COUNTY OF SAN BERNARDINO
**Office of the District Attorney**
**Appellate Services Unit**
**MICHAEL A. RAMOS**
DISTRICT ATTORNEY

February 17, 2015

Mr. Frank A. McGuire
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, California, 94102-4797

Re: Informal Response
*In re William Richards,* on habeas corpus
S223651; E049135; FVI00826

Dear Sir:

The People informally respond to the petition for writ of habeas corpus filed by petitioner, William Richards.

The People respectfully request that the petition be denied.

## FACTUAL SUMMARY

On August 10, 1993, William Richards strangled his wife, Pamela Richards, beat her with fist-sized rocks, and crushed her skull with a cinderblock. He was convicted on July 8, 1997 of the murder of his wife, Pamela Richards. He was sentenced on December 4, 1998 to twenty five years to life in prison.

412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042 Phone: (909) 891-3302
E-mail address: szeitlin@sbcda.org Web site: www.district-attorney.org Fax (909) 891-3303

**PROCEDURAL BACKGROUND**

On July 6, 1994, Richards' first jury trial began (Vol. I C.T.[1] p. 228). On August 29, 1994, the court declared a mistrial because the jury could not agree on a verdict. (Vol. II C.T. pp. 417-420, 781.) On October 24, 1994, Richards' second trial began (Vol. II C.T. pp. 431-432). Just three (3) days later, the trial court recused itself during voir dire and declared a "mistrial." (C.T. pp. 433, 781.)

On November 15, 1994, Richards' third jury trial began (C.T. p. 438). On January 9, 1995, the court declared a mistrial because the jury was hung eleven to one in favor of guilt. (C.T. pp. 474, 871.)

On May 29, 1997, Richards' fourth jury trial began. (C.T. p. 532.) On July 8, 1997, he was convicted of murder. (*Id.* at p. 563.)

Richards' previous appellate efforts and requests for habeas corpus relief were unsuccessful. (E049135, C.T. Vol. II pp. 392-418.) In fact, in an opinion the appellate court issued regarding petitioner's direct appeal from his conviction, belief in a sufficient motive was discussed at length. (E049135, C.T. Vol. II p. 410.)

After petitioner's 2007 filing for habeas corpus relief, the cause proceeded to several days of evidentiary hearing and concluded on June 18, 2009. (Vol. IV C.T.[2] p. 1183.) Closing arguments were made on August 10, 2009 and the trial court, from the bench, issued its order immediately thereafter, granting relief. (Vol. IV C.T. p. 1185.)

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1 Case Number E024368.

2 Until further notice, "C.T." refers to the appeal bearing the Case Number E049135 within this section.

In response to the lower court's August 10, 2009 order, the People filed a Notice of Appeal under Penal Code § 1506 and a Request for an Immediate Stay at the trial court level on August 20, 2009. (Vol. IV C.T. p. 1187.)

The People appealed the ruling to the Court of Appeal after the trial court declined to act on the People's request for an Immediate Stay. (See *In re Clark* (1993) 5 Cal.4th 750; *People v. Gonzalez* (1990) 51 Cal.3d 1179**Error! Bookmark not defined.**; *In re Lawler* (1979) 23 Cal.3d 190.) On appeal, the People contended that Richards failed to present new evidence to justify habeas relief.

On November 19, 2010, the Court of Appeal reversed the trial court's findings in total. On December 10, 2010, petitioner filed a Petition for Review with this Court and review was granted on February 23, 2011. This Court affirmed the judgment on December 3, 2012 in a 4-3 decision. Thereafter, petitioner filed a petition for rehearing and was denied by a 4-3 vote on February 13, 2013.

On October 9, 2013, petitioner filed a Post-Conviction Discovery Motion under Penal Code § 1405 before Judge Margaret Powers, the prior trial court judge. Petitioner's motion was denied after hearing on January 22, 2014. Petitioner filed a Writ of Mandate seeking to challenge that decision but was summarily denied on March 25, 2014 (Court of Appeal Case Number E060568).

Petitioner filed for review on June 18, 2014 and this Court granted review while transferring the matter to the Court of Appeal to consider the matter in light of *Richardson v. Superior Court* (2008) 43 Cal. 4th

1040 and *People v. Jointer* (2013) 217 Cal. App. 4th 759, 765-766. After formal briefing, the court of appeal again denied petitioner's motion on November 2, 2014.

Petitioner comes before this Court and currently claims that, due to legislative revisions of Penal Code § 1473, specifically as it applies to expert testimony, he is *de facto* entitled to relief. The People disagree as additional evidence supported the underlying conviction.

## SUMMARY OF FACTS AT TRIAL

By his account, Richards found his dead wife when he got back from work late one evening. (R.T. Vol. III 352:3-18.) He told Sheriff's deputies that he found her naked from waist to ankles, drenched in blood, having lost a large portion of her skull, with one of her eyes hanging from its socket. (R.T. Vol. IV 561:1-9.) Richards called 9-1-1 only after a friend of his wife's urged him to do so. (R.T. Vol. IV 561: 10-28.)

When the first Sheriff's deputy, Mark Nourse, arrived, Richards volunteered that his wife was "stone cold. You don't have to go back there and check her. She has been dead a long time." (*Id.* Vol. IV R.T. 589:9-12, 24; 590:2-3, 11-15; 624-625; 640:8, 10; 6/11/97 Vol. IV R.T. 685:21-22, 26, 28.) When Nourse checked Mrs. Richards' corpse for a pulse, however, her arm "just fell down. It went limp." In fact, "her arm felt just like if [he] walked up and picked your arm or someone else's, still alive, not dead." (*Id.* Vol. IV 635:7-8, 10-16; 636:4-5, 7-10.) Mrs. Richards' body was neither warm nor cold. To Nourse, it seemed "very

fresh." (*Id.* Vol. IV R.T. 636:11-14, 23, 25.)[3] The blood near her head had the same consistency, wet and damp. It had yet to soak in to the ground. (*Id.* Vol. IV R.T. 638:8-14; 639:3-4.) Nourse noticed the blood there *starting* to be absorbed; it was still wet to the touch. (*Id.* Vol. IV R.T. 638:15-16; 639:3-6.)

Richards told Nourse he had found his wife face down. He had rolled her over. (6/11/97 Vol. IV R.T. 592:24-25.) If, in fact, the victim had died face down, she would have had marks from gravel and the sandy terrain on her chest. (E049135, C.T. Vol. I pp. 119-120.) There were none. (6/10/97 Vol. III R.T. 412:2-10.) Post-mortem abrasions indicated the victim's body had been moved after she died. (*Id.*, Vol. I 120-121; 122:18.)

At the murder scene, Richards' demeanor vacillated from rehearsed calmness to bawling, sobbing, and falling down. (6/11/97 Vol. IV R.T. 627:14-16, 23-24; 628:1-12.) Dep. Nourse started thinking things were odd. (*Id.* Vol. IV R.T. 628:11-12.) Richards made him uneasy. (8/29/04 Vol. II 328:15-28.) Richards told Nourse, "That brick right there, that's the one that killed her, that's what they used to finish her off with" and began to illustrate what he believed to have happened. (*Id.* Vol. IV R.T. 625:21-27;[4] 626:1-16.) Richards had peculiar knowledge of the evidence

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[3] At trial, Dr. Frank Sheridan, the pathologist, testified that it typically takes about two hours for rigor mortis to set in. (E049135, C.T. Vol. I 135: 4-5.) There was no evidence of rigor mortis when first responders arrived.

[4] Richards interchangeably referred to the cinderblock as a brick. (12/7/94 Vol. IV R.T. 889:16-18; 6/1/97 Vol. IV R.T. 625:22-23.)

despite the dark conditions of the remote murder scene, "like he had first-hand knowledge." (*Id.* Vol. IV 645:1-25.) According to Nourse, Richards "stated, pointing, he goes, there's the block that killed her. If he was the one that did it – if he wasn't the one that did it, how did he know that block and not a different one killed her? He explained that her pants were back by a generator, and that there was blood on rocks. It's dark. He stated he had no flashlight. I couldn't even see something as big as a body in a sleeping bag and he is explaining to me where little drops of blood are in the dark. The freshness of the body. Just the many things he was telling me just didn't add up. I was beginning to view him as – view the whole thing as something was wrong." (11/30/94 Vol. I R.T. 229:6-21.) Moreover, "[h]e described many things in explicit detail that even in the daytime, we had a hard time finding." Richards' thorough explanation of the crime scene was odd. (6/11/97 Vol. IV 686:21-24; 6/16/97 Vol. V. R.T. 855:4-9.)

When Nourse told Richards to leave the crime scene so as not to disturb it, Richards repeatedly fell to his knees and wailed, "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." (*Id.* Vol. IV R.T. 645:11-21.) At that point, "[i]t seemed like something was

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The terminology is relevant as Richards later argued the significance of the weapon's name at the evidentiary hearing on the instant petition. (i.e. "stepping stone" vs. "cinderblock.") It was also apparent to Det. Tom Bradford "[t]hat [the] cinderblock that was by her head was used as a stepping stone that led from their motor home area out to --the impression I got was to their shed. There was a series of blocks that acted as stepping stones." (12/6/94 Vol. II R.T. 431: 15-24.)

seriously wrong." Nourse retrieved a tape recorder to capture Richards' statements. (*Id.* Vol. IV R.T. 645:24-25, 28.)

Sheriff's Criminalist Dan Gregonis found evidence of crime scene manipulation. (6/16/97 Vol. V R.T. 1082:28-1083:1-2.) Richards' apparent intimate knowledge of the scene, his dubious responses to law enforcement inquiries, and the crime scene manipulation, made Richards the prime suspect in his wife's murder.

In addition to infliction of the massive injury to her skull, Mrs. Richards also had been strangled. (6/10/97 Vol. III R.T. 354:19-356:22.) The strangulation came first; the blunt-force trauma followed within minutes.[5] (*Id.* Vol. III R.T. 377:13-381:28; 385:6-386:7.)

Criminalists discovered a tuft of light blue cotton fibers jammed into a crack in one of the victim's fingernails. (6/16/97 Vol. V R.T. 917:7-918, 921-923.) Those fibers were indistinguishable from the fibers of the shirt Richards was wearing the night of the murder. (*Id.* Vol. V R.T. 923:15-925:21; 92713-15.) Five hairs found in the victim's hands were tested and found to be consistent with the victim's hair. (6/18/97 Vol. VI R.T. 1265.)

There were 30 to 40 bloodstains on the victim's pants, 12 of which consisted of medium energy blood spatter. (6/16/97 Vol. V R.T. 972:13-974:25, 976:21-977:1.) There was no spatter on her bare legs. (*Id.* Vol. V R.T. 977:7-18.) The findings indicated the victim was wearing her

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[5] The order of the atrocities inflicted on Mrs. Richards' person is important, as Richards told Nourse, "That brick right there, that's the one that killed her, that's what they used to finish her off with." (*Id.* Vol. IV R.T. 625:21-27; 626:1-16.)

pants when her skull was crushed. (*Id.* Vol. V R.T. 978:1-7.) Investigators believed that Richards removed his wife's pants after killing her in an apparent attempt to create a sexual assault scenario. A sex kit was performed on Mrs. Richards (whose pants and panties were discovered strewn about). The results were negative for semen or any other evidence of sexual assault. (6/16/97 Vol. V R.T. 915:17-917:5.)

Experts determined that the cinderblock was used to crush Mrs. Richards' head. (*Id.* Vol. V R.T. 975:25-28, 998:8-21.) Medium energy blood spatter was found on Richards' right shoe. (*Id.* Vol. V R.T. 1002:4-1003:12.) There were three medium energy spatter stains on Richards' pants. (*Id.* Vol. V R.T. 1006:14-1009:11.)

Sheriff's homicide investigator Norm Parent and his team found no signs that anyone other than Mr. and Mrs. Richards had been on the property the night of the murder. (6/9/97 Vol. II R.T. 275:7-28, 277:1-28; 278-282.) Parent checked Nourse's patrol car's tires and ascertained where it had been driven. (*Id.* Vol. II R.T. 268:2-28; 269:1-9.) He also checked the tires of the family cars, a Ford Ranger and a Suzuki Samurai. (*Id.* Vol. II R.T. 269:1-28-270:1-22.) He tracked where they had come up the driveway and stopped. (*Id.*) There were no other tread marks. (*Id.* Vol. II R.T. 268:10-28; 270:1-22.)

Parent accounted for all shoeprints, including everyone at the crime scene, and found none for which he could not account. (*Id.* Vol. II R.T. 272-274.) Three of the victim's shoeprints were found. (*Id.* Vol. II R.T. 271:6-25.) Richards' shoes were very worn and left very few shoe tracks.

(*Id.* Vol. II R.T. 273:2-28.) Only one of Richards' shoeprints was found. (*Id.*)

Parent and his team fanned out in about a 100-yard perimeter down a hill around the crime scene to check for *any* signs that someone other than Richards and his wife had come up the hill. They found nothing. (*Id.* Vol. II R.T. 275:7-28, 278-282.) There was no evidence of disturbed soil or vegetation within a hundred-yard perimeter. (*Id.* Vol. II R.T. 279:17-20; 280:1-28- 281:1-22; 282:1-18.)

Richards' wife was having an affair with Eugene Price. (6/16/97 Vol. V R.T. 843-848.) Richards was afraid his wife was going to leave him because she would repeatedly come home and tell him about her trysts with Price. (*Id.*; see also E049135, Vol. I C.T. p. 22.) The affair bothered Richards. (*Id.* Vol. V R.T. 856:8-28- 857:4.)

In June 1993, two months prior to the murder, Richards closed the couple's joint bank accounts. (*Id.* Vol. V 845:3-28-846:1-11.) He told bank teller Betsy Otte that henceforth he would have an individual account. (12/6/94 Vol. II 483: 9-19.)

Susan Ellison, a counselor the victim had started seeing, revealed Mrs. Richards' fear of her husband. The counseling sessions began only a month before the murder. (E049135, C.T. Vol. I pp. 30-33.) Mrs. Richards sought to leave her husband and enter a battered women's shelter. (*Id.*)

On September 3, 1993, Richards spoke to Sheriff's Det. Kathleen Cardwell. Richards told her that he and his wife had had marital and financial problems. (6/16/97 Vol. V R.T. 855:10-28; 856:1-7.) Richards'

wife had handled the finances until he discovered she allowed the payments on his Ford Ranger to lapse, causing the original $14,000 loan to have an additional $11,000 tacked onto it. (*Id.*) (*Id.* Vol. V R.T. 856:8-28.) In fact, Steve Browder, a "repo man," visited Richards the day before the victim was killed, attempting to repossess the truck. (12/6/94 Vol. II R.T. 491:28; 492:1-2, 12-14; 494:27; 497:20-22.)

## ANALYSIS

Preliminarily, the People set forth the trial testimony of each party's forensic odontological experts as, at least with respect to petitioner's current claims, such testimony is relevant. However, despite its relevance to petitioner's current argument, such testimony was only a portion of evidence that was introduced at trial and, thus, only a portion of what the jury considered when reaching the underlying guilty verdict. Additionally, as the People have pointed out during each and every progression of this matter, petitioner's counsel was the catalyst for the introduction of such evidence at the convicting trial. Only after the People learned petitioner intended to call Dr. Golden, did they secure the testimony of Dr. Sperber. In securing petitioner's odontological expert, it also bears noting that petitioner had new counsel at his third trial. The People have consistently asserted that the pursuit of such testimony and, ultimately the associated conviction could, quite feasibly, simply be the result of attorney strategy and a different jury rather than inexorably tied to three trials and bite mark evidence, as petitioner asserts.

## A. EXPERT TRIAL TESTIMONY

### 1. Dr. Norman Sperber

Norman Sperber, a forensic odontologist practicing for more than forty years, examined autopsy photos of the victim's hand and identified a wound consistent with a human bite mark. (6/18/97 Vol. VI R.T. 1179:1-3, 24; 1179-1181; see also E049135, Vol. I C.T. p. 43.) At trial, Dr. Sperber testified for the prosecution. He came to the conclusion that teeth in a lower jaw made the bite mark and that the biter had an abnormality, an under-erupted tooth No. 27, in the lower jaw. (*Id.* Vol. VI 1183:1183:16-17; 1184:1-16.) He noted the abnormality in the biter's dentition based upon the injury to the victim's hand prior to taking molds of Richards' teeth.

Dr. Sperber opined that the mark was consistent with the abnormality of Richards' teeth. (*Id.* Vol. VI R.T. 1201:11-1203:11; 1209:17-1210, 1215, 1218:1-6.) Dr. Sperber was not absolutely certain that it was Richards' bite mark because of the angle at which the picture of the bite mark was taken. (*Id.* Vol. VI R.T. 1198-1199, 1214:24-1215:4, 1217, 1248:8-24.) He could not, however, rule out Richards as the person who left the bite mark. (*Id.* Vol. VI R.T. 1202; 1271:7-28; 1230:1-14.) At trial, Dr. Sperber testified that, given a sample of one-hundred people "a very, very few of that hundred" would have the under-erupted canine that Richards had. (*Id.* Vol. VI 1212:23-27; 1213:17-25.) Dr. Sperber testified that it was "even more unusual" to have an individual with a "perfectly normal lineup of the teeth" on one side and abnormal positioning of teeth on the other side. (*Id.* Vol. VI R.T. 1213:17-25.) In

fact, "[t]hat's kind of a unique feature." (*Id.*; see also 6/26/1997 Vol. VII R.T. 1537:10-26.)

Despite all of Dr. Sperber's trial testimony, he simply could not rule petitioner out as the biter. The opinion presented to the convicting jury was not earth-shattering or even definite. In fact, Dr. Sperber's ultimate conclusion at trial was that the bite mark was consistent with petitioner's dentition, "consistent" being on the lower range of a positive odontological judgment. (Vol. VI, R.T. 1213:17-25; 1/26/09 Vol. I R.T. 85:7-15.) Moreover, Dr. Sperber discussed, in front of the jury, distortion issues with the bite mark photograph. (R.T. 1195: 17.) He further indicated he was conservative in his opinions. (R.T. 1198.) At trial, Dr. Sperber testified that his "mission" was to teach others to use bite mark evidence properly so that the wrong people are not convicted. (R.T. 1231-21-23.) Evidentiary shortcomings were presented to the jury. They still convicted petitioner.

**2. Dr. Gregory Golden**

Dr. Gregory S. Golden, D.D.S., testified for the defense. It was not until the defense asked him to be a witness that the bite mark issue was introduced. (*Id.* Vol. VII R.T. 1522:19-22.) At trial, Dr. Golden testified that the bite mark on the victim's hand was consistent with a human bite. (*Id.* Vol. I R.T. 96:9-16.) Regardless, he testified then that the evidence should be disregarded. (*Id.*)

While looking through models of his own patients' teeth, Dr. Golden randomly picked, in half an hour, five people whose teeth were similar to Richards'. (*Id.* Vol. VII R.T. 1528:22-1529:12.) Golden thought that a

"canine, to be submerged like this, would probably be less than five percent of the population."[6] (6/18/97 Vol. VI R.T. 1249:14, 17, 19-21.) Ultimately, however, Dr. Golden opined that the bite-mark evidence should be disregarded due to the "low value" of the photograph, despite later testifying that the photo still had some use. (6/26/97 Vol. VII R.T. 1532:4-10; 1532:20.) Concerns over photo distortion and the quality of the bite mark photo were discussed at length in the 1997 trial. (Case Number E049135, C.T. 48-49.)

## B. BITE MARK TESTIMONY AT THE EVIDENTIARY HEARING

### 1. Dr. Sperber

At evidentiary hearing, Dr. Sperber claimed that the bite mark photo he relied upon for the 1997 trial was distorted and not "well done." (1/26/09 Vol. I R.T. 67:10-24.) Dr. Sperber testified that he should not have stated any percentages as to the number of people who shared Richards' dental peculiarity. (1/26/09 Vol. I R.T. 74:16-28.)

In his declaration in support of the petition, Dr. Sperber stated that "[b]ecause 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 Richards' guilt." (E049135, Augmented C.T. Vol. II pp. 251-253.) He testified that he had "essentially" ruled petitioner out. (R.T. 91.) The modifier "essentially" hardly constitutes hard, definitive evidence.

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[6] Notably, petitioner's own witness, Dr. Golden, used a five percent estimation, only a few points within that of Dr. Sperber and, thus, the People argue statistical insignificance.

**2. Dr. Golden**

At evidentiary hearing, Dr. Golden testified that the relevant bite could have been a dog bite in an effort to rule Richards out as the biter. (*Id.* Vol. I R.T. 100:1-4.) Curiously, on re-direct, Dr. Golden testified that his initial opinion that the victim's hand injury was a human bite mark had not changed. (*Id.* Vol. I R.T. 109:27-28- 110:1-8.)

Dr. Golden also testified that, despite his awareness of photographic distortion issues at the convicting trial in 1997, he made no attempt to remedy the distortion. (1/26/09 Vol. I R.T. 103:1-7.)

**THE PRACTICAL RESULT OF PETITIONER'S ARGUMENT RESULTS IN AN ATTEMPT TO PRESENT A SUFFICIENCY OF THE ARGUMENT CLAIM; A CLAIM SPECIFICALLY NOT COGNIZABLE ON HABEAS.**

If, as petitioner seems to argue, Dr. Sperber's testimony was eliminated from consideration due to the application of revised Penal Code § 1473, petitioner still must address all of the remaining pieces of evidence the convicting jury considered in rendering its verdict[7]. In doing so, the People contend that the resulting evaluative process amounts to nothing more than a sufficiency of the evidence analysis in determining whether there is a reasonable probability that, had the evidence not been introduced, the result of the proceeding would have been different. It is well-established that such post-conviction analyses are prohibited on habeas. (*See In re Reno* (2012) 55 Cal. 4th 428 and *In*

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[7] The People assert that this premise holds true even *if* Dr. Golden's testimony was eliminated for similar reasons. Odontological evidence was not the only convicting factor. Speculations about juror state of minds as to weight of evidence and credibility determinations are specious.

*re Lindley* (1947) 29 Cal.2d 709.) Additionally, because habeas corpus proceedings seek to collaterally attack a presumptively final judgment, petitioner bears a heavy burden to plead sufficient grounds for relief and prove them. (*In re Bolden* (2009) 46 Cal. 4th 216). For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence rendered after a procedurally fair trial; defendant must undertake the burden of overturning it. (*In re Lawley* (2008) 42 Cal. 4th 1231.)

Ultimately, it cannot be reasonably argued that the remaining evidence was inadequate to support the petitioner's conviction or that he would be likely to have enjoyed a better trial outcome. Simply, petitioner has not made a prima facie case for relief. A court can summarily deny a petition for habeas corpus for the same reasons that justify summarily denying a petition for writ of mandate because the petition fails to state a prima facie case or because it is procedurally defective. (*Gomez v. Superior Court* (2012) 54 Cal. 4th 293.)

Resolution of any conflicts or inconsistencies in testimony is the "exclusive province of the trier of fact"—the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The testimony of a single witness can support a conviction, unless it is physically impossible or inherently improbable. (*Ibid.*) A reviewing court does not resolve credibility issues or evidentiary conflicts. (*Ibid.*) Similarly, the United States Supreme Court in *Jackson v. Virginia,* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560] stated "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of

insufficient evidence only if no rational trier of fact could have agreed with the jury." (*Id.* at p. 319.)

Regardless of changes to Penal Code § 1473, the jury considered the breadth of additional evidence when reaching their verdict. One cannot simply ignore the remaining evidence. Additionally, belief in sufficient motive was discussed at length in petitioner's direct appeal (Case Number E049135, C.T. Vol. II, p. 410)[8] and by the majority in the prior habeas proceeding when this Court noted other "significant evidence pointing persuasively to petitioner's guilt" (*In re Richards* (2012) 55 Cal. 4th 948, 969) such as petitioner's in depth knowledge about crime scene details that "only the murderer could know, and evidence of blood spatter on petitioner's clothes and shoes, indicating that he was present when Pamela's head was smashed." (*Id.*) Further, "...the case against [petitioner] was strong, including evidence that defendant and victim were in the process of ending their marriage, that no other motive appeared for the murder, that the murder took place on a remote property guarded by several dogs that were hostile to strangers, and that footprints and tire tracks indicated that no one else had been present." (*Id.* at p. 967.) This Court also noted facts in the trial record noting that petitioner's responses to law enforcement "seemed rehearsed". (*Id.*) Notwithstanding petitioner's claims regarding legislative developments,

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[8] In this response, the People primarily address petitioner's contentions regarding bite mark evidence. They do not, however, waive any arguments regarding the state of the remaining evidence petitioner offered at evidentiary hearing. Despite petitioner's presentation of hair, blood spatter, DNA, and fiber evidence, he has not successfully proven any of his claims made at evidentiary hearing to be sufficient bases for relief.

the convicting jury certainly considered more than just Dr. Sperber's less than definitive trial testimony in reaching their decision.

**PREVIOUSLY INTRODUCED DOCTOR REPORTS**

At trial, the jury was presented with a three-to-one enlarged photograph of the lesion (6/18/97 Vol. VI R.T. 1173:19-26), an exemplar of petitioner's teeth (R.T. 1185:11-1186:14, 1188:23-27), and the testimony of two highly qualified experts - one testifying for the prosecution, the other for the defense.

In his current petition, petitioner again presents argument regarding evidentiary hearing testimony of both Drs. Raymond Johanson and Michael Bowers and, thus, the People must respond. Importantly, neither of these experts testified at the convicting trial. Rather, they were presented only at evidentiary hearing in an effort to highlight alleged distortion in the bite mark photograph- a fact already established and presented to the convicting jury- and in an attempt to explain how Adobe Photoshop could be manipulated to distort digital images. The fact that the photograph used in this case was distorted is not a revelation. The trial testimony fully addressed the distortion present in the photograph. (6/18/97 Vol. VI R.T. 1195:13-1196:24.) The net result of each doctor's testimony was uncompelling and lacking a legitimate scientific foundation with regard to purported "advances". Its inclusion was not a sufficient basis upon which to conclude petitioner would have been likely to enjoy a better result had it not be introduced. The evidence had inherent weaknesses, which the jury considered.

**1. Dr. Johanson**

Dr. Johansen was called as a defense witness at evidentiary hearing. He co-authored a book on Adobe Photoshop and distortion correction methods. (1/26/09 Vol. I R.T. 116: 18-28.) Dr. Johansen testified that he has been using Photoshop for eight (8) to (10) years prior to his testimony. (*Id.* Vol. I R.T. 118: 4-5.) Additionally, he testified that "the Adobe technique", making overlays, was in existence and being used in 1996 and 1997, during the time of and presumably a usable technology at petitioner's convicting trial. (*Id.* Vol. I. 120: 10-17.) Further, Dr. Johansen testified that he began compiling data regarding Photoshop in 1998 and 1999 for a self-published article and that "photo distortion has been corrected for many, many years." (*Id.* Vol. I 161: 9-23; 174: 21-25; 175: 1-12.) The witness discussed a report he compiled and presented Dr. Bowers, another witness in 2000. (*Id.* Vol. I R.T. 186: 12- 25-187.)

Dr. Johansen described a sort of self-designated expert qualification as he stated he "wrote the book" on Adobe and people came to him wanting to learn more "[a]nd so we taught them." (*Id.* Vol. I 119: 15-20.) The People objected to his testimony on *Kelly-Frye* grounds. (*Id.* Vol. I R.T. 1219.)

Unsurprisingly, Dr. Johansen stated that "in his opinion", the use of Adobe Photoshop for rectification of digital distortion is "very proven". (*Id.* Vol. I. R.T. 121: 25.) In response to a query regarding Photoshop's use in the odontological community, Dr. Johansen gave an unresponsive answer that "[a]ll the odontologists I've spoken with, we speak the language." (*Id.* Vol. I R.T. 123: 4-9). He alluded to citations in journals.

(*Id.*) However, when pressed, he could give no citations or peer review results of the efficacy and accuracy of the Photoshop program in the scientific community. (*Id.* Vol. I R.T. 123-125; 177: 16-28; 178: 1-2.)

At evidentiary hearing, Dr. Johansen analyzed the upper arch pattern of petitioner because he "felt was more consistent" with the victim's injury pattern. (*Id.* Vol. I R.T. 178: 20-28.) This was despite the fact the mark was believed to have been made by a lower arch. (*Id.* Vol. VI 1183: 1183: 16-17; 1184: 1-16.) Dr. Johansen then went on to describe how he uses Photoshop to distort photos. (*Id.* Vol. I 127: 1-10.) Again, the People raised *Kelly-Frye* concerns. (*Id.* Vol. I. R.T. 11-24.) Dr. Johansen could not discuss the technological intricacies, such as coding or algorithms that provide the basis for the program's conclusions. He was "just familiar with the program, how it works." (*Id.* Vol. I R.T. 127: 23-28- 128: 1-3.) He could only testify that he stuck a disk into a computer and watched it work. Dr. Johansen then described how he used the "rectification", "distort function", and the program's "magic wand" functions to arrive at his conclusions. (*Id.* Vol. I R.T. 132: 7-8, 11; 138: 5-6, 139: 1-28; 141: 25-28- 142: 1-6; 147: 1-28; 171: 21-28.) The People objected to Dr. Johansen's computer program testimony, given his training as a dentist. (*Id.* Vol. I R.T. 148: 28- 149; 159-160.)[9]

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[9] In addition to the arguments the People outline here, they do not waive any arguments concerning their prior *Kelly/Frye* objections (see Vol. I R.T. 1219; Vol. I. R.T. 11-24) to the Adobe Photoshop evidence presented at evidentiary hearing. "Forcing" matches with Photoshop, presenting subjective Styrofoam exemplars without regard to how hard the victim was actually bitten, and testimony from dentists regarding the

Dr. Johansen then tried to focus on alleged commonalities between the fencing material found at the crime scene and dentition. (*Id.* Vol. I R.T. 152: 26-28; 190: 17-20.) However, when directly asked whether he had an opinion as to whether there was a pattern match between the two, he could offer none. (*Id.* Vol. I R.T. 153: 2-9.) Dr. Johansen's conclusion that the bite mark on the top of Pamela Richards' right hand between the thumb and index finger may be an impression from the fence at the homicide scene was speculative. A discussion about the well-established fact that the bite mark photo was of poor quality occurred with Dr. Johansen still being unable to include or exclude petitioner as the biter, *despite his Photoshop efforts.* (Italics supplied.) (*Id.* Vol. I R.T. 156-157; 189: 1-25.) He opined the mark could have been made by the fencing material. (*Id.* Vol. I R.T. 157: 25-28.) Ultimately, however, the witness acknowledged his report wherein he characterized victim's hand injury as a human bite and admits he reviewed only one set of teeth. (*Id.* Vol. I R.T. 188.)

**2. Dr. Bowers**

Dr. Bowers was also called as a paid defense witness. (January 26, 2009 Vol. II R.T. 280: 13-15.) Former defense counsel first contacted Dr. Bowers about the petitioner's case in 1998. (*Id.* Vol. II R.T. 259: 25-28-260: 1-4.) In fact, he generated a report in 1998 analyzing many of the very same issues contained within petitioner's initial petition, including

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technological intricacies of a computer program did not meet such requirements.

rectification of photo distortion. (*Id.* Vol. II R.T. 260; 262-266.) Additionally, Dr. Bowers published an article regarding digital imagine in bite mark cases just a year after petitioner's murder conviction. (*Id.* Vol. II R.T. 297: 12-24.)

Dr. Bowers testified similarly to Dr. Johansen in that he was familiar with the Adobe Photoshop program. He too became, by his own admission, "self-qualified" in the use of Photoshop. (*Id.* Vol. II R.T. 209: 4-14.) He opined that Photoshop distortion techniques began in earnest in the late 1990's. (*Id.* Vol. II R.T. 209: 17-28; 210: 7, 9.) Dr. Bowers also discussed the photographic distortion of the photo of victim's hand injury. Similarly to Dr. Johansen, Dr. Bower's described his Photoshop efforts as "fixing" or "forcing" the image. (*Id.* Vol. II R.T. 232: 18-22.) He acknowledged the subjectivity of "forcing" a match. (*Id.* Vol. II 284: 11-25.)

Dr. Bowers presented in court Styrofoam exemplars of petitioner's teeth and also noticed the abnormality in petitioner's lower teeth, specifically number 27. (*Id.* Vol. II R.T. 223: 7-28; 224: 1-17.) Dr. Bowers discussed how he made an exemplar of petitioner's teeth by taking existing dental molds and pressing them into the Styrofoam. (*Id.* Vol. II R.T. 227.) In fact, he made two exemplars- one with lighter pressure to create a shallow exemplar and another with more pressure that would be deeper. (*Id.*) Dr. Bowers solely controlled the amount of pressure exerted between the molds and the Styrofoam exemplar. (*Id.* Vol. II R.T. 256; 281.) He had no way of knowing how hard the victim was bitten. (*Id.* Vol. II, R.T. 281:27-28; 282:1-6.) Contrary to significant

previous trial testimony of multiple dental experts, at evidentiary hearing, Dr. Bowers believed petitioner's tooth number 27 was "at the same level with all the other lower front teeth that [petitioner] has." (*Id.* Vol. II R.T. 233: 4-11.) Yet the impression made by the exemplars he used did not make an indentation at tooth number 27. (*Id.* Vol. II R.T. 233: 12-24.) He testified that tooth number 27 made an indentation in the Styrofoam exemplar, contrary to Dr. Sperber's initial testimony. (*Id.* Vol. II R.T. 237: 19-22; 238: 14-15.) Dr. Bowers also attempted to claim similarities between other injuries on the victim's body caused by, perhaps the fencing material, and the bite mark on her hand. (*Id.* Vol. II R.T. 243: 21-25.) Neither witness could explain the fact the injury to victim's hand was semi-circular, as in a bite, and the fencing material contained solely right-angles.

## CONCLUSION

Each and every iteration of expert testimony, its weight, its effects, and, ultimately, certain intrinsic weaknesses were considered and evaluated by both the jury and multiple courts in hearings, motion proceedings, appeals, and multiple petitions for writs of habeas corpus. There is no dispute this matter is a circumstantial one. That fact alone is not dispositive of its merits. Common sense dictates that, regardless what affect Penal Code § 1473 may have, if any, upon this proceeding, there is still substantial additional evidence that may not simply be discarded in the interests of granting the current petition. Even absent Dr. Sperber's testimony, it cannot be persuasively argued that there is a

reasonable probability of a different outcome had it not been introduced. Finding otherwise invades the province of the jury as exclusive fact finder. There is nothing inherently impossible or improbable about the testimony, facts, and physical evidence that established petitioner's guilt and, even when considering his claims regarding odontological testimony, he cannot carry his heavy burden. The People respectfully request that the Court deny the petition.

Done this 16th day of February 17, 2015, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS**
District Attorney

**STEPHANIE H. ZEITLIN**
Deputy District Attorney
Appellate Services Unit

## CERTIFICATE OF WORD COUNT

I certify that the **INFORMAL RESPONSE** in this case uses a 13-point Bookman Old Style font and contains 5,720 words.

Done this 17th day of February, 2015, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS**
District Attorney

**SHEILA A. WALKER**
Secretary II
Appellate Services Unit

**SAN BERNARDINO COUNTY**
**OFFICE OF THE DISTRICT ATTORNEY**
**PROOF OF SERVICE BY UNITED STATES MAIL**

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO } ss.

***In re Richards***
S223651

Sheila Walker says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 412 W. Hospitality Lane, First Floor, San Bernardino, CA, 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on February 17, 2015, I served the within:

**RESPONDENT'S INFORMAL RESPONSE**

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice, addressed as follows:

Attorney General
P.O. Box 85266-5299
San Diego, CA, 92186-5266

Jan Stiglitz
Alexander Simpson
225 Cedar Street
San Diego, CA 92101

Superior Court
County of San Bernardino
401 North Arrowhead Avenue
San Bernardino, CA, 92415-0063

Court of Appeal
Fourth District, Division Two
3389 Twelfth Street
Riverside, CA, 92501

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on February 17, 2015.

Sheila Walker