had no factual basis. In addition, using new computer technology to correct for distortion, Richards proved that Richards could not have been responsible for the bitemark.

At the hearing, Richards also presented new evidence, in the form of DNA test results, which refuted the prosecution's claim that no one other than Richards and Pamela had been at the scene. Specifically, DNA test results showed that a two centimeter hair found under Pamela's fingernail – which was likely caught there during her struggle with her killer – came from someone other than Richards. In addition, DNA belonging to an unknown male was found on a paving stone the killer used as a weapon in the location that the prosecution suggested that the killer's DNA would be found.

Finally, Richards produced pictures of Pamela's right middle finger, both before and after the autopsy, which graphically demonstrated that a fiber attributed to Richards' shirt was not in the fingernail prior to autopsy.

After hearing all of the evidence and reviewing the transcripts from the underlying trial, the court concluded that the evidence presented created a "fundamental doubt ... as to the accuracy and reliability of the evidence presented at trial." (R.T. 481.[1]) In addition, the court found that the evidence presented at the hearing undermined the "entire prosecution case" and that petitioner had met his burden of proof and had shown that the evidence presented "points unerringly to innocence." (2 R.T. 481.)

STATEMENT OF THE FACTS AND CASE

The San Bernardino District Attorney charged Richards with one count

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[1] References to the record on appeal will be "C.T." and "R.T." References to the Augmented Clerk's Transcript will be designated as "A.C.T." References to the 1997 trial will be be designated as "Tr. R.T." and "Tr. C.T."

of murder. Richards' first two full trials ended with hung juries. (2 Tr. C.T. 417-20, 474, 3 Tr. C.T. 871.) The third trial resulted in a conviction and life sentence, which was affirmed on appeal. (3 Tr. C.T. 923.)

On December 5, 2007, Richards filed a petition for writ of habeas corpus in the San Bernardino Superior Court alleging that false evidence was introduced against him at trial and new evidence showed that he was innocent. (1 A.C.T. 1-86.) Superior Court Judge Brian McCarville granted the petition after a contested evidentiary hearing. (4 C.T. 1147-1148, 1185.) On November 19, 2010, the Court of Appeal reversed.

A.

FACTS ADDUCED AT TRIAL

On August 10, 1993, Pamela Richards was severely beaten outside of her home with fist-sized rocks, manually strangled, and a cinder block and stepping stone were used to crush her skull. (3 Tr. R.T. 252; 5 Tr. R.T. 962.) The killer dropped a cinder block on her head, crushing her skull and creating blood spatter for a radius of fifteen feet. (3 Tr. R.T. 378; 5 Tr. R.T. 976.)

The Prosecution's Case: "It must have been Richards."

Right from the beginning, the police concluded that Richards was lying about what happened and the investigation focused on him.

On the night of August 10, 1993, Richards clocked out of work at 11:03 p.m. and drove home. (5 Tr. R.T. 867.) San Bernardino Deputy Sheriff Navarro recreated the drive home and determined that it would have taken forty-one minutes – suggesting that Richards arrived home at 11:47. (5 Tr. R.T. 867-72.) According to Richards, upon arriving home that night, he initially noted that no lights were on. (4 Tr. R.T. 645; 8 Tr. R.T. 1849.) Richards went to the shed and had a glass of iced tea. (8 Tr. R.T. 1849.) He then walked toward the trailer and saw his wife laying face down by the porch.

(4 Tr. R.T. 592.) He turned her over to see what was wrong and his fingers went into a hole in her head. (4 Tr. R.T. 592.) Richards cradled his wife and then he heard the phone. (4 Tr. R.T. 557.)

Eugene Price (Pamela's former lover) called and spoke with Richards at 11:55 p.m. (4 Tr. R.T. 557.) Thus, by the prosecution's time line, Richards had only 8 minutes in which to kill his wife. (4 Tr. R.T. 557; 6 Tr. R.T. 1382.)

Richards told Price that Pamela was dead. (4 Tr. R.T. 559.) Price told him to call 911. (4 Tr. R.T. 561.) Price characterized Richards as being stressed and in need of guidance. (4 Tr. R.T. 561.) Richards called 911 at 11:58 p.m. (2 Tr. R.T. 168.) Deputy Mark Nourse, arrived on the scene at approximately 12:32 a.m. (4 Tr. R.T. 580.)

Nourse testified that it was very dark when he reached the scene. (4 Tr. R.T. 584, 586.) Richards directed Nourse to the body and told Nourse Pamela was "stone cold dead." He also said: "she has been dead for a long time. I know that because the battery is dead on the Toyota." (4 Tr. R.T. 590.) Richards told Nourse he found the victim face down and he turned her over. (4 Tr. R.T. 592.) Nourse put on surgical gloves and checked the body. To his gloved touch, the body was "neither cold nor warm." (4 Tr. R.T. 636.)

Nourse did not investigate the crime scene. (4 Tr. R.T. 683.) Homicide detectives did not arrive on the scene until 3:15 a.m. (2 Tr. R.T. 228.) Because it was dark, the detectives did not process the scene until 6:00 a.m., more than six hours after the body was found. (1 Tr. R.T. 94; 2 Tr. R.T. 327.) In the interim, dogs entered the crime scene. (4 Tr. R.T. 642.)

Detective Parent and his team found the victim covered by a sleeping bag; she was naked from the waist down except for a pair of socks. (2 Tr. R.T. 232.) A twelve-by-twelve-by-two-inch stepping stone was found north of the victim. (2 Tr. R.T. 193, 230.) Criminalist David Stockwell tested genetic

markers from eight stains taken from this stepping stone, and all were the victim's. (4 Tr. R.T. 742-43.)

The prosecutor repeatedly elicited testimony and argued that no one other than Richards could have committed the murder because there was no evidence of anyone other than Richards and Pamela at the murder scene. (1 Tr. R.T. 62-65, 81; 2 Tr. R.T. 270, 274, 278; 4 Tr. R.T. 587; 7 Tr. R.T. 1669; 8 Tr. R.T. 1789, 1790, 1793, 1799, 1913-14, 1924, 1932.)

At the autopsy, before Pamela's right index and middle fingertips were severed and delivered to criminalist Daniel Gregonis, criminalist Craig Ogino received scrapings from Pamela's fingernails. (4 Tr. R.T. 698.) Ogino looked at the fingernails under a stereo microscope and never reported that a tuft of blue fibers was lodged in a crack in Pamela's right middle fingernail. (4 Tr. R.T. 699.) Material recovered from under the fingernails of the victim's right hand included a large amount of soil and blood, one tri-lobule synthetic fiber, one dark-blue wool fiber, one dark hair, and one blond hair. (4 Tr. R.T. 699-00.) At trial, Gregonis testified, "there is no hair that was consistent with anyone but Pamela Richards on Pamela Richards." (6 Tr. R.T. 1155.)

However, Gregonis classified a tuft of blue cotton fibers that *he* later discovered as relevant to the investigation, because he found it "jammed" in a crack in the victim's right middle fingernail. (6 Tr. R.T. 1256.) At trial, Gregonis testified this tuft of blue cotton fibers was indistinguishable from fibers in the blue cotton shirt Richards was wearing the night Pamela was murdered. (5 Tr. R.T. 922-25; 6 Tr. R.T. 1330.) Gregonis videotaped the removal. (4 Tr. R.T. 715, 918-19, 921-22; 6 Tr. R.T. 1251.)

Gregonis also testified regarding blood spatter found at the crime scene. He found 30 to 40 blood stains on the victim's pants and believed that twelve of these stains were from medium energy spatter. (5 Tr. R.T. 973-74, 977.)

No spatter was found on her legs. As a result, Gregonis opined that the victim was wearing her pants when her skull was caved in. (5 Tr. R.T. 977-78.) Gregonis also testified that a few spots that could be interpreted as medium energy blood spatter were also found on Richards' pants. (5 Tr. R.T. 1010.)

Gregonis also testified that there was "evidence of manipulation of the crime scene." (5 Tr. R.T. 1082-83.) When asked what evidence supported that claim, Gregonis referred to some alleged diluted blood. (5 Tr. R.T. 1083.) However, Gregonis never wrote about any alleged diluted blood in his notes and never mentioned his claim of diluted blood during the three prior occasions when he was called to testify. (5 Tr. R.T. 1083-84.)

Dr. Norman Sperber, the chief forensic dentist for San Diego and Imperial Counties, testified for the prosecution. (6 Tr. R.T. 1170.) Dr. Sperber testified that he examined a single autopsy photograph of the victim's right hand and identified a lesion which he concluded was a human bitemark made by the lower teeth. (6 Tr. R.T. 1170, 1172, 1177-78.) Sperber testified that the lesion had "a roundness only seen in bitemarks." (6 Tr. R.T. 1177.)

Dr. Sperber testified that the photograph was distorted because: (1) the photograph was not taken from an ideal position; and (2) the ruler used in the photograph was not in the correct position. (6 Tr. R.T. 1198-1200.) Dr. Sperber testified this "angular distortion" was "definitely a factor" in the certainty of his analysis. (6 Tr. R.T. 1199.)

Dr. Sperber opined that whoever left the mark had a distinctive abnormality relative to their lower right canine tooth and that Richards had the same distinctive abnormality, shared by "one or two or less" out of one hundred people. (6 Tr. R.T. 1202-03, 1212-13.) Dr. Sperber testified that Richards' abnormal tooth (tooth number 27) would not leave a mark on the skin because it was shorter than his other teeth and that the bitemark was

consistent with Richards' teeth. (6 Tr. R.T. 1214.)

Sergeant Bradford testified that the day after the murder, investigators took pictures of Richards and collected all the clothes he was wearing the night his wife was killed. (4 Tr. R.T. 793-94, 796.) They also took pictures of Richards' hands. (4 Tr. R.T. 798-801.) No indications of cuts, abrasions, or wounds were found on Richards. (4 Tr. R.T. 813-15.)

Dr. Frank Sheridan, Chief Medical Examiner, testified he performed an autopsy on August 13, 1993. (3 Tr. R.T. 346, 359.) Sheridan testified Pamela had suffered extensive blunt force trauma to the face and several defensive wounds. (3 Tr. R.T. 356, 360.) He opined that the victim had been manually strangled and suffered blunt force trauma to her skull, either of which could have been fatal. (3 Tr. R.T. 362, 365, 373, 375, 377.) Dr. Sheridan gave no opinion as to time of death. (3 Tr. R.T. 431.)

Dr. Sheridan found pronounced marks on Pamela's buttocks area from pebbles, indicating she had been lying on her back for some time after she had died. (3 Tr. R.T. 409-10.) He could not say she had died in that position. (3 Tr. R.T. 410.) He did not find similar marks on her breasts. (3 Tr. R.T. 412.)

Dr. Sheridan found evidence of lividity on Pamela's back. (3 Tr. R.T. 393.) According to Dr. Sheridan, it usually takes at least two hours for lividity to become obvious and it becomes fixed at six to ten hours. (3 Tr. R.T. 394, 397.) These findings are consistent with Richards' claim that he found Pamela on her stomach and then rolled her over. (4 Tr. R.T. 592.)

The prosecution also introduced evidence suggesting that Richards and Pamela were having financial and marital problems.

Defense Case: Shoddy Police Work and Inconsistent Evidence

Dr. David Thomas testified that it was difficult to estimate a precise time of death because tests routinely conducted to aid in that determination

were never conducted. (7 Tr. R.T. 1408-11, 1467.)

Officers also failed to investigate clues that could have established a clearer time line. They did not feel the hood of the victim's car, although the driver's door was ajar (2 Tr. R.T. 318, 521), and Richards told the police the car's battery was dead (4 Tr. R.T. 590). They did not feel the generator to determine if it had been in use, although the generator was the only source of electricity, and the victim would have started the generator had she been alive after dark. (2 Tr. R.T. 295; 4 Tr. R.T. 521, 530.) Officers also failed to fingerprint the cars, the inside of the home, the shed, or two smooth fist sized rocks used to strike the victim. (2 Tr. R.T. 318, 338.) They did not swab the bitemark in order to test for DNA from the biter's saliva. (6 Tr. R.T. 1151.)

Richards hired a private investigator who made three trips recreating the route Richards would have used when returning home from work. According to the investigator, if Richards had driven home at 65 mph, he would have arrived home at 11:54 p.m., just before Price's call. (6 Tr. R.T. 1382.)

Dr. Golden, who served as the chief odontologist for San Bernardino County, testified for the defense that he received a single photograph of the injury on the victim's right hand. (7 Tr. R.T. 1514, 1520.) He assumed it was a bitemark and could not rule out Richards as the biter. (7 Tr. R.T. 1521, 1528.) Golden also agreed that Richards' under-erupted canine would be found only in "maybe two percent of the population." (7 Tr. R.T. 1537.)

Dean Gialamas, Senior Criminalist with the Los Angeles County Sheriff's Department, testified regarding the blood spatter evidence and disagreed with the conclusion reached by Gregonis. Looking at the blood stains on Richards' shoelaces, Gialamas could not say whether they were the result of transfer or spatter; the stains were consistent with either possibility. (7 Tr. R.T. 1598-1600.) However, he found the presence of only four spots,

all lined up, to be "curious": "Typically, from beating events, very severe beating events, there typically is a lot of exchange of blood spatter from a bleeding source to a perpetrator." (7 Tr. R.T. 1600.) In addition, there was no blood spatter on the shoe itself. (7 Tr. R.T. 1598-99, 1602.) Gialamas also concluded that the stains on Richards' pants were more like transfer stains. (7 Tr. R.T. 1641.) Gialamas testified that he found *no* blood spatter stains on Richards' shirt. All of the stains appeared to be transfer stains. (7 Tr. R.T. 1654, 1657.) Gialamas concluded that the stains on Richards' clothing were *not* consistent with his being Pamela's killer. (7 Tr. R.T. 1659.)

B.

FACTS ADDUCED AT THE EVIDENTIARY HEARING.

1. New DNA Evidence.

a. DNA from a Hair Found under Pamela's Fingernail. Mitochondrial DNA testing of a hair, measuring two centimeters (equal to .787 inches), which had been recovered from amongst blood and debris under one of Pamela's fingernails, determined that this hair did not match the DNA of either Pamela or Richards. Instead, the hair belonged to an unknown third party. (Petition Exh. W [2 A.C.T. 255-60] and Exh. X [2 A.C.T. 262-67], admitted by stipulation [2 R.T. 248; 4 C.T. 991].)

Dr. Patricia Zajac, a consulting criminalist, concluded that the lodged hair was the product of the attack. (2 R.T. 316.) Zajac provided four reasons for her conclusion. First, the length of the hair was such that a person like Pamela, who was a waitress, would normally have noticed and removed it. (2 R.T. 310.[2]) Second, the crime scene was not a place where one would

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Pamela was "on call" the night she was murdered. Each shift, employees were checked to make sure their appearance (including fingernails) were up to standards. (6 Tr. R.T. 1358-59.)

normally find lots of hairs. (2 R.T. 311-12.) Third, the hair was found under, and not just on the nail, so it would take some kind of action to get the hair in the place it was found. (2 R.T. 312.) Fourth, the nature of the crime, i.e., a violent struggle where the victim sustained defensive wounds, made it more likely the hair was lodged during the struggle. (2 R.T. 312-13.)

Dr. Zajac also testified the fact that the hair had a telogen root was not significant. (2 R.T. 314.) Zajac stated that most hair collected as evidence has a telogen, not an anogen, root. (2 R.T. 314.[3])

At the hearing, respondent's witness (Gregonis) also admitted that the hair's location under the nail was relevant and that it was more likely that a woman working as a waitress would be more fastidious in her grooming and cleanliness. (2 R.T. 428-29.)

b. DNA from the Murder Weapon. At trial, the prosecution repeatedly took the position that a 12 x 12 x 2" stepping stone found north of Pamela was one of the murder weapons. (1 Tr. R.T. 54; 5 Tr. R.T. 975, 999, 1000, 1004, 1011-11, 1079; 8 Tr. R.T. pp. 1798-99; 8 Tr. R.T. 1807.) Critically, Gregonis believed the cinder block and stepping stone shielded the murderer from blood spatter when used to murder Pamela and explained why Richards' shirt did not have any blood spatter on it. (5 Tr. R.T. 1015.)

In 1994, Gregonis identified three areas on the stepping stone, which he noted were the most likely places to find the perpetrator's DNA. In 2006, those areas were tested by the Department of Justice and STR DNA testing conclusively established that two of these three areas (areas "f" and "c") contained a mixture of the victim's DNA and male DNA. (Prosecution's

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An anogen root is living. A telogen root reflects a mature hair that is ready to or has already fallen out. (2 R.T. 313-14.)

Second Amended Return [3 C.T. 698-99, 733-35].) Male DNA contributed as much as one-tenth of the DNA in the area near "f" and one-sixth of the DNA in area "c." (Petition Exh. CC [2 A.C.T. 290-91, 302].) Significantly, the male DNA did *not* belong to Richards. (3 C.T. 698, 699, 733-35.) At the hearing, Gregonis agreed that the ratios of Pamela's DNA and the unknown DNA was consistent with the theory that the unknown male DNA was deposited by the perpetrator. (2 R.T. 439-40.)

Most significantly, Gregonis acknowledged that DNA testing on the stepping stone revealed that DNA not belonging to Richards was found exactly where Gregonis predicted the killer's DNA would be found. (2 R.T. 438.)

Unfortunately, mitochondrial DNA and nuclear DNA cannot be compared so petitioner could not show that the same person was the source of the hair and the DNA on the paving stone. (4 C.T. 995-96.)

2. False Evidence and New Bitemark Evidence.

The photo that Drs. Sperber and Golden used as a basis for their testimony was reexamined by Dr. Sperber and Dr. Golden and two new experts: Dr. Raymond Johansen and Dr. C. Michael Bowers.

a. Dr. Norman Sperber's Recant. At trial in 1997, Dr. Sperber testified to the rarity of Richards' dentition: "[s]o if it was a hundred people that we took in here, I doubt that we would see in a hundred people one tooth lower, submerged like this. It might be one or two, or less." (6 Tr. R.T. 1213.) At the evidentiary hearing, Dr. Sperber testified that he never should have provided an estimate regarding the percentage of the population that had Richards' dentition abnormality, and stated the statistic he provided was scientifically inaccurate. (1 R.T. 74.) When Sperber testified at Richards' trial, he was not aware of any studies providing statistical support for his testimony. (1 R.T. 74.) He also testified that the American Board of Forensic

Odontology now finds such testimony to be inappropriate in the absence of any scientific studies. (1 R.T. 74.)

At the hearing, Dr. Sperber testified to a conclusion directly opposite of the conclusion he gave at trial. At trial, Sperber found Richard's dentition to be both rare and consistent with the bitemark. At the hearing, Dr. Sperber "ruled out" Richards as the person who caused the bitemark on Pamela's hand: "My opinion today is that [Richards'] teeth, as we have seen, are not consistent with the lesion on the hand." (1 R.T. 91.) "Nonconsistent means you don't see similar patterns. I have essentially ruled [Richards] out." (1 R.T. 91.)

b. Dr. Gregory Golden's Recant. In 2007, Dr. Golden digitally scanned a 35-mm slide to generate a high resolution photo, and then re-analyzed the injury. Dr. Golden testified that since Richards' trial, he and other forensic odontologists have used Adobe Photoshop to correct the angular distortion that is visible in photographs. (1 R.T. 97-98.) Unlike at trial, where he testified that he could not rule out Richards as the source of the bitemark, based on a new digital analysis of the photograph, at the hearing, Dr. Golden ruled Richards out. (1 R.T. 100, 110.)

c. Dr. C. Michael Bowers' Testimony. Dr. Bowers, like the other experts, testified that the photograph of Pamela's hand, used at Richards' trial, was distorted. (2 R.T. 212.) Dr. Bowers testified that he created a corrected version of the photograph using Adobe Photoshop. (2 R.T. 216; Exh. 22.)

The new methods used by Dr. Bowers are considerably more precise than the visual methods available in 1997 and demonstrated numerous areas of *discrepancy* between Richards' lower arch teeth and the bitemark. (2 R.T. 218, 232, 234, 246.) The digital analysis Dr. Bowers used captured the outlines of the indentations (from the mold of Richards lower arch that was originally created by Dr. Sperber) to create a digital exemplar to be

superimposed onto the corrected bitemark image. (2 R.T. 228-31.)

Dr. Bowers performed various measurements of the bruise and of Richards' dentition and found that the bruise was too small to have been made by Richards. (2 R.T. 218.) Additionally, when superimposing the digital exemplar of Richards' teeth onto the digitally enhanced photograph of the bitemark, Dr. Bowers found three of Richards' teeth matched and three did not, i.e., were, in fact, complete mismatches. Thus he eliminated Richards as a possible biter. (2 R.T. 232, 234, 235-37.)

3. New Revelations about the Blue Tuft of Fibers.

At the autopsy, investigators took several photos of Pamela's right hand. (See, e.g., Exh's. 19, 45, 46, 50 and 54.) After the autopsy, the tips of Pamela's index and middle fingers were severed and delivered to the Sheriff's Department for a forensic examination. (2 R.T. 253, 256, 259.)

At Richards' request, Dr. Bowers made high resolution scans of the original photos. (2 R.T. 249.) No blue fibers appear in a photograph of Pamela's right hand – prior to the fingers being severed but after the fingers had been cleaned. (2 R.T. 251; Exh. 45.)

Using Adobe Photoshop, Dr. Bowers conducted a saturation test (which increases the "purity of color") to determine whether there was any indication of the color blue in a close-up photograph of the finger. (2 R.T. 255; Exh. 50.) No blue is visible in the color saturation photo. (2 R.T. 255; Exh. 49.)

Dr. Bowers also produced a still photograph from a video which Gregonis made after he allegedly found a blue fiber in Pamela's fingernail (after the fingertip had been severed). (2 R.T. 256; Exh. 47.) A blue, z-shaped line is clearly visible in that photo. (2 R.T. 256; Exh. 47.) Dr. Bowers testified that the z-shaped line is the blue fiber that Gregonis allegedly found. (2 R.T. 257.) Dr. Bowers testified that considering the size and amount of blue

material that Gregonis removed, *if those fibers had been present at the time the autopsy photographs had been taken, the blue fibers would have shown up in the autopsy photographs*. (2 R.T. 257-58.)

Dr. Bowers also used Adobe Photoshop to adjust the saturation of the blue in the photo taken from the videotape Gregonis made. (2 R.T. 258; Exh's. 49 and 55.) Although the saturation adjustments were the same for Exhibits 49 and 55 (2 R.T. 288) there was no blue visible on the "saturated" autopsy photo (Exh. 49), yet the blue zig-zag is clearly visible on the "saturated" photo from the Gregonis tape (Exh. 55).

4. Evidence Introduced by the District Attorney

Gregonis agreed the hair found under Pamela's fingernail did not match either Richards or Pamela. (2 R. T. 409.) Gregonis testified that he was aware that Ogino had opined that this hair was historical, but that he (Gregonis) could not "say either way." According to Gregonis, the hair "could be historical or could be something to do with the incident." (2 R.T. 409.)

With regard to the stepping stone, Gregonis testified that the DNA found could have been on the stone and then covered with Pamela's blood or that the DNA could have been deposited at a later point in time. (2 R.T. 415-16.) However, the DNA was found in areas where Gregonis would have expected the murderer's DNA to be located. (2 R.T. 435.) Gregonis also acknowledged that the manner in which an object was handled might have an impact on the presence of DNA. Rougher handling would more likely result in the presence of DNA. (2 R.T. 439-40.) Gregonis agreed that the ratios of Pamela's DNA and the unknown DNA was consistent with the theory that the unknown male DNA was deposited by the perpetrator. (2 R.T. 439-40.)With regard to the tuft of fibers, Gregonis testified that he recalled having discovered it only after looking at the nail through a microscope. (2 R.T. 420.)

The District Attorney did not call any witness to testify in regard to the bitemark evidence that Richards introduced.

C.

JUDGE McCARVILLE'S DECISION.

At the conclusion of the hearing, the judge granted the writ:

> The Court has considered the evidence with respect to the bite mark and the DNA as well as the hair evidence and the allegations with respect to Mr. Gregonis ...
>
> I have not taken those portions of evidence individually, but *I have taken them collectively* in light of each of the witnesses that testified.
>
> ...
>
> The Court finds that the evidence with respect to the bite mark analysis *and* the DNA analysis *and* hair analysis has established, *taken together*, that there was a – that there did exist and does exist a fundamental doubt in my mind as to the accuracy and reliability of the evidence presented at the trial proceeding.
>
> ...
>
> Taking the evidence as to the tuft fiber – and when I say tuft, I'm talking about the blue fiber under the finger, – *and* the DNA *and* the bite mark evidence, the Court finds that the entire prosecution case had been undermined, and that petitioner has established his burden of proof to show that the evidence before me presents or points unerringly to innocence.
>
> Not only does the bite mark evidence appear to be questionable, it puts the petitioner as being excluded. *And* ... the DNA evidence establishes that someone other than petitioner and the victim was at the crime scene. (2 R.T. 480-81; emphasis added.)

D.

THE COURT OF APPEAL OPINION

The legal issues raised by the Court of Appeal's opinion will be discussed in the argument section. The flaws in the opinion's recitation of the

facts are documented in the Petition for Rehearing filed on November 30, 2010.[4] As discussed in the Petition for Rehearing, the opinion omits critical facts. For example, it fails to mention that the defense presented a blood spatter expert who testified that bloodstains found were *not* consistent with Richards' having perpetrated the violent attack on Pamela. (7 Tr. R.T. 1659.) The opinion also fails to note that Dr. Sperber – in his testimony at the hearing – recanted his trial testimony. The opinion also fails to note that Dr. Golden now believes that Richards could not have been responsible for the bitemark.

ARGUMENT

I.

RICHARDS' CONVICTION WAS THE PRODUCT OF FALSE EVIDENCE SUGGESTING THAT THE "BITEMARK" FOUND ON PAMELA'S HAND WAS CONSISTENT WITH RICHARDS' DENTITION AND COULD ONLY HAVE BEEN MADE BY RICHARDS AND TWO PERCENT OF THE POPULATION. DR. SPERBER'S STATISTICAL EVIDENCE HAD NO BASIS. IN ADDITION, DR. SPERBER NOW BELIEVES THAT HIS TESTIMONY REGARDING RICHARDS' DENTITION MATCHING THE WOUND WAS FALSE. AS A RESULT, THIS COURT SHOULD REINSTATE THE TRIAL COURT'S GRANTING THE PETITION.

At trial, Drs. Sperber and Golden testified they had formed their opinions about the bitemark using a single, distorted photograph of the injury. The prosecution then linked Richards to the bitemark using that photograph and a powerful but unfounded statistic. Based on a review of the trial transcript and an assessment of the witnesses who testified at the hearing,

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A copy of the Petition for Rehearing has been appended to Richards' motion to file a non-conforming brief.

Judge McCarville, concluded Richards was "excluded" as the person responsible. Thus, Richards' conviction was based on false evidence.

The Court of Appeal, without citation of authority, and contrary to the testimony, concluded that "the evidence offered in 1997 was true and valid." (Opinion, p. 25.) Since Dr. Sperber testified that he had *no* basis for his opinion regarding the rarity of Richards' dentition and since *both experts recanted* their testimony indicating that Richards could have been responsible for the bitemark, the Court of Appeal's conclusion is simply wrong.

A.

DOCUMENTED PROBLEMS WITH BITEMARK "MATCHES" IN FORENSIC ODONTOLOGY.

The scientific validity of bitemark comparisons and testimony has been challenged for many years. For example, in 1985, two researchers wrote:

> There is effectively no valid documented scientific data to support the hypothesis that bitemarks are demonstrably unique. Additionally, there is no documented scientific data to support the hypothesis that a latent bitemark, like a latent fingerprint, is a true and accurate reflection of this uniqueness. To the contrary, what little scientific evidence that does exist clearly supports the conclusion that crime-related bitemarks are grossly distorted, inaccurate, and therefore unreliable as a method of identification. (Wilkinson & Geroughty, *Bitemark Evidence: its admissibility is hard to Swallow*, 12 W. St. U L. Rev. 519, 560.)

Those criticisms were echoed in a recently published study of the National Research Council entitled "Strengthening Forensic Science in the United States: A Path Forward." (The National Academies Press, 2009, hereafter "NSC Study.")

The NSC Study was the product of a congressional request that the National Academy of Sciences review issues related to the use of non-DNA

forensic evidence in our judicial system. (NSC Study, pp.-1.) In its introduction, the NSC Study states:

> For decades, the forensic science disciplines have produced valuable evidence that has contributed to the successful prosecution and conviction of criminals as well as the exoneration of innocent people....
>
> Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence." (NSC Study, pp.-3.)

The NSC Study found that "[m]uch forensic evidence – including for example, bitemarks – is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." (*Id.* at pp. 3-18. Footnote omitted.)

In the specific section on forensic odontology, the NSC Study found that bitemark comparison was the most controversial area of forensic odontology and that there "is continuing dispute over the value and scientific validity of comparing and identifying bitemarks." (*Id.* at pp. 5-35.) In its criticism of bitemark comparisons, the NSC Study stated:

> There is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match... Even when using the [American Board of Forensic Odontology] guidelines, different experts provide widely differing results and a high percentage of false positive matches of bitemarks using controlled comparison studies.
>
> No thorough study has been conducted of large populations to establish the uniqueness of bitemarks.... If a

> bitemark is compared to a dental cast ... there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite....
> (*Id.* at pp. 5-36.)

Similar conclusions were reached in a recent study of wrongful convictions. (Garrett and Neufeld (2005) *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia L. Rev. 1.) They documented four cases in which odontologists provided invalid testimony which led to convictions. (*Id.* at p. 69.) One case, involving Ray Krone, was similar to Richards'. The case was mostly circumstantial and the bitemark evidence was described as "critical" to the state's case. (*State v. Krone* (1995) 182 Ariz. 319, 322.) As in Richards, the forensic odontologist found a match and advanced statistics (one in 1200) to suggest the significance of the match. (Garrett and Neufeld, *supra*, 95 Virginia L. Rev. at pp. 69-70.) Krone was ultimately exonerated when DNA evidence found on the victim excluded him. (Wagner, Dennis et. al, *DNA Frees Arizona Inmate After 10 Years in Prison* (April 9, 2002) The Arizona Republic.)

Although there are documented problems with bitemark "matches," *bitemark exclusions are reliable*. For example, the NSC Study states: "Despite the inherent weaknesses involved in bitemark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects." (*Study*, *supra*, at p. 5-37.) Similarly, in the chapter on Bitemark and Dental Identification in Scientific Evidence, Giannelli and Imwinkelried (4th Ed., Lexis Nexis 2007), the authors write: "It is easier to conclude that a person's dentition and a bitemark do not match than it is to find a match. This is due to the fact that any *unexplained* inconsistency between the bitemark and the dentition means that the suspect could *not* have made the bitemark." (*Id.* at p. 677, emphasis added.)

B.

THE TRIAL WHICH RESULTED IN RICHARDS' CONVICTION WAS FATALLY INFECTED BY FALSE BITEMARK TESTIMONY.

Contrary to the conclusion reached by the Court of Appeal, the statistical opinion expressed by Dr. Sperber regarding the rarity of Richards' dentition was unfounded and an example of "junk science." We also now know that the conclusions reached by Drs. Sperber and Golden indicating that Richards could have been responsible for the bitemark were false. Both experts have recanted the conclusions they testified to at Richards' trial.

Contrary to his trial testimony, Dr. Sperber now states that the bitemark could have been produced by someone without Richards' dentition abnormality. Dr. Sperber testified that he never should have provided an estimate regarding the percentage of the population which had the dentition abnormality he had identified in Richards. (1 R.T. 74.) At the time, he was not aware of any studies which would have provided statistical support for his testimony. Finally, contrary to his trial testimony that the bitemark was consistent with Richards' dentition, Dr. Sperber has now "ruled out" Richards as the person who caused the bitemark. (1 R.T. 91.)

Dr. Golden has also recanted his testimony. Unlike at trial, where he testified that he could not rule out Richards as the source of the bitemark, at the hearing, based on the digital analysis, Dr. Golden ruled Richards out. (1 R.T. 110.)

C.

"FALSE EVIDENCE" CLAIMS UNDER PENAL CODE § 1473 ARE NOT GOVERNED BY THE STANDARD FOR NEW EVIDENCE CLAIMS.

Prior to 1975 the rule was clear that to obtain habeas corpus relief on the ground of perjured testimony, the petitioner was required to establish by a preponderance of the evidence: (1) that perjured testimony was adduced at his trial, (2) that this was known to a representative of the state, and (3) that the perjured testimony may have affected the outcome of the trial. (*In re Pratt* (1980) 112 Cal.App.3d 795, 865.)

In 1975, PC § 1473, which set out the standard for habeas corpus relief, was amended. Since 1975, the law requires only that the evidence be false and substantially material or probative on the issue of guilt or punishment; there is no longer any obligation to show that the testimony was perjured or that the prosecutor or his agents were aware of the impropriety. (*In re Hall*, *supra*, 30 Cal. 3rd 408, 425. See also, *In re Pratt* (1980) 112 Cal. App. 3d 795, *In re Malone* (1996) 12 Cal.4th 935, and *In re Bell* (2007) 42 Cal.4th 630.)

In *In re Bell, supra*, 42 Cal.4th at 637, this Court expressly restated the separate standards for false evidence and actual innocence. The standard for false evidence requires proof that false evidence was introduced against the petitioner at his trial and that such evidence was material and probative on the issue of his guilt. (*Id.*) Quite differently, the standard for actual innocence or new evidence depends on an evidentiary showing that would undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (*Id.*) While the discovery of false testimony will almost always necessarily involve the discovery of new evidence, these constitute distinct grounds for habeas corpus relief, are subject to different legal standards, and must be considered separately. (*In re Pratt*, *supra*, 112 Cal. App. 3d at 866.)

There is some dicta in this Court's decision in *In re Lawley*, *supra,* 42 Cal.4th 1231, which suggests that a petitioner claiming false evidence must meet the higher new evidence standard. The issue in *Lawley* was whether the

"actual innocence" standard applied to claims of newly discovered evidence or, as petitioner there claimed, that it only applied on the issue of whether a petitioner could overcome the procedural problems caused by timeliness or successive petitions. (42 Cal.4th at p. 1239.) In *Lawley*, this Court made it quite clear that the "actual innocence" standard did apply to new evidence claims. (*Id.* p. 1240.) However, this Court did not expressly state that this standard was going to apply to false evidence claims under PC § 1473. Moreover, this Court repeatedly cited its decision in *Bell*, *supra*, which articulates different standards for new evidence and false evidence claims.

Petitioner believes, that this Court should clarify that its dicta in *Lawley* did not render void PC § 1473, and all existing case law applying the "substantially material or probative" standard.

D.

THE FALSE EVIDENCE WAS MATERIAL AND PROBATIVE. ABSENT FALSE EVIDENCE, RICHARDS WOULD NOT HAVE BEEN CONVICTED. THUS, THE TRIAL COURT CORRECTLY RULED THAT IT COULD NOT HAVE CONFIDENCE IN THE VERDICT.

There can be little doubt that the false bitemark evidence – that Richards' dentition was a match and that his tooth abnormality was shared by only 2% of the population – was material and probative. Based on the results of the first two trials, we know that the bitemark evidence was critical to the prosecution's case. Two trials without bitemark evidence resulted in hung juries. The jury which convicted Richards heard both Dr. Sperber and Dr. Golden testify that the injury on Pamela's hand was a bitemark which only Richards and 2% of the population were capable of making.

In closing argument, the prosecutor made it clear that the biter had an abnormal dentition shared by Richards. (8 Tr. R.T. 1802.) He argued that it

was unreasonable for the jury to believe that the killer "just happened to share the same dental abnormality as William Richards, who [sic] is only shared by two percent of the population." (8 Tr. R.T. 1932.)

To fully appreciate the importance of the bite mark evidence and understand why the trial court concluded that it could no longer have confidence in the verdict, this Court should recognize the nature of the proof against Richards. This was not a multiple eyewitness case where Richards merely undermined the testimony of one eyewitness. Instead, this was a purely circumstantial. Moreover, much of the circumstantial evidence was based on the subjective feelings and beliefs of prosecution witnesses and not on objectively verifiable facts.

For example, the prosecution relied on Deputy Nourse's "impression" that Richards' recitation of events sounded "rehearsed." (4 Tr. R.T. 627.) Nourse also concluded that Richards was lying when Richards stated that he found Pamela "stone cold." "Stone cold" is a figure of speech and Nourse's own determination that Pamela's body was neither warm nor cold was made while he was wearing gloves. (4 Tr. R.T. 634.)

At trial, (and here on appeal) the prosecution has relied on the blood spatter testimony of Gregonis. Yet, as noted here (but left out of the Court of Appeal's recitation of Richards' defense at trial) Gregonis' testimony was contradicted by Los Angeles County Criminalist Dean Gialamas. Moreover, blood spatter evidence is not a question of fact but one of subjective opinion:

> In general, the opinions of bloodstain pattern analysis are more subjective than scientific. In addition, many bloodstain pattern analysis cases are prosecution driven or defense driven, with targeted requests that lead to context bias.
>
> ...
>
> The uncertainties associated with bloodstain pattern analysis are enormous. (*Study*, *supra*, at p. 5-39.)

Courts have long recognized the pernicious effect of false statistics on the fact finding process. In *People v. Collins* (1968) 68 Cal.2d 319, this Court reversed a conviction which had been based, in large part, on statistical evidence which had no scientific basis. The pernicious effect of unfounded statistics was also recognized in *Ege v. Yukins* (6th Cir. 2007) 485 F.3d. 364. In *Ege*, a forensic expert testified that the defendant's dentition matched a bitemark on the victim and that there was a 3.5 million to one chance that someone other than the defendant had made the mark. The District Court concluded that the expert's testimony was "unreliable and grossly misleading" and that the evidence was "so unfair that its admission violate[d] fundamental concepts of justice" and the Court of Appeals agreed. (*Id.* at p. 370.)

The statistics criticized in *Collins* and *Ege* were far more dramatic than the evidence introduced against Richards. However, because Richards was only convicted after a third trial which included Dr. Sperber's unfounded scientific/mathematical evidence, this evidence had the similar effect on the result.

In *Ege*, the Court of Appeals also found that "Bitemark evidence may by its very nature be overly prejudicial and unreliable." (*Id.* at p. 376.):

> Bitemark evidence is more persuasive on the ultimate issue of guilt than other analogous forms of evidence. For example, fingerprints tend to be circumstantial or associative; that is, they rarely decide a case alone, but tend to link a defendant to the scene of the crime or an object involved in the crime. By contrast, bitemarks, in the ususal case, will be conclusive of the guilt issue: the logical distance between the fact of biting and the ultimate issue of guilt is short. Thus, admission of irrelevant bitemark evidence may be particularly prejudicial to the defendant. (*Ege*, *supra*, at p. 377, n. 6.)

E.

CONCLUSION

Contrary to the Court of Appeal opinion, material false evidence (based on junk science) was introduced against Richards. Given that the prosecution's case against Richards was circumstantial and subjective, and that the bitemark pillar has now been destroyed by Dr. Sperber's recantation, by Dr. Bowers' exclusion, and by the NSC Study which has debunked all bitemark matching testimony as lacking scientific rigor, this Court should sustain the trial court's decision to grant the petition for writ of habeas corpus.

II.

NEW EVIDENCE, IN THE FORM OF DNA TEST RESULTS, A DIGITALLY CORRECTED PICTURE OF THE BITE MARK, AND A COLOR-SATURATE PHOTO OF PAMELA'S FINGERNAIL, UNDERMINES THE PROSECUTION'S CASE AND POINTS UNERRINGLY TOWARDS INNOCENCE. THE CORRECTED PHOTO SHOWS THAT RICHARDS WAS NOT RESPONSIBLE FOR THE BITEMARK RELIED UPON BY THE PROSECUTION. DNA EVIDENCE FROM THE HAIR FOUND UNDER PAMELA'S FINGERNAIL AND ON ONE OF THE WEAPONS USED TO KILL PAMELA – IN THE LOCATIONS SUGGESTED BY THE PROSECUTION – SHOWS THAT SOMEONE OTHER THAN RICHARDS WAS RESPONSIBLE FOR THE MURDER.

A criminal judgment may be collaterally attacked on the basis of newly discovered evidence if such evidence casts a "fundamental doubt on the accuracy and reliability of the proceedings" and "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." (*In re Hardy* (2007) 41 Cal.4th 977, 1016; *In re Hall*, *supra*, 30 Cal.3d 408, 417; *In re Weber* (1974) 11 Cal.3d 703, 724.) However, a petitioner need not refute every piece of evidence or every possible scenario in order to conclusively establish his innocence. (*In re Hall*, *supra*, 30 Cal.3d at p. 423.)

At the hearing, Richards presented three kinds of new evidence: new bitemark evidence, new photographic analysis, and DNA test results. The new bitemark evidence excluded Richards as the person responsible for the bitemark that the prosecution used to convict Richards. The new DNA evidence both contradicts the prosecution's claim that no one else was at the scene and demonstrates that Richards was not the person who wielded the murder weapon or struggled with the victim. Finally, the saturated color photograph of Pamela's fingernail prior to its removal suggests that the tuft of fiber relied upon by the prosecution was *not* present prior to the finger being severed.

The judge who heard this evidence found that it undermined the prosecution's case and pointed unerringly toward innocence. That determination is supported by the record and should have been affirmed. Instead, the Court of Appeal ignored evidence and failed to consider the cumulative effect of the evidence presented.

A.

THE NEW EVIDENCE UNDERMINES THE PROSECUTION'S CASE AND POINTS UNERRINGLY TO INNOCENCE.

It is undisputed that a hair, measuring two centimeters (or just under an inch), from an unknown person, was recovered from amongst blood and debris from under one of Pamela's fingernails and that DNA testing in 2006 revealed this hair did not match the DNA of either Pamela or Richards. Instead, the hair belonged to an unknown third party. Dr. Patricia Zajac, a consulting criminalist, testified she believed the hair was likely the product of the attack because: the length of the hair is such that a person like Pamela would

normally have noticed and removed it,[5] the location of the crime scene was not a place where one would normally find lots of hairs, the hair was found under, and not just on the nail, so it would take some kind of action to get the hair under the nail, and the nature of the crime, i.e., the fact there had been a violent struggle where the victim defended herself, made it more likely the hair was deposited during the struggle.[6]

At trial, the prosecution repeatedly took the position that a twelve-by-twelve-by-two-inch paving stone found north of Pamela was one of the weapons used to murder Pamela. In 1994, Gregonis identified three areas on this stone, which he noted were most likely to have evidence belonging to the killer. It is undisputed that DNA testing in 2006 conclusively established that two of these three areas contained a mixture of the victim's DNA and male DNA which did *not* belong to Richards.

At the hearing, Gregonis agreed that the ratios of Pamela's DNA and the unknown DNA were consistent with the theory that the male DNA was deposited by the killer. (R.T. 439.) Significantly, Gregonis also acknowledged that the male DNA not belonging to Richards was found exactly where Gregonis predicted the killer's DNA would be found. (R.T. 438.)

All experts testified that the photograph of Pamela's hand which was used at Richards' trial was distorted. (R.T. 212.) Dr. Bowers created a corrected version of the photograph using Adobe Photoshop. (R.T. 216, Exh. 22.) Based on that corrected photograph, Dr. Bowers concluded that the

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[5] Two centimeters is approximately the size of this line: ————

[6] This new evidence also undermined Gregonis' claim, at trial, that "there [was] no hair that was consistent with anyone but Pamela Richards on Pamela Richards."

bitemark was too small to have been made by Richards. (R.T. 218.) Dr. Bowers also testified that mismatches between Richards' teeth and the bruise indicate that Richards' teeth were *not* responsible for the bruise. (R.T. 235.)

Dr. Bowers' conclusions were supported by the testimony of the two experts who, at trial, had linked Richards to the bitemark. These experts (Sperber and Golden) have now concluded that Richards was not responsible for the bitemark attributed to the killer.

New evidence also included color saturated photographs of Pamela's fingernail both before and after it was severed. The blue fiber "discovered" after the finger was severed should have been visible in the photograph taken before the finger was removed. It wasn't. Although Judge McCarville did not find this evidence was planted, he found that the photographs raised "factual concerns," which formed part of the basis of his finding a "fundamental doubt ... as to the accuracy of the trial proceeding." (2 R.T. 480-81.)

In reversing the decision of the trial court, the Court of Appeal concluded, without authority, that the bitemark evidence Richards presented was not "new evidence." (Opinion p. 28.) Two experts recanted their trial testimony. Recants have always been viewed as new evidence. (See, e.g., *In re Hall*, *supra*, 30 Cal.3d 408.) Similarly, advances in computer science, enabling photographs to be corrected for angular distortion, provide the same kind of "new evidence" as the advances in chemistry and biology which enabled experts to extract, test, and compare DNA from blood. If new technology provides new information, expert opinion based on the new information constitutes new evidence.

In deciding whether the new evidence "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." it is not necessary that a petitioner refute every piece of evidence or every

possible scenario in order to conclusively establish his innocence. (*In re Hall*, *supra*, 30 Cal.3d at p. 423.)

There can be little doubt that Richards has met the first prong of the new evidence standard, i.e., that such evidence casts a "fundamental doubt on the accuracy and reliability of the proceedings." This was not an eyewitness identification case in which the testimony of any one eyewitness could, independently, support a conviction. Instead, the case against Richards depended on the *combination* of four circumstantial foundational pillars: the bitemark, the claim that there was no evidence of another person present, the blue fiber, and the contested blood spatter evidence.

New evidence undermining any one of these evidentiary pillars would result in the prosecution's case collapsing like a house of cards. The bite mark evidence excluding Richards undermined one pillar. Two crime-related sources of stranger DNA evidence indicate that another person was at the scene, which undermined another pillar.

It is equally clear that the new evidence meets the second prong in that it "points" unerringly towards innocence. We think it significant that this Court used the word "point," rather than prove. Logically, it is difficult to prove a negative. Thus the question is one of inferences rather than concrete proof. And, in considering whether Richards has met his burden, a court should look at the combination or cumulative effect of the new evidence, as Judge McCarville did, instead of considering each piece in isolation, which is what the Court of Appeal did.

In securing this conviction, the prosecution sold the jury on the fact that the killer left a bitemark on Pamela, that Richards' dentition matched that bitemark, and that Richards' dentition was statistically rare. New evidence shows that Richards was not responsible for the bitemark.

In securing Richards' conviction, the prosecution also argued that there was no evidence that anyone else was present at the scene. The hair found under Pamela's fingernail and the DNA on the murder weapon not only destroy that pillar, this evidence unerringly points to someone else as the murderer. While there is a possible innocent explanation for each item, by itself, the presence of a third party's DNA on the murder weapon *and* a third party's hair under the victim's fingernail (after she engaged in a violent struggle) suggests more than coincidence. The combination of the bitemark, hair, and DNA on the murder weapon, provide the kind of evidence which destroys the prosecution's subjective circumstantial case, and leads any fair minded person to concluded that Richards is innocent of the crime. If not, the *Hall* standard simply presents too much of a burden and needs to be modified.

No reasonable trier of fact would have found Richards guilty if they had known Richards did not bite Pamela and that DNA found on the murder weapon and underneath Pamela's fingernails did not match Richards. Hence, Richards is entitled to relief and the Superior Court was correct in granting him relief.

CONCLUSION

For all of the foregoing reasons, this Court should grant review.

Respectfully submitted,

JAN STIGLITZ
California Innocence Project
Attorney for Petitioner and Respondent
William Richards

WORD COUNT CERTIFICATION

I hereby certify that the foregoing Petition for Review contains 9,084 words and 31 pages, including footnotes, not including the cover or tables, as ascertained by the word count function of the computer program (WordPerfect) used to prepare the memorandum. I understand California Rules of Court rule 8.504(d), limits a Petition for Review to 8,400 words and 30 pages, therefore I have simultaneously filed a request for permission to file a non-conforming brief, which is to be considered prior to the filing of this brief.

Dated: December 21, 2010

JAN STIGLITZ

PROOF OF SERVICE

I declare as follows:

I am over the age of eighteen years, not a party to this action, my business address is 225 Cedar Street, San Diego, CA 92101. On the date shown below, I served the Petition for Review in case No. E049135 to the following parties by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail as San Diego, California, addressed as follows:

William Richards
Booking No. 1003342912
West Valley Detention Center
9500 Etiwanda Avenue
Rancho Cucamonga, California 91739

Hon. Brian McCarville
San Bernardino Superior Court
351 North Arrowhead Ave.
San Bernardino, CA 92415-0240

Stephanie Hope Zeitlin
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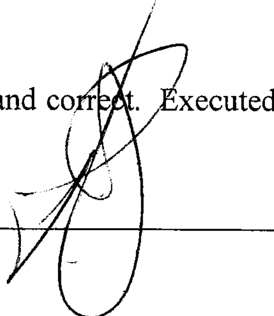
Appellate Defenders, Inc.
555 West Beech Street, Ste. 300
San Diego, CA 92101-2396

Court of Appeal, 4th Dist., Div. w
3389 Twelfth Street
Riverside, CA 92501

I declare under penalty of perjury the foregoing is true and correct. Executed this 21st day of December, 2010, at San Diego, California.



Jan Stiglitz

APPENDIX

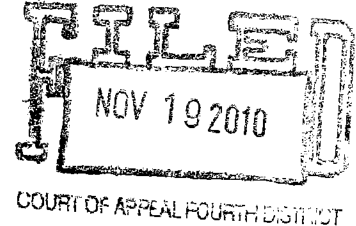
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



COURT OF APPEAL FOURTH DISTRICT

In re WILLIAM RICHARDS,

On Habeas Corpus.

E049135

(Super.Ct.Nos. SWHSS700444 & FV100826)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Reversed.

Michael A. Ramos, District Attorney, Grover D. Merritt, Lead Deputy District Attorney, and Stephanie H. Zeitlin, Deputy District Attorney, for Appellant The People.

Jan Stiglitz, under appointment by the Court of Appeal, for William Richards.

The People appeal the grant of petition for writ of habeas corpus of William Richards (Defendant) pursuant to Penal Code[1] section 1506. The People contend the trial court erred in finding that new forensic evidence suggested Defendant's conviction was

[1] All further statutory references are to the Penal Code unless otherwise indicated.

fatally flawed, and as a consequence, erred in granting the petition for writ of habeas corpus. We agree and reverse.

I. INTRODUCTION

On July 8, 1997, Defendant was convicted by a jury of first degree murder of his wife, Pamela (victim) (§ 187, subd. (a)). He was sentenced to an indeterminate term of 25 years to life in state prison. He appealed, contending (1) the evidence was insufficient to show that he acted with willful deliberation and premeditation, and (2) he was denied effective assistance of counsel.[2] (*People v. Richards* (Aug. 17, 2000, E024365 [nonpub. opn.].) On August 17, 2000, this court rejected Defendant's contentions and affirmed the judgment. (*People v. Richards*, *supra*, E024365.)

In December 2007, Defendant filed a petition for writ of habeas corpus. According to such petition, he claimed the introduction of bite mark evidence in the fourth[3] trial was false and that new forensic tools now excluded him as the person responsible for the bite mark. Additionally, Defendant alleged that: (1) new evidence, obtained through DNA testing, showed that someone other than Defendant held one of the alleged murder weapons exactly where the prosecution suspected the murderer's DNA to be; (2) a hair belonging to someone other than Defendant had been found under

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[2] We take judicial notice of the record and opinion issued in our case No. E024365.

[3] As Defendant acknowledges, his first trial resulted in a mistrial after the jury could not reach a unanimous verdict; his second trial ended in mistrial following juror voir dire; and his third trial also resulted in a mistrial after the jury could not reach a unanimous verdict.

victim's fingernail; and (3) the tuft of fiber similar to the material in Defendant's shirt did not become lodged in victim's fingernail during her struggle with her killer. After hearing the testimony and reviewing the record, the trial court granted Defendant habeas corpus relief on the grounds that new forensic evidence suggested the conviction was fatally flawed.

The People appeal, contending the trial court erred because Defendant failed to meet his burden of proof under *In re Lawley* (2008) 42 Cal.4th 1231, pages 1239 through 1241 (*Lawley*).

II. FACTS PRESENTED AT TRIAL

The facts as presented at trial are fully set forth in our prior opinion in *People v. Richards*, *supra*, E024365. We thus incorporate them word for word, as follows:

"*The Prosecution's Case:*

"On August 10, 1993, at 11:00 p.m., San Bernardino County Sheriff's Deputy Mark Nourse began patrolling the Apple Valley area. Approximately one hour later, at 12:02 a.m., he received a dispatch regarding a possible dead body located at 5148 Trush in Summit Valley. To reach the residence, the deputy had to drive up a very steep driveway which consisted of sand and loose gravel. By the time he reached the house, it was approximately 12:32 a.m.

"The residence was in a very sparsely populated area. There were no lights to illuminate the area and the sky was overcast. Through the darkness, Deputy Nourse saw two vehicles, a small shack house, and Defendant. Defendant was wearing blue jeans and a blue jeans-type shirt, and he had blood on him. Defendant told the deputy that he

had just arrived home, that it was dark when he arrived, and that the only power on at the residence was supplied by a generator.

"Deputy Nourse asked Defendant for the location of the body. Defendant pointed toward what appeared to be the porch. The deputy pulled his flashlight out of his back pocket and saw a sleeping bag containing what he believed to be a body. The body was subsequently determined to be that of Pamela Richards, Defendant's wife. As Deputy Nourse began walking toward the victim's body, Defendant volunteered that 'she is stone cold, you don't have to go back there and check her.'

"Defendant followed closely as the deputy approached the victim's body. Defendant said he found his wife face down, and rolled her over. He stated that he put one of his hands on her head and that his fingers went into the hole in her head. He explained that he had called 9-1-1 immediately after realizing that she was cold and dead. Deputy Nourse did not want to check for a pulse without gloves on, so he went back to his patrol vehicle to get them. Defendant followed.

"As Deputy Nourse put on his latex gloves and walked toward the victim's body a second time, Defendant continued to volunteer statements. Defendant stated several times that, 'that brick right there, that's the one that killed her, that's what they used to finish her off with.' Defendant said there was a stepping stone on the side of the hill with blood on it, but the deputy could not see it. Defendant indicated he had been back by the generator. Defendant then stated that his wife's pants were by the generator, and they did not come off easily, adding, 'trust me on this.' Defendant's demeanor vacillated from seemingly rehearsed calmness to bawling, sobbing and falling down on the ground.

"Deputy Nourse pulled back the sleeping bag, and picked up the victim's arm to check her wrist for a pulse. Her arm and wrist were pliable and limp. There was no pulse. Deputy Nourse then checked for a carotid pulse, but felt none. The victim's body was neither warm nor cold, but seemed very fresh. Large portions of her skull were missing. Her eye was hanging out, and a little puddle of blood was by the side of her face. The blood was very fresh, bright red and wet. The victim's hair was full of bright red, wet blood. The blood on the sand near her head had the same consistency and had yet to soak in. Based on the deputy's experience, he stated that the victim's body was similar to someone who had just died in his arms.

"Realizing that the victim was dead, Deputy Nourse canceled medical aid and radioed dispatch to inform his sergeant that there had been a homicide. Deputy Nourse told Defendant that they needed to leave the crime scene so that he could secure it. Defendant repeatedly fell to his knees and stated, 'it don't matter any, all the evidence that relates to this case I already touched and moved trying to figure out how this whole thing happened.' Deputy Nourse and Defendant walked back to the patrol car.

"Norman Parent, a sheriff's homicide detective, was dispatched to the scene at approximately 1:00 a.m. on August 11, 1993. He arrived at 3:15 a.m. It was very dark with no moonlight. The residence was in a rural desert area and was quite isolated. Deputy Nourse briefed Detective Parent on what he had seen up to that point.

"Detective Parent was the case agent and conducted the crime scene investigation. Because of the darkness, a decision was made not to process the crime scene until first light, and no one entered the scene. At first light, around 6:00 a.m., Detective Parent,

Deputy Nourse, Criminalist Dan Gregonis and Forensic Specialist Valerie Seleska began processing the scene.

"Detective Parent started processing the scene at the beginning of the steep, narrow, dirt roadway that ascended to the small plateau where the house was located. On the property, about 100 yards from the dirt roadway, was a shed with a wooden deck or porch and a travel trailer. The wood shed was unlocked with the door slightly ajar. Inside were numerous guns, including about five or six rifles. A smaller wood shed contained a generator. There was a Ford Ranger pickup truck, subsequently determined to be Defendant's, which had a gun in it. There was also a Suzuki Samurai, subsequently determined to be the victim's, which contained a purse. Inside the purse, there were several items identifying the victim, and a letter[4] detailing a property division between her and Defendant.

"Detective Parent and his team found the victim's body face up by the porch and covered by a sleeping bag. She was naked from the waist down except for a pair of socks. There was a large pool of blood beside her. They found various items belonging to the victim, including two white canvas shoes, a broken fingernail, denim pants by the generator, and panties inside the trailer. They also found pillow cases and a telephone in the camper, two 12-inch stepping stones and an 8- by 6- by 16-cinder (cement) block near her body. All the above items contained various amounts of blood, as did the shed and

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4 "The letter, which was signed, was dated July 14, 1993. It stated: 'I, William Richards, relinquish all claim to joint properties between myself and my wife Pamela Richards, except for my tools, guns, Warrior and fifty percent of the equity in the land we own in Summit Valley. This includes profit sharing earned while we were together.'"

many other areas, including the ground and rocks on the property. The position of the stepping stones, cinder block and the victim's body led Detective Parent to the conclusion that they had been used to smash her head. The murder appeared to have occurred by the porch area, and someone appeared to have bled in the trailer. No struggle appeared to have occurred by the generator.

"Detective Parent checked the tires of Deputy Nourse's patrol car and ascertained where it had been driven and came to a stop. He also checked the tires of the Ranger and the Samurai and tracked where they came up the driveway and stopped. There were no other tread marks. Three of the victim's shoeprints were found on the property. Defendant's shoes were very worn and would leave very little shoe track. Only one of Defendant's shoeprints was found. Detective Parent accounted for all shoeprints, including himself and everyone who had been at the crime scene, and found none he could not account for. Until about 8:00 p.m., Detective Parent and his team fanned out in about a 100-yard radius down a hill around the crime scene to check for any signs that someone had come up the hill onto the property. They found nothing.

"Sheriff's Homicide Detective Tom Bradford spoke with Defendant for several hours on August 11, 16, 30, and September 3, 1993.[5] During one of those interviews, upon questioning by Detective Bradford, Defendant said and later repeated that he came home from work in his truck, entered the property, and discovered his wife, who was naked from the waist down, in front of their trailer lying face down. Defendant said he

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[5] "Defendant was arrested on September 3, 1993."

rolled her over and cradled her, and his hands went into the large hole in her head. Defendant then spoke with Eugene Price on the telephone about five to ten minutes after he arrived home. Defendant stated that after speaking with Price he cradled his wife again while waiting for the police to arrive. Defendant denied any knowledge of his wife's murder. He stated that he could not find anything missing at the residence. He said that both he and his wife were proficient with firearms and that he owned many guns.

"Detective Bradford collected the clothes worn by Defendant the night of the murder. At his instruction, pictures were taken of Defendant's body the day after the murder. There were no visible marks on his body. Detective Parent has seen many cases where the murderer is not injured at all.

"The day after the murder, Detectives Bradford and Parent went to Schuller Manufacturing, Defendant's employer in Corona. They discovered that on the day of the murder, Defendant clocked in at 2:42 in the afternoon and clocked out at 11:03 that night.

"Sheriff's Homicide Investigator John Navarro exited Schuller Manufacturing on August 17, 1993, at approximately 11:03 p.m. After taking three minutes to walk to his unmarked Ford Taurus, Navarro left the parking lot at about 11:06 and drove a quarter mile to the Interstate 15 North on-ramp. Driving at the speed of traffic, between 60 and 70 miles per hour, Navarro drove on Interstate 15 North, turned right on Highway 138 and traveled towards Lake Silverwood to the Summit Valley exit. Having driven a total of 45 miles, Navarro arrived at Defendant's residence at 11:47, 41 minutes after he left the parking lot.

"Dan Gregonis has been a criminalist in the sheriff's crime laboratory for almost 18 years. On August 11, 1993, around 3:50 in the morning, Gregonis arrived at the crime scene. Gregonis collected blood from the crime scene, including from the wooden porch, soil around the victim's body, the sleeping bag, the pool of blood around the victim's body, the pillow cases, the victim's shoes, the stepping stones, the cinder block, the telephone, the victim's pants, and Defendant's clothes. There was evidence of crime scene manipulation. The victim's panties were in the camper, and her pants were by the generator. A sex kit was performed on the victim and the results were negative for semen or any other evidence of sexual assault.

"Gregonis collected two fingertips with broken fingernails from the victim's autopsy. There was a tuft of 14 or 15 light blue, cotton fibers jammed into one of the nails. The fibers were indistinguishable from the fibers of the shirt Defendant was wearing the night of the murder. Gregonis could not say definitively that the fibers came from Defendant's shirt, but there were no significant differences.

"Gregonis testified that low energy blood spatter operates by gravity alone, such as blood dripping. It leaves large drops, half-an-inch to three quarters of an inch in size. In medium energy spatter, an object hitting something causes blood to spurt out from the blood source into smaller drops. High energy spatter, usually caused by a gunshot, causes blood to break into very small particles less than a millimeter. When blood in flight comes into contact with something at an angle, it can be determined what direction the blood came from. A transfer stain is not spatter, but occurs when an object simply

comes into contact with a blood source. A smear is transfer stain that occurs when the object touches the blood source while in motion.

"There were 30 to 40 blood stains on the victim's pants, of which 12 consisted of medium energy spatter. There was no spatter on her bare legs. Gregonis opined that the victim was wearing her pants when her skull was caved in.

"The stepping stones contained medium energy blood spatter. Gregonis opined that the stepping stones were not dropped on victim's head, but were close to the impact. The cinder block was slightly broken, had an area of saturated blood, and also contained a very low angle medium energy spatter. Based on the blood, the medium energy spatter, and hairs taken off the block, Gregonis opined that the cinder block was used to bash in the victim's head. Gregonis also opined, based on the amount of medium energy blood spatter and pooled blood on it, that one of the stepping stones may also have been thrown or dropped on the victim's head.

"Medium energy blood spatter was found on Defendant's right shoe. There were two medium energy spatter stains on Defendant's pants. The two stains were from different directions, suggesting two separate medium energy events, such as two objects hitting the victim's head. There was also medium energy spatter stains on the porch. In Gregonis's opinion, based on the blood spatter evidence, Defendant could have been the person who threw the cinder block and/or stepping stone on the victim's head. A cinder block acts as a shield to block most blood that would fly back towards the person holding it. This could explain the small amount of blood spatter on Defendant and the porch.

"The night of the murder, there was transfer blood on Defendant's shirt, but no spatter. Gregonis knew Defendant had told Detective Bradford that he kneeled down and cradled his wife's head against his right shoulder after he arrived home from work. Gregonis recreated the murder by filling a dummy with human blood and agarose, a gelatin-like substance that simulated a brain inside the dummy's head, and having a criminalist wear clothing similar to what Defendant was wearing the night of the murder. Gregonis then bashed the dummy's head with a cinder block and had the criminalist cradle the dummy similar to how Defendant described. The criminalist's shirt stained in areas similar to Defendant's shirt, but the criminalist's shirt contained much more blood and staining in the right breast area than Defendant's shirt. The criminalist's pants contained dripping from the cavity of the head, but Defendant's pants had no such drip patterns.

"Gregonis performed another test and discovered that in gravel and dirt similar to the crime scene, blood could only be transferred onto blue denim such as Defendant's shirt for about 12 minutes. Blood coagulates in anywhere from three to fifteen minutes depending on the circumstances.

"David Stockwell, a criminalist in the sheriff's crime laboratory specializing in forensic serology and DNA analysis, analyzed the blood stains collected by Gregonis. Almost all of the stains from the crime scene were consistent with the victim's blood, and not Defendant's. This included blood underneath two of the victim's fingernails, two blood stains on the telephone, blood spots of one of the victim's shoes, blood on the sleeping bag in which the victim's body was found, fourteen blood stains on the victim's

jeans, and three blood stains on Defendant's pants. Defendant's blood was consistent only with two blood stains on his pants, and those stains could not be dated. There was no blood evidence of a third person being present during the crime.

"Frank Sheridan, Chief Medical Examiner for the Coroner's Office of San Bernardino County, performed an autopsy on the body on August 13, 1993. Her body displayed defensive wounds, bruising, and lacerations and abrasions to the face. She had also been manually strangled, and had suffered a massive blunt trauma injury to her skull.

"Dr. Sheridan's opinion[] that the victim had been manually strangled was based on various injuries to her neck which included external bruising, internal hemorrhaging and the breaking of her hyoid bone. He opined that the injuries to the victim's neck would have been fatal even without the blunt-force trauma to her head. With constant pressure on the neck, a person will lose consciousness in 20 to 30 seconds. If the pressure is continued, brain death will occur in two and one-half to three minutes. After brain death, the heart can beat for a short time. Dr. Sheridan also explained the agonal state, which is characterized by a very slow erratic heartbeat and very low blood pressure just before a person dies.

"The blunt-force trauma injury to the victim caused bruising, a large laceration, extensively fractured the left side of her skull from front to back, and crushed her brain. Dr. Sheridan opined the trauma would have killed the victim even without strangulation. She was either dead or in the agonal state when the blunt-force injury was inflicted because there was little bleeding and bruising. The strangulation came first, followed

contemporaneously within minutes by the blunt-force trauma while the victim was agonal or dead. No signs of forced sex were discovered.

"Lividity is the discoloration of the skin caused by gravity pulling the blood down into the lowest parts of the body after the heart stops beating. It takes at least two hours for lividity to be obvious to an observer, and it becomes fixed at six to ten hours. The amount of lividity is proportionate to the amount of blood remaining in the body after death. This means after the victim died, she was lying on her back at least long enough for the lividity to form. No lividity was found in the front of the victim's body.

"Indentations in the skin remain after death due to lack of circulation. The victim's body had gravel and stone marks in the lower back and buttock area with no inflammation, indicating they were created postmortem. There were no indentations on her front side, indicating that after death she did not face downward. Also, a number of abrasions were possibly consistent with dragging the body postmortem.

"Dr. Sheridan gave no opinion as to the victim's time of death.

"Norman Sperber, forensic odontologist (dentist), is, among other things, the chief forensic dentist of San Diego and Imperial Counties. Dr. Sperber made an impression of Defendant's teeth. Defendant's lower right canine tooth was unusual, because it protruded and was lower than the other teeth in his lower jaw. The other canine tooth was normal. The condition is very rare, shared by very few, possibly two, out of a hundred people. After studying an autopsy photograph, Dr. Sperber opined that a mark on the victim's hand was a human bite mark consistent with the abnormality of Defendant's teeth. Dr. Sperber was not absolutely certain it was Defendant's bite mark

because the angle in which the picture of the bite mark was taken made it impossible to determine.

"Eugene Price knew the victim for a year and a half before she was murdered. They were friends until March of 1993, when the relationship became more intimate and sexual in nature. This level of intimacy lasted until she was murdered. About three weeks to a month before her murder, the victim showed Price the letter detailing the property division later found by the detective in her purse. Price told her to consult an attorney regarding the note.

"The day before the murder, Price was in Camarillo and Oxnard looking for an apartment because the victim was going to move in with him. That night, the victim left a message on Price's answering machine at approximately 7:00 or 7:30 p.m. asking Price to call her back at her residence. He called her back that night between 9:30 and 10:00 p.m., but the line was busy. Price continued calling and receiving a busy signal. He called the phone company to assist him. Around 11:55 to midnight, Price called and Defendant answered the phone. Defendant, sounding stressed and agitated, answered, 'Hello.' Price asked to speak with the victim. Defendant replied, in a matter of fact voice, '[S]he is dead.' After realizing Defendant was not joking, Price asked what had happened. Defendant, sounding anxious, stated that his wife's head was bashed in and her eye was hanging out of its socket. Price told Defendant to call 9-1-1. Defendant called 9-1-1 at 11:58 p.m., followed soon thereafter by calls at 12:06 and 12:33 a.m.

"In June 1993, Betsy Otte was a teller and new accounts representative for the Hesperia Branch of Great Western Bank. Defendant and his wife had a joint checking

and a joint savings account with the bank. In June of 1993, Defendant closed out the joint accounts and said from that day forth he would have an individual account. Defendant said he felt his wife was irresponsible with money, and that he was tired of having to support himself, her, and the man she was having an affair with. Defendant stated he was only going to support himself. On a later occasion in June, Defendant spoke with Otte and said he was saving money to give to his wife and her boyfriend so they could establish their own place.

"On September 3, 1993, Sheriff's Homicide Detective Kathleen Cardwell spoke with Defendant about how much time Defendant needed to drive from Summit Valley to his job in Corona. Defendant said 2:15 p.m. was the latest he could leave his home and make it on time to work in Corona. Defendant also told Detective Cardwell that the financial conditions of his marriage were not the best. Defendant stated his wife had handled the finances until recently when he discovered she had allowed the payments on Defendant's Ford Ranger to lapse, causing the original $14,000 loan to have an additional $11,000 added onto it. Defendant said he was afraid his wife was going to leave him because she would repeatedly come home and tell him about her sexual encounters with Price. Defendant was bothered by his wife's sexual encounters.

"Steve Browder is a recovery agent and repossessor for an agency in Palm Springs. Browder was assigned to go to Defendant's residence and repossess his Ford Ranger. He arrived in the early morning daylight on the day before the murder. The driveway was steep and extended 50 yards from the main road to the residence. The residence was at the top of the driveway on a plateau. Browder's vehicle had difficulty

ascending the driveway. Browder did not repossess the Ranger after Defendant called the finance company.

"*The Defense:*

"Wayne Kozica, the victim's brother, spoke with her at approximately 7:15 to 7:30 p.m. the night of the murder and she seemed normal at that time. She told him that she and Defendant had been arguing, and he offered to let her stay with him in San Diego.

"Arthur Quas knew Defendant and the victim. The night of the murder, he called Defendant at home just before 10:00 p.m. The phone rang four or five times, then there were two clicks and a dial tone. Quas called again and received no answer. Both Defendant and the victim would have flings lasting a few days, but then go on with each other.

"Paul Rios worked with Defendant at Schuller Manufacturing. He saw Defendant at work three times on the day of the murder. Defendant's demeanor was similar to most days. On previous occasions, Defendant openly spoke of affairs, so Rios thought he was a swinger.

"Robert Gager started employment at the Olive Garden as the victim's general manager three weeks before her murder. He spoke with her around 5:30 p.m. on the day of her murder and she sounded fine. She was not scheduled nor did she work on the day she was killed.

"Gregory Randolph was the deputy coroner investigator at the time of the murder. He arrived on scene about 10:00 a.m. on the day after the murder. He stated that he was

not requested until that time by the homicide detail. The body was cool to the touch and was in advanced stages of rigor mortis.

"In 1997, Christian Filipiak, a defense investigator, left Schuller Manufacturing at 11:06 p.m. and drove the same route as Navarro. Driving with the cruise control set at 60, 65 and 70 miles per hour, it took him 52 minutes, 48 minutes, and 44 minutes respectively to arrive at the residence.

"Griffith Thomas, a physician specializing in pathology and forensic pathology, explained that time of death is a very complex study. Factors include rigor mortis, lividity, and core body temperature. The closer observations are made to the time of death, the more accurate the findings will be. He opined that it cannot be said when death occurred in this case, but many of the victim's contusions occurred several hours before her death.

"Dr. Gregory S. Golden, a dentist and chief odontologist for San Bernardino County, compared models of Defendant's teeth with a similar photograph to the one studied by Dr. Sperber of the victim's body. Dr. Golden could not eliminate Defendant as a suspect, but then did further studies. In 15 sets of models of patients he had treated, he randomly picked, in half an hour, five people whose teeth were similar to Defendant's. He opined that by itself, the bite-mark evidence should be disregarded because of the generic nature of the bite and the low value of the photograph. On cross-examination,

Dr. Golden stated that Defendant's under-erupted, displaced canine tooth would only be found in about two percent of the population." (*People v. Richards*, *supra*, E024365.)[6]

III. FACTS PRESENTED AT THE HEARING ON DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

A. The Defense Case

At the evidentiary hearing, Dr. Sperber claimed that the bite mark photography that he relied on for his testimony in the 1997 trial was distorted and "the position of the ruler with regards to the camera and with regard to the skin" was not very well done. Thus, he testified that he should not have stated any percentages as to the number of people who shared Defendant's dental peculiarity unless there existed a prior scientific study concluding that this particular feature was unusual. In his declaration in support of Defendant's petition, Dr. Sperber stated: "Because the photograph was of such poor quality and because only a single arch injury was present for analysis, the photograph of the injury should never have been relied upon as conclusive evidence of [Defendant's] guilt." The doctor's declaration did not recant his trial testimony.

In the 1997 trial, Dr. Golden testified that the bite mark was consistent with a human bite. At the evidentiary hearing, he testified that the mark on the victim's hand may have been a dog bite. However, he also maintained that his initial opinion that the

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[6] During oral argument, defense counsel criticized our quoting the facts set forth in our prior opinion in *People v. Richards*, *supra*, E024365. We note our prior opinion addressed Defendant's claim that the evidence was insufficient to support his conviction of first degree murder. Given the applicable standard of review applied to such issue (*People v. Kelly* (2007) 42 Cal.4th 763, 787, 788), we find defense counsel's criticism to be misplaced.

victim's hand injury was a human bite mark had not changed. Despite his awareness of photographic distortion issues at the 1997 trial, Dr. Golden made no attempt to remedy the distortion.

Dr. Raymond Johansen co-authored a book entitled, "Digital Analysis of Bite Mark Evidence Using Adobe Photoshop" in 2000. He had been using Adobe Photoshop for eight to 10 years prior to his testimony. He testified that the "Adobe technique," making overlays, was in existence and being used in "probably, '96, '97 by Dr. David Sweet from Canada." Dr. Johansen began compiling data regarding Adobe Photoshop in 1998 and 1999 for his book. Based on his book, he was approached by many who wanted to learn more, so he started teaching them.[7] In Dr. Johansen's opinion, the use of Adobe Photoshop for rectification of digital distortion is "very proven." However, regarding the use of Adobe Photoshop in the dental or odontological community, he could give no citations or peer review results of its efficacy and accuracy. He also could not explain how Adobe Photoshop worked. Instead, he merely looks at an image for photographic distortion and then corrects it with Adobe's "distort function."[8] As for explaining how Adobe Photoshop works, Dr. Johansen stated he was "just familiar with the program, how it works," not the technological intricacies, such as coding or algorithms, which provide the basis for the program's conclusion. Following further

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[7] Because the court allowed Dr. Johansen's testimony, the People's *Kelly-Frye* objection was apparently overruled. (*Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 and *People v. Kelly* (1976) 17 Cal.3d 24.)

[8] Again, the People objected on *Kelly-Frye* grounds. The court allowed the testimony subject to a motion to strike.

testimony, the People objected to Dr. Johansen's computer program testimony on the grounds that he was offered as a dentist. The court overruled the objection.

Regarding the mark on victim's hand, Dr. Johansen opined: "After my analysis of [Defendant's] dentition as well as the fence detail, it was just as likely that that injury pattern was caused by the fence detail as it was by [Defendant's] dentition." Thus, Dr. Johansen remained unable to include or exclude Defendant as the biter. He acknowledged his report, in which he characterized victim's hand injury as a human bite.

Dr. Michael Bowers, a practicing dentist, was first contacted in 1998 by defense counsel. Dr. Bowers published an article regarding digital imaging in bite mark cases that same year. He was familiar with the Adobe Photoshop program and became "self-qualified" in its use. In his opinion, Adobe Photoshop distortion techniques began in the late 1990's, after Defendant's trial. He discussed the distortion of the photograph of victim's hand injury and described his efforts to correct the image. On cross-examination, he acknowledged the subjectivity of a "forced match."

Dr. Bowers provided Styrofoam exemplars of Defendant's teeth, and noted the abnormality in the lower teeth, specifically tooth No. 27. He made two exemplars, one with lighter pressure to create a shallow exemplar and the other with deeper pressure for a deeper exemplar. This was to make a bite mark in the Styrofoam; however, Dr. Bowers had no knowledge of how hard victim was bitten. He believed that Defendant's tooth No. 27 was "at the same level with all the other lower front teeth that he has." He testified that tooth No. 27 did not make a bruise; however, it did make an indentation in

the exemplars. Dr. Bowers discussed victim's other bruises and concluded the other bruises raised significant doubt that the hand injury was caused by teeth.

Dr. Bowers also testified regarding color saturation of photographs of victim's fingertips and associated blue fibers. He opined that the autopsy photos should have shown the blue fibers.

Dr. Patricia Zajac, a criminalist, opined that a hair found under victim's artificial nail was not historical[9] in nature, largely due to its length (two centimeters), the location of the crime and where the body was found, the hair itself, and the violence of the crime. The hair in question had a "telogen root," meaning that it was naturally shed.

B. The People's Response

Dan Gregonis, who testified at the trial, examined five hairs that were from victim's hand. Four of them were consistent with victim's DNA profile, one was inconclusive. Gregonis testified regarding the contents of victim's fingernail scrapings. Among the contents there was a dark hair and a light blonde hair. The dark hair was animal in origin. Mito Typing Laboratories concurred that the dark hair was not human hair. Gregonis acknowledged fellow criminalist Craig Ogino's opinion that the hairs were historical but stated that he could not agree or disagree.

According to Gregonis, a large cinder block was used to crush victim's skull. A stepping stone could also have been used as a weapon. The conclusions regarding the cinder block were made based upon the amounts of blood and the type of splatter present.

[9] Dr. Zajac described "historical" as "something that occurs naturally and is not related to a crime event."

A Department of Justice analysis concluded that the DNA present upon the stepping stone was primarily the victim's; however, there was the presence of male DNA to a minor degree. Gregonis opined that the male DNA could have been present prior to victim's DNA being deposited or the stepping stone could have been contaminated in the courtroom throughout the lengthy trial history by people handling the exhibits or talking over them.

Regarding the blue fibers, Gregonis found them wedged in a crack of victim's broken fingernail. He recalled looking at the fingers under a microscope before looking at them with the naked eye. He compared the fibers to a blue shirt taken from Defendant and found them to be indistinguishable.

Regarding the hair under victim's nail, Gregonis testified that it was possible it was historical in nature and "given the fact that [victim] had extended nails, I don't think that it's unusual that it could be there without her being aware of it."

C. Trial Court's Ruling

Following the conclusion of the evidentiary hearing, the trial court issued its ruling: "The Court finds that the evidence with respect to the bite mark analysis and the DNA analysis and the hair analysis has established, taken together, that there . . . did exist and does exist a fundamental doubt in my mind as to the accuracy and reliability of the evidence presented at the trial proceeding.

"This finding is based upon the Court's review of the trial transcript as well as assessing the credibility of the witnesses that have testified before me.

"Taking the evidence as to the tuft fiber—and when I say tuft, I'm talking about the blue fiber under the finger,—and the DNA and the bite mark evidence, the Court finds that the entire prosecution case has been undermined, and that the petitioner has established his burden of proof to show that the evidence before me presents or points unerringly to innocence.

"Not only does the bite mark evidence appear to be now questionable, it puts the petitioner has [*sic*] being excluded. And while I agree with [the prosecution's] statements with respect to the flat stone versus the cinderblock, the DNA evidence establishes that someone other than petitioner and the victim was present at the crime scene.

"For purposes of [the prosecution's] objection with respect to the testimony—or the report of Dr. Bowers, I should say, the Court notes the objection. It's overruled. Dr. Bowers testified to the contents of the report. I find it was properly received into evidence.

"Based upon all the evidence presented, the Court grants petitioner's application. The petition for writ of habeas corpus is granted."

IV. HABEAS CORPUS RELIEF

The People contend the trial court prejudicially erred by concluding Defendant had made an adequate showing that newly discovered evidence undermined the entire structure of the case presented at the time of the conviction. We agree with the People's position.

A. Standard of Review

"Generally, of course, habeas corpus claims must surmount the presumption of correctness we accord criminal judgments rendered after procedurally fair trials. '"For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."' [Citations.] Unlike claims directed at prosecutorial, judicial, juror, or defense counsel misconduct, however, actual innocence claims based on either newly discovered or nonperjured false evidence do not attack the procedural fairness of the trial. They *concede* the procedural fairness of the trial, but nevertheless attack the accuracy of the verdict rendered and seek a reexamination of the very question the jury or court has already answered: Is the defendant guilty of the charges presented? A conviction obtained after a constitutionally adequate trial is entitled to great weight. Accordingly, a higher standard properly applies to challenges to a judgment whose procedural fairness is conceded than to one whose procedural fairness is challenged. [Citations.] Metaphorically, an actual innocence claim based on newly discovered evidence seeks a second bite at the apple, but unlike an ineffective assistance of counsel claim, for example, it does not contend the first bite was rotten." (*Lawley*, *supra*, 42 Cal.4th at pp. 1240-1241.)

Defendant contends this court must not read *Lawley* too broadly. He claims the cases cited by *Lawley*, which discuss false evidence, spelled out the less stringent standard, i.e., that false evidence must be substantially material or probative on the issue

of guilt. (*In re Pratt* (1980) 112 Cal.App.3d 795, 865; *In re Hall* (1981) 30 Cal.3d 408, 425 (*Hall*); *In re Malone* (1996) 12 Cal.4th 935, 966; *In re Roberts* (2003) 29 Cal.4th 726, 741-742; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1232; and *In re Bell* (2007) 42 Cal.4th 630, 638.) Thus, he argues the Supreme Court's dicta in *Lawley* did not serve to render section 1473 and the existing case law void. Defendant's argument is misplaced. According to Defendant, false evidence was used at his 1997 trial to support the jury's finding of guilt. As discussed below, we do not agree the evidence was false. Rather, we conclude the evidence offered in 1997 was true and valid; Defendant merely offered new expert testimony on how to interpret the evidence. As such, we treat the new expert testimony as new evidence.[10]

Accordingly, as the People point out, defendant had to show the trial court that "his (1) newly discovered evidence (2) undermined the prosecution's ***entire*** case ***and*** (3) the evidence had to point ***unerringly*** to his innocence." (*In re Johnson* (1998) 18 Cal.4th 447, 460-462; *Hall, supra*, 30 Cal.3d at pp. 415-417, 424; *In re Weber* (1974) 11 Cal.3d 703, 724 (*Weber*).)

B. Analysis

In analyzing the evidence offered at the evidentiary hearing, we are mindful that "newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. [Citations.] '[A]

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[10] We note Defendant also recognizes that new bite mark evidence was introduced.

criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' [Citation.]" (*In re Clark* (1993) 5 Cal.4th 750, 766.)[11]

1. Bite mark evidence

The testimonies of Drs. Sperber, Golden, Johansen, and Bowers at the evidentiary hearing regarding the injury on victim's hand did not constitute new evidence. Dr. Sperber testified about the fact that the photography he relied upon in 1997 was distorted. He provided the same opinion about the photography in 1997. In Dr. Sperber's declaration in support of the petition, he stated that the photograph "should never have been relied upon as conclusive evidence of [Defendant's] guilt." However, in 1997 he did not claim the photograph was conclusive evidence of Defendant's guilt. Instead, he testified there were four levels he uses when rating and comparing the teeth of a person to the bite mark, namely, inconsistent, consistent, probable, and "reasonable doubt certainty." Of those four levels, his 1997 opinion was that Defendant's teeth were consistent, which means he could have been the source of the mark. Regarding the quality of the photograph, Dr. Sperber rated it as a six or seven on a scale of one to ten.

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[11] During oral argument, defense counsel maintained that new evidence was introduced to contradict the evidence presented at trial. We disagree. As we discuss below, the evidence previously relied upon by the experts was never presented as conclusive evidence of Defendant's guilt. There was no testimony that Defendant unequivocally murdered the victim.

His declaration did not recant his trial testimony. Instead, the main point of his declaration was that he should not have testified that "very few, maybe one or two, or less, out of one hundred people will have an under erupted canine similar to the one of [Defendant]."

Dr. Golden testified in 1997 that he and Dr. Sperber did not differ in their opinion, i.e., they agreed the photography was "somewhat less than ideal evidence," that it was a generic bite, they could not rule Defendant out as a suspect, they could not rule many other individuals out as suspects, and that they tended to disregard the bite mark as evidence. He also opined that, while there is some consistency between Defendant's teeth impression and the bite mark, if this were the only evidence to prove that Defendant killed victim, it must be "thrown out." In 1997 Dr. Golden found the bite mark evidence to be basically irrelevant. At the evidentiary hearing, the doctor testified the mark may have been a dog bite; however, he also maintained that his initial opinion that victim's hand injury was a human bite mark had not changed. Although the photograph was distorted, Dr. Golden made no attempt in 1997 to remedy the distortion.

Dr. Johansen did not testify at the 1997 trial. His testimony at the evidentiary hearing concerned his use of Adobe Photoshop to rectify digital distortion in photographs. He could not explain how the program worked. Rather, he merely stated that he looks at an image for distortion and then corrects it with Adobe Photoshop's distort function. This "Adobe Photoshop technique" was in existence and being used in 1996 or 1997. Dr. Johansen opined the mark on victim's hand may have been caused by the fence; however, he was unable to include or exclude Defendant as the source.

Dr. Bowers provided Styrofoam exemplars of Defendant's teeth and mimicked Defendant's bite. However, he did not know how hard victim was bitten. He discussed victim's other bruises and concluded the other bruises raised "significant doubt" that the hand injury was caused by teeth. Dr. Bowers's testimony did not provide new evidence; it merely provided another expert's opinion that the bite mark should be given little to no value.

Considering the evidence introduced at the 1997 trial and the evidence offered at the evidentiary hearing regarding the bite mark on victim's hand, we agree with the People's observation that there was no newly discovered evidence. Even with the manipulation of the digital image in the photograph, there was no conclusive evidence establishing Defendant's innocence such that the prosecution's case was undermined. As the People point out, Defendant was merely attempting to relitigate an issue covered at trial. Moreover, contrary to Defendant's claim and as established by the expert testimony in the 1997 trial, the bite mark evidence was not offered as conclusive proof of Defendant's guilt. In fact, the prosecution argued that it did not plan to introduce any testimony regarding the bite mark (and did not during the first two trials) until defense counsel hired an expert to discuss it for the 1997 trial.

2. Hair evidence

According to Defendant, the hair found under one of victim's fingernails points towards his innocence. Specifically, he notes that in 2006, mitochondrial DNA testing revealed this hair did not match the DNA of either victim or Defendant. Instead, it belonged to an unknown third party. At the hearing, Dr. Zajac opined the hair was not

historical in nature due to its length (two centimeters), the location of the crime and where the body was found, where the hair was found, and the violence of the crime. However, she did note the hair had a telogen root, meaning that it was naturally shed. She explained that hairs with telogen roots are mature and at a stage where they are ready to fall out. Nonetheless, she opined the hair was "forcibly" pushed under victim's nail.

In contrast, Gregonis testified that in the 1997 trial he had examined five hairs that were found on the victim's hands. Four of them were consistent with victim's DNA profile; one was inconclusive. Regarding the contents of victim's fingernail scrapings, there was a dark hair and a light blonde hair. The dark hair was animal in origin. Mito Typing Laboratories concurred with that finding. Gregonis acknowledged Ogino's opinion that the hairs were historical in nature but stated that he could not agree or disagree.

Contrary to Defendant's claim that the DNA testing resulted in new evidence pointing to Defendant's innocence, we conclude that Zajac's testimony creates a conflict with the trial record, specifically, Ogino's testimony. Such conflict does not constitute new evidence. (*Weber*, *supra*, 11 Cal.3d at p. 724.)

3. Stepping stone

In addition to the cinder block, the prosecution presented a stepping stone as a second murder weapon. There were three areas on the stepping stone that contained

blood. STR DNA[12] testing established that two of the three contained a mixture of victim's DNA and male DNA, with the male DNA contributing one-tenth of the DNA in one area and one-sixth of the DNA in the other. Although the male DNA did not belong to Defendant, the STR DNA testing that established this fact was not performed until January 2006. Thus, the People rightly observe that "a microscopic sample of unknown male DNA on the purported murder weapon when it was analyzed years later **do[es] not** establish that someone other than [Defendant] and [victim] were present at the crime scene **at the time of the crime**." Did the person who was the source of the male DNA touch the stepping stone prior to the murder, at the time of the murder, or subsequently after the murder? Defendant did not offer any chain of custody evidence to establish that the stepping stone was not touched by anyone subsequent to the time of the murder. As such, it takes a leap of faith to pinpoint the source of the male DNA to the exact time of victim's murder. Given the facts before this court, we do not have such faith. Rather, we conclude that there is no exonerating evidence.

4. Fibers evidence

At the 1997 trial, the People presented evidence of 14 or 15 light blue, cotton fibers wedged in one of victim's fingernails. (*People v. Richards*, *supra*, E024365, p. 8.) Although the fibers were indistinguishable from the fibers of the shirt Defendant was wearing the night of the murder, Gregonis could not say definitively that the fibers came from Defendant's shirt. (*Ibid.*) At the hearing on Defendant's petition, Defendant

[12] Gregonis testified that "STR" technology "gives you an idea of the quantity of DNA that's contributed by each person in a mixture . . . ."

offered the testimony of Dr. Bowers, who used Adobe Photoshop to enhance a photograph of victim's broken nail, along with a still photograph from a video of the same nail. The video was taken by Gregonis after he found the blue fibers wedged under a crack in victim's artificial nail using a stereomicroscope.[13] Dr. Bowers testified that the still photograph showed the fibers, whereas the autopsy photograph had not. Defendant thus implied that Gregonis had planted the fibers.

The trial court found Defendant had "failed to establish that . . . Gregonis[] presented perjured or planted evidence in this case." However, the court opined that the fibers evidence raised "factual concerns." Defendant thus claims that "another pillar from the prosecution's case was undermined by the evidence presented at the hearing." We disagree.

Gregonis explained the reason why the fibers were not initially found. Specifically, he stated that his first examination of victim's fingernails was cursory. However, on the second examination, he used the stereomicroscope "looking for tissue and stuff and such that [he] might take on to typing." Upon finding the fibers, he "felt that the manner which they were actually in the crack of the fingernail was significant enough to document with the video camera . . . ." Thus, he attached the video camera to the stereomicroscope. He then compared the fibers to the clothing items that came from Defendant. Going back to the 1997 trial testimony, we note that Gregonis could not say

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[13] Gregonis testified that a stereomicroscope is a "low power microscope that allows . . . a 10 to 100 magnification of an object so that you can see details better."

definitively that the fibers came from Defendant's shirt. (*People v. Richards*, *supra*, E024365, p. 8.)

Nothing offered at the hearing regarding the fibers evidence clearly demonstrated Defendant's innocence. Again, "newly discovered evidence will not undermine the case of the prosecution so as to warrant habeas corpus relief unless (1) the new evidence is conclusive, and (2) it points unerringly to innocence." (*Weber*, *supra*, 11 Cal.3d at p. 724.)

5. Adobe Photoshop evidence and *Kelly-Frye* standards

Assuming this court affirmed the trial court's decision to grant Defendant's petition, the People also challenge the admitted testimony regarding Adobe Photoshop evidence on the grounds that it did not meet *Kelly-Frye* and Evidence Code standards. Because we have concluded the trial court erred in finding that Defendant had made an adequate showing that newly discovered evidence undermined the entire structure of the case presented at the time of the conviction, we need not reach the merits of this issue.

C. Summary

The case against Defendant was based entirely upon circumstantial evidence. We are mindful that in such case "'. . . we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. [Citation.]' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290.) In examining the evidence, we focus on the evidence that did exist rather than on the evidence that did not. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299.) The scope

of the evidence includes both the evidence in the record as well as "reasonable inferences to be drawn therefrom." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.)

Here, Defendant had the motive and the opportunity. A divorce was imminent. Defendant closed the joint banking account and instructed the teller that from that day forward he would have an individual account. He stated he was tired of victim's financial irresponsibility and he was tired of supporting her and the man she was having an affair with. He also indicated he was saving money so that victim and her boyfriend could establish their own place. Regarding the crime scene, Defendant was able to determine what happened to victim despite the fact that it was dark and the only power on at the residence was supplied by a generator. When Deputy Nourse told Defendant they needed to leave the crime scene so he could secure it, Defendant stated, "it don't matter any, all the evidence that relates to this case I already touched and moved trying to figure out how this whole thing happened." (*People v. Richards*, *supra*, E024365, pp. 4, 13-14.) All footprints were accounted for, and a search of the surrounding area revealed that there was no indication that anyone (other than Defendant and the officers) approached the residence. (*People v. Richards*, *supra*, E024365, p. 6.)

In addition to the above, there was the blood splatter evidence. The bite mark evidence was never conclusive, nor was the hair or fibers evidence. While Defendant's petition suggested that certain evidence against him was weak, the fact remains those weaknesses were brought out during the trial. Even with the weaknesses, there was sufficient circumstantial evidence to establish Defendant's guilt. The new evidence offered by Defendant in support of his petition failed to undermine the prosecution's

entire case and point unerringly to his innocence. (*In re Johnson*, *supra*, 18 Cal.4th at pp. 453-454.)

V. DISPOSITION

The superior court's order granting Defendant's petition for writ of habeas corpus is vacated, and the superior court is directed to enter an order denying the petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.