IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

WILLIAM RICHARDS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

Case No. **S189275**

(San Bernardino Superior Court Case No. **SWHSS700444**)

(San Bernardino Superior Court Criminal Case No. **FVI00826**)

(Related Appeal Case Nos. **E049135, E024365, E023171, E013944**)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Review Upon Decision of the Court of Appeal for the Fourth Appellate District, Division Two, Reversing the Grant of a Petition for Writ of Habeas Corpus

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THE PEOPLE OF THE STATE OF CALIFORNIA,	(San Bernardino Superior Court Criminal Case No. **FVI00826**)
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	RESPONDENT'S ANSWER BRIEF ON THE MERITS

STATEMENT OF ISSUES

This matter is before the Court following its grant of review of the decision in the Court of Appeal reversing the trial court's granting of habeas corpus relief. As framed by this Court, this case presents the following 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?

PRELIMINARY STATEMENT

Framing petitioner's entitlement to habeas relief in the context of "false evidence" is misplaced here. There was no false evidence presented at any stage of the proceedings that could be substantially material or probative on the issue of guilt nor is there newly discovered evidence that 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. One of the State's witnesses, Dr. Sperber, was an expert witness offering opinion testimony at trial, the proper focus at this juncture is to what extent, if any, new evidence in the form of a changed opinion affects his credibility as an expert, and the corresponding weight that his original opinion testimony continues to carry.

The answers to this Court's remaining queries must be "no." Alteration of an expert's opinion a decade after it was first rendered is not a renunciation of his original view, but rather a refinement based on years of additional experience. Regardless, that original opinion was inconclusive and fully litigated at trial. Moreover, with regard to the statistical estimation with which petitioner has taken issue, both

experts- for the defense and the People- offered bite mark expert testimony within three percentage points of each other. Such a statistically insignificant variation is neither an adequate nor compelling ground to overturn a jury verdict. Both experts testified at trial that the bite mark photo suffered from some distortion and neither testified that it was most certainly petitioner who left the mark.

"New" DNA evidence in the form of hair or trace deposits on the stepping stone, similarly, does not call into doubt any central conclusion from the trial. Meanwhile, the powerful array of physical and circumstantial evidence that otherwise convicted petitioner remains undisturbed. Petitioner cannot possibly meet the burden of demonstrating that the case against himself has been undermined, or seriously argue that the facts now point "unerringly" to his innocence. The Court of Appeal's reversal of his grant of relief was, therefore, unquestionably correct under the law.

STATEMENT OF PROCEDURAL HISTORY

On July 6, 1994, Richards' first jury trial began (E024368,[1] Vol. I, C.T. p. 228). On August 29, 1994, a mistrial was declared because the jury could not agree on a verdict. (*Id.*; 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 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 hung eleven to one in favor of guilt. (C.T. pp. 474, 871.)

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[1] Until further notice, all record references within this section refer to petitioner's appeal in Case Number E024368.

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,[2] Vol. II, C.T. 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. (*Id.*; Vol. II, C.T. 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. p. 1183.) Closing arguments were made on August 10, 2009 and the trial court, from the bench, issued its order immediately thereafter. (Vol. IV, C.T. p. 1185.) The trial court found that various pieces of evidence undermined the People's case and pointed unerringly to petitioner's innocence. (*Id.*)

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; *In re Lawler* (1979) 23 Cal.3d 190.) On appeal, the People contended that Richards failed to present new evidence to justify habeas relief. Rather, evidence presented at evidentiary hearing merely rehashed issues already considered throughout the lengthy procedural history of this case. Further, petitioner did not meet his stringent

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[2] Until further notice, all record references within this section refer to petitioner's appeal in Case Number E049135.

burden of proof by "completely undermining" the "entire structure of the prosecution's case" as required. (*People v. Gonzalez* (1990) 51 Cal.3d 1179.) Portions of evidence petitioner submitted were of questionable value and methodologies. The People largely asserted petitioner failed to meet his extremely heavy burden of proof, relied upon "new evidence" claims that considered materials and testimony well-considered at his convicting trial and, thus, were not subject to unilateral trial court review, presented experts who relied upon questionable methodologies to support their opinions and/ or did not have sufficient background to offer expert testimony and presented evidence claiming it "exonerated" him when, in reality, it merely caused unjustified distraction for the lower court.

On November 19, 2010, the Court of Appeal agreed with the People. It reversed the trial court's findings in total. Richards now requests review of that decision. This Court granted review on February 23, 2011.

SUMMARY OF FACTUAL HISTORY

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.

Eleven years later, however, another superior court in San Bernardino granted Richards' habeas corpus relief based on his assertion that "new forensic evidence" meant that his conviction was fatally flawed.

On appeal, the People argued the lower court erred. Rehashed old evidence, speculation regarding the import of recent DNA analyses, misconduct accusations without proof, and changed "expert" opinions do

not render Richards "innocent" of his wife's murder. Richards failed to meet his extremely heavy burden of proof of innocence under, e.g., *In re Lawley* (2008) 42 Cal.4th 1231, 1239-1241.

SUMMARY OF TRIAL EVIDENCE

A. POLICE AND CIVILIAN WITNESS TESTIMONY

By his account, Richards found his dead wife when he got back from work late one evening. (6/10/97[3] Vol. III, R.T. 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. (6/11/97 Vol. IV, R.T. 561:1-9.) Richards called 9-1-1 only after a friend of his wife's urged him to do so. (6/11/97 Vol. IV, R.T. 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." (6/11/97 Vol. IV, R.T. 589:9-12, 24; 590:2-3, 11-15; 624-625; 640:8, 10; *Id.*; 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, R.T. 635:7-8, 10-16; 636:4-5, 7-10.) Mrs. Richards' body was neither warm nor cold. To Nourse, it seemed "very

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[3] With the exception of limited appellate record references, until further notice, record citations within this section refer to San Bernardino County Superior Court case number FVI00826. The citations bear the date of the respective trial in an effort to clarify the lengthy record.

fresh." (*Id.*; Vol. IV, R.T. 636:11-14, 23, 25.[4]) 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, Vol. I, C.T. 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, R.T. 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. (8/29/94 Vol. II, R.T. 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[5]; 626:1-16.) Richards had peculiar knowledge of the evidence despite

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

[5] 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.) The terminology is relevant as Richards later argued the significance of the weapon's name at evidentiary hearing on the instant petition. (i.e.

the dark conditions of the remote murder scene, "like he had first-hand knowledge." (*Id.*; Vol. IV, R.T. 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 seriously wrong." Nourse retrieved a tape recorder to capture Richards' statements. (*Id.*; Vol. IV, R.T. 645:24-25, 28.)

"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.*" (Emphasis supplied.) (12/6/94 Vol. II, R.T. 431:15-24.)

Sheriff's Criminalist Dan Gregonis found significant[6] 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.[7] (*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; 927:13-15.) 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.)

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[6] Petitioner took issue in the Court of Appeal with the State's characterization of manipulation as being "significant". The fact the evidence showed victim's body was moved post mortem, her pants were removed after her head was crushed and her undergarments were removed so as to create the impression of a sexual assault would be, in the People's estimation, "significant". Contrary to petitioner's assertions, evidence of crime scene manipulation was not limited to some discussion regarding dilution of blood spatter. Rather, multiple indicators of scene manipulation were apparent and troubling to the responding officers given the remote, extremely dark nature of the crime scene.

[7] 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.)

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 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). Test 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.[8] (*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 none. (*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, R.T. 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, R.T. 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, Vol. I, C.T. pp. 30-33.) Mrs. Richards sought to leave her husband and enter a battered women's shelter. (*Id.*)

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[8] The worn condition (i.e. unlikely to leave tracks) of petitioner's shoes negates petitioner's conclusion that petitioner was not present at the scene simply because his shoe prints were not found. (Petitioner's Opening Brief on the Merits, p. 9.)

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 payments on his Ford Ranger to lapse, causing the original $14,000 loan to have an additional $11,000 tacked onto it. (*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.) At trial, a defense witness, Pedro Galvan, testified that he had seen an unfamiliar red vehicle in the area a couple of times shortly before the murder. (8/11/94[9] R.T. pp. 7-8.) His testimony was part of an attempt to support the defense theory that an unknown party in a red truck was in the area and responsible for the killing. Mr. Browder drove a red truck. (12/6/94 Vol. II, R.T. 492:23.) He had attempted a couple of times to find the Richards' property in an attempt to repossess the truck. (12/6/94 Vol. II R.T. 491:28; 492:1-2, 12-14.)

B. EXPERT 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 concluded that teeth in a lower jaw made the bite mark and that the biter had an abnormality, an

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[9] In the absence of a volume number reference, only one record volume exists for that date.

under-erupted tooth No. 27, in the lower jaw. (*Id.*; Vol. VI, R.T. 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, R.T. 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; 6/18/97 R.T. 32:10-14.) In fact, "[t]hat's kind of a unique feature." (*Id*; see also 6/26/1997 Vol. VII, R.T. 1537:10-26.) However, *petitioner's trial counsel* specifically asked "...about how often [will] you yourself ... see this dental abnormality with the offset canines?" (6/18/97 R.T. 47:5-9.)

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.[10] It was not until the defense asked him to be a witness that the bite mark issue was brought up. (*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." (6/18/97 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.

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[10] Richards argued that Dr. Golden presented "false evidence" against him at trial. However, that argument *must* fail given that Dr. Golden was *his* witness. Such false purported evidence must be "introduced *against* a person at ... trial." (Penal Code § 1473(b)(1) [emphasis supplied].)

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. (E049135, C.T. 48-49.)

C. TESTIMONY AT THE EVIDENTIARY HEARING

Richards claimed in his habeas petition that the bite mark evidence was the linchpin of the prosecution's case. (1/26/09[11] Vol. I, R.T. p. 53:17-24.) However, *Richards* requested bite mark analysis first and the prosecution responded to it. (6/26/97 Vol. VII, R.T. 1522:16-21; 1523-1524.) Petitioner argues the reliability of forensic bite mark analysis should be discounted. Only after the People learned petitioner intended to call Dr. Golden, did they secure the testimony of Dr. Sperber. (*Id.*; Vol. VII, R.T. 1522:19-22.) As such, it cannot be argued that the allegedly problematic bite mark testimony was a "pillar" of the State's case.

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; 88:6-7.) 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.[12])

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[11] With the exception of limited appellate record references, until further notice, record citations within this section refer to San Bernardino County Superior Court case number SWHSS700444, the underlying habeas corpus petition.

[12] Petitioner's attempt to highlight alleged similarities between the instant case and the Arizona case of *State v. Krone* (1995) 182 Ariz. 319 is misplaced in addition to being non-binding. The prosecution in *Krone* retained a highly relevant video tape and neglected to turn it over to the defense until the night before trial. The instant case has been

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 Vol. II, C.T. pp. 251-253 [emphasis supplied].) Dr. Sperber's declaration in support of the petition did not "recant" his testimony regarding Richards' dental abnormality. Rather, he testified that he had "essentially" ruled petitioner out. (1/26/09 Vol. I R.T. 91:11-13.) The modifier "essentially" hardly constitutes hard, definitive evidence.

2. DR. GOLDEN

At evidentiary hearing, Dr. Golden testified that the relevant bite could have been a dog bite[13] 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.)

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petitioner's attempt to re-litigate evidence considered multiple times. There have been no surprises or withholding of evidence.

[13] The distinction of whether the bite was "human" or "canine" in origin was a significant argument at the evidentiary hearing. However, "the canine teeth of a dog are usually most prominent." (6/18/97 Vol. VI, R.T. 1211:24-28.) An article published in 2003 in *The New England Journal of Medicine* points out that it is difficult to confuse a human bite mark with a dog's bite mark. (Howard Fischer, M.D., Pamela W. Hammel, DD.S., L.J. Dragovic, M.D., "Human Bites versus Dog Bites," *The New England Journal Of Medicine*, Vol. 349:311, No.11 (Sept. 11, 2003).) Richards' argument that a dog made the bite mark is not a good one.

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.)

3. DR. JOHANSEN

Dr. Johansen was called as a defense witness. His report and testimony was not new evidence and it fails to support petitioner's claim of innocence.

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* (*People v. Kelly* (1976) 17 Cal. 3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.) grounds. (*Id.*; Vol. I, R.T. 121:9.)

At the 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.) Yet, the target exemplar was the petitioner's lower arch and Dr. Johansen made no effort to present an Adobe analysis of the lower arch. (*Id.*)

A colloquy 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. (*Id.*; Vol. I, R.T. 156:25-28; 157:1-12.) He opined the fencing material could have made the mark. (*Id.*; Vol. I, R.T. 157:25-28.) The witness acknowledged his report wherein he characterized victim's hand injury as a human bite and admitted he reviewed only one set of teeth. (*Id.*; Vol. I, R.T. 188.) Even after his Photoshop efforts, he could still not rule petitioner out as the biter. (*Id.*; Vol. I, R.T. 189:1-25.)

Photoshopping cannot undo what is clear, unequivocal and scientifically demonstrable. Dr. Johansen's report hardly provided conclusive evidence that undermined the prosecution's entire case nor did it point unerringly to petitioner's innocence. He found the general size of the bite mark was consistent with petitioner's dentition, but due to the poor quality of the bite mark, he could neither identify nor exclude petitioner as the biter. Again, this is nothing new and the difficulties with the bite mark and photo were acknowledged at the convicting trial.

4. DR. MICHAEL BOWERS

Dr. Bowers was also called as a paid defense witness. (1/26/09 Vol. II, R.T. 280:13-15.) Assuming, *arguendo*, Dr. Bowers' report on the bite mark was admissible at the evidentiary hearing, it was not new evidence. It also failed to support petitioner's claim of innocence on the merits. Former defense counsel first contacted Dr. Bowers 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 issues contained within the 2007 petition, including rectification of photo distortion. (*Id.*; Vol. II, R.T. 260; 262-266.) Additionally, Dr. Bowers published an article regarding digital imaging in bite mark cases just one year after petitioner's murder conviction. (*Id.*; Vol. II, R.T. 297:12-24.)

Dr. Bowers prattled on with similar testimony to Dr. Johansen in that he was familiar with the Adobe Photoshop program. He too became, by his own admission, "self-qualified" in Photoshop use. (*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. Similar to Dr. Johansen, Dr. Bower's described his

Photoshop efforts as "fixing" or "forcing" the image. (*Id.*; Vol. II, R.T. 232: 18-22.) On cross-examination, 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 the exemplars made 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 speculated other injuries on the victim's body were caused by, perhaps, the fencing material. (*Id.*; Vol. II, R.T. 243:21-25.)

Later, Dr. Bowers testified regarding color saturation of photographs of the victim's fingernails and associated blue fibers. (*Id.*; Vol. II, R.T. 255:3-5, 7-10.) He thought that the autopsy photos should have shown the blue fibers. (*Id.*; Vol. II, R.T. 258:1-3.)

ARGUMENT

I.

PETITIONER FAILED TO MEET HIS WELL-SETTLED BURDEN OF PROOF UNDER HABEAS CORPUS LAW AND HIS CLAIM OF "ACTUAL INNOCENCE". HE HAS NEITHER "COMPLETELY UNDERMINED THE STATE'S CASE" NOR HAS HE "POINTED UNERRINGLY TO HIS INNOCENCE."

"Habeas corpus will lie to vindicate a claim that **newly discovered evidence** demonstrates a prisoner is **actually** innocent." (Emphasis supplied.) (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) This Court has long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence or on proof false evidence was introduced at trial. (*In re Bell* (2007) 42 Cal.4th 630, 637 [false evidence]; *In re Johnson* (1998) 18 Cal.4th 447, 453–454 [both]; *In re Hall* (1981) 30 Cal.3d 408, 415–417, 424 [both]; *In re Weber* (1974) 11 Cal.3d 703, 724 [new evidence].)

To obtain habeas corpus relief, the burden is on the petitioner to show there is newly discovered evidence that undermines the entire structure of the case upon which the prosecution is based. The evidence must point unerringly to the petitioner's innocence, and it must be conclusive. "It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury." (*In re Clark* (1993) 5 Cal.4th 750, 766; *In re Weber* (1974) 11 Cal.3d 703, 723-725.)

This standard is firmly established; it dates back to *In re Lindley* (1947) 29 Cal.2d 709.

> "A criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts 'fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine **the entire prosecution case *and* point unerringly** to innocence or reduced culpability.

(Emphasis supplied.) (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 [citations omitted].) If "a reasonable jury could have rejected" the evidence presented, petitioner has **not** satisfied his burden. (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 33.)

In *In re Lawley* (2008) 42 Cal.4th 1231, 1239-1241, petitioner disputed this standard, arguing that it applied ***only*** to the determination whether a petitioner has shown actual innocence for purposes of overcoming procedural bars to habeas corpus relief. Lawley argued that he needed only to show by a preponderance of the evidence that he was entitled to relief. (*e.g. In re Sassounian* (1995) 9 Cal.4th 535, 546 [habeas corpus petitioner bears the burden of proving facts entitling him to relief by a preponderance of the evidence].)

This Court rejected his claim and pointed out that:

> "[W]e have consistently and consciously applied this higher standard, rather than the preponderance standard, to actual innocence claims. (*See*, e.g., *In re Hardy*, *supra*, 41 Cal.4th at pp. 1016–1021 [implicitly applying preponderance standard to ineffective assistance of counsel claim, but applying heightened *Lindley* standard to newly discovered evidence claim]; *In re Johnson*, *supra*, 18 Cal.4th at pp. 460–462 [acknowledging generally applicable preponderance standard, but

> applying higher *Lindley* standard to actual innocence claim]; *In re Branch* (1969) 70 Cal.2d 200, 210, 217 [implicitly applying preponderance standard to ineffective assistance of counsel claim, but applying ***heightened*** *Lindley* standard to newly discovered evidence claim]; *In re Imbler* (1963) 60 Cal.2d 554, 560, 569 [applying preponderance standard to perjured testimony claim and heightened *Lindley* standard to newly discovered evidence claim].)."

(*Id.* at p. 1240.)

Even *if* petitioner could successfully argue the existence of new evidence to prove actual innocence, petitioner must show that his claims (1) undermine the prosecution's entire case and (2) the claims must point unerringly to petitioner's innocence. (*In re Bell* (2007) 42 Cal. 4th 630; *In re Robbins* (1998) 18 Cal.4th 770, 812; *In re Clark* (1993) 5 Cal.4th 750, 766.) In order to warrant relief, newly discovered evidence must be of such a character as to completely undermine the entire structure of the prosecution's case; this standard is met if: "(1) the new evidence is conclusive; and (2) points unerringly to innocence." (*In re Weber* (1974) 11 Cal.3d 703, 724.)

"Evidence relevant only to an issue already disputed at trial which does no more than conflict with trial evidence, does not constitute new evidence . . . ." (*In re Clark, supra,* at p. 798, fn. 33.) Rather, the "'new' evidence must cast fundamental doubt on the accuracy and reliability of the proceedings." (*Clark, supra,* 5 Cal.4th at p. 766.) For instance, "[a]n example of such evidence **is a confession of guilt by a third party**." (Emphasis supplied.) (*In re Hardy* (2007) 41 Cal.4th 977, 1015.) "Depriving an accused of facts that 'strongly' raise issues of reasonable doubt is not the standard. Where newly discovered evidence is the basis for a habeas corpus petition, as alleged [by petitioner], the newly

discovered evidence must 'undermine' the prosecution's entire case. In is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. [Citations.]" (*Id.* at p. 1017 citing *In re Clark, supra.*)

Petitioner claimed that the DNA results discussed here "conclusively bear witness to his innocence." (Petition, p. 2:2-3.) This exuberance is unjustified in light of the ambiguities obvious in the results. The mere presence of the DNA does not, in fact, exonerate petitioner. Nor is it conclusive. All it shows is that, at some point, someone touched, sneezed, spoke over or handled the stepping stone. It does not negate the myriad of elements of motive, both financial and romantic, the impression of multiple law enforcement officials that something was just not right given the circumstances and petitioner's peculiar familiarity with the scene, the witness interview reports tending to show a violent relationship between petitioner and the victim or the hard evidence negating the presence of anyone else at the crime scene but the victim and petitioner.

Contrary to the trial court's findings, nothing petitioner has presented "completely undermined" the entire state's case. Petitioner's alternative theories regarding the alleged presence of a third party at the scene are purely speculative. Conflicting expert testimony about the possible historical nature of a hair does not undermine the state's entire case. The presence of unknown male DNA on the stepping-stone is easily explained, and was so at trial. Use of Adobe Photoshop techniques were, according to petitioner's own witnesses, being enlisted around the time of the jury's 1997 guilty verdict. That petitioner happened upon a different strategy through a different lawyer, does not support a claim of

"new" evidence. All of the parties have been well-aware of the photo distortion issues since the inception of this criminal case. It is not new evidence.

Motive and opportunity do not lie. Nor does the fact that the People presented ample evidence at trial that the crime scene had been substantially manipulated. Nor does the fact that no evidence of another person's presence was ever found at the scene. Nor does the fact the physical evidence at the scene did not comport with petitioner's version of events. Petitioner failed to produce conclusive "new" evidence that undermines the prosecution's entire case and points unerringly to his innocence. His theories were speculative at best. The Court of Appeal agreed. Petitioner's evidence is not enough.

II.
DR. SPERBER'S ALLEGED "RECANTATION" OF HIS EARLIER STATISITCAL ESTIMATE DOES NOT CONSTITUTE "FALSE EVIDENCE."

Prior to being amended in 1975, Penal Code § 1473 did not specify any specific grounds for relief.[14] There was no dispute that habeas relief pursuant to section 1473 predicated on a theory of "false evidence" meant the "false evidence" constituted perjury. (*People v. Marshall* (1996) 13 Cal.4th 799, 830; *In re Wright* (1978) 78 Cal.App.3d 788, 807.) In other words, the evidence was not allegedly "false" in the sense that a petitioner, who lost the argument at trial regarding the correctness of the evidence, would like to re-open that argument on habeas. It was also

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[14] Prior to amendment in 1975, Penal Code § 1975 simply stated: "Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

required that the prosecution knew the evidence was perjured, and that the perjury affected the outcome of the trial. (*Ibid.*)

In 1975, Penal Code § 1473 was amended to provide in pertinent part:

> (a) Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.
>
> (b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration;

In *Wright, supra,* the Court of Appeal noted that the section's reference to "false evidence," rather than to perjury, did away with the element – required for a conviction on a charge of perjury – that "the testimony given could have probably influenced the tribunal before which the cause was being tried." (*In re Wright, supra,* 78 Cal.App.3d 788, 809, fn. 5.) However, the Court of Appeal in *Wright, supra,* made no suggestion that a witness's mere mistake (or a later court's belief the witness made a mistake) would amount to a showing of "false evidence."

That fact notwithstanding, this Court would later, in *In re Hall* (1981) 30 Cal.3d 408, incorrectly cite to *Wright* as authority for the proposition that a showing of "false evidence" could be made merely by reference to a witness's *innocent* statement, if later evidence convinced a judicial officer that the statement "apparently" was *incorrect.* (30 Cal.3d 408, 424.) Since then, *Hall* has been cited in conjunction with *Wright* for

the indisputably correct point that *perjury* need not be shown. (See *People v. Marshall* (1996) 13 Cal.4th 799, 830.[15]) However, it does not appear that this Court has since condoned *Hall*'s mistaken assertion that an apparently incorrect statement, innocently made, can amount to "false" evidence. And, at a minimum this Court has made perfectly clear that a "false evidence" claim will not serve as sufficient disguise for a habeas petitioner's desire to argue that jurors reached an erroneous conclusion from the trial evidence – even if the habeas petitioner manages to convince a referee to find the facts differently than did the trial jury. (*See In re Bell* (2007) 42 Cal.4th 630.)

Given the nature of expert testimony, it is clear that any definition of "false evidence" does not provide the proper framework for a claim predicated upon an expert changing their opinion from that considered by the jury at trial.

Dr. Sperber was qualified and accepted by the Court as an expert. The mere fact that Dr. Sperber testified regarding petitioner's dentition is nothing more than opinion. The testimony was not false. Labeling Dr. Sperber's trial testimony "false" in light of his subsequent criticism of his characterizations of the bite mark evidence at trial incorrectly frames the issue. Because Dr. Sperber was an expert witness offering opinion testimony at trial, the post-conviction focus is properly whether and to what extent new evidence (i.e., a new opinion) affects his credibility as an expert, and the corresponding weight that his original opinion testimony

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[15] Respondent does not dispute that the materiality element of the crime of perjury has been supplanted, for the purpose of the habeas statute, with a separate description that the evidence is "substantially material or probative on the issue of guilt or punishment." (Penal Code § 1473(b)(1).)

continues to carry. As the United States Supreme Court stated in an analogous context in *Schlup v. Delo* (1995) 513 U.S. 298, "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." (*Id.* at p. 330.) While a changed expert opinion may indeed constitute new evidence (see *Souter v. Jones* (6th Cir. 2005) 395 F.3d 577, 592-593), its significance for purposes of habeas litigation should be framed in terms of its impact on the ongoing weight that should be accorded the opinion(s) offered at trial. In this sense an expert is unlike a percipient witness, whose testimony at trial is more susceptible to labels such as "true" and "false."

At trial, jurors are not instructed to evaluate expert witness testimony on a simplistic true/false basis. Rather, they are required to decide the "meaning and importance of any opinion" by considering "the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion." (CALCRIM No. 332; see also Evidence Code § 721(a).) It is not the prerogative of a post-conviction court to disregard the law's nuanced approach to expert scientific testimony, and override fact finders' credibility determinations, by uncritically assuming the truth of one opinion and the falsity of another opinion. This is so even when the opinions are rendered by the same person at different times.

After all, and taking a broader perspective, scientific evidence itself cannot be evaluated on a strict and standalone true/false basis. All scientific evidence carries with it a risk of uncertainty, because that is the nature of science. (See, *e.g.*, Greenland, *The Need For Critical*

Appraisal Of Expert Witnesses In Epidemiology And Statistics (2004) 39 Wake Forest L. Rev. 291, 293 [describing the reality of competing scientific theories, diversity of opinions among scientists, and the need to remain open-minded and critical of one's own theories].) Jurors are often presented with dueling and contradictory expert opinions in a case, yet routinely accept an opinion as credible and reject another. Likewise, an expert witness's changed opinion years after a trial merely presents a new element with which to evaluate the ongoing credibility of the trial opinion, which may or may not have had much to begin with. "True or false," in any case, is not the measure.

Dr. Sperber was not forced into testifying the way he did. He did so under penalty of perjury and with the benefit of a lengthy odontological career to support his opinion. The fact that, over a decade later and after being contacted by defense counsel, Dr. Sperber thinks perhaps he should not have placed a statistical value upon petitioner's dental defect does not render his trial testimony "false".[16] Instead, his change of opinion may be attributed, perhaps even solely, to the benefit of additional years of dental practice and experience. Nothing more.

Petitioner's claim that the trial prosecutor should not have used the two-percent statistic in his closing argument is similarly unpersuasive as jurors were admonished that closing arguments do not constitute

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[16] A necessary policy consideration is presented if petitioner's argument regarding Dr. Sperber's "hindsight" is rendered viable. It would be a particularly troubling position to encourage experts, whether defense or prosecution, to avoid schooling themselves on developments within their respective fields and, rather, languish in stagnant knowledge. Dr. Sperber had the benefit of a decade of additional study and experience when petitioner's counsel obtained his declaration. Thus, it is entirely foreseeable that his opinion would be malleable.

evidence in accordance with well-accepted case law. Simply, petitioner's evidence is not enough.

III.
PETITIONER CANNOT SHOW THAT THE CHANGE IN SPERBER'S TESTIMONY EVEN BEGINS TO "COMPLETELY UNDERMINE" THE PROSECUTION'S CASE.

Petitioner has attempted to undo his conviction with the claim that, *inter alia*, bite mark evidence offered at his third trial was flawed and that the People's expert, Dr. Norman Sperber, has established by declaration and testimony that the earlier testimony was "false." He then concludes that this "recantation," if it even were that, entitles him to relief. This is wrong at every turn.

The most conspicuous flaw in petitioner's argument is that petitioner himself not only recognized the ambiguity of the bite mark evidence, but actively raised it in trial court. Indeed, the record establishes that petitioner first secured the testimony of Dr. Gregory Golden, a bite-mark expert typically employed by the People, with the intent to call him in their case in chief. The People then responded by hiring a second expert, Dr. Sperber, to testify on their behalf in their own case in chief. Sperber's evidence was, therefore, immediately challenged not only by cross-examination, but by the evidence of Dr. Golden. On the totality of the record, the bite mark evidence was peripheral to the prosecution's case.

Further, and perhaps most importantly, most of the alleged weaknesses of Dr. Sperber's testimony, including the distorted nature of the key photograph and the statistical estimations, were presented to the jury for their consideration at trial. Dr. Sperber testified only that he could not rule petitioner out as the biter and that the bite mark was

consistent with Richards' dentition. He stated that he considered it his "mission" to teach others to present bite mark evidence appropriately, so as to ensure that the innocent are not convicted. (6/18/97 R.T. 1231:20-23.)

Petitioner's claims are heavily reliant on his view that Dr. Sperber, at trial, suggested that the apparent abnormality in the bite mark was present in no more than two in a hundred people. Yet his own expert, Dr. Golden, rated the frequency at five in a hundred, leaving it still a significant correlation. This illustrates that the evidence was presented as meaningful in perfectly good faith by the prosecutor. Additionally, both experts testified at trial that the bite mark photo suffered from demonstrable distortion and neither testified that it was most certainly petitioner who left the mark.

Petitioner further suggests that the prosecutor wrongly influenced the jury by utilizing the "two percent" number in his closing argument. This is a frivolous claim. A prosecutor is fully entitled to argue from the evidence at trial, as he cannot foretell that it might later be called into question, and in any case juries are invariably instructed, as this one was, that the arguments of counsel are not evidence. (Vol. II, C.T. 368.)

In short, this was not an expert who took the rendition of such an opinion lightly, and the opinion he offered was highly qualified. As such, his evidence was merely suggestive, not conclusive. The jury considered it in conjunction with the far stronger evidence that incriminated Mr. Richards, and convicted him of murder. Even were that piece of evidence completely discredited today, which vastly overstates the case, it could not undermine the verdict of the jury.

IV.
EVEN AFTER CONSIDERATION OF EVIDENCE PETITIONER DUBS "NEW", PETITIONER STILL FAILED TO *CONCLUSIVELY* DEMONSTATE HIS INNOCENCE. THUS, PETITIONER FAILS IN HIS BURDEN.

Petitioner's arguments are inherently flawed. While he attempts to argue applicability of a lower preponderance standard to his "false" evidence claims, he cannot escape the applicability of the "actual innocence" standard to his claims of new evidence. In other words, none of the "new" evidence petitioner presented conclusively pointed to his innocence. A jury, sitting today, would still find petitioner guilty beyond a reasonable doubt. The evidence was strong at the convicting trial. Motive, opportunity, and means were amply shown. Alleged weaknesses were liberally explored and petitioner was sufficiently represented by counsel. Evidence petitioner attempts to advance in the current iteration of his claims is speculative, inconclusive, and fails to meet the standard for relief in habeas corpus. In fact, much of the evidence was considered in 1997. For example:

A. THE HAIR

Evidence offered at evidentiary hearing did nothing more than contradict the People's evidence at the convicting trial. "Evidence relevant only to an issue already disputed at trial which does no more than conflict with trial evidence, *does not* constitute new evidence [leading to habeas relief]..." (*In re Weber, supra,* 11 Cal.3d at p. 798 n. 33 [emphasis supplied.].) Petitioner posits that the DNA on the hair under the victim's fingernails conclusively reflects the "victim's struggle with a third party." (Petition, p. 2:6.) This evidence, petitioner says, shows he is innocent. Not so.

The new DNA testing done on the hair gathered from underneath the victim's nails at autopsy does not conclusively demonstrate petitioner's innocence. The human hair fragment in the scrapings of the fingernails on the victim's right hand had no anagon root and was "historical" in origin, meaning it was likely picked up in the course of the victim's everyday life.

Mr. Craig Ogino described the contents of the nail scrapings in C-8 and C-9 as coming from contact with items in daily life. (6/12/97 Vol. IV, R.T. 701-702, 704.) They were "historical" in nature (*Id.* Vol. IV R.T. 713-714.) Thus, the presence of a hair fragment not belonging to the victim or petitioner does not inexorably lead to the conclusion that the donor of the hair killed Pamela Richards. Pamela Richards worked at a restaurant, which brought her into contact with numerous individuals every day. Anyone she contacted could have been the contributor of the hair.

Petitioner offered testimony of Dr. Patricia Zajac at hearing to refute the People's assertion that the hair was historical in nature. Dr. Zajac never examined the photos of the hair or the hair itself. (*Id.*; Vol. II, R.T. 345:7-28-346:1-13; 358:21-28; 359:1-5.) She never conducted nor asked to conduct a microscopic analysis of the hair to include or exclude Richards and she conceded that she "would have" compared the hair to the victim to attempt to include or exclude Richards. (*Id.*; Vol. II, R.T. 359:1-5.) Dr. Zajac testified that hairs with telogen roots, like the one found underneath the victim's artificial nail, are mature and at a stage they are ready to fall out. (2/11/09 Vol. II, R.T. 347:3-16.) Dr. Zajac opined that the hair was "forcibly" pushed under the victim's nail. (2/11/09 Vol. II, R.T. 312:21-28.)

Thus, at best, Zajac's untested opinion regarding the nature of the hair creates merely a conflict with the trial record. It does not refute what Mr. Ogino had to say nor is it new evidence. The Court of Appeal agreed. (E049135, Opinion, p. 40.)

B. TUFT

At hearing, Richards attempted to prove that criminalist Dan Gregonis "planted" a tuft of blue fibers beneath the victim's fingernail. This was unsupported by any evidence.

Gregonis testified that the manner in which the fibers were found within the nail crack was significant. They were not simply placed, as you might expect had they been "planted," they were jammed under the nail as though part of a struggle. (E049135, C.T. 288.) Mr. Gregonis testified that after examination of the blue fibers with a stereomicroscope, they were then visible to the naked eye. (1/18/09 Vol. II, R.T. 59:23-25.) That is, they were visible because Mr. Gregonis knew where to look.

Moreover, Petitioner's own Exhibit "I" (Vol. II, C.T. 116-122.) discusses the fact that postmortem examination of the victim was intended to focus upon the broken conditions of the fingernails rather than any fibers that may have been observed. (*Id.* at p. 122.) Additionally, "...the position of the hands in the photographs taken at autopsy [citations omitted] do not clearly show the right side of the fingernail from which the fibers were recovered. One can only assume that the fibers were not observed at that time, or their significance was discounted." (*Id.*) Even petitioner's own documents belie a "planting" conspiracy. Regardless, the fiber evidence does not demonstrate petitioner's innocence. (E049135, Opinion, pp. 42-42.)

C. THE STEPPING-STONE

Similarly, the "unknown male DNA" found on the stepping-stone does not conclusively demonstrate petitioner's innocence. Petitioner's claim of "exoneration" is over-reaching. The mere existence of a minor contributor's DNA (at 1/6th or 1/10th the potency of the victim's blood) shows only that another may have handled the stone or that it may have been contaminated during the course of this case's lengthy history.

Petitioner argued that the DNA found on the stepping-stone means the "actual killer" left it and thus he is "actually innocent." Not only is this argument legally defective, as petitioner's evidence must exonerate him, it fails to account for the accessibility of the stone to potential DNA donors before it was seized and inside the criminal justice system after it was seized.

First, the DNA could have been deposited at the place where the stepping-stone was purchased. The DNA could be from anyone in the stream of interstate commerce leading to its purchase and placement on the Richards property or from a person subsequently visiting the Richards' house. The stone was used as a method of ingress and egress from a camper on the property. (8/29/94 Vol. II, R.T. 431:15-24.)

Further, the stepping-stone was a trial exhibit beginning in 1994 and remained in the superior court clerk's exhibits section until 2003 when it was taken from the court exhibits for transport to the DOJ lab. Any number of DNA contributors prior to the new testing have handled it and subjected it to contamination. Accordingly, the minute traces of unknown DNA on the stepping-stone hardly constitute evidence of petitioner's "actual innocence."

The court does not have a record of those who came into contact with the stepping-stone during this period. Based on its status as a trial exhibit at the courthouse over a period of at least ten years, a myriad of individuals may have handled the stone, including petitioner's various defense counsel, the prosecutor, numerous Innocence Project personnel; defense investigators; court clerks; and any of their substitutes in the course of the trials; bailiffs at the trials and any of their substitutes in the course of the trials; and up to 36 different jurors. The stepping-stone has been in open court where individuals could have deposited DNA on the stepping-stone by speaking near the exhibit or coughing or sneezing in its direction.

Given the exposure of the stepping-stone to likely contamination, the finding of minute traces of male DNA belonging to someone other than petitioner does not constitute conclusive evidence that an unknown male deposited the DNA on the night of the murder. There are simply too many possibilities. The traces of DNA fail to undermine the prosecution's entire case and point unerringly to petitioner's innocence. The Court of Appeal agreed. (E049135, Opinion, p. 41.) Simply, there is no conclusive method to ascertain when the unknown DNA was deposited. (i.e. before, during or after the murder.)

D. PREVIOUSLY INTRODUCED DOCTOR REPORTS

The reports of Drs. Bowers, Johansen and Sperber do not constitute "new evidence" supporting petitioner's "actual innocence." At the convicting trial in 1997, all parties acknowledged that the bite mark photo was of less than perfect quality. Manipulation of the photograph of the bite mark with digital imaging fails to yield conclusive evidence that

undermines the prosecution's entire case and fails to support unerringly petitioner's "actual innocence."

Petitioner's argument regarding the bite mark testimony is merely an attempt to relitigate an issue covered at trial. This invades the province of the jury as the exclusive fact finder to determine the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The jury was presented with a three-to-one enlarged photograph of the lesion (6/18/97 Vol. VII, R.T. 1173:19-26), an exemplar of petitioner's teeth (Vol. VII, 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. Any attempt to claim that "new photographs" were considered showing the presence of fencing material and its possible link to the victim's hand injury at the scene is specious. Neither witness could explain away the fact the injury to victim's hand was semi-circular, as in a bite, and the fencing material contained solely right-angles. Photos were available throughout the course of the criminal matter. Petitioner's experts should have considered them then. Additionally, arguing this section of fence caused the bite mark would undermine petitioner's statement to law enforcement that he found his wife's body, face down, and that he turned her body over. (6/11/97 Vol. IV, R.T. 592:21-25.) Whether he rolled her to the right or to the left, the upper part of her right hand would not have come into contact with the fence. The evidence negates petitioner's claim that he found her face down.

"Evidence relevant only to an issue already disputed at trial which does no more than conflict with trial evidence, does not constitute new evidence. . . ." (*In re Clark* (1993) 5 Cal.4th 750, 798 n. 33, *internal quotations removed*, emphasis added; see also *In Re Hall* (1981) 30 Cal.3d

408, 421-22 ["evidence reinforcing evidence presented at trial "is cumulative and may not be considered 'new.'"].

Petitioner argues that Dr. Bowers' report extracts new evidence from the old. This argument must fail. Dr. Bowers' reanalysis of the bite mark photograph is cumulative, and merely reinforces evidence presented at trial. The fact that the photograph used in this case was distorted is not a revelation nor is it new. The trial testimony fully addressed the distortion present in the photograph. (6/18/97 Vol. VI, R.T. 1195:13-1196:24.) Petitioner, through his experts or otherwise, failed to undermine the prosecution's entire case and failed to point unerringly to his innocence. The Court of Appeal found that the testimony of Drs. Golden, Sperber and Bowers was not new evidence and that of Dr. Johansen was not sufficiently conclusive so as to warrant relief. (E049135, Opinion, pp. 36-39.) Simply, petitioner's evidence is not enough.

CONCLUSION

Mr. Richards was convicted of murdering his wife by a wealth of evidence- physical, circumstantial, and psychological. He had motive, both financial and romantic. He had the means – his hands and weapons in the form of a cinderblock and stepping stone. And he alone, on the basis of the evidence, had the opportunity.

He was convicted on the basis of extensive physical evidence. He claimed to have found his wife nude, yet there was no blood spatter on her bare legs. The crime scene showed signs of alteration. The suggestion of a sex crime was belied by the complete lack of evidence that sexual contact had occurred. The body he described as "stone cold" was in fact neither cold nor warm, and rigor mortis had not yet set in.

Mrs. Richards would necessarily have had gravel marks on her face and body if initially face down, as petitioner claimed, but she did not. There were clear signs that her body had been moved.

Petitioner was also convicted by his own statements and behavior. The victim's counselor testified to her fear of him and intent to separate from petitioner. Petitioner had closed the couple's joint bank accounts and acknowledged that they were undergoing marital problems. Witnesses testified to past violence. His demeanor was remarked upon as strange and erratic. His statements suggested his own first-hand knowledge of the facts of the killing. He immediately stated that he had "already touched" all "evidence that relates to this case." He claimed to have perceived things in the dark of night that were difficult to discern even in daylight by responding officers.

Finally, there is no evidence that anyone else had been present at the scene. This crime occurred at a remote hilltop house surrounded by open desert with about a mile between the Richards' property and the nearest house. (E024368 Vol. I C.T. 92:20-21; 93:2-7.) Sheriff's officers themselves had difficulty reaching it. Nor did officers find any sign of disturbance in the area within a 100-yard radius of the home.

In light of this, it is obvious that petitioner has presented nothing that could "completely undermine" the State's entire case. His offer is, essentially, a further discrediting of an item of evidence never viewed as substantial, an entirely non-dispositive DNA result, and arguments over photographs that were already admitted and considered at trial. In short, he is attempting to carry a great burden with conspiracy theories and speculation. That cannot suffice here.

The trial court's grant of petitioner's petitioner for habeas relief was in error. The appellate court's subsequent reversal of its findings was proper and supported in law and fact. The People respectfully request this Court affirm the appellate court's findings.

Done this June 16, 2011.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney

STEPHANIE H. ZEITLIN,
Deputy District Attorney
Appellate Services Unit

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Bookman Old Style font and contains 10,564 words, excluding required tables, this certification, signature blocks and the proofs of service pursuant to California Rule of Court 8.500.

Executed on June 16, 2011, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney

STEPHANIE H. ZEITLIN,
Deputy District Attorney
Appellate Services Unit

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

STATE OF CALIFORNIA	)		**WILLIAMS RICHARDS**
	)	ss.	**S189275/SWHSS700444/**
COUNTY OF SAN BERNARDINO	)		**FVI00826**

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, San Bernardino, California 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 June 16, 2011, I served the within:

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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

Jan Stiglitz, Esq.
California Innocence Project
225 Cedar Street
San Diego, CA 92101

Howard C. Cohen
Appellate Defenders Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101-2396

Office of the Clerk
California Court Of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, Ca 92501

Gary W. Schons
Senior Assistant Attorney General
Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-85266

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on June 16, 2011.

Sheila Walker

OFFICE OF THE DISTRICT ATTORNEY
SAN BERNARDINO COUNTY

PROOF OF SERVICE BY INTEROFFICE MAIL

STATE OF CALIFORNIA	)		**WILLIAMS RICHARDS**
	)	ss.	**S189275/SWHSS700444/**
COUNTY OF SAN BERNARDINO	)		**FVI00826**

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 California 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing inter-office mail used by the County of San Bernardino;

That on June 16, 2011, I served the within:

RESPONDENT'S ANSWER BRIEF ON THE MERITS

on interested party by providing a copy thereof by depositing a copy thereof, enclosed in an inter-office envelope for collection by the County Inter-Office Mail Service addressed to:

Clerk of the Court for delivery to
Hon. Brian McCarville
Department S-36
San Bernardino Superior Court
303 W. Third Street
San Bernardino, CA 92415-0210
IOM 0210

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino California, on June 16, 2011.

Sheila Walker