

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re)
) No. S189275
)
 WILLIAM RICHARDS,) Court of Appeal No. E049135
)
 Petitioner,) San Bernardino Superior Court
) No. SWHSS700444
 On Habeas Corpus.) Criminal Case No. FVI00826
)
 _____)

PETITIONER'S OPENING BRIEF ON THE MERITS

SUPREME COURT
FILED

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PETITIONER’S OPENING BRIEF ON THE MERITS

STATEMENT OF ISSUES

(1) When a petitioner seeks relief on habeas corpus because an expert witness who testified at trial later fundamentally alters the opinion he or she rendered, should this be viewed as a claim that false evidence substantially material or probative on the issue of guilt was presented at trial or as a claim that newly discovered evidence casts “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.)

(2) Is petitioner entitled to relief on either ground in this case?

(3) Is petitioner entitled to habeas corpus relief based on newly discovered DNA evidence?

INTRODUCTION

In July of 1997, Williams Richards was convicted of killing his wife, Pamela Richards (“Pamela”). The evidence against Richards was limited and circumstantial. Two trials ended in hung juries. In each, the prosecution relied

on blood spatter evidence, the absence of evidence indicating the presence of a third party at the crime scene, 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, and evidence of some marital discord. It was not until the third full trial that the prosecution, for the first time, introduced evidence suggesting Richards was responsible for a bitemark found on Pamela and that only 2% of the population had a dentition which could have made that bitemark. That trial resulted in Richards' conviction.

In December of 2007, Richards filed a petition for writ of habeas corpus alleging that the bitemark evidence used to convict him was false and that new forensic tools now excluded him as the person responsible for the bitemark. The petition also alleged that new evidence, obtained through DNA testing, showed that someone other than Richards held one of the murder weapons exactly where the prosecution suspected the murderer's DNA would be found. The petition also alleged that DNA test results showed that a hair belonging to someone other than Richards had been found under the victim's fingernail. Finally, the petition alleged that the tuft of fiber similar to the material in Richards' shirt had not become lodged in the victim's fingernail during Pamela's struggle with her killer. Instead, the fibers must have become lodged in the nail after the autopsy.

At an evidentiary hearing, the prosecution witness who had provided false bitemark statistics at trial acknowledged that there was no factual basis for them. After the application of new computer-based photo analysis to correct for distortion, that same prosecution witness (and other forensic odontologists) testified that the bitemark relied upon by the prosecution did *not* match Richards' dentition and *excluded* him as the person responsible for the bitemark.

At the hearing, Richards also produced other new evidence, in the form of DNA test results, which refuted the prosecution's claim that there was no evidence that anyone other than Richards had been present on the night of the murder. DNA test results showed that a two centimeter hair found under Pamela's fingernail – likely lodged there during her struggle with her killer – came from someone other than Richards. In addition, DNA test results showed that DNA belonging to an unknown male was found on a stepping stone, which the prosecution claimed the killer used as a weapon, in the location that the prosecution suggested 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 fibers attributed to Richards' shirt was not lodged in the fingernail prior to autopsy.

After hearing all of the evidence and argument, and after reviewing the

transcripts from the underlying trial, the superior court concluded that the evidence presented created a “fundamental doubt . . . as to the accuracy and reliability of the evidence presented at trial.” (2 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 by showing the evidence presented “points unerringly to innocence.” (2 R.T. 481.)

The Court of Appeal reversed in an opinion which did not fully consider the evidence adduced, did not give appropriate deference to the superior court’s factual determinations, and did not apply the appropriate legal standards. Accordingly, this Court should reverse and reinstate the superior court’s decision granting Richards’ petition for writ of habeas corpus.

STATEMENT OF THE CASE

The San Bernardino District Attorney’s Office charged Richards with one count of murder in violation of Penal Code section 187. (1 Tr. C.T. 5.)

Richards’ first jury trial commenced July 6, 1994. (1 Tr. C.T. 228.) On August 29, 1994, the court declared a mistrial after the jury could not reach a verdict. (2 Tr. C.T. 417-20, 3 Tr. C.T. 871.) Richards’ second jury trial

¹

References to the record on appeal from the grant of habeas relief (E049135) will have the usual C.T. and R.T. references. References to the record on appeal from the criminal conviction will be designated as “Tr. R.T” and “Tr. C.T.”

commenced October 24, 1994. (2 Tr. C.T. 431-32.) On October 27, 1994, the court recused itself during juror voir dire and declared a mistrial. (2 Tr. C.T. 433, 3 Tr. C.T. 871.) Richards' third jury trial commenced on November 15, 1994. (2 Tr. C.T. 438.) On January 9, 1995, the court again declared a mistrial after the jury could not reach a verdict. (2 Tr. C.T. 474, 3 Tr. C.T. 871.) On May 29, 1997, Richards' third full jury trial commenced. (2 Tr. C.T. 532.) At the conclusion of this trial, Richards was convicted of first degree murder and sentenced to twenty-five years to life. (3 Tr. C.T. 923.)

On August 17, 2000, the Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment. (Court of Appeal Case No. E024365.)

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 he was innocent. (1 A.C.T. 1-86.) Superior Court Judge Brian McCarville issued an order to show cause and subsequently held an evidentiary hearing. (1 C.T. 180-81.) At the conclusion of that hearing, Judge McCarville granted Richards' petition and vacated the judgment of conviction. (4 C.T. 1147-48, 1185.)

The People appealed, and on November 19, 2010, the Court of Appeal reversed. On December 3, 2010, the Court of Appeal denied a petition for rehearing. On February 23, 2011, this Court granted review.

STATEMENT OF FACTS

Because the issues in this case will require a comparison of the evidence presented at the trial which resulted in Richards' conviction with the evidence presented at hearing on Richards' petition for writ of habeas corpus, each set of facts will be presented separately.

A. FACTS ADDUCED AT TRIAL.

On August 10, 1993, Pamela Richards was severely beaten with fist-sized rocks, manually strangled, and a cinder block and stepping stone were used to crush her skull. (3 Tr. R.T. 380; 5 Tr. R.T. 962.) Testimony indicated that strangulation was most likely the cause of death. (3 Tr. R.T. 365.) The beating took place on her property outside of her home. (2 Tr. R.T. 252; 5 Tr. R.T. 975.) There, 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, 1035.)

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 and prosecution focused on Richards as the person responsible for Pamela's death.

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 County Sheriff

Deputy Navarro recreated the drive from Richards' work to his home and determined that if Richards left his place of employment at 11:06 p.m. and kept up with the flow of traffic, it would have taken forty-one minutes for Richards to drive home. (5 Tr. R.T. 867-72.) Based on this analysis, police believed Richards arrived home at 11:47 p.m. (5 Tr. R.T. 872.)

According to Richards, upon his arrival at home on the night of Pamela's murder, 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 left the shed, 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 ring. (4 Tr. R.T. 557.)

At approximately 11:55 p.m., Eugene Price (Pamela's former lover) called Richards' residence, and Richards answered the phone. (4 Tr. R.T. 557.) Thus, even relying on the prosecution's time line and theory of the case, Richards had only eight 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.) Richards asked Price what he should do, and Price told him to call 911. (4 Tr. R.T. 561.) Price characterized Richards as being stressed and in need of help and

guidance during the phone conversation. (4 Tr. R.T. 561.)

At 11:58 p.m., Richards called 911 and reported his wife was dead. (2 Tr. R.T. 168.) Richards placed two more calls to 911 at 12:06 a.m. and 12:33 a.m., frantically urging officers to hurry. (2 Tr. R.T. 168-69.)

The responding officer, Deputy Mark Nourse, arrived on the scene shortly after 12:30 a.m. (4 Tr. R.T. 580.) Richards flashed the headlights on his truck to guide Nourse to his property. (4 Tr. R.T. 582.)

Nourse testified that it was very dark when he reached the scene and that he found Richards standing next to his truck. (4 Tr. R.T. 584, 586.) Richards directed Nourse to the victim's body and told Nourse his wife was "stone cold dead, you don't have to check her out, 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'd found the victim face down and he'd turned her over. (4 Tr. R.T. 592.) Nourse testified he put on surgical gloves and checked the body. To his gloved touch, the wrist was pliable and the body was "neither cold nor warm." (4 Tr. R.T. 636.)

Nourse did not investigate the scene at that time. (4 Tr. R.T. 683.) Homicide detectives did not arrive on the scene until 3:15 a.m. (2 Tr. R.T. 228.) After the first officer responded to the scene, three or four dogs entered the crime scene. (4 Tr. R.T. 642.) Because it was dark, the detectives decided

not to process the scene until first light (approximately 6:00 a.m.) more than six hours after the body was found. (1 Tr. R.T. 94; 2 Tr. R.T. 327.)

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.) The stone was labeled item 25 at the scene, later identified as A-18, and marked with evidence number 139 for identification purposes at trial. (2 Tr. R.T. 193, 246.) Criminologist David Stockwell of the San Bernardino Sheriff's Department testified that he tested genetic markers from eight stains taken from this stepping stone, and all were consistent with the victim's blood. (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 the victim 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.) According to Detective Parent, all shoe prints found at the scene were accounted for. (1 Tr. R.T. 273.) However, the ground was not good for finding such prints and Richards' shoe prints were not found in the areas where the struggle occurred. (Tr. R.T. 301-04, 323.)

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. (4 Tr. R.T. 699.) He never reported that a tuft of blue fibers was lodged in a crack in Pamela's right middle fingernail. Ogino analyzed the evidence taken from the fingernails of the victim's right hand. (4 Tr. R.T. 699.) He found 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. 700.) At trial, Gregonis testified, "there is no hair that was consistent with anyone but Pamela Richards on Pamela Richards." (6 Tr. R.T. 1155.) Blood under her fingernails was consistent with her own. (5 Tr. R.T. 731.)

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 that after microscopic testing, under a florescent microscope, and with microspectometry, this tuft of blue cotton fibers was indistinguishable from fibers in the blue cotton shirt Richards wore the night Pamela was murdered. (5 Tr. R.T. 922-25; 6 Tr. R.T. 1330.) Gregonis established that the fibers were recovered from a deep crack in Pamela's

fingernail by showing to the jury a videotape of their removal. (4 Tr. R.T. 715, 919, 921-22; 6 Tr. R.T. 1251.) The video was recorded after the fingertips from the victim's right hand were severed at the autopsy. (5 Tr. R.T. 918.)

Gregonis 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 testified that these stains were from different directions and consistent with two separate events. (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 he had to support that claim, Gregonis referred to some alleged diluted blood next to the victim's head. (5 Tr. R.T. 1083.) However, Gregonis never wrote about any alleged diluted blood in his crime scene notes and never mentioned any alleged diluted blood during the three prior occasions when he was called to testify in Richards' case. (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.) He testified that he was board certified by the American Board of Forensic Odontology (“ABFO”) and was a diplomat of the ABFO. (6 Tr. R.T. 1163.) Dr. Sperber testified that he examined a single autopsy photograph of the dorsal side of the victim’s right hand and identified a lesion (i.e., bruise) 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 he examined the photograph and stated there were two problems causing distortion: (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 the angular distortion was “definitely a factor” in the certainty of his analysis. (6 Tr. R.T. 1199.) The photo also lacked detail; individual teeth in the injury could not be measured because the edges of the teeth were not visible in the photo. (6 Tr. R.T. 1200-01.)

Dr. Sperber could only draw the conclusion that the edges of the teeth were somewhere in the general area of the mark. (6 Tr. R.T. 1200.) From that single distorted photograph, Sperber opined that whoever left the mark had a rather distinctive abnormality relative to their lower right canine tooth. (6 Tr.

R.T. 1202.)

Based upon a molding Dr. Sperber made of Richards' mouth, he determined that Richards had the same distinctive abnormality. (6 Tr. R.T. 1203.) 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. (6 Tr. R.T. 1207.) Dr. Sperber testified "one or two or less" out of one hundred people would have such an abnormality. (6 Tr. R.T. 1212-13.) He stated he could not rule out Richards as the person who left the bite mark. (6 Tr. R.T. 1214.) Dr. Sperber opined that the bite mark 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.) Criminologist Gregonis opined that the perpetrator used his hands, the stepping stone, and the cinder block to batter the victim. (5 Tr. R.T. 1010-11, 1102.)

Dr. Frank Sheridan, Chief Medical Examiner for the Coroner's Office of San Bernardino County, testified that he performed an autopsy on the victim's body on August 13, 1993. (3 Tr. R.T. 346, 359.) Sheridan testified

that Pamela had suffered extensive blunt force trauma to the face and several defensive wounds. (3 Tr. R.T. 356, 360.) Dr. Sheridan opined that the victim had been manually strangled and suffered blunt force trauma to her skull, either of which could have been fatal on its own. (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 testified he 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.) Dr. Sheridan 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.) However, as indicated, when the body was discovered, Pamela had a shirt on, but was naked from the waist down. (2 Tr. R.T. 232.)

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 were consistent with Richards' claim that he found Pamela on her stomach and then rolled her over. (4 Tr. R.T. 592.) Crime scene photos show Pamela on her back. Her body had been in that position from at least midnight to six a.m. (2 Tr. R.T. 179.)

Dr. Sheridan also testified that rigor mortis becomes noticeable about

two hours after death. (3 Tr. R.T. 426.) Thus, even if one accepts Nourse's lay testimony that Pamela's body was pliable, it does not mean that the murder happened just minutes before he arrived. It could have happened hours before Richards arrived home.

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 not conducted by the coroner or the coroner's investigator. (7 Tr. R.T. 1408-11, 1467.) Dr. Thomas testified that the determination was difficult, because neither the liver temperature nor the core temperature were measured at the scene, rigor mortis was not assessed upon the discovery of the body, and an inadequate number of microscopic sections of the victim's injuries were collected and preserved at the autopsy. (7 Tr. R.T. 1408-11, 1415, 1417, 1426.) According to Dr. Thomas, several tests which the coroner's office neglected to conduct are standard practices for determining time of death. (7 Tr. R.T. 1474.)

Perhaps because the focus was on Richards, officers failed to investigate several 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 on the property, 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 investigate for other clues that may have led to another suspect. They did not fingerprint the cars, the inside of the home (where blood had been found), or the shed. (2 Tr. R.T. 318, 338.) They did not swab the crescent-shaped mark found on Pamela's hand, which is routinely done with bitemarks 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's test runs, 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. (7 Tr. R.T. 1521.) He testified that the injury was a typical arch shape, and although he could not rule out Richards as the biter, he also could not rule out several exemplars taken at random from his office collection. (7

Tr. R.T. 1528-29.) He also testified he was a colleague of Dr. Sperber, they often worked together on cases, that he had great respect for Dr. Sperber, and that Dr. Sperber was prominent in the field of forensic odontology. (7 Tr. R.T. 1533.) He testified Dr. Sperber was internationally known as the founding father of forensic odontology. (7 Tr. R.T. 1533.) He testified that he and Dr. Sperber came to the exact same conclusions about the interpretation of the bitemark evidence. (7 Tr. R.T. 1534.) 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 conclusions reached by Gregonis.² Looking just 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

2

The Court of Appeal's opinion devotes two pages to the prosecution's blood spatter evidence, yet the court's recitation of the evidence presented at trial by the defense fails to contain *any* reference to Gialamas' testimony. (Opinion, pp. 9-11, 16-18.)

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 also 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 the perpetrator of the violent attack perpetrated by Pamela's killer. (7 Tr. R.T. 1659.)

Investigator Tom Bradford took Richards' clothing and photographed him that morning. There were no cuts or scratches on his hands and only one small mark on his elbow. (4 Tr. R.T. 813, 821-22.)

B. FACTS ADDUCED AT THE HABEAS EVIDENTIARY HEARING.

Petitioner presented evidence presented at the hearing relating to three issues. First, petitioner presented DNA evidence pointing to a person other than Richards as having murdered Pamela. Second, petitioner presented expert testimony indicating that Richards could not have been responsible for a bite mark attributed to the killer. That testimony included a recant by the prosecution's dental expert. Finally, Richards presented photographic evidence indicating that the fibers in the victim's fingernail, allegedly lodged during the victim's struggle, were not present until after autopsy.

1. New DNA Evidence.

a. Mitochondrial DNA from a Hair Found under Pamela's Fingernail.

A single hair, measuring two centimeters (equal to .787 inches³), from an unknown person, was recovered from amongst blood and debris under one of the fingernails of Pamela's right hand. In 2006, mitochondrial DNA testing revealed 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, who has qualified as an expert in approximately 500 cases, testified she disagreed with the prosecution's belief that the hair was likely historical (i.e., present prior to the murder). (2 R.T. 305, 310.) Instead, it was more likely the lodged hair was the product of the attack. (2 R.T. 316.)

Dr. 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.) (In fact, the manager at the Olive Garden, where Pamela worked, testified that Pamela wanted to be on

³ Two centimeters is approximately this long: _____

call for work the night she was murdered and that on each shift, the employees were checked to make sure their appearance (including fingernails) were up to standards. [6 Tr. R.T. 1358-59].) Second, the crime scene was not a place where one would 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, and the fact there had been 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.) Dr. Zajac stated that most hair collected as evidence has a telogen, not an anogen, root. (2 R.T. 314.) (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].)

Based on all of these factors, Dr. Zajac opined that the hair was not historical but, instead, was related to Pamela's murder. (2 R.T. 313.)

At the evidentiary hearing, Gregonis testified that he could not say whether the hair was historical or not. (2 R.T. 409.) In fact, he 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, through the testimony of Gregonis and in argument, repeatedly took the position that a twelve-by-twelve-by-two-inch stepping stone found north of Pamela was one of the weapons used to murder her. The stone was labeled item 25 at the scene, later identified as A-18, and marked as Exhibit Number 139 for identification purposes at trial. (2 Tr. R.T. 193, 246.) It was the prosecution's theory of the case that both the cinder block and this stepping stone were murder weapons.

In his opening statement, the District Attorney said, "this attacker picked up a concrete stepping stone and threw it at her face. The attacker then picked up a second concrete stepping stone and threw on at her face." (1 Tr. R.T. 54.) Gregonis repeatedly referred to the stone as a weapon. (5 Tr. R.T. 975, 999, 1000, 1079.)

Similarly, the District Attorney referred to the two bludgeoning instruments as "heavy objects coming into contact with her skull." (5 Tr. R.T. 1004.) Gregonis agreed there were two separate events with two heavy objects used as weapons. (5 Tr. R.T. 1010-11.) Gregonis also concurred that the cinder block and stepping stone shielded the murderer from blood spatter when used to murder Pamela. (5 Tr. R.T. 1015.) This was a critical point since the

prosecution had to explain why Richards' shirt did not have any blood spatter on it.

Finally, in closing, the District Attorney referred to "cinder blocks to the head" (8 Tr. R.T. 1792); "bashing her head in with bricks" (8 Tr. R.T. 1798); "the cinder block, stepping stone" (8 Tr. R.T. 1799); and he argued, "you have got two blocks in evidence with blood, her blood and tissue on them. Whoever threw those blocks did it more than once." (8 Tr. R.T. 1807.)

In 1994, Gregonis identified three areas on the stepping stone, which he noted were the "most likely candidates for [the] suspect's blood." (2 R.T. 437-38; see Petition Exh. Z [2 A.C.T. 276] and Exh. AA [2 A.C.T. 279].) At trial, the prosecution elicited testimony that blood on this item was consistent with Pamela's. (4 Tr. R.T. 742-43.)

In 2006, Item A-18 was tested by the Department of Justice. 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 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], admitted by stipulation [2 R.T. 248; 4 C.T. 991].) Significantly, the male DNA did *not* belong to Richards. (Prosecution's Second Amended Return [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, at the hearing, 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.)

2. New Developments in Bitemark Evidence.

At trial in 1997, Dr. Sperber and Dr. Golden testified they had formed their opinions about the crescent shaped injury on Pamela's right hand using a single, low resolution photograph of the injury. Post conviction, at Richards' request, Dr. Sperber and Dr. Golden reexamined the photo of the crescent shaped injury on Pamela's hand. This photo was also examined by experts Dr. Raymond Johansen and Dr. C. Michael Bowers. In 2006 and 2007, all of the experts were also provided with additional photographs of the crime scene and other crescent shaped injuries on Pamela's body. All four experts provided declarations in support of the petition and testified at the evidentiary hearing.

a. Dr. Norman Sperber's Declaration and Testimony.

At trial in 1997, at the insistence of the District Attorney, Dr. Sperber testified as to the uniqueness of Richards' dentition. (Exh. 12, ¶ 16, 5 C.T.

1207; 1 R.T. 73.) Before a break, Dr. Sperber began to explain that he had no scientific evidence of the uniqueness of Richards' dentition. (6 Tr. R.T. 1204.) After the court recessed for lunch, Dr. Sperber testified, "[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 request of Richards, Dr. Sperber reviewed all evidence relevant to the bitemark analysis and provided a declaration stating that he would not testify now as he did in 1997. (Exh. 12, ¶¶ 27 and 30, 5 C.T. 1208.) At the evidentiary hearing, Dr. Sperber testified that he never should have provided an estimate regarding the percentage of the population that had the dentition abnormality he had identified in Richards, and he stated the statistic he provided was scientifically inaccurate. (1 R.T. 74; Exh. 12, ¶ 19, 5 C.T. 1207.) At the time of trial, he was not aware of any studies which would have provided 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.)

Additionally, Dr. Sperber admitted he made his determinations about the "bitemark" and formed his opinions and testified at the 1997 trial based on a single distorted picture. (Exh. 12, ¶ 20, 5 C.T. 1208.) At the hearing, Dr.

Sperber testified that the picture of the bitemark was “unreliable and inaccurate” because of the relationship between the camera and the ruler that was next to the lesion. (1 R.T. 67.) Specifically, he testified that because the right side of the ruler was closer to the lesion, there was distortion in the picture of the lesion. (1 R.T. 70.) At the time of Richards’ trial, no one in the field was using computers to correct angular distortion in photographs. (1 R.T. 84.)

Dr. Sperber also testified that the lesion could have been produced by someone without Richards’ dentition abnormality. (1 R.T. 72.) Although Richards’ number 27 tooth was abnormal, the injury on Pamela’s hand could have been created by someone without this abnormal dentition. A barrier, like clothing, could have been over part of the area of the lesion and nullified the ability to see a mark from the lower right canine. (1 R.T. 72; Exh. 12, ¶ 20, 5 C.T. 1207.)

Dr. Sperber also acknowledged that he never attempted to use the mold of Richards’ teeth to determine if it would make a “bite registration” or “dental impression.” (1 R.T. 90. See also, 1 R.T. 80.) Instead, his trial testimony was based solely on his visual observation: “Because I had basically *eyeballed* this case and I saw one tooth that was shorter than the others. I saw a space in that collection of red lesion” (1 R.T. 90; emphasis added. See also, 1

R.T. 80.)

After review of all relevant evidence and with the benefit of added experience, contrary to his trial testimony that the lesion was consistent with Richards' dentition, Dr. Sperber now has "no degree of certainty" that Richards' teeth could have caused the lesion. (1 R.T. 81; Exh. 12, ¶ 20, 5 C.T. 1208.) In fact, Dr. Sperber testified to a conclusion that is the polar opposite of the conclusion he gave at trial. At trial, Dr. Sperber found Richard's dentition to be both rare and consistent with the bitemark. Dr. Sperber has now "ruled out" Richards as the person who caused the lesion 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 Declaration and Testimony.

At the time of Richards' trial, Dr. Golden was provided a single photograph of the injury on Pamela's right hand. (Exh. 14, ¶ 6, 5 C.T. 1217. 1 R.T. 99.) In 2007, Dr. Golden digitally scanned a 35-mm slide to generate a high resolution photo. (Exh. 14, ¶ 7, 5 C.T. 1217.) He 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.) Dr. Golden testified that with advances in technology he has been able to do a more accurate analysis and, based on that analysis, Richards' "dental signature does not line up as well with the injury as it did in the distortion [sic] injury." Therefore, he excludes Richards as the suspected biter. (1 R.T. 100; Exh. 14, ¶ 10, 5 C.T. 1218.)

Unlike at trial, where he testified that he could not rule out Richards as the source of the lesion, at the hearing, based on the digital analysis, Dr. Golden has now ruled Richards out. (1 R.T. 110; Exh. 14, ¶¶ 1 and 12, 5 C.T. 1218.) In fact, Dr. Golden also testified that the lesion might well have been caused by a dog bite as it fits "the classic characteristics" he has seen in dog bites. (1 R.T. 100; Exh. 14, ¶¶ 11 and 12, 5 C.T. 1218.)

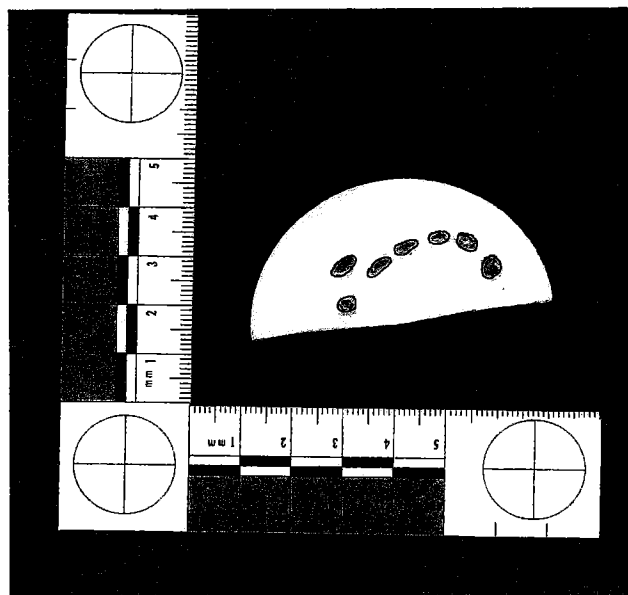
c. Dr. C. Michael Bowers' Report and Testimony.

Corrected Photo. Dr. Bowers, like the other experts, testified that the photograph of Pamela's hand, which was used at Richards' trial, was distorted. (2 R.T. 212.) Dr. Bowers testified 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.) A copy of the digital exemplar created by Dr. Bowers was introduced at the hearing as Exhibit 32 and is reproduced below:

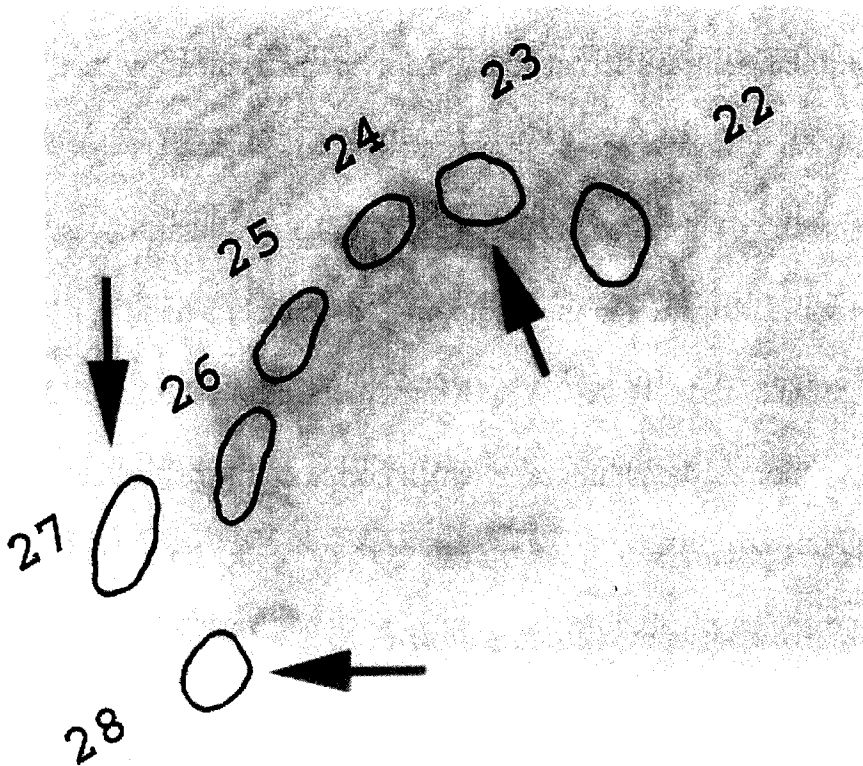
Exhibit 32



Dr. Bowers testified he took measurements of the bruise and of Richards' dentition. (2 R.T. 218.) For example, he measured the bruise as 24 millimeters, yet Richards' lower teeth were 33 millimeters. Thus, the bruise was too small to have been made by Richards. (2 R.T. 218.) Additionally, as shown by Habeas Exhibit 36, when superimposing the digital exemplar of Richards' bottom teeth onto the digitally enhanced photograph of the bitemark,

three of Richards' teeth matched and three did not. (2 R.T. 232, 234.)

Exhibit 36



The red arrows indicate three "mismatches" between Mr. Richards and the skin injury.

The three teeth that did not match were in fact complete mismatches, and thus Dr. Bowers eliminated Richards as the possible biter. (2 R.T. 235-37.)

Tooth 27. Dr. Bowers also testified to making two Styrofoam impressions from the plaster mold of Richards' teeth. (2 R.T. 224; Exh. 27.) At trial, Dr. Sperber had testified that tooth 27 would not have come in contact with the skin because the higher teeth would have acted as "barriers." (6 Tr. R.T. 1207, 1209.) However, when Dr. Bowers used the mold of Richards' teeth to make impressions in Styrofoam, tooth 27 *did* leave marks. (2 R.T.

225-26, 238; Exh's. 29 and 39.)

d. Dr. Raymond Johansen's Report and Testimony.

Dr. Johansen testified at Richards' evidentiary hearing that he is the author of a book on the use of digital analysis of bitemark evidence using Adobe Photoshop, published in 2000. (1 R.T. 117.) Dr. Johansen testified that there was some distortion in the photograph of Pamela's hand. (1 R.T. 130; 5 C.T. 1225-32; Exh. 16-A-D.) Using Adobe Photoshop, Dr. Johansen created a version of the photograph which corrected the distortion contained in the original photograph. (1 R.T. 139; 5 C.T. 1237; Exh. 16-g.) He also created a corrected photo with an outline of Richards' upper teeth. (1 R.T. 140-42; 5 C.T. 1239; Exh. 16-H.) Dr. Johansen used the upper arch because it was "more consistent with the size and shape of the injury pattern." (1 R.T. 178.) According to Dr. Johansen, there were marks on Pamela's hand which were outside the semi-circular dentition area of Richards' teeth. (1 R.T. 143.)

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.) Exhibit 45 is a photograph of Pamela's right hand – prior to the fingers being severed but after the fingers had been cleaned. (2 R.T. 251.) No blue fibers appear in that photo.

Using Adobe Photoshop, Dr. Bowers conducted a saturation test to determine whether there was any indication of the color blue in a close up photograph of finger R-3. (2 R.T. 255; Exh. 50.) Adobe Photoshop has an adjustment which allows one to increase the “saturation” or “purity of the color” in a photograph to 100%. (2 R.T. 255.) 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 had 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 that 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 was clearly visible on the "saturated" photo from the Gregonis tape (Exh. 55).

4. Evidence Introduced by the Prosecution

Gregonis testified that hair found under Pamela's fingernail did not match either Richards or Pamela. (2 R. T. 409.) Gregonis testified that he was aware that criminalist 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 his testimony regarding the stepping stone being a weapon was "more definite" at trial and has changed since that time. (2 R.T. 436.) 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.)

The ratio of male DNA to the victim's, for the DNA found at area A-18-15, the ratio was approximately 1:6. (Petition Exh. CC [2 A.C.T. 289] admitted by stipulation [2 R.T. 248; 4 C.T. 991].) In addition, Gregonis testified that he would "certainly . . . expect" that there would be a greater quantity of DNA from Pamela's blood than from the perpetrator's handling of the stepping stone. (2 R.T. 438-39.) And, as indicated, 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.

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ARGUMENT

I.

RICHARDS' CONVICTION WAS THE PRODUCT OF FALSE EVIDENCE SUGGESTING THAT A "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.

At Richards' third trial – the only one which resulted in a conviction – the prosecution linked Richards to the alleged bitemark using one distorted photograph and bolstered that linkage with a powerful but unfounded statistic. The two experts who provided that testimony – Dr. Sperber and Dr. Golden – have now testified their trial testimony was not correct. At the evidentiary hearing, Dr. Sperber testified he had no basis for his statistics. At the evidentiary hearing, both Dr. Sperber and Dr. Golden testified that Richards could *not* have been responsible for the bitemark.

Based on a review of the trial transcripts and based on an assessment of the testimony provided at the hearing, the superior court concluded the bitemark evidence “excluded” Richards. (2 R.T. 481.) Thus, the prior contrary testimony provided at Richards' trial was false. As will be discussed in Point II, this false testimony was material and the superior court was correct in granting Richards' petition for writ of habeas corpus.

A. DOCUMENTED PROBLEMS WITH BITEMARK “MATCHES” IN FORENSIC ODONTOLOGY.

Before reviewing the specific bitemark evidence introduced at the hearing and how it relates to the bitemark testimony used to convict Richards, it is important to understand that the scientific validity of bitemark comparisons 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 & Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow* (1985) 12 W. St. U. L. Rev. 519, 560.)

Those criticisms have not dissipated in the ensuing 26 years. Instead, they 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 “*NRC Study*.”)

The *NRC 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. (*NRC Study* at p. S-1.) In its

introduction, the *NRC 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.

(*NRC Study* at p. S-3.)

In its discussion of the admissibility of forensic evidence, the *NRC Study* found that “[m]uch forensic evidence – including for example, bitemarks and firearm and toolmark identifications – 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 p. 3-18. Footnote omitted.)

In the specific section on forensic odontology, the *NRC 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 p. 5-35.) In its criticism of bitemark comparisons, the *NRC 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 p. 5-36.)

Similar conclusions were reached in a recent study of wrongful convictions. (Garrett & Neufeld (2005) *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia L. Rev. 1.) The authors of the wrongful convictions study documented four cases in which odontologists provided false 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 here, the forensic odontologist found a match and advanced statistics (one in 1200) to suggest the significance of the match. (Garrett & Neufeld, *supra*, 95 Virginia L. Rev. at pp. 69-70.) Krone was ultimately exonerated when DNA evidence found on the victim excluded him. (Wagner, et. al, *DNA Frees Arizona Inmate After*

10 Years in Prison, The Arizona Republic (Apr. 9, 2002) p. 1A .)

Although there are documented problems with bitemark “matches,” bitemark exclusions are reliable. For example, the Summary Assessment of bitemark analysis in the *NRC Study* states: “Despite the inherent weaknesses involved in bitemark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects.” (*NRC Study, supra*, at p. 5-37.) Similarly, in the chapter on Bitemark and Dental Identification in Scientific Evidence, Giannelli & Imwinkelried (4th Ed 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 in original.)

B. RICHARDS’ CONVICTION WAS FATALLY INFECTED BY FALSE BITEMARK TESTIMONY.

As indicated, bitemark evidence was provided at Richards’ trial by Dr. Norman Sperber, the chief forensic odontologist for San Diego and Imperial Counties. Relying on only a single, distorted photograph, Dr. Sperber identified a lesion that he said was consistent with a human bitemark and came from the lower teeth. From that photograph, Dr. Sperber opined that whoever left the lesion had a rather distinctive abnormality relative to his or her lower right canine tooth (number 27). That tooth was outside the other teeth and

“somewhat shorter.” (6 Tr. R.T. 1184.) Based upon a molding Dr. Sperber made of Richards’ mouth, he determined that Richards had the same distinctive abnormality. (6 Tr. R.T. 1188-90.) Finally, Dr. Sperber testified “one or two or less” out of one hundred people would have such an abnormality. (6 Tr. R.T. 1213.) He stated he could not rule out Richards as the person who left the bitemark and that the bitemark was consistent with Richards’ teeth.

Dr. Golden testified for the defense that he received a single photograph of the injury on Pamela’s right hand and assumed it was a bitemark. He testified that the injury was a typical arch shape, and although he could not rule out Richards as the biter, he also could not rule out several exemplars taken at random from his office collection. Like Sperber, Golden testified that Richards’ under-erupted canine would likely be found in only two percent of the population. (7 Tr. R.T. 1537.)

At the hearing, all of that testimony was recanted and shown to have been false.

1. Dr. Norman Sperber.

As documented fully in the Statement of Facts, at the evidentiary hearing, Dr. Sperber testified to four key points:

First, contrary to his trial testimony that the lesion was consistent with

Richards' dentition, today Dr. Sperber has "no degree of certainty" that Richards' teeth could have caused the lesion. (1 R.T. 81.) In fact, Dr. Sperber has now "ruled out" Richards as the person who caused the lesion: "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." (*Ibid.*)

Second, Dr. Sperber testified that he never should have provided an estimate regarding the percentage of the population that had the dentition abnormality he had identified in Richards. (1 R.T. 74.) He had no statistical support for his testimony and the American Board of Forensic Odontology now finds such testimony to be inappropriate in the absence of any scientific studies. (1 R.T. 74.)

Third, Dr. Sperber also testified that the lesion could have been produced by someone without Richards' dentition abnormality.

Finally, Dr. Sperber testified that the picture of the "bitemark" was "unreliable and inaccurate" because of the relationship between the camera and the ruler next to the lesion. (1 R.T. 67.)

2. Dr. Gregory Golden.

Dr. Golden testified that since Richards' trial, he and other forensic odontologists have used Adobe Photoshop to correct the distortion visible in

photographs. (1 R.T. 97-98.) Dr. Golden testified that with advances in technology he has been able to do a more accurate analysis and, based on that analysis, Richards' "dental signature does not line up as well with the injury as it did in the distortion [sic] image." (1 R.T. 100.) Unlike at trial, where he testified he could not rule out Richards as the source of the lesion, at the hearing, based on the digital analysis, Richards was ruled out. (1 R.T. 110.)

C. WHEN AN EXPERT FUNDAMENTALLY ALTERS THE OPINION RENDERED AT TRIAL, A PETITIONER SHOULD BE ABLE TO ASSERT CLAIMS BASED ON BOTH FALSE EVIDENCE AND NEW EVIDENCE. ACCORDINGLY, RICHARDS HAS A VALID FALSE EVIDENCE CLAIM.

Prior to 1975, habeas relief was not available simply by showing that "false" testimony was used at trial. The rule was clear that to obtain habeas corpus relief, a petitioner had 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 Imbler* (1963) 60 Cal.2d 554, 560; *In re Pratt* (1980) 112 Cal.App.3d 795, 865.)

In 1975, Penal Code section 1473, which set out the standard for habeas corpus relief, was amended. Since 1975, a writ may be granted if "False evidence, that is substantially material or probative on the issue of guilt . . . was introduced against a person at any hearing or trial relating to his

incarceration.” (Penal Code § 1473, subd.(b)(1).) There is no longer any obligation to show the testimony was perjured or that the prosecutor or his agents were aware of the impropriety. (*In re Hall* (1981) 30 Cal.3d 408, 425.)

Since 1975, when analyzing a habeas petitioner’s claim of false evidence, the only standard used is the standard set forth in Penal Code section 1473 and defined by cases such as, *In re Hall, supra*, 30 Cal.3d 408, *In re Malone* (1996) 12 Cal.4th 935, *In re Roberts* (2003) 29 Cal.4th 726, 741-742, *In re Bell* (2007) 42 Cal.4th 630, *In re Pratt, supra*, 112 Cal.App.3d 795, and *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1232.

Hall, supra, 30 Cal.3d 408, is significant because this Court found that the same evidence could support relief on *both* new evidence and false evidence grounds. Hall’s conviction was based, primarily, on the testimony of two brothers: Victor and Daniel Lara. As stated by this Court: “The Lara brothers were the only eyewitnesses to the crime who either placed [Hall] at the scene or implicated him as the gunman.” (*Id.* at p. 417.) Based on a referee’s finding, this Court concluded that Hall had met his burden of proving that there was new evidence which undermined the prosecution’s case and pointed unerringly towards innocence. In addition, this Court *also* concluded that the trial testimony given by the Lara brothers was false evidence which provided a separate basis for granting of the writ. (*Id.* at p. 424.) A similar

approach was taken in *In re Bell, supra*, 42 Cal.4th at 637, where this Court expressly restated the separate standards for false evidence and actual innocence and considered the evidence presented by petitioner under both standards. (*Id.* at p. 642.)

This Court has also analyzed changed expert testimony under a false evidence standard. (*In re Imbler, supra*, 60 Cal.2d 554.) In *Imbler*, a fingerprint expert had testified that there were only two prints on plastic razor case and that neither was sufficiently clear to attribute to anyone. At a habeas hearing, the expert admitted that there were three prints and that Imbler could be excluded as the person who left one of the prints. (*Id.* at p. 566.) Thus, as in Richards' case, petitioner presented a false evidence claim based, in part, on testimony provided by an expert which contradicted the testimony that expert had given at trial. Imbler was not successful in pursuing this false evidence claim because it preceded the 1975 change in Penal Code section 1473. This Court concluded that the expert did not "intentionally give false testimony" and stated, "An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error." (*In re Imbler, supra*, 60 Cal.2d at p. 567.) While recognizing that negligence by an expert might, in some cases, deprive a petitioner of a fair trial, that was not true in Imbler's situation.

With regard to the new evidence claim, this Court cited the standard set out in *In re Lindley* (1947) 29 Cal.2d 709, 723, and found that the new evidence merely conflicted with the trial evidence and did not point unerringly towards Imbler's innocence. The new evidence consisted of a recant by the sole identifying eye witness and the absence of Imbler's fingerprints found on a razor in a coat that the perpetrator left at the scene. This court rejected the significance of the recanting witness because the referee who had conducted a hearing on the claims found the witnesses recant to be "impeached in so many ways as to defy lucid presentation." (*Id.* at p. 569.)

In *In re Bell, supra*, 42 Cal.4th at p. 637, this Court again 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. (*Ibid.*) 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. (*Ibid.*) While the discovery of false testimony will almost always necessarily involve the discovery of new evidence, these constitute distinct grounds for habeas corpus relief, and are subject to different legal standards. (*In re Pratt, supra*, 112 Cal.App.3d 795, 866; *In re Wright*

(1978) 78 Cal.App.3d 788, 802.)

D. THE USE OF A DUAL STANDARD IS PARTICULARLY APPROPRIATE IN CASES WHERE DISCREDITED SCIENCE HAD LED TO A CONVICTION.

Use of a dual standard is particularly appropriate in cases involving discredited science. As documented by the National Research Council study and research on the causes of wrongful convictions, we now know that “junk science” has played a role in the incarceration of innocent people. If these convictions could only be overturned under the new evidence standard, many innocent people would remain incarcerated because the new evidence standard places the burden of proving innocence on the person who had been the victim of the unfounded “scientific” evidence. This is a burden many victims of wrongful convictions simply cannot meet.

A recent Texas case illustrates the problem. In *Ex Parte Henderson* (2007) 246 S.W.3d 690, a person was convicted of killing a child. The conviction was based on expert testimony indicating that the child’s injuries could not have been caused by a short fall, as described by the defendant. Specifically, the medical examiner “testified that it was ‘impossible’ for Brandon’s extensive brain injuries to have occurred in the way that [Henderson] stated.” (*Id.* at p. 760.) The medical examiner testified that Henderson’s story was “false and ‘incredible’” and that the infant’s “injuries

had to have resulted from a blow intentionally struck by [Henderson].” (*Ibid.*)

That expert has now recanted his opinion. He now believes that “a fall of a relatively short distance onto a hard surface can cause the degree of injury that [the victim] experienced.” (*Id.* at p. 692.) As a result the Texas court has issued a stay of execution and remanded the case for further proceedings. (*Id.* at p. 691.)

If Henderson had been convicted in California and was required to meet the new evidence standard, he would still be facing death. While the expert’s recanted testimony would undermine the basis of Henderson’s conviction, Henderson would lack affirmative evidence pointing unerringly towards his innocence. However, under a false evidence test, Henderson would be entitled to habeas relief.

The difference between the two results is created by the fact that the new evidence test does not restore the presumption of innocence. Instead it places the burden of proving innocence on the inmate challenging the conviction. A petitioner should not have that burden when the conviction was obtained by expert testimony that we now know to be false. If we take away the evidence which was used to convict, a petitioner should again have the benefit of the presumption of innocence.

E. CONCLUSION

Richards is not asking this Court to change existing precedent. Instead, he merely asks this Court to reaffirm that there are two distinct grounds for obtaining habeas relief: new evidence and false evidence. In addition, Richards asks this Court to declare that expert testimony, based on what is later determined to be bad or invalid science, can be the basis for habeas relief under the false evidence standard.

If fairness dictates that a person in Henderson's situation have the opportunity to undo his conviction when the basis of that conviction turns out to be junk science, Richards should be given the same opportunity.

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II.

THE FALSE EVIDENCE INTRODUCED AGAINST RICHARDS WAS MATERIAL AND PROBATIVE. ABSENT THAT FALSE EVIDENCE, RICHARDS WOULD NOT HAVE BEEN CONVICTED. THUS, THE SUPERIOR COURT BELOW 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 ability to convict Richards. Two juries hearing the case without bitemark evidence were unable to convict Richards. The jury that convicted Richards heard both Dr. Sperber and Dr. Golden testify that the injury on Pamela’s hand was a bitemark. In addition, the jury had been told by one of the country’s leading experts on bitemark evidence and by Richards’ own expert that the injury on Pamela’s hand could only have been inflicted by Richards and 2% of the population.

During closing argument, the District Attorney made it clear that the biter had an abnormal dentition and Richards had that exact abnormality. (8 Tr. R.T. 1809.) The District Attorney 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.)

Thus, the effect of this false expert testimony was that Richards could not be ruled out as the biter. This false expert testimony effectively rebutted the defense argument that Pamela was killed by a third party.

A. THE PROSECUTION’S CASE WAS A “HOUSE OF CARDS.”

In order to fully appreciate the importance of the bitemark evidence and understand why the court below 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, the case was purely circumstantial and much of the circumstantial evidence provided was not based on objectively verifiable facts. Instead, much of the circumstantial evidence presented consisted of the subjective feelings and beliefs of the prosecution witnesses.

For example, at trial, the prosecution relied on Deputy Nourse’s “impression” that Richards’ recitation of events sounded “rehearsed.” (4 Tr. R.T. 627.) Yet Nourse had no training with regard to how a person would normally act or sound shortly after finding his wife brutally murdered. Nourse also concluded that Richards was lying when Richards stated that he found

Pamela “stone cold.” “Stone cold” is as much a figure of speech as it is a description of temperature. Moreover, 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, the prosecution relied on testimony regarding lividity to conclude that Richards lied about the position of Pamela’s dead body. Yet lividity takes two hours to become obvious and ten hours to become fixed. If Pamela had been killed less than two hours prior to Richards’ arrival and he moved her from face down to face up, the evidence of lividity found by the coroner would have been the result of Richards’ actions and not evidence that he lied.

At trial, the prosecution relied on the blood spatter testimony of Gregonis. Yet, as noted earlier, that 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.

(*NRC Study, supra*, at p. 5-39.)

Similarly, at trial, the prosecution relied on alleged significant evidence of crime scene manipulation. However, the only “evidence” was the opinion of Gregonis, which itself was based on an undocumented assertion regarding allegedly diluted blood that Gregonis did not bother to mention at any time prior to the third trial.

B. THE PERNICIOUS EFFECT OF STATISTICS.

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. In *Collins*, the prosecution attempted to bolster eyewitness identifications with statistical testimony about the likelihood of another pair of individuals with physical characteristics similar to the defendant’s being found at the scene. This Court reversed the conviction, in part, because there was an inadequate evidentiary foundation for the probabilities used in the calculations: “First, as to the foundational requirement, we find the record devoid of any evidence relating to any of the six individual probability factors used by the prosecutor The bare, inescapable fact is that the prosecution made no attempt to offer any such evidence.” (*Id.* at pp. 327-328.) In reaching this conclusion, this Court quoted from a New Mexico case for the proposition that “[m]athematical odds are not

admissible as evidence to identify a defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated.” (*Id.* at p. 328, quoting *State v. Sneed* (1966) 76 N.M. 349.) This Court ultimately ruled that this “‘trial by mathematics’ so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice.” (*Id.* at p. 332.)

The prejudicial 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 bite mark found 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 ultimately 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.)

Obviously, 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, the most reasonable inference is that this evidence had the same effect that it was found to have had in *Collins* and *Ege*.

In *Ege*, the Court of Appeals also found that “[b]itemark evidence may by its very nature be overly prejudicial and unreliable.” (*Ege, supra*, 485 F.3d 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 usual 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.

(*Id.* at p. 377, fn. 6, citing Hale, *The Admissibility of Bitemark Evidence* (1978) 51 S. Cal. L. Rev. 309, 326.)

There can be no doubt that false evidence (which here one might fairly categorize as junk science) was introduced at trial against Richards. The prosecution’s own witness has acknowledged he was wrong in citing statistics and wrong in concluding that Richards was responsible for the bitemark found on Pamela’s hand. Significantly, at the habeas hearing, the People offered no contrary testimony. There can be no doubt that the evidence was material. The unfounded statistical evidence provided by Dr. Sperber and Dr. Golden was specifically cited by the Court of Appeal in its original opinion affirming Richards’ conviction and quoted in the Court of Appeal opinion under review. (See Court of Appeal opinion at pp. 13, 17.)

Given that the prosecution's case against Richards was both circumstantial and subjective, and that the bitemark pillar has now been destroyed by Dr. Sperber's recantation, by Dr. Bowers' exclusion, and by the *NRC Study* which has debunked all bitemark matching testimony as lacking scientific rigor, Richards has met the standard set forth in Penal Code section 1473 and this Court should sustain the decision of the superior court below to grant the petition for writ of habeas corpus and overturn Richards' conviction.

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III.

THE NEW DNA AND BITEMARK EVIDENCE PRESENTED AT THE HEARING UNDERMINES THE PROSECUTION'S CASE AND POINTS UNERRINGLY TOWARDS RICHARDS' INNOCENCE.

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, supra*, 41 Cal.4th 977, 1016; *In re Lawley* (2008) 42 Cal.4th 1231; *In re Hall, supra*, 30 Cal.3d 408, 417; *In re Weber* (1974) 11 Cal.3d 703, 724.) However, 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.)

At the hearing, Richards presented new bitemark evidence and new DNA test results. The new bitemark evidence excluded Richards as the person responsible for the bitemark the prosecution used to convict Richards. The new DNA evidence both contradicted the prosecution's claim that no one else was at the scene and demonstrated that Richards was not the person who wielded the murder weapon or struggled with the victim. The superior court below found that this evidence undermined the prosecution's case and pointed unerringly toward innocence. That determination is supported by the record

and should be reinstated.

A. THE NEW EVIDENCE

A complete statement of the new evidence presented at the habeas hearing has been presented in the Statement of Facts and will not be repeated here. For this Court's convenience, the following is a summary of that evidence.

1. Mitochondrial DNA from Hair Found under Pamela's Fingernail Belonged to a Third Party, Thus Pointing Towards Richards' Innocence.

Mitochondrial DNA testing revealed that a hair, measuring two centimeters, from an unknown person, was recovered from amongst blood and debris under one of the fingernails of Pamela's right hand. In 2006, this hair did not match the DNA of either Pamela or Richards.

Dr. Patricia Zajac, a consulting criminalist, testified that in her expert opinion, the hair was likely lodged under the nail during the crime. (2 R.T. 310.) Dr. Zajac provided four reasons for her conclusion: (1) the length of the hair was such that a person like Pamela would normally have noticed and removed it. (2 R.T. 310); (2) the crime scene was not a place where one would normally find lots of hairs (2 R.T. 311-12); (3) the hair was found under, and not just on the nail, so it would take some kind of action to lodge the hair in the place where it was found (2 R.T. 312); and (4) the nature of the crime,

coupled with the fact there had been a violent struggle, where the victim would have defended herself, made it more likely the hair was deposited during the struggle. (2 R.T. 312-13.)

At the evidentiary hearing, Gregonis himself stated that he could not say whether the hair was historical or not. (2 R.T. 409.) In fact, he admitted 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.)

2. DNA Belonging to a Stranger Was Found on the Murder Weapon, Thus Pointing to Richards' Innocence.

At trial, the prosecution, through the testimony of Gregonis and in argument, repeatedly took the position that a twelve-by-twelve-by-two-inch stepping stone found near Pamela was one of the weapons used to murder Pamela. Gregonis repeatedly referred to the stone as a weapon. (5 Tr. R.T. 975, 999, 1000, 1079.) Gregonis also concurred that the cinder block and stepping stone acted to shield from blood spatter when it was used to murder Pamela. (5 Tr. R.T. 1015.)

In 1994, Gregonis identified three areas on the stepping stone, which he noted were the "most likely candidates for [the] suspect's blood." (2 R.T. 437-38; Exh. 56, p. 306.) As documented in the Statement of Facts, in 2006, STR DNA testing conclusively established that two of these three areas

contained a mixture of the victim's DNA and male DNA. Significantly, the male DNA did *not* belong to Richards. 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.)

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

3. New Bitemark Evidence Points Towards Innocence.

Dr. Michael Bowers created a corrected version of the photograph that had been used at trial to secure Richard's conviction. (2 R.T. 216, Exh. 22.) Dr. Bowers testified that he performed various measurements of the bruise and of Richards' dentition. From those measurements Bowers concluded the bruise was too small to have been made by Richards. (2 R.T. 218.)

Dr. Bowers also testified to making Styrofoam impressions from the plaster mold of Richards' teeth. (2 R.T. 224; Exh. 27.) At trial, Dr. Sperber had testified that tooth 27 would not have made an impression. However, when Dr. Bowers used that the mold of Richards' teeth to make impressions in the Styrofoam, tooth 27 left marks. (2 R.T. 225-26, 238; Exh's. 29 and 39.)

Dr. Bowers created pictures of the bruise with an overlay of Richards'

teeth. (2 R.T. 226-30.) Although there were some areas where there was a positive correlation between Richards' teeth and the bruise, there were areas where there was a mismatch. (See, e.g., Exh. 36.) The mismatches indicate that Richards' teeth were not responsible for the bruise. (2 R.T. 235.)

Dr. Johansen testified that there were marks on Pamela's hand which were outside the semi-circular dentition area of Richards' teeth. (1 R.T. 143.) Thus, neither Richards' upper or lower teeth could have caused the lesion relied upon by the prosecution.

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

As indicated, 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, supra*, 41 Cal.4th at p. 1016.) Moreover, Richards 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.)

There can be little doubt that Richards has met the first prong of the standard. 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. Given how close this case was (i.e., that the two trials without bitemark evidence ended with hung juries), new evidence undermining any one of these evidentiary pillars would result in the prosecution's case collapsing like a house of cards. The new bitemark evidence excluding Richards undermined one pillar. The new DNA evidence indicating another person was at the scene undermined another pillar.

Although not technically part of the "new evidence," the superior court below properly considered the photographic evidence which suggested that the tuft of fibers were *not* lodged in Pamela's finger nail prior to autopsy.

At trial, the prosecution relied on the fact that the fibers lodged in Pamela's fingernail came from the struggle and that the fibers were similar to those in the shirt Richards was wearing. Although the court below found that Richards had failed to prove that Gregonis "presented perjured testimony or planted evidence," it also stated that the evidence presented by Richards on that issue "raise[d] factual concerns" regarding those fibers. (2 R.T. 480.) As a result, another pillar from the prosecution's case was undermined by the evidence presented at the hearing.

It is equally clear that the new evidence meets the second prong in that it “points” unerringly towards innocence. Logically, it is difficult, if not impossible, to prove a negative.⁴ Thus the question is one of inferences rather than concrete proof. And, in considering whether Richards has met his burden, this Court, like the superior court below, should look at the combination of the new evidence as opposed to looking at any one piece by itself.

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. Factually, the difference in probative value cannot be overstated. To quote Dr. Golden: “In one situation you’re saying Richards could have done it. In another situation you’re saying Richards couldn’t have done it.” (1 R.T. 110.) Moreover, as indicated, the scientific significance and probative power of exclusions (as opposed to matches) has been supported by the same academic literature that has criticized the use of statistics in alleged matches. (See, e.g., *NRC Study*, *supra*, at p. 5-37 and Giannelli & Imwinkelried, *Scientific Evidence*,

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Even in the classic DNA exoneration in a rape case, the DNA evidence does not “prove” innocence. It merely undermines the evidence of guilt and thus “points” towards innocence.

“Bitemark and Dental Identification,” *supra*, p. 677.)

In securing Richards’ conviction, the prosecution also argued that there was no evidence that anyone else was present at the 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.) The hair found under Pamela’s fingernail and the DNA on the murder weapon not only destroys that pillar, it unerringly points to someone else as the murderer.

With regard to the hair, its size, its location, the fact that Pamela worked as a waitress, and the fact that it was found after a violent struggle makes it extremely unlikely that this hair was historical. As Dr. Zajac testified, a hair this long would have been noticed by Pamela. She was a woman who obviously paid attention to her nails – they were painted. In addition, she was a waitress and was likely not in the habit of serving food with dirty fingernails and whose hands were subject to inspection. If so, the hair was present as a result of the struggle.

The Court of Appeal never considered the combined effect of the evidence presented. Instead, it looked at each piece of evidence, by itself, and concluded that each was insufficient to support the petition.

The Court of Appeal dismissed the DNA hair evidence and Dr. Zajac’s testimony as merely “creat[ing] a conflict with the trial record.” (Opinion, p.

29.) But as noted, in *Hall*, this Court held new evidence may be supplemented by other evidence not presented at trial which assists in establishing innocence.” (*In re Hall, supra*, 30 Cal.3d at p. 420.) The superior court judge who heard Dr. Zajac’s testimony, obviously found her testimony to be both credible and probative since it used the “hair analysis” as a basis for granting the writ. (2 R.T. 481.)

With regard to the DNA on the stepping stone, the Court of Appeal noted the absence of a chain of custody and suggested the possibility that the DNA evidence might have been the result of contamination from later handling. (Opinion, p. 30.) However, the prosecution’s expert (Gregonis) confirmed that it would be more likely that any DNA found on the weapon would be the product of someone holding it firmly, during a violent struggle. The DNA was also found on the murder weapon in the location where the prosecution’s expert suggested it would be found. Significantly, Richards DNA was *not* found on the murder weapon.

Most importantly, what petitioner argued, and what was relied upon by the Superior Court, was the *totality* of the evidence:

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.)

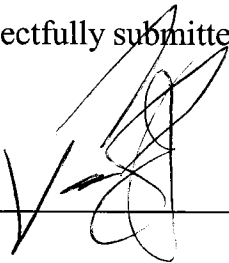
C. CONCLUSION

Here, the prosecution’s case rested on circumstantial evidence including the absence of evidence of anyone else at the scene, coupled with a bitemark that matched Richards’ rare dentition. Richards presented evidence that he was not responsible for the bitemark attributed by the prosecution to Pamela’s killer. Richards also presented evidence of another person’s DNA on the murder weapon and a hair from another person lodged under the victim’s fingernail, likely at the time of her death. The combination undermines the prosecution’s case and points unerringly towards innocence. Accordingly, Richards is entitled to habeas relief.

CONCLUSION

As has been demonstrated, the court below recognized that Richards' trial was fatally tainted by false evidence and that the new evidence he presented undermined the basis of his conviction and pointed unerringly to someone else having brutally murdered Pamela Richards. It is time to end Richards' nightmare and free him from this wrongful conviction. We are confident that this Court will see that the facts, the law, and justice require that the decision of the Superior Court below, which granted the petition for writ of habeas corpus, be reinstated.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. Stiglitz', is written over a horizontal line. The signature is stylized and somewhat cursive.

JAN STIGLITZ
Attorney for Petitioner
WILLIAM RICHARDS

WORD COUNT CERTIFICATION

I hereby certify that the foregoing Petitioner's Opening s Brief on the Merits contains 14,307 words, 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 rules 8.520(c)(1) limits an Opening Brief on the Merits to 14,000 words, 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: May 13, 2011



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 Petitioner's Opening Brief on the Merits in case No. S189275 to the following parties by 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:

Court of Appeal
Fourth Appellate District, Div. 2
3389 Twelfth Street
Riverside, CA 92501

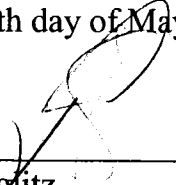
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I declare under penalty of perjury the foregoing is true and correct. Executed this 13th day of May, 2011, at San Diego, California.



Jan Stiglitz