



In re WILLIAM RICHARDS, On Habeas Corpus.

E049135

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION TWO

2010 Cal. App. Unpub. LEXIS 9284

November 19, 2010, Filed

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**PRIOR HISTORY:** [\*1]

APPEAL from the Superior Court of San Bernardino County. Super.Ct.Nos. SWHSS700444 & FV100826. Brian S. McCarville, Judge.

**DISPOSITION:** Reversed.

**COUNSEL:** Michael A. Ramos, District Attorney, Grover D. Merritt, Lead Deputy District Attorney, and Stephanie H. Zeitlin, Deputy District Attorney, for Appellant The People.

Jan Stiglitz, under appointment by the Court of Appeal, for William Richards.

**JUDGES:** HOLLENHORST, Acting P. J., MCKINSTER, J., RICHLI, J. concurred.

**OPINION BY:** HOLLENHORST

**OPINION**

The People appeal the grant of petition for writ of habeas corpus of William Richards (Defendant) pursuant to Penal Code ' section 1506. The People contend the trial court erred in finding that new forensic evidence

suggested Defendant's conviction was fatally flawed, and as a consequence, erred in granting the petition for writ of habeas corpus. We agree and reverse.

1 All further statutory references are to the Penal Code unless otherwise indicated.

**I. INTRODUCTION**

On July 8, 1997, Defendant was convicted by a jury of first degree murder of his wife, Pamela (victim) (B 187, subd. (a)). He was sentenced to an indeterminate term of 25 years to life in state prison. He appealed, contending (1) the evidence was insufficient to show that he acted with [\*2] willful deliberation and premeditation, and (2) he was denied effective assistance of counsel.<sup>2</sup> (*People v. Richards* (Aug. 17, 2000, E024365 [nonpub. opn.]) On August 17, 2000, this court rejected Defendant's contentions and affirmed the judgment. (*People v. Richards, supra*, E024365.)

2 We take judicial notice of the record and opinion issued in our case No. E024365.

In December 2007, Defendant filed a petition for writ of habeas corpus. According to such petition, he claimed the introduction of bite mark evidence in the fourth<sup>3</sup> trial was false and that new forensic tools now excluded him as the person responsible for the bite mark. Additionally, Defendant alleged that: (1) new evidence, obtained through DNA testing, showed that someone other than Defendant held one of the alleged murder weapons exactly where the prosecution suspected the murderer's DNA to be; (2) a hair belonging to someone other than Defendant had been found under victim's fingernail; and (3) the tuft of fiber similar to the material in



Defendant's shirt did not become lodged in victim's fingernail during her struggle with her killer. After hearing the testimony and reviewing the record, the trial court granted Defendant [\*3] habeas corpus relief on the grounds that new forensic evidence suggested the conviction was fatally flawed.

3 As Defendant acknowledges, his first trial resulted in a mistrial after the jury could not reach a unanimous verdict; his second trial ended in mistrial following juror voir dire; and his third trial also resulted in a mistrial after the jury could not reach a unanimous verdict.

The People appeal, contending the trial court erred because Defendant failed to meet his burden of proof under *In re Lawley* (2008) 42 Cal.4th 1231, pages 1239 through 1241 (*Lawley*).

## II. FACTS PRESENTED AT TRIAL

The facts as presented at trial are fully set forth in our prior opinion in *People v. Richards, supra*, E024365. We thus incorporate them word for word, as follows:

### "The Prosecution's Case:

"On August 10, 1993, at 11:00 p.m., San Bernardino County Sheriff's Deputy Mark Nourse began patrolling the Apple Valley area. Approximately one hour later, at 12:02 a.m., he received a dispatch regarding a possible dead body located at 5148 Trush in Summit Valley. To reach the residence, the deputy had to drive up a very steep driveway which consisted of sand and loose gravel. By the time he reached the house, it [\*4] was approximately 12:32 a.m.

"The residence was in a very sparsely populated area. There were no lights to illuminate the area and the sky was overcast. Through the darkness, Deputy Nourse saw two vehicles, a small shack house, and Defendant. Defendant was wearing blue jeans and a blue jeans-type shirt, and he had blood on him. Defendant told the deputy that he had just arrived home, that it was dark when he arrived, and that the only power on at the residence was supplied by a generator.

"Deputy Nourse asked Defendant for the location of the body. Defendant pointed toward what appeared to be the porch. The deputy pulled his flashlight out of his back pocket and saw a sleeping bag containing what he believed to be a body. The body was subsequently determined to be that of Pamela Richards, Defendant's wife. As Deputy Nourse began walking toward the victim's body, Defendant volunteered that 'she is stone cold, you don't have to go back there and check her.'

"Defendant followed closely as the deputy approached the victim's body. Defendant said he found his

wife face down, and rolled her over. He stated that he put one of his hands on her head and that his fingers went into the hole in her [\*5] head. He explained that he had called 9-1-1 immediately after realizing that she was cold and dead. Deputy Nourse did not want to check for a pulse without gloves on, so he went back to his patrol vehicle to get them. Defendant followed.

"As Deputy Nourse put on his latex gloves and walked toward the victim's body a second time, Defendant continued to volunteer statements. Defendant stated several times that, 'that brick right there, that's the one that killed her, that's what they used to finish her off with.' Defendant said there was a stepping stone on the side of the hill with blood on it, but the deputy could not see it. Defendant indicated he had been back by the generator. Defendant then stated that his wife's pants were by the generator, and they did not come off easily, adding, 'trust me on this.' Defendant's demeanor vacillated from seemingly rehearsed calmness to bawling, sobbing and falling down on the ground.

"Deputy Nourse pulled back the sleeping bag, and picked up the victim's arm to check her wrist for a pulse. Her arm and wrist were pliable and limp. There was no pulse. Deputy Nourse then checked for a carotid pulse, but felt none. The victim's body was neither warm [\*6] nor cold, but seemed very fresh. Large portions of her skull were missing. Her eye was hanging out, and a little puddle of blood was by the side of her face. The blood was very fresh, bright red and wet. The victim's hair was full of bright red, wet blood. The blood on the sand near her head had the same consistency and had yet to soak in. Based on the deputy's experience, he stated that the victim's body was similar to someone who had just died in his arms.

"Realizing that the victim was dead, Deputy Nourse canceled medical aid and radioed dispatch to inform his sergeant that there had been a homicide. Deputy Nourse told Defendant that they needed to leave the crime scene so that he could secure it. Defendant repeatedly fell to his knees and stated, '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.' Deputy Nourse and Defendant walked back to the patrol car.

"Norman Parent, a sheriff's homicide detective, was dispatched to the scene at approximately 1:00 a.m. on August 11, 1993. He arrived at 3:15 a.m. It was very dark with no moonlight. The residence was in a rural desert area and was quite [\*7] isolated. Deputy Nourse briefed Detective Parent on what he had seen up to that point.

"Detective Parent was the case agent and conducted the crime scene investigation. Because of the darkness, a decision was made not to process the crime scene until



the skin" was not very well done. Thus, he testified that he should not have stated any percentages [\*25] as to the number of people who shared Defendant's dental peculiarity unless there existed a prior scientific study concluding that this particular feature was unusual. In his declaration in support of Defendant's petition, Dr. Sperber stated: "Because 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 [Defendant's] guilt." The doctor's declaration did not recant his trial testimony.

In the 1997 trial, Dr. Golden testified that the bite mark was consistent with a human bite. At the evidentiary hearing, he testified that the mark on the victim's hand may have been a dog bite. However, he also maintained that his initial opinion that the victim's hand injury was a human bite mark had not changed. Despite his awareness of photographic distortion issues at the 1997 trial, Dr. Golden made no attempt to remedy the distortion.

Dr. Raymond Johansen co-authored a book entitled, "Digital Analysis of Bite Mark Evidence Using Adobe Photoshop" in 2000. He had been using Adobe Photoshop for eight to 10 years prior to his testimony. He testified that the "Adobe [\*26] technique," making overlays, was in existence and being used in "probably, '96, '97 by Dr. David Sweet from Canada." Dr. Johansen began compiling data regarding Adobe Photoshop in 1998 and 1999 for his book. Based on his book, he was approached by many who wanted to learn more, so he started teaching them.<sup>7</sup> In Dr. Johansen's opinion, the use of Adobe Photoshop for rectification of digital distortion is "very proven." However, regarding the use of Adobe Photoshop in the dental or odontological community, he could give no citations or peer review results of its efficacy and accuracy. He also could not explain how Adobe Photoshop worked. Instead, he merely looks at an image for photographic distortion and then corrects it with Adobe's "distort function."<sup>8</sup> As for explaining how Adobe Photoshop works, Dr. Johansen stated he was "just familiar with the program, how it works," not the technological intricacies, such as coding or algorithms, which provide the basis for the program's conclusion. Following further testimony, the People objected to Dr. Johansen's computer program testimony on the grounds that he was offered as a dentist. The court overruled the objection.

7 Because the court [\*27] allowed Dr. Johansen's testimony, the People's *Kelly-Frye* objection was apparently overruled. (*Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 and *People v. Kelly* (1976) 17 Cal.3d 24.)

8 Again, the People objected on *Kelly-Frye* grounds. The court allowed the testimony subject to a motion to strike.

Regarding the mark on victim's hand, Dr. Johansen opined: "After my analysis of [Defendant's] dentition as well as the fence detail, it was just as likely that that injury pattern was caused by the fence detail as it was by [Defendant's] dentition." Thus, Dr. Johansen remained unable to include or exclude Defendant as the biter. He acknowledged his report, in which he characterized victim's hand injury as a human bite.

Dr. Michael Bowers, a practicing dentist, was first contacted in 1998 by defense counsel. Dr. Bowers published an article regarding digital imaging in bite mark cases that same year. He was familiar with the Adobe Photoshop program and became "self-qualified" in its use. In his opinion, Adobe Photoshop distortion techniques began in the late 1990's, after Defendant's trial. He discussed the distortion of the photograph of victim's hand injury and described his efforts to [\*28] correct the image. On cross-examination, he acknowledged the subjectivity of a "forced match."

Dr. Bowers provided Styrofoam exemplars of Defendant's teeth, and noted the abnormality in the lower teeth, specifically tooth No. 27. He made two exemplars, one with lighter pressure to create a shallow exemplar and the other with deeper pressure for a deeper exemplar. This was to make a bite mark in the Styrofoam; however, Dr. Bowers had no knowledge of how hard victim was bitten. He believed that Defendant's tooth No. 27 was "at the same level with all the other lower front teeth that he has." He testified that tooth No. 27 did not make a bruise; however, it did make an indentation in the exemplars. Dr. Bowers discussed victim's other bruises and concluded the other bruises raised significant doubt that the hand injury was caused by teeth.

Dr. Bowers also testified regarding color saturation of photographs of victim's fingertips and associated blue fibers. He opined that the autopsy photos should have shown the blue fibers.

Dr. Patricia Zajac, a criminalist, opined that a hair found under victim's artificial nail was not historical<sup>9</sup> in nature, largely due to its length (two centimeters), [\*29] the location of the crime and where the body was found, the hair itself, and the violence of the crime. The hair in question had a "telogen root," meaning that it was naturally shed.

9 Dr. Zajac described "historical" as "something that occurs naturally and is not related to a crime event."



### B. The People's Response

Dan Gregonis, who testified at the trial, examined five hairs that were from victim's hand. Four of them were consistent with victim's DNA profile, one was inconclusive. Gregonis testified regarding the contents of victim's fingernail scrapings. Among the contents there was a dark hair and a light blonde hair. The dark hair was animal in origin. Mito Typing Laboratories concurred that the dark hair was not human hair. Gregonis acknowledged fellow criminalist Craig Ogino's opinion that the hairs were historical but stated that he could not agree or disagree.

According to Gregonis, a large cinder block was used to crush victim's skull. A stepping stone could also have been used as a weapon. The conclusions regarding the cinder block were made based upon the amounts of blood and the type of splatter present. A Department of Justice analysis concluded that the DNA present upon the [\*30] stepping stone was primarily the victim's; however, there was the presence of male DNA to a minor degree. Gregonis opined that the male DNA could have been present prior to victim's DNA being deposited or the stepping stone could have been contaminated in the courtroom throughout the lengthy trial history by people handling the exhibits or talking over them.

Regarding the blue fibers, Gregonis found them wedged in a crack of victim's broken fingernail. He recalled looking at the fingers under a microscope before looking at them with the naked eye. He compared the fibers to a blue shirt taken from Defendant and found them to be indistinguishable.

Regarding the hair under victim's nail, Gregonis testified that it was possible it was historical in nature and "given the fact that [victim] had extended nails, I don't think that it's unusual that it could be there without her being aware of it."

### C. Trial Court's Ruling

Following the conclusion of the evidentiary hearing, the trial court issued its ruling: "The Court finds that the evidence with respect to the bite mark analysis and the DNA analysis and the hair analysis has established, taken together, that there . . . did exist and does exist [\*31] a fundamental doubt in my mind as to the accuracy and reliability of the evidence presented at the trial proceeding.

"This finding is based upon the Court's review of the trial transcript as well as assessing the credibility of the witnesses that have testified before me.

"Taking the evidence as to the tuft fiber--and when I say tuft, I'm talking about the blue fiber under the finger,--and the DNA and the bite mark evidence, the Court

finds that the entire prosecution case has been undermined, and that the petitioner has established his burden of proof to show that the evidence before me presents or points unerringly to innocence.

"Not only does the bite mark evidence appear to be now questionable, it puts the petitioner's [*sic*] being excluded. And while I agree with [the prosecution's] statements with respect to the flat stone versus the cinderblock, the DNA evidence establishes that someone other than petitioner and the victim was present at the crime scene.

"For purposes of [the prosecution's] objection with respect to the testimony--or the report of Dr. Bowers, I should say, the Court notes the objection. It's overruled. Dr. Bowers testified to the contents of the report. I find [\*32] it was properly received into evidence.

"Based upon all the evidence presented, the Court grants petitioner's application. The petition for writ of habeas corpus is granted."

### IV. HABEAS CORPUS RELIEF

The People contend the trial court prejudicially erred by concluding Defendant had made an adequate showing that newly discovered evidence undermined the entire structure of the case presented at the time of the conviction. We agree with the People's position.

#### A. Standard of Review

"Generally, of course, habeas corpus claims must surmount the presumption of correctness we accord criminal judgments rendered after procedurally fair trials. "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." [Citations.] Unlike claims directed at prosecutorial, judicial, juror, or defense counsel misconduct, however, actual innocence claims based on either newly discovered or nonperjured false evidence do not attack the procedural fairness of the trial. They *concede* [\*33] the procedural fairness of the trial, but nevertheless attack the accuracy of the verdict rendered and seek a reexamination of the very question the jury or court has already answered: Is the defendant guilty of the charges presented? A conviction obtained after a constitutionally adequate trial is entitled to great weight. Accordingly, a higher standard properly applies to challenges to a judgment whose procedural fairness is conceded than to one whose procedural fairness is challenged. [Citations.] Metaphorically, an actual innocence claim based on newly discovered evidence seeks a second bite at the apple, but unlike an ineffective assistance of counsel



nique" was in existence and being used in 1996 or 1997. Dr. Johansen opined the mark on victim's hand may have been caused by the fence; however, he was unable to include or exclude Defendant as the source.

Dr. Bowers provided Styrofoam exemplars of Defendant's teeth and mimicked Defendant's bite. However, he did not know how hard victim was bitten. He discussed victim's other bruises and concluded the other bruises raised "significant doubt" that the hand injury was caused by teeth. Dr. Bowers's testimony did not provide new evidence; it merely provided another expert's opinion that the bite mark should be given little to no value.

Considering the evidence introduced at the 1997 trial and the evidence offered at the evidentiary hearing regarding the bite mark on victim's hand, we agree with the People's observation that there was no newly discovered evidence. Even with the manipulation of the digital image in the photograph, there was no conclusive evidence establishing Defendant's innocence such that the prosecution's case was undermined. As the People point out, Defendant was merely attempting to relitigate an issue covered at trial. Moreover, contrary to Defendant's [\*39] claim and as established by the expert testimony in the 1997 trial, the bite mark evidence was not offered as conclusive proof of Defendant's guilt. In fact, the prosecution argued that it did not plan to introduce any testimony regarding the bite mark (and did not during the first two trials) until defense counsel hired an expert to discuss it for the 1997 trial.

## 2. Hair evidence

According to Defendant, the hair found under one of victim's fingernails points towards his innocence. Specifically, he notes that in 2006, mitochondrial DNA testing revealed this hair did not match the DNA of either victim or Defendant. Instead, it belonged to an unknown third party. At the hearing, Dr. Zajac opined the hair was not historical in nature due to its length (two centimeters), the location of the crime and where the body was found, where the hair was found, and the violence of the crime. However, she did note the hair had a telogen root, meaning that it was naturally shed. She explained that hairs with telogen roots are mature and at a stage where they are ready to fall out. Nonetheless, she opined the hair was "forcibly" pushed under victim's nail.

In contrast, Gregonis testified that in the 1997 [\*40] trial he had examined five hairs that were found on the victim's hands. Four of them were consistent with victim's DNA profile; one was inconclusive. Regarding the contents of victim's fingernail scrapings, there was a dark hair and a light blonde hair. The dark hair was animal in origin. Mito Typing Laboratories concurred with that finding. Gregonis acknowledged Ogino's opinion that the

hairs were historical in nature but stated that he could not agree or disagree.

Contrary to Defendant's claim that the DNA testing resulted in new evidence pointing to Defendant's innocence, we conclude that Zajac's testimony creates a conflict with the trial record, specifically, Ogino's testimony. Such conflict does not constitute new evidence. (*Weber, supra*, 11 Cal.3d at p. 724.)

## 3. Stepping stone

In addition to the cinder block, the prosecution presented a stepping stone as a second murder weapon. There were three areas on the stepping stone that contained blood. STR DNA <sup>12</sup> testing established that two of the three contained a mixture of victim's DNA and male DNA, with the male DNA contributing one-tenth of the DNA in one area and one-sixth of the DNA in the other. Although the male DNA did not belong [\*41] to Defendant, the STR DNA testing that established this fact was not performed until January 2006. Thus, the People rightly observe that "a microscopic sample of unknown male DNA on the purported murder weapon when it was analyzed years later do[es] not establish that someone other than [Defendant] and [victim] were present at the crime scene at the time of the crime." Did the person who was the source of the male DNA touch the stepping stone prior to the murder, at the time of the murder, or subsequently after the murder? Defendant did not offer any chain of custody evidence to establish that the stepping stone was not touched by anyone subsequent to the time of the murder. As such, it takes a leap of faith to pinpoint the source of the male DNA to the exact time of victim's murder. Given the facts before this court, we do not have such faith. Rather, we conclude that there is no exonerating evidence.

12 Gregonis testified that "STR" technology "gives you an idea of the quantity of DNA that's contributed by each person in a mixture . . . ."

## 4. Fibers evidence

At the 1997 trial, the People presented evidence of 14 or 15 light blue, cotton fibers wedged in one of victim's fingernails. (*People* [\*42] v. *Richards, supra*, E024365, p. 8.) Although the fibers were indistinguishable from the fibers of the shirt Defendant was wearing the night of the murder, Gregonis could not say definitively that the fibers came from Defendant's shirt. (*Ibid.*) At the hearing on Defendant's petition, Defendant offered the testimony of Dr. Bowers, who used Adobe Photoshop to enhance a photograph of victim's broken nail, along with a still photograph from a video of the same nail. The video was taken by Gregonis after he found the blue fibers wedged under a crack in victim's artificial nail using a stereomicroscope. <sup>13</sup> Dr. Bowers