IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF AUTHORITIES

CASES Page

FEDERAL

CALIFORNIA

STATUTES

PENAL CODE

MISCELLANEOUS

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PETITIONER'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Petitioner assumes that this Court has read and considered all of the facts and arguments made in the Opening Brief. As a result, this brief will focus solely on assertions made by respondent in its brief and will not burden the Court with a detailed repetition of the facts and arguments already presented by petitioner.

STATEMENT OF FACTS

Since the issues presented in this case are fact sensitive, respondent's "Summary of Trial Evidence" requires some scrutiny and does not tell the entire story.

First, as was true in the Court of Appeal, there is reference to blood spatter evidence offered by criminalist Gregonis against Richards. (Resp. Br.

p. 10.) Yet there is no reference to the testimony of Los Angeles County Criminalist Dean Gialamas who concluded that the stains on Richards' clothing were *not* consistent with his being the perpetrator of the violent attack on Pamela. (7 Tr. R.T. 1659.)

Second, respondent again claims there was "significant evidence of crime scene manipulation" but only cites the testimony of Gregonis about some allegedly diluted blood which Gregonis failed to document in his notes or to testify about in the preliminary hearing or in the first two trials. (Resp. Br. p. 9.) In a footnote, respondent attempts to justify its use of the term "significant" (which is not a word that Gregonis used in cited pages). The key point, however, is that there is *no* evidence which shows that any of this alleged manipulation was attributable to Richards. The existence of manipulation says nothing about who was responsible for it. In other words, evidence of manipulation is not evidence that supports the claim that Richards was responsible for the murder.

Respondent also misrepresents Richards' claims regarding the shoe print evidence. Richards never argued – as suggested by respondent – that he was not present at the crime scene. (Resp. Br. p. 11, n. 8.) Of course Richards was there. He lived there. He found the body. He called the police. He was there when the police arrived. The point respondent missed was that the

ground at the crime scene was not conducive to foot prints. (2 Tr. R.T. 323.) In fact, investigators only found two prints belonging to Pamela, and we know, that she, like Richards, was present at the crime scene. Thus the absence of unidentified footprints is of limited significance.

Respondent also claims that if Pamela had died face down, she would have had marks from the gravel and terrain on her chest. (Resp. Br., p. 7.) However, the Medical Examiner testified that lividity may not become fixed until four hours have elapsed. (2 Tr. R.T. 320.) He also testified that the pebbles at the scene "could" have left marks on her if her clothing was "not too thick." (2 Tr. R.T. 322.) Since Pamela was wearing a shirt (Habeas Exh. 6), there is no assurance that any marks were made. If the murder occurred less than four hours prior to Richards cradling Pamela in his arms upon finding her, the marks may well have disappeared prior to when the Medical Examiner performed the autopsy – which was days after the body had been discovered. (2 Tr. R.T. 350, 352.)

Respondent also relies, improperly, on the Sheriff's Department's summary of an interview with a person named Susan Ellison for the proposition that Pamela was afraid of Richards. (Resp. Br. p. 11.) This report is double hearsay and was never offered into evidence at Richards' trial. Its inclusion under the heading of "Summary of Trial Evidence" serves no

legitimate purpose. Richards' burden is to confront the evidence presented against him – not any random document which contains information that respondent finds somewhere and uses to "poison the well."

Respondent's recitation of the testimony from the evidentiary hearing suffers from similar problems.

With regard to the testimony of Dr. Bowers, respondent states, with derision, that Dr. Bowers "prattled on with similar testimony to Dr. Johanson." (Resp. Br. p. 18.) Respondent then suggests that Dr. Bowers' conclusion that Richards could be eliminated as the person responsible for the bitemark should be ignored, because it was based on a "forced match." (Resp. Br. p. 19.) Dr. Bowers testified that in order to do a bitemark analysis, the odontologist needs to establish a starting point for comparison. (2 R.T. 232.) Here, Dr. Bowers chose an area where Richards' tooth number 22 would fit as his starting point. (*Ibid.*) Respondent fails to note that Dr. Bowers also used the size of the bruise, as compared to the size of Richards' lower teeth, as another basis for his conclusion that Richards could be eliminated as the source of the bitemark.

Notwithstanding respondent's attempts to discredit and diminish the probative value of the testimony presented by Bowers, Sperber, and the other experts, this Court should take note of the fact that respondent never introduced any contrary testimony. The fundamental conclusions reached by

petitioner's experts were not contradicted by any experts offered by respondent.

Thus, the court which heard this evidence had every reason to accept the conclusion that Richards could not have been responsible for the bitemark used to convict Richards.

ARGUMENT

I.

RICHARDS' CONVICTION WAS THE PRODUCT OF FALSE EVIDENCE SUGGESTING THAT A "BITEMARK" FOUND ON PAMELA'S HAND WAS CONSISTENT WITH RICHARDS' DENTITION AND COULD ONLY HAVE BEEN MADE BY RICHARDS AND TWO PERCENT OF THE POPULATION.

In its brief, respondent presents no real challenge to the testimony presented at the habeas by Dr. Sperber in which Dr. Sperber concluded: (1) that he had no scientific basis for presenting an estimate regarding the relative rarity of Richards' dentition, (2) that under current standard he should not have offered such an opinion, and (3) that after reviewing the digitally rectified photograph of the bitemark, Richards is "excluded" as the person responsible. Instead, respondent claims that the recantation by Sperber does not meet the definition of "false evidence" under Penal Code section 1473. (Resp. Br, pp. 24-29.)

In support of this position, respondent first takes issue with this Court's

holding in *In re Hall* (1981) 30 Cal.3d 408, claiming that "this Court . . . incorrectly cite[d] to *Wright* as authority for the proposition that a showing of 'false evidence' could be made merely by reference to a witness's *incorrect* statement, if later evidence convinced a judicial officer that the statement 'apparently' was *incorrect*." (Resp. Br. p. 25, citing *Hall, supra*, 30 Cal.3d at p. 424 and *In re Wright* (1978) 78 Cal.App.3d 788.)

Respondent's criticism is not supported by any language in *Hall* or *Wright*. *Wright* was the first published case to deal with the change in Penal Code section 1473. The statute as written in 1975 only required a showing of "false" evidence and the court in *Wright* held that this change eliminated the longstanding requirement that a petitioner show there was perjured testimony known to state officials. (*In re Imbler* (1963) 60 Cal.2d 554, 560.) In *Hall*, this Court simply and correctly cited *Wright* for the proposition that "there is no longer any obligation to show that the testimony was perjured or that the prosecutor or his agents were aware of the impropriety." (*Hall, supra*, 30 Cal.3d at p. 424.)

Citing this Court's decision in *In re Bell* (2007) 42 Cal.4th 630, respondent also claims: "[A]t a minimum this Court has made it perfectly clear that a 'false evidence' claim will not serve as a 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." (Resp. Br., p. 26.) Nothing in *Bell* supports respondent's assertion.

Petitioner Bell's habeas claim was premised, originally, on declarations alleging recantations by a number of witnesses, including Dorothy Dorton. (*Bell*, *supra*, 42 Cal.4th at p. 635.) At the hearing on the habeas claim, most of the declarations, including Dorton's, were withdrawn and Dorton actually testified for the prosecution. (*Id.* at p. 636.)

The hearing focused on a witness named Kelly, who claimed that a trial witness named Jackson had admitted to falsely inculpating Bell and to persuading other witnesses (including Dorton) to falsely implicate Bell. As this Court stated: "by the end of the hearing, petitioner's claims for relief rested almost entirely on the testimony of Leroy Kelly . . . ." (*Bell*, *supra*, 42 Cal.4th at p. 638.) The referee found Jackson to be credible in denying that she recanted to Kelly and found that Kelly was not credible. (*Id.* at p. 639.) This Court accepted those factual findings. (*Ibid.*)

At the very end of the opinion, this Court referred to a minor claim in the petition noting an inconsistency in Dorton's testimony. (*Bell*, *supra*, 42 Cal.4th at p. 642.) In rejecting this discrepancy as a basis for habeas relief, this Court noted that the discrepancy had been presented at trial and rejected by the

jury. (*Ibid.*) Nothing in the *Bell* opinion suggests that the referee had made any findings about this alleged discrepancy that was supportive of Bell's claim.

Thus, *Bell* does not undermine Richards' claim or support respondent's position. Here, unlike *Bell*, the critical witness (Dr. Sperber) *has* recanted and the judge hearing the evidence found the recantation to be credible. Moreover, here the entitlement to habeas relief is not based on a dispute between two witnesses who testified at trial (Sperber and Golden). It is premised on Sperber testifying that he was wrong. It is also premised on both witnesses agreeing that they were wrong in concluding that Richards could have been responsible for the bitemark.

In rejecting the argument that Dr. Sperber provided false evidence at the original trial, respondent also states: "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." (Resp. Br., p. 2.) There are several problems with this argument. First, at the time of trial, Dr. Sperber had no scientific studies on which to base his original statistic regarding the number of people out of a hundred who would match Richards' dentition. Second, Dr. Sperber's recantation was not solely based on "years of additional experience." It was based on a scientific advance: the ability to digitally rectify distortion in the photo he relied upon and to superimpose a

precise computer drawn outline of Richards' dentition on the lesion. Third, even if the recantation was based solely on expertise gleaned from additional years of experience, the bottom line is the same: Dr. Sperber now knows that he was wrong in testifying that Richards' dentition matched the bitemark in a way that included Richards and, most critically, Sperber has now testified that Richards can be excluded as the person responsible for the bitemark.

In terms of our criminal justice system – and the need to remain vigilant to the possibility that an innocent person may have been wrongfully convicted – once an expert says "I was wrong," it should not matter whether that conclusion is based on additional experience or advances in science. Further, to draw some distinction between "wrong" and "false" is to let semantics interfere with justice.

Respondent's position also fails to recognize the widespread problem with unreliable and invalid forensic evidence. In a recent book, Brandon Garrett documented the prevalence of unreliable and invalid forensic evidence used to convict innocent people. (Garrett, Convicting the Innocent, Where Criminal Prosecutions Go Wrong (2001) pp. 89-91.) Garrett found that "in 61% of trials where a forensic analyst testified for the prosecution, the analyst gave invalid testimony," including 5 out of 7 cases involving bite mark comparison. (*Id.* at p. 90.)

Respondent also argues that acceptance of Richards' position would "encourage experts . . . to avoid schooling themselves on developments within their respective fields and, rather, languish in stagnant knowledge." (Resp. Br. p. 28.) Respondent fails to explain why that would be the case. It seems far fetched to suggest that a distinguished expert, like Sperber, would avoid keeping up to date in his field because he might be presented, a decade later, with the opportunity to go into court and admit a mistake.

Contrary to what respondent claims, a decision in Richards' favor would not encourage lazy experts. Instead, it would properly recognize what we all know to be true: experts make mistakes, advances in science and technology help courts and experts recognize those mistakes, and those whose convictions are caused by flawed science should have a vehicle to present those mistakes and obtain their release.

With regard to the bitemark testimony, respondent also argues that "It is not the prerogative of a post-conviction court to disregard the law's nuanced approach to expert scientific testimony, and override the fact finders' credibility determinations, by uncritically assuming the truth of one opinion and the falsity of another opinion." (Resp. Br., p. 27.) However, courts have long recognized the power of expert testimony and the need to step in. As stated by the court in *United States v. Frazier* (11th Cir. 2004) 387 F.3d 1244,

1263: "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." Similar sentiments were expressed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 595 [113 S.Ct. 2786, 2798; 125 L.Ed.2d 469, 484]: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under [Federal Rules of Evidence] Rule 403 of the present rules exercises more control over experts than over lay witnesses." (Citing Weinstein, Rule 702 of the Federal Rules of Evidence is Sound: It Should Not be Amended (1991) 138 F.R.D. 631, 632.)

Given the powerful nature of forensic evidence, this Court should conclude that demonstrably flawed evidence like that presented at Richards' trial be reviewable as "false" evidence under Penal Code section 1473.

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II.

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

As documented in the Opening Brief, the false evidence used against Richards was material and probative. Richards was not convicted in the two trials which did not have bitemark testimony, but was convicted once this testimony was offered. The prosecution's case was entirely circumstantial and relied, in no small part, upon the feelings and impressions of law enforcement and the fact that law enforcement was unable to find anyone else to blame.

Respondent never directly addresses this argument. Instead, respondent argues that Dr. Sperber's recantation does not constitute false evidence (Resp. Br., Point II, pp. 24-2) and that Richards cannot show that the change in Dr. Sperber's testimony "even begins to 'completely undermine' the prosecution's case" (Resp. Br., Point III, pp. 29-30).

If this Court does find that the bitemark evidence introduced against Richards was false evidence, the materiality standard under Penal Code section 1473 applies. And, as fully articulated in the Opening Brief, Richards need not meet the higher, new evidence standard. (Opening Br., pp. 41-47.)

Respondent's failure to argue that Richards has not met the materiality standard suggests a concession on respondent's part that Richards has met that standard.

III.

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

In its brief, respondent correctly cites appropriate case law governing new evidence claims but continues to make the same errors made by the Court of Appeal. Respondent fails to consider the cumulative impact of new evidence presented, both ignores and understates the probative value of that evidence, and overstates the probative value of the evidence presented by the prosecution.

Some of these problems are encapsulated in the following passage from its brief:

> The mere presence of the DNA does not, in fact, exonerate petitioner. Nor is it inclusive. All it shows is that at some point, someone touched, sneezed, spoke over or handled the stepping stone. It does not negate the myriad 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 scene.

(Resp. Br. p. 23.)

As fully documented in the Opening Brief, Richards does not rely on the "mere presence of DNA." Richards relies on the location of the DNA, the ratio of the DNA to Pamela's DNA, as well as the hair and the bitemark evidence. In context, the DNA evidence suggests more than the fact that someone spoke over or sneezed on the paving stone.

The combination of the DNA on the murder weapon, a hair under Pamela's fingernail likely belonging to her attacker, and a bitemark made by someone other than Richards certainly trumps the alleged motive, the "impressions" of law enforcement officials, and the fact that Richards, who was at the scene and had lived there, was familiar with it. It is also far more probative than respondent's attempted reliance on a document, never presented to the jury, containing a double hearsay claim of a "violent" relationship between Richards and Pamela.

Further, it is unclear exactly what "hard evidence" exists which "negat[es] the presence of anyone else at the scene." The absence of footprints on a surface that was demonstrably not conducive to footprints is not "hard evidence." The absence of fingerprints – when investigators never looked for prints (2 Tr. R.T. 318) – is not "hard evidence." Testimony that a husband and wife argued about money and sex is more a "fact of life" then "hard evidence."

Respondent argues that "Motive and opportunity do not lie." (Resp. Br. p. 24.) Here, however, the evidence regarding opportunity raises serious questions regarding opportunity. Under the prosecution's theory, Richards only had 8 minutes to commit the crime and engage in all of the alleged manipulation.

But DNA belonging to someone other than Richards on the murder weapon *is* circumstantial evidence that someone else was there. Hair belonging to a stranger, lodged under Pamela's fingernail, is also evidence that someone else was there. Finally, the prosecution presented evidence that Richards – the alleged killer – left a bitemark on Pamela. If that bitemark did belong to Pamela's killer and it was not left by Richards, it is extremely probative evidence that someone else was there – evidence far more persuasive than impressions and motive. Analytically, a bitemark made by Pamela's murderer can be just as probative as semen left by a rapist.

Respondent also suggests that Richards did not present "new" evidence, because "All of the parties have been well-aware of the photo distortion issues since the inception of this criminal case." (Resp. Br. p. 24.) However, Richards never suggested that the distortion was new evidence. The new evidence presented was based on the ability to rectify the distortion through the use of Photoshop, a technique that was not in use at the time of Richards' trial.

Richards was only convicted after three trials. Without the bitemark evidence, the prosecution's case – which was largely "who else?" – was too weak. Richards' new evidence answers that question: the person who left the DNA on the murder weapon, the bitemark on the victim, and the hair under the victim's fingernail. Since the new evidence shows that Richards was not that person, the cumulative effect of the new evidence undermines the prosecution's case and points unerringly towards innocence.

CONCLUSION

This Court should conclude that Richards' conviction was the product of false evidence and that he has presented sufficient new evidence to have his conviction reversed. The facts, the law, and justice require that the decision of the superior court, which granted the petition for writ of habeas corpus, be reinstated.

Respectfully submitted,

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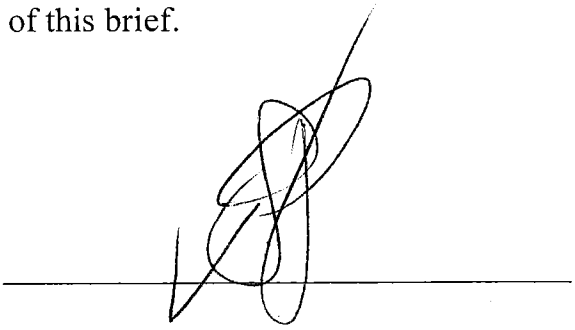
WORD COUNT CERTIFICATION

I hereby certify that the foregoing Petitioner's Reply Brief on the Merits contains 3,368 words, including footnotes, not including the cover or tables, as ascertained by the word count function of the computer program (WordPerfect) used to prepare the memorandum.

I understand California Rules of Court rules 8.520(c)(1) limits an Opening Brief on the Merits to 8,400 words, therefore I have simultaneously filed a request for permission to file a non-conforming brief, which is to be considered prior to the filing of this brief.

Dated: July 6, 2011



JAN STIGLITZ

PROOF OF SERVICE

I declare as follows: I am over the age of eighteen years, not a party to this action, my business address is 225 Cedar Street, San Diego, CA 92101. On the date shown below, I served Petitioner's Reply Brief on the Merits in case No. S189275 to the following parties by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail as San Diego, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 6th day of July, 2011, at San Diego, California.

Jan Stiglitz