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Jan Stiglitz
California Western School of Law, js@cwsl.edu

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VIEW FROM THE TRENCHES: THE STRUGGLE TO FREE WILLIAM RICHARDS

*Jan Stiglitz**

I. INTRODUCTION

The mounting number of convictions reversed as a result of DNA testing and television shows like “CSI” have probably given the general public some misperceptions about forensic evidence and the criminal justice system. First, DNA is *not* always a magic bullet that will conclusively demonstrate innocence. Second, not all forensic evidence presented at trial is scientifically valid. To the contrary, junk science has been a major cause of wrongful convictions. Finally, prosecutors do not willingly and graciously partner with innocence projects when we come forward with information suggesting that an innocent person has been convicted of a crime. Instead, most prosecutors reflexively fight efforts to overturn wrongful convictions even when faced with evidence of innocence that most fair-minded people would find compelling.¹

Those facts are also illustrated by the story of William Richards’s efforts to overturn his wrongful conviction. In 2001, William Richards contacted the newly formed California Innocence Project (CIP) for help. In 1997, Richards had been convicted of killing his wife, Pamela Richards. As will be discussed, the evidence against him was, primarily, circumstantial and far from compelling. What follows is the story of our² continuing efforts to seek his release.

* Professor of Law and Co-Director, California Innocence Project, California Western School of Law.

¹ The struggle to overturn wrongful convictions and the attitude of prosecutors in opposing those efforts is illustrated in two powerful documentaries: *After Innocence* [which documents several cases pursued by the Innocence Project] and *Witch Hunt* [which documents the efforts that the California Innocence Project and the Northern California Innocence Project undertook to exonerate John Stoll and others who were wrongfully convicted for being part of an alleged child molestation ring in Bakersfield, California]. *AFTER INNOCENCE* (New Yorker Films 2005); *WITCH HUNT* (KTF Films 2008).

² Most of the work in the Richards investigation and litigation was directed by me and my “partner in crime” Justin Brooks, Co-Founder and Director of the California Innocence Project. But cases like this “take a village.” Over the nine year life of this case, Justin and I were assisted by four staff attorneys (Nancy Rosenfeld, Alex Simpson, Wendy Koen, and

II. THE CRIME SCENE AND FIRST TWO TRIALS

Sometime in the afternoon or evening of August 10, 1993, Pamela Richards was strangled and severely beaten with a large paving stone and a cinder block.³ The murder scene was a remote location in Hesperia, California. Bill and Pamela lived there in a trailer. Electricity came from a gas powered generator.

Richards left work on the night of August 10, 1993, at 11:03 p.m. Based on "trial runs" from his workplace, the San Bernardino County Sheriff's Department believed that Bill arrived home at 11:47. Richards called 911 at 11:58. Thus, under the prosecution's time line, Richards had approximately eleven minutes in which to have committed the crime. And it was undisputed that during that small window of time, Richards received a phone call from a man named Gene Price, who called and expressed concern because he had been unable to reach Pamela by phone earlier that evening.

It took a while for the police to arrive and even then, they did not secure or process the crime scene. It was too dark. The investigation did not really commence until daylight and by then, dogs which roamed the area had wandered around the crime scene and had partially covered up Pamela's face with dirt. In addition, no one from the Sheriff's Department or the Medical Examiner's Office ever attempted to take Pamela's core liver temperature to determine a time of death. Nor did they investigate other clues that might have established a clearer time line. For example, they did not feel the generator to see if it had been used that night.

The first two trials resulted in hung juries. The prosecution introduced some evidence to suggest that Bill and Pamela were having marital and financial problems. The prosecution introduced some testimony which suggested that Richards had lied about whether he had found Pamela's body face up or face down (a fact which had no forensic significance). The prosecution introduced blood spatter evidence which suggested that blood stains found on Richards's clothing were consistent with high velocity blood spatter and not merely blood which had been transferred when, as Richards claimed, he'd cradled Pamela's dead body. Finally, the prosecution

Alissa Bjerkhoel), two volunteer attorneys (Mario Conte and Christopher Plourd) and eight clinic students (Amy Luo, Jevon Hatcher, John Nielsen, Lance Banks, Ashley Augustin, Brian McNeil, Mary Ott, and Derek Van Deviver). All deserve credit for our success to date.

³ The description of the events is taken from the record on appeal. Petition for Writ of Habeas Corpus at 30, *People v. Richards*, No. E024365 (Cal. Ct. App., 4th App. Dist., Div. 2 Dec. 5, 2007).

argued that a small tuft of blue fibers allegedly found under Pamela's fingernail was consistent with material from the shirt that Richards had worn.

The defense countered with an expert who testified that the limited amount of blood found on Richards's clothing was totally inconsistent with the prosecution's theory. The crime scene indicated a violent bloody struggle had taken place and Richards had almost no blood on his shirt and no blood spatter on his pants. The defense also relied on the fact that Richards had no marks on any part of his body, yet Pamela's broken fingernails suggested that her attacker would have some scratches or other marks from the struggle. Finally, the defense pointed to the absence of any marks or tears on Richards's shirt. Other than a hole made by the Sheriff's Department's criminalist (Daniel Gregonis) to obtain a sample for fiber comparison, the shirt was intact.

III. THE BITE MARK EVIDENCE IN THE THIRD TRIAL

During the third trial, both sides introduced testimony from forensic odontologists regarding a crescent shaped injury (or "lesion") which had been found on Pamela's right hand. Relying on a single photograph provided by the prosecution, Dr. Norman Sperber, the prosecution's expert, testified that the injury was consistent with a human bite mark. He also testified that whoever had left that bite mark had a rather distinctive abnormality relative to their lower right canine tooth which would only occur in "one or two or less" out of one hundred people. The defense expert, Dr. Gregory Golden, also based his testimony on the one photograph. Like Sperber, Golden believed that injury was a human bite mark and testified that he could not rule Richards out as the biter. However, he testified that he could also not rule out others, whose (teeth) exemplars he had in his office.

This time, after deliberating for three days, the jury came back with a guilty verdict.

IV. DNA TESTING

As indicated, in 2001, Richards contacted the California Innocence Project. We quickly determined that there was a hair found under Pamela's fingernail which had never been tested. We also believed that the rough surfaces of the paving stone and the cinder block might contain testable genetic material left by the person who wielded these weapons. Finally, we identified

individuals who might be linked to the crime through DNA testing of the hair and the paving stone.

One, Gene Price, was the person who claimed to have tried to call Pamela on the night of the murder. Our investigation indicated that he and Pamela once had an intimate relationship. However, Pamela's sister (now deceased) told us that the Pamela's relationship with Price had ended and that Pamela was now afraid of Price.

The second was an individual named Rafael Resendez-Ramirez ("Resendez"). At the time, Resendez was on death row in Texas. Known as the "Railway Killer," Resendez was believed to have been responsible for scores of murders throughout the United States and Mexico.⁴ Of particular interest to us was the fact that Resendez traveled by train and committed most of his crimes in remote areas near railroad lines. (Richards's property was both remote and near to a railway line.) In addition, Resendez's crimes were particularly bloody and brutal.⁵

Then-recent legislation in California allowed us to get court-ordered DNA testing in cases where the identity of the perpetrator was at issue, where the evidence sought to be tested would be material to issue of identity, and where test results would have raised a probability of a more favorable result if the testing had been available at the time of trial.⁶

In order to expedite the testing, and because we believed that Richards's case was exactly the kind of case the legislature had in mind when it enacted Penal Code section 1405, Justin and I picked up the phone and called Michael Risley, the Deputy District Attorney (DDA) who had prosecuted the case. Risley did not share our view. First, he told us that our client was guilty. When we asked Risley why he could be so sure in light of the absence of any direct evidence and the fact that two prior juries had doubt regarding Richards's culpability, Risley said, in words or substance: "Trust me. I know he's guilty." Risley then made it clear that while he was happy to "cooperate" with us, his office would not stipulate to testing and would vigorously oppose a 1405 motion.

So in December of 2005, we filed our 1405 motion, and in February of 2006, the District Attorney's office filed its opposition.

⁴ Linda Diebel, *187 Deaths Now Linked to Railway Killer*, TORONTO STAR, July 6, 1999.

⁵ Michael Graczky, *Suspected Serial Killer Resendez-Ramirez is a Master of Disguise*, MACON TELEGRAPH, June 24, 1999, at B6; Allan Turner, *Texas Killer May Have Links to '93 California Cases*, HOUS. CHRON., Nov. 18, 2001, at A37.

⁶ CAL. PENAL CODE 1405(f) (West Supp. 2010).

On the issue of whether favorable DNA evidence would have made a difference in the result, we, of course, cited the fact that two prior juries had been unable to reach a guilty verdict.⁷ The District Attorney's response to that claim (authored by DDA Grover Merritt) ranks as one of the oddest I've encountered in over thirty-four years of practice. For example, he cited the movie *12 Angry Men* for the proposition that juror disagreement does not necessarily mean disagreement over the evidence.⁸ Justin and I were both amused and confused: Was Merritt trying to argue that the jurors in *12 Angry Men* were wrong and that the movie should have ended in a guilty verdict? Or was he saying that the criminal justice system should not trust jury verdicts—an odd position for a prosecutor to maintain?

Regardless, in July of 2003, the judge who heard the motion granted it and we were, naively, confident that Richards's release was just going to be a matter of time, maybe six months to a year. However, our DNA consultant had suggested to us that we have all testing done by the California Department of Justice (DOJ) in order to avoid any claims that the lab which tested the material was untrustworthy or biased. The District Attorney's office agreed to that suggestion and the critical items (including the paving stone and the hair found under Pamela's fingernail) were sent off for testing in mid-2003.

Unfortunately, the DOJ did not give our request much priority and, literally, years went by without any testing being performed.⁹ Despite repeated calls and letters, we did not get all of the DNA test results back until February, 2007.

As we hoped and expected, DNA was found on the paving stone in the exact location where the Criminalist Gregonis had suggested the killer's DNA might be found and that DNA did *not* match either Bill or Pamela. Similarly, mitochondrial DNA testing indicated that the hair found under Pamela's nail did not belong to either Bill or Pamela. Unfortunately, it was impossible to determine whether the DNA from the paving stone came from the person whose hair

⁷ Motion for DNA Testing at 17, *People v. Richards*, No. FVI-00826 (Super. Ct. San Bernardino County Dec. 5, 2002).

⁸ Opposition to Defendant's Motion for Post-Conviction DNA Testing at 20, *People v. Richards*, No. FVI-00826 (Super. Ct. San Bernardino County Dec. 5, 2002).

⁹ Similar problems have arisen on other cases. In one case, the court ordered DNA testing on hair found in the victim's hand. The lab insisted that "hair" was singular and would not test all of the hair we had sent. The lab wanted us to select one. We declined and went back to court for clarification.

was found under Pamela's fingernail.¹⁰

IV. NEW BITE MARK EVIDENCE

While we were waiting for the DNA results, we contacted two other forensic odontologists and interviewed the two dental experts who had testified at Richards's third trial. The results were eye-opening. First, we learned that the photograph which Dr. Sperber and Dr. Golden had relied upon contained what is known as "angular distortion" caused by the fact that the camera which had taken the photo had not been on the same plane as the surface of the hand. Using Adobe Photoshop, Dr. Michael Bowers was able to correct the angular distortion. When he did so and compared the corrected photograph with an exemplar of Richards's teeth, he was able to *exclude* Richards's teeth as the source of injury found on Pamela's hand.

Another expert suggested that the injury which the prosecution claimed was a bite mark, could as easily have been made by a wire mesh screen found near the body.

Finally, Dr. Sperber recanted his trial testimony. Dr. Sperber told us that he never should have provided an estimate regarding the percentage of the population which had the dentition abnormality he had identified in Richards. At the time, he was not aware of any studies which would have provided statistical support for his testimony. Moreover, the American Board of Forensic Odontology now finds such testimony to be inappropriate in the absence of any scientific studies. Finally, he, like Dr. Bowers, now believed that the corrected photo ruled out Richards as the person who caused the injury.

V. WERE THE BLUE FIBERS PLANTED?

My partner Justin always tells our students that they need to "rework the crime." To the extent possible, they should reexamine all of the evidence to see where it was found, how it was handled, and how it was used as trial. Following this admonition, a clinic student named Wendy Koen went back through the autopsy photos (taken prior to Pamela's fingers being removed) and compared them

¹⁰ Mitochondrial DNA is found outside of the nucleus of a cell. Examination produces a "sequence." Nuclear DNA comes from the nucleus and, when tested, reveals a "profile." See Stipulated Testimony of Marc Taylor, Transcript on Appeal at 995, *In re Richards*, No. E049135 (Cal. Ct. App. 4th Dist. 2007).

with the photos allegedly showing the tuft of blue fiber being removed from under the fingernail (which occurred after the fingers had been removed and given to Criminalist Gregonis). That examination suggested that the fibers were not present in the nail at the time of the autopsy and therefore could not have been there as a result of any struggle between Pamela and her killer. In addition, Wendy's research indicated that Gregonis had been accused of providing false and misleading evidence in another high profile murder case in San Bernardino County.

VI. THE HABEAS PROCEEDINGS

In November of 2007, we filed a petition for writ of habeas corpus seeking to overturn Richards's conviction.¹¹ By then, we were under no illusions regarding the fact that we were going to face vigorous opposition to our claim. Fortunately, we had a judge who was both fair and intelligent. Unfortunately, this did not result in a quick resolution.

Some delay was caused by the District Attorney's written response to the petition. The initial response was a long, rambling explanation of why Richards was guilty but never directly admitted or denied the specific allegations in the petition. I was forced to make a motion to strike the District Attorney's pleading for its failure to either admit or deny the particular allegations we had made. The District Attorney's second response was equally flawed and I had to make another trip to San Bernardino to argue—successfully—that the court should strike the second response.

Further delay was caused by the fact that habeas work is low priority for the courts and District Attorney's office. In addition, since we did not have subpoena power or discovery rights prior to the filing of a petition, we had to start and stop proceedings as new information came to light. For example, we first learned, more than a year after the petition had been filed, that the District Attorney's office at one point had three photographs of the injury on Pamela's hand and that back in 1994, there had been a request to have those photographs sent to an expert for an opinion.

This resulted in some substantial and unexpected delay. It was possible that the prosecution had failed to turn over photos and a report suggested we might have to raise a *Brady* claim against DDA

¹¹ The testimony described in this section is taken from the record on appeal. Petition for Writ of Habeas Corpus at 10, *in re Richards*, No. E049135 (Cal. Ct. App. 4th Dist. 2007).

Risley.¹² That possibility prompted DDA Meritt to recuse himself. Between the time of our 1405 motion and the hearing, Risley had been responsible for Meritt getting fired. Meritt sued and was reinstated, but did not believe that he could stand up in court and vouch for Risley's honesty and integrity. Unless we were willing to drop any possible *Brady* claim, the case was going to be put on hold until a new DDA could substitute for Meritt and get up to speed. What made the decision to pursue a possible *Brady* claim even harder was the fact that Bill Richards had developed cancer and time was not on his side.

Unfortunately, the other pictures were never found and to this day we do not know whether they were submitted to an expert. When we questioned a detective who had been involved about that inquiry, he told us that the medical examiner had concluded that the bite mark on Pamela's arm had come from a dog.

VII. THE LEGAL ARGUMENTS

Our legal theory was that Richards's conviction was the product of false evidence (the bite mark testimony and the fiber testimony) and that we had new exculpatory evidence (the new expert testimony based on the corrected photograph of the alleged bite mark and results of the DNA testing). In California, the standards for the two are similar. A criminal judgment may be collaterally attacked on the basis of newly discovered evidence if such evidence casts a "fundamental doubt on the accuracy and reliability of the proceedings" and "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability."¹³ However, it is not necessary that a petitioner refute every piece of evidence or every possible scenario in order to conclusively establish his innocence.¹⁴ To obtain habeas relief on the ground of false evidence, there is no requirement that perjury be proved.¹⁵ Where a false evidence claim is based upon non-perjured false testimony, the California Supreme Court has suggested, recently, that the same standard which applies to new evidence applies to the false evidence claim.¹⁶

¹² See *Brady v. Maryland*, 373 U.S. 83 (1963).

¹³ *In re Hardy*, 163 P.3d 853, 882 (Cal. 2007); *In re Hall*, 637 P.2d 690, 693 (Cal. 1981); *In re Weber*, 523 P.2d 229, 243 (Cal. 1974).

¹⁴ See *Hall*, 637 P.2d at 698.

¹⁵ *In re Wright*, 144 Cal. Rptr. 535, 549 n.5 (Cal. Ct. App. 1978).

¹⁶ *In re Lawley*, 179 P.3d 891, 898 (Cal. 2008). In *Lawley*, the California Supreme Court made it quite clear that the "actual innocence" standard did apply to new evidence claims.

VIII. RICHARDS'S CONVICTION WAS BASED ON "JUNK" SCIENCE

Between the time of Richards's conviction and the habeas hearing there was a wealth of research and case law which supported our claim that Dr. Sperber's trial testimony regarding Richards's teeth being a match and one that would only be found in some low, defined percentage of the population was the equivalent of "junk science."

Even before Richards's conviction, the scientific validity of bite mark comparisons and testimony has been challenged. For example, in 1985, two researchers wrote:

There is effectively no valid documented scientific data to support the hypothesis that bite marks are demonstrably unique. Additionally, there is no documented scientific data to support the hypothesis that a latent bite mark, like a latent fingerprint, is a true and accurate reflection of this uniqueness. To the contrary, what little scientific evidence that does exist clearly supports the conclusion that crime-related bite marks are grossly distorted, inaccurate, and therefore unreliable as a method of identification.¹⁷

Those criticisms had not dissipated in the ensuing twenty-four years, and were echoed in a recently published study of the National Research Council entitled *Strengthening Forensic Science in the United States: A Path Forward*.¹⁸

The NSC Study was the product of a congressional request that the National Academy of Sciences review issues related to the use of non-DNA forensic evidence in our judicial system.¹⁹ In its introduction, the NSC Study states:

For decades, the forensic science disciplines have produced valuable evidence that has contributed to the successful prosecution and conviction of criminals as well as the exoneration of innocent people. . . .

Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty

However, the Supreme Court did not expressly state that this standard was going to apply to false evidence claims under Penal Code § 1473. Moreover, the court repeatedly cited its decision in *In re Bell*, 170 P.3d 153, 157 (Cal. 2007), which articulates different standards for new evidence and false evidence claims.

¹⁷ Allen P. Wilkinson & Ronald M. Gerugthy, *Bite Mark Evidence: Its Admissibility Is Hard to Swallow*, 12 W. ST. U. L. REV. 519, 560 (1985).

¹⁸ NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009).

¹⁹ *Id.* at 1-2.

forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.²⁰

In its discussion of the admissibility of forensic evidence, the NSC Study found that “[m]uch forensic evidence—including, for example, bite marks and firearm and toolmark identifications—is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.”²¹

In the specific section on forensic odontology, the NSC Study found that bite mark comparison was the most controversial area of forensic odontology and that there “is continuing dispute over the value and scientific validity of comparing and identifying bite marks.”²² In its criticism of bite mark comparisons, the NSC Study stated:

There is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. . . . Even when using the [American Board of Forensic Odontology] guidelines, different experts provide widely differing results and a high percentage of false positive matches of bite marks using controlled comparison studies.

No thorough study has been conducted of large populations to establish the uniqueness of bite marks If a bite mark is compared to a dental cast . . . there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite.²³

Similar conclusions were reached in a recent study of wrongful convictions by Brandon L. Garrett and Peter J. Neufeld, entitled *Invalid Forensic Science Testimony and Wrongful Convictions*, documenting four cases in which odontologists provided invalid testimony which led to convictions.²⁴ One case, involving Ray

²⁰ *Id.* at 4.

²¹ *Id.* at 107–108 (footnotes omitted).

²² *Id.* at 173 (footnote omitted).

²³ *Id.* at 174 (footnote omitted).

²⁴ 95 VA. L. REV. 1, 69 (2009).

Krone,²⁵ was similar to Richards's. The case was mostly circumstantial and the bite mark evidence was described as "critical" to the state's case.²⁶ As in Richards's case, the forensic odontologist found a match and advanced statistics (one in 1200) to suggest the significance of the match.²⁷ Krone was ultimately exonerated when DNA evidence found on the victim excluded him.²⁸

Although there are documented problems with bite mark "matches," bite mark exclusions can be reliable. For example, the Summary Assessment of bite mark analysis in the NSC Study states: "Despite the inherent weaknesses involved in bite mark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects."²⁹ Similarly, in the chapter on *Bite Mark and Dental Identification in Scientific Evidence*, by Paul C. Giannelli and Edward L. Imwinkelried, Jr., the authors write, "[i]t is easier to conclude that a person's dentition and a bite mark do not match than it is to find a match. This is due to the fact that any *unexplained* inconsistency between the bite mark and the dentition means that the suspect could not have made the bite mark."³⁰

As indicated, bite mark evidence was provided at Richards's trial by Dr. Norman Sperber, the chief forensic odontologist for San Diego and Imperial Counties. Relying on only a single, distorted photograph, Dr. Sperber identified a mark that he said: was consistent with a human bite mark; whoever left the mark had a rather distinctive abnormality relative to their lower right canine tooth (number 27); that Richards had the same distinctive abnormality; and that "one or two or less' out of one hundred people would have such an abnormality."³¹ The defense expert, Dr. Golden, also testified from that same single photograph, that he "assumed" the lesion was a bite mark and that he could not rule out Richards as the biter.³²

At the hearing, all of that testimony was recanted. Using new

²⁵ Ray Krone was represented by San Diego Attorney Christopher Plourd, who provided great assistance to us in the Richards case.

²⁶ *State v. Krone*, 897 P.2d 621, 624 (Ariz. 1995).

²⁷ Garrett & Neufeld, *supra* note 24, at 69–70.

²⁸ Dennis Wagner et. al, DNA Frees Arizona Inmate After 10 Years in Prison, ARIZ. REPUBLIC, Apr. 9, 2002, at A1, *available at* www.truthinjustice.org/krone.htm.

²⁹ NSC Study, *supra* note 18, at 176.

³⁰ PAUL C. GIANNELLI & EDWARD L. IMWINKELRIED, SCIENTIFIC EVIDENCE: BITE MARK AND DENTAL IDENTIFICATION § 13.04, at 677 (4th ed. 2007) (emphasis in original).

³¹ Petition for Writ of Habeas Corpus, *supra* note 3, at 35.

³² *Id.* at 36.

scientific techniques, we were also able to demonstrate that the bite mark testimony provided at trial by Dr. Sperber was “false evidence.” First, Dr. Sperber testified that the picture of the “bite mark” was “unreliable and inaccurate” because of the relationship between the camera and the ruler that was next to the lesion.³³ Dr. Sperber also testified that the lesion could have been produced by someone without Richards’ dentition abnormality.³⁴ A barrier, like some clothing could have been over part of the area of the lesion which would have “nullif[ied]” the ability to see a mark from the lower right canine.³⁵ Dr. Sperber also acknowledged that he never attempted to use the mold of Richards’s teeth to see if it would make a “bite registration” or “dental impression.” Instead, his trial testimony was just based solely on his visual observation: “Because I had basically eyeballed this case and I saw one tooth that was shorter than the others. I saw a space in that collection of red lesion”³⁶

In addition, Dr. Sperber testified that he never should have provided an estimate regarding the percentage of the population which had the dentition abnormality he had identified in Richards.³⁷ At the time, he was not aware of any studies which would have provided statistical support for his testimony.³⁸ He also testified that the American Board of Forensic Odontology now finds such testimony to be inappropriate in the absence of any scientific studies.³⁹

Finally, contrary to his trial testimony that the lesion was consistent with Richards’s dentition, at the hearing, Dr. Sperber testified that he had “no degree of certainty” that Richards’s teeth could have caused the lesion.⁴⁰ Sperber also “ruled . . . out” Richards as the person who caused the lesion: “My opinion today is that [Richards’s] teeth, as we have seen, are not consistent with the lesion on the hand.”⁴¹ “Nonconsistent means you don’t see similar patterns. I have essentially ruled [Richards] out.”⁴²

³³ Reporter’s Transcript of Oral Proceedings on Appeal at 67, *People v. Richards*, No. E024365 (Cal. Ct. App. 4th Dist. Dec. 10, 2009) [hereinafter Reporter’s Transcript] (on file with Albany Law Review).

³⁴ *Id.* at 72.

³⁵ *Id.*

³⁶ *Id.* at 89–90; *see also id.* at 55.

³⁷ *Id.* at 74.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 81.

⁴¹ *Id.* at 91.

⁴² *Id.*

Dr. Golden testified that since Richards's trial, he and other forensic odontologists have used Adobe Photoshop to correct the distortion that is visible in photographs.⁴³ Dr. Golden testified that with advances in technology he has been able to do a more accurate analysis and, based on that analysis, Richards's "dental signature" did not line up as well with the injury as it did in the distorted image he had examined.⁴⁴ Unlike at trial, where he testified that he could not rule out Richards as the source of the lesion, at the hearing, based on the digital analysis, Dr. Golden ruled Richards out.⁴⁵ In fact, Dr. Golden also testified that the lesion might well have been caused by a dog bite as it fits "the classic characteristics" he has seen in dog bites.⁴⁶

Dr. Ray Johansen, an author of a book on the use of digital analysis of bite mark evidence using Adobe Photoshop,⁴⁷ testified that there was some distortion in the photograph that had been taken of Pamela's hand.⁴⁸ Using Adobe Photoshop, Dr. Johansen created a version of the photograph which corrected the distortion contained in the original photograph.⁴⁹ He also created a corrected photo with an outline of Richards's upper teeth.⁵⁰ Dr. Johansen used the upper arched because it was "more consistent with the size and shape to the injury pattern."⁵¹ According to Dr. Johansen, there were marks on Pamela's hand which were outside the semi-circular dentition area of Richards's teeth.⁵²

Dr. Johansen also analyzed pictures of other bruises on Pamela and compared them with metal fencing type material found near the body at the crime scene. Based on this analysis, Dr. Johansen concluded that there were common features between the fence pattern and Richards's dentition.⁵³ Ultimately, Dr. Johansen reached and testified to three conclusions: (1) that the original image was distorted, (2) that the hand injury was as likely caused

⁴³ *Id.* at 97–98.

⁴⁴ *Id.* at 100.

⁴⁵ *Id.* at 110.

⁴⁶ *Id.* at 100.

⁴⁷ *Id.* at 116.

⁴⁸ *Id.* at 129–130; Clerk's Transcript on Appeal at 1225–32 exhibits 16a–d, *People v. Richards*, No. E024305 (Cal. Ct. App. 4th Dist. Dec. 10, 2009) (on file with Albany Law Review).

⁴⁹ Reporter's Transcript, *supra* note 33, at 139; Clerk's Transcript on Appeal, *supra* note 48, at 1237–38 Ex. 16g.

⁵⁰ Reporter's Transcript, *supra* note 33, at 140–42; Clerk's Transcript on Appeal, *supra* note 49, at 1239–40 Ex. 16h.

⁵¹ Reporter's Transcript, *supra* note 33, at 178.

⁵² *Id.* at 143.

⁵³ *Id.* at 152.

by the fence as by Richards, and (3) that whatever mechanism caused the hand injury could also have caused another injury found on Pamela's arm.⁵⁴

Dr. Bowers, like the other experts, testified that the photograph of Pamela's hand which was used at Richards's trial was distorted.⁵⁵ Like the other experts, Dr. Bowers created a corrected version of the photograph using Adobe Photoshop.⁵⁶

Dr. Bowers testified that he performed various measurements of the bruise and of Richards's dentition.⁵⁷ For example, he measured the bruise as twenty-four millimeters, yet Richards's lower teeth were thirty-three millimeters.⁵⁸ Thus, according to Bowers, the bruise was too small to have been made by Richards.⁵⁹

Dr. Bowers also testified to making a Styrofoam impression from the plaster mold of Richards's teeth.⁶⁰ At trial, Dr. Sperber had testified that tooth twenty-seven would not have made an impression.⁶¹ However, when Dr. Bowers used the mold of Richards's teeth to make an impression in the Styrofoam, tooth twenty-seven did leave a mark.⁶² Using one of the Styrofoam impressions and Adobe Photoshop, Dr. Bowers created a picture of the bruise with an overlay of Richards's teeth.⁶³ Although there were some areas where there was a positive correlation between Richards's teeth and the bruise (Ex. 35), there were areas where there was a mismatch.⁶⁴ Dr. Bowers testified that the areas of correlation were based on a "forced match" (made as a starting point using tooth number twenty-two).⁶⁵ The mismatches indicate that Richards' teeth were not responsible for the bruise.⁶⁶

Dr. Bowers also reviewed other bruises found on Pamela's body. Like Dr. Johansen, he concluded that these other injuries cast doubt on whether the bruise on Pamela's hand was even a bite mark.⁶⁷

Based on the cited case law and the testimony, we argued that

⁵⁴ *Id.* at 156–57; Clerk's Transcript on Appeal, *supra* note 48, at 1266 exhibit 16U.

⁵⁵ Reporter's Transcript, *supra* note 33, 213.

⁵⁶ *Id.* at 215; Clerk's Transcript on Appeal, *supra* note 48, at 819 Ex. 3 fig. 4.

⁵⁷ Reporter's Transcript, *supra* note 33, at 218.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 223; Clerk's Transcript on Appeal, *supra* note 48, at 822 Ex. 3 fig. 4.

⁶¹ Reporter's Transcript, *supra* note 33, at 225.

⁶² *Id.* at 223–24; Clerk's Transcript on Appeal, *supra* note 48, at 828 Ex. 3 figs. 18, 19.

⁶³ Reporter's Transcript, *supra* note 33, at 231; Clerk's Transcript on Appeal, *supra* note 48, at 826–27 Ex. 3 figs. 15, 16.

⁶⁴ Reporter's Transcript, *supra* note 33, at 235.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 235–36.

the critical question was whether the case presented against Richards would have been undermined had the jury not heard the baseless testimony indicating that Richards's dentition was a match and that his tooth abnormality was shared by only 2% of the population *and* if the jury had heard testimony indicating that the bruise might not have been a bite mark and that even if it was a bite mark, Richards could be excluded as the biter. We believed (and argued) that the answer to both questions was an unequivocal "yes."

We argued also that the prosecution's case was a "house of cards." This was not a multiple eyewitness case, where undermining the testimony of one eyewitness would be insufficient to undermine the prosecution's case if their other eyewitnesses still identified that defendant as the perpetrator of the crime. In such a case, each eyewitness independently provides evidence sufficient to support a conviction.

Instead, the case against Richards was circumstantial and depended on the *combination* of four circumstantial foundational pillars: the bite mark, the claim that there was no evidence of another person present, the blue fiber, and the contested blood spatter evidence. If any of these evidentiary pillars was undermined, the case, like a building or a house of cards, collapses.

We also argued that the jury was swayed by the bogus statistics provided by Dr. Sperber and argued by DDA Risley in closing argument. Risley had argued specifically that it was unreasonable for the jury to believe that the killer "just happened to share the same dental abnormality as William Richards, who [sic] is only shared by two percent of the population."⁶⁸ Courts have long recognized the pernicious effect of false statistics on the fact finding process. In *People v. Collins*,⁶⁹ the California Supreme Court reversed a conviction which had been based, in large part, on statistical evidence which had no scientific basis. In *Collins*, the prosecution attempted to bolster eyewitness identifications with statistical testimony about the likelihood of another pair of individuals with physical characteristics similar to the defendants found at the scene. The California Supreme Court reversed the conviction, in part, because there was an inadequate evidentiary foundation for the probabilities used in the calculations: "First, as to the foundational requirement, we find the record devoid of any

⁶⁸ R.T. 1932.

⁶⁹ *People v. Collins*, 438 P.2d 33 (Cal. 1968).

evidence relating to any of the six individual probability factors used by the prosecutor The bare, inescapable fact is that the prosecution made no attempt to offer any such evidence.”⁷⁰ In reaching this conclusion, the California Supreme Court quoted from a New Mexico case for the proposition that “[M]athematical odds are not admissible as evidence to identify a defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated.”⁷¹ The California Supreme Court ultimately ruled that this “trial by mathematics” so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice.”⁷²

The pernicious effect of unfounded statistics was also recognized in *Ege v. Yukins*.⁷³ In *Ege*, a forensic expert testified that the defendant’s dentition matched a bite mark found on the victim and that there was a 3.5 million to one chance that someone other than the defendant had made the mark.⁷⁴ The District Court ultimately concluded that the expert’s testimony was “unreliable and grossly misleading” and that the evidence was “so unfair that its admission violate[d] fundamental concepts of justice” and the Court of Appeals agreed.⁷⁵

Obviously, the statistics criticized in *Collins* and *Ege* were far more dramatic than the evidence introduced against Richards. However, because Richards was only convicted after a third trial which included Dr. Sperber’s unfounded scientific/mathematical evidence, we argued that the false statistical evidence used against Richards had the same impact that the false statistical evidence had in *Collins* and *Ege*.

In *Ege*, the Court of Appeals also found that “[b]ite mark evidence may by its very nature be overly prejudicial and unreliable.”⁷⁶

Bite mark evidence is more persuasive on the ultimate issue of guilt than other analogous forms of evidence. For example, fingerprints tend to be circumstantial or associative; that is, they rarely decide a case alone, but tend to link a defendant to the scene of the crime or an object involved in the crime. By contrast, bite marks, in the usual case, will be conclusive of the guilt issue: the

⁷⁰ *Id.* at 38.

⁷¹ *Id.* at 39 (citing *State v. Sneed*, 414 P.2d 858, 862 (N.M. 1966)).

⁷² *Collins*, 438 P.2d at 41.

⁷³ 485 F.3d 364 (6th Cir. 2007).

⁷⁴ *Id.* at 375.

⁷⁵ *Id.* at 370.

⁷⁶ *Id.* at 376.

logical distance between the fact of biting and the ultimate issue of guilt is short. Thus, admission of irrelevant bite mark evidence may be particularly prejudicial to the defendant.⁷⁷

We further argued that even if the “false” evidence of a match with an unfounded statistical correlation was not, by itself, sufficient to undermine the conviction, the new evidence excluding Richards as the biter undermined the prosecution’s case. There is a dramatic difference between an inclusion and an exclusion. As Dr. Sperber testified: “In one situation you’re saying Richards could have done it. In another situation you’re saying Richards couldn’t have done it.”⁷⁸ Moreover, as indicated, the significance and probative power of exclusions (as opposed to matches) has been supported by the same academic literature that has criticized the use of statistics in alleged matches.⁷⁹

Since the bite mark evidence had been a pillar of the prosecution’s case, once that pillar was destroyed, so, too, was the case against Richards.

IX. THE NEW DNA EVIDENCE UNDERMINED A SECOND PILLAR OF THE PROSECUTION’S CASE

The DNA evidence presented a different challenge. The District Attorney’s office⁸⁰ did not dispute that a hair, measuring two centimeters (or just under an inch), from an unknown person, was recovered from amongst blood and debris from under one of the fingernails of Pamela’s right hand. Nor did the District Attorney’s office dispute that mitochondrial DNA testing revealed this hair did not match the DNA of either Pamela or Richards. Instead, the District Attorney’s office argued that the hair was probably “historical,” i.e., that it could have been picked up any time prior to the crime and from a source other than Pamela’s killer.

Our expert, Dr. Patricia Zajac, a consulting criminalist, testified that she disagreed with the prosecution’s belief that the hair was likely historical. She opined that it was more likely that it was the

⁷⁷ *Id.* at 377 n.6 (citing Adrienne Hale, Note, *The Admissibility of Bite Mark Evidence*, 51 S. CAL. L. REV. 309, 326 (1978)).

⁷⁸ Reporter’s Transcript, *supra* note 33, at 110.

⁷⁹ See, e.g., *NSC Study*, *supra* note 18, at 5–37; see generally GIANNELLI & IMWINKELRIED, *supra* note 30, §§ 13.01–13.09.

⁸⁰ After Grover Merritt recused himself, another prosecutor (Steven Sinfield) took over the case. Since both Merritt and Sinfield took the same position regarding the evidence, reference will be to the position taken by the District Attorney’s office.

product of the attack.⁸¹ Dr. Zajac provided four reasons for her conclusion. First, the length of the hair was such that a person like Pamela (who was a waitress) would normally have noticed and removed it.⁸² Second, the location of the crime scene was not a place where one would normally find lots of hairs.⁸³ Third, the hair was found under, and not just on the nail, so it would take some kind of action to get the hair in the place where it was found.⁸⁴ Fourth, the nature of the crime, and the fact there had been a violent struggle where the victim would defend herself, made it more likely the hair was deposited during the struggle.⁸⁵

With regard to the DNA found on the paving stone, the District Attorney's office tried to back away from the position it had taken at trial. At trial, the prosecution, through the testimony of Gregonis and in argument, repeatedly took the position that a twelve-by-twelve-by-two-inch paving stone found north of Pamela was one of the weapons used to murder Pamela. In his opening statement DDA Risley had said, "the attacker picked up a concrete stepping stone and threw it at her face. The attacker then picked up a second concrete stepping stone and threw it at her face."⁸⁶ Similarly, at trial, Criminalist Gregonis repeatedly referred to the stone as a weapon.⁸⁷

However, when DNA testing by the Department of Justice conclusive established that male DNA not belonging to Richards was found where Gregonis had predicted that one would find biological evidence from the killer, the District Attorney's office first tried to argue that the paving stone might not have been a murder weapon—a position that was at odds with the position taken at trial. The District Attorney's office also argued that the genetic material might have post-dated the murder, when the paving stone was handled by other (e.g., the police, court personnel or even jurors).

⁸¹ Reporter's Transcript, *supra* note 33, at 310.

⁸² *Id.* Even the prosecution's criminalist admitted that the hair's location under the nail was relevant and that it was more likely that a woman working as a waitress would be more fastidious in her grooming and cleanliness. H.T. II 47.

⁸³ Reporter's Transcript, *supra* note 33, at 310.

⁸⁴ *Id.* at 312.

⁸⁵ *Id.* at 312–14.

⁸⁶ R.T. 54.

⁸⁷ R.T. 975, 999, 1000, 1079.

X. THE PLANTED BLUE FIBERS?

The photographs which suggested that the blue fibers had not been present under Pamela's nails until after her fingers had been cut off during the autopsy was both the strongest and weakest parts of our case. If we could have convinced the judge that this evidence had been planted, it would have guaranteed a reversal. But convincing a judge that a member of the prosecution team had been guilty of planting evidence was a hard sell. As with forensic odontology, there is an unfortunate documented history of wrongful convictions obtained through fabricated and planted forensic evidence. In fact, the wrongful convictions in 50% of the first seventy-four DNA exonerations were attributable to government misconduct, including deliberate fabrication of evidence.⁸⁸

One example of deliberate fabrication of evidence can be found in the case of *State v. Duncan*.⁸⁹ In 1994, prosecutors charged Jimmie Duncan with capital murder for the drowning death of a toddler.⁹⁰ Duncan was tried, convicted, and sentenced to death based partly on bite-mark evidence that Duncan had bitten the toddler on her right cheek.⁹¹ Duncan's post-conviction attorneys discovered a video in the district attorney's file which documented forensic odontologist Michael West's examination of the toddler.⁹² In the video, West was caught repeatedly pressing and scraping a dental mold of Duncan's teeth on the deceased toddler's right cheek, creating a bite mark that was not formerly present.⁹³

Another example is the case Kevin Cooper, who was tried and sentenced to death for murder. In a May 2009 dissenting opinion to a denial of a petition for a rehearing en banc, five judges of the Ninth Circuit concluded that the San Bernardino County Sheriff's Department concealed or destroyed exculpatory evidence as well as manipulated and planted evidence.⁹⁴ The testimony of Gregonis was specifically called into question by the dissenting opinion and provided the basis for the five judges concluding that there was a

⁸⁸ The Innocence Project, *Understand the Causes: Government Misconduct*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Mar. 30, 2010).

⁸⁹ 802 So. 2d 533 (La. 2001).

⁹⁰ *Id.* at 542.

⁹¹ *Id.* at 541-42.

⁹² Radley Balko, *Manufacturing Guilt?: Experts Say this Exclusive Video Shows a Dental Examiner Creating the Bite Marks that Put a Man on Death Row*, REASON, Feb. 19, 2009, available at <http://reason.com/archives/2009/02/19/manufacturing-guilt>.

⁹³ *Id.*

⁹⁴ *Cooper v. Brown*, 565 F.3d 581, 634 (9th Cir. 2009).

“strong likelihood” that the blood test results were “false evidence” and that the evidence was “tampered with . . . to ensure that it would generate inculpatory results.”⁹⁵

Other examples of evidence fabrication include a pathologist named Ralph R. Erdmann, who was accused of malfeasance in as many as twenty capital cases, and who faked around one hundred autopsies because he never performed autopsies on the bodies, falsified toxicology reports, and falsified tissues samples.⁹⁶ One investigation into evidence tampering by the New York State Police Department revealed up to thirty-six cases over the span of eight years in which six troopers fabricated evidence, usually by planting fingerprints.⁹⁷

In addition to planting and fabricating evidence, forensics experts have blatantly lied about evidence linking a suspect to a crime. For example, forensic expert Fred Zain testified as an expert in dozens cases about tests he had never done and results he had never obtained.⁹⁸ Zain’s misconduct led to the wrongful conviction of Glen Woodall in 1987, when Zain falsely testified that semen recovered from the victims were identical to Woodall’s.⁹⁹ In 1993, at the request of Prosecuting Attorney William Forbes, a circuit judge launched an investigation into Zain’s misconduct.¹⁰⁰ At the end of the investigation, some of the discovered deliberate and systematic acts of Zain’s misconduct included: (1) reporting multiple items had been tested, when only one single item had been tested; (2) reporting inconclusive results as conclusive; (3) repeatedly altering laboratory records; (4) implying a match with a suspect when testing supported only a match with the victim; and (5) reporting scientifically impossible or improbable results.¹⁰¹

Other instances of forensic experts lying about evidence include a lab analyst named Pamela Fish who testified that serology testing was inconclusive when, in fact, it excluded John Willis, who spent

⁹⁵ *Id.* at 615. However, despite some questionable forensic work, the prevailing wisdom in San Bernadino is that Cooper was guilty and we did not believe that any great weight would be given to challenges to the work Gregonis performed in the *Cooper* case. *Id.* at 615–16.

⁹⁶ Robert Suro, *Ripples of a Pathologist’s Misconduct in Graves and Courts of West Texas*, N.Y. TIMES Nov. 22, 1992, at A22.

⁹⁷ Richard Perez-Pena, *Supervision of Troopers Faulted in Evidence-Tampering Scandal*, N.Y. TIMES Feb. 4, 1997, at B1.

⁹⁸ *In re Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993).

⁹⁹ *Id.* at 509.

¹⁰⁰ *Id.* at 502.

¹⁰¹ *Id.* at 503.

eight-and-a-half years behind bars for a crime he did not commit.¹⁰² In another example, a Santa Clara prosecutor named Jaime Stringfield used a phony lab report in a sexual assault case which indicated the presence of the suspect's semen on the victim's bedspread when no such semen existed.¹⁰³ In another case, a police chemist named Joyce Gilchrist testified that hairs and DNA proved Curtis McCarty, who spent twenty-one years behind bars for a crime he did not commit, was in fact at the crime scene when testing on the hair and DNA excluded him.¹⁰⁴ An FBI Special Agent named Thomas Curran testified against Thomas Doepel in a rape and murder trial claiming that Doepel's shorts contained the victim's blood when, in fact, they did not.¹⁰⁵ In another case, a college anthropology professor named Louise Robbins testified falsely for over a decade in more than twenty criminal cases that she could match a footprint on any surface to the person who made it, putting more than a dozen people behind bars before her claims were thoroughly debunked.¹⁰⁶

XI. A VICTORY?

Immediately after hearing closing arguments, Judge McCarville granted the petition. As expected, he did not find that Gregonis had planted evidence. However, he did conclude that the conviction had been based on false evidence and that our new evidence undermined the prosecution's case.

Unfortunately, our victory was short lived. Judge McCarville stayed the granting of the writ in order to give the prosecution an opportunity to appeal. As this is being written, the prosecution has appealed and it looks like another year will pass before we have the possibility of a final resolution of the case.

Technically, Richards is eligible for release on bail pending appeal. But the bail has been set at a level that makes his release impossible. So William Richards, who we believe to be innocent, and whose conviction has been thoroughly undermined, continues to

¹⁰² Steve Mills, et al., *When Labs Falter, Defendants Pay: Bias Toward Prosecution Cited in Illinois Cases*, CHICAGO TRIBUNE, Oct. 20, 2004, at C1.

¹⁰³ Tracey Kaplan, *Did Santa Clara County Prosecutor Withhold Evidence in Sex-Assault Case?* MERCURY NEWS, June 14, 2009.

¹⁰⁴ The Innocence Project, *After 21 Years in Prison—Including 16 on Death Row—Curtis McCarty is Exonerated Based on DNA Evidence*, <http://www.innocenceproject.org/Content/575.php> (last visited Mar. 30, 2010).

¹⁰⁵ JOHN F. KELLY & PHILLIP K. WEARNE, *TAINTING EVIDENCE: INSIDE THE SCANDALS AT THE FBI CRIME LAB 14* (1998).

¹⁰⁶ *Id.* at 13.

languish behind bars for a crime he did not commit.