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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re WILLIAM RICHARDS, On Habeas Corpus.	E049135 (Super.Ct.Nos. SWHSS700444 & FV100826) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Reversed.

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.

The People appeal the grant of petition for writ of habeas corpus of William Richards (Defendant) pursuant to Penal Code[1] section 1506. The People contend the trial court erred in finding that new forensic evidence suggested Defendant's conviction was

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

fatally flawed, and as a consequence, erred in granting the petition for writ of habeas corpus. We agree and reverse.

I. INTRODUCTION

On July 8, 1997, Defendant was convicted by a jury of first degree murder of his wife, Pamela (victim) (§ 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 willful deliberation and premeditation, and (2) he was denied effective assistance of counsel.[2] (*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.)

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[3] 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

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

[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.

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 habeas corpus relief on the grounds that new forensic evidence suggested the conviction was fatally flawed.

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:

"<u>*The Prosecution's Case:*</u>

"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 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 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 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 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 first light, and no one entered the scene. At first light, around 6:00 a.m., Detective Parent,

Deputy Nourse, Criminalist Dan Gregonis and Forensic Specialist Valerie Seleska began processing the scene.

"Detective Parent started processing the scene at the beginning of the steep, narrow, dirt roadway that ascended to the small plateau where the house was located. On the property, about 100 yards from the dirt roadway, was a shed with a wooden deck or porch and a travel trailer. The wood shed was unlocked with the door slightly ajar. Inside were numerous guns, including about five or six rifles. A smaller wood shed contained a generator. There was a Ford Ranger pickup truck, subsequently determined to be Defendant's, which had a gun in it. There was also a Suzuki Samurai, subsequently determined to be the victim's, which contained a purse. Inside the purse, there were several items identifying the victim, and a letter[4] detailing a property division between her and Defendant.

"Detective Parent and his team found the victim's body face up by the porch and covered by a sleeping bag. She was naked from the waist down except for a pair of socks. There was a large pool of blood beside her. They found various items belonging to the victim, including two white canvas shoes, a broken fingernail, denim pants by the generator, and panties inside the trailer. They also found pillow cases and a telephone in the camper, two 12-inch stepping stones and an 8- by 6- by 16-cinder (cement) block near her body. All the above items contained various amounts of blood, as did the shed and

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[4] "The letter, which was signed, was dated July 14, 1993. It stated: 'I, William Richards, relinquish all claim to joint properties between myself and my wife Pamela Richards, except for my tools, guns, Warrior and fifty percent of the equity in the land we own in Summit Valley. This includes profit sharing earned while we were together.'"

many other areas, including the ground and rocks on the property. The position of the stepping stones, cinder block and the victim's body led Detective Parent to the conclusion that they had been used to smash her head. The murder appeared to have occurred by the porch area, and someone appeared to have bled in the trailer. No struggle appeared to have occurred by the generator.

"Detective Parent checked the tires of Deputy Nourse's patrol car and ascertained where it had been driven and came to a stop. He also checked the tires of the Ranger and the Samurai and tracked where they came up the driveway and stopped. There were no other tread marks. Three of the victim's shoeprints were found on the property. Defendant's shoes were very worn and would leave very little shoe track. Only one of Defendant's shoeprints was found. Detective Parent accounted for all shoeprints, including himself and everyone who had been at the crime scene, and found none he could not account for. Until about 8:00 p.m., Detective Parent and his team fanned out in about a 100-yard radius down a hill around the crime scene to check for any signs that someone had come up the hill onto the property. They found nothing.

"Sheriff's Homicide Detective Tom Bradford spoke with Defendant for several hours on August 11, 16, 30, and September 3, 1993.[5] During one of those interviews, upon questioning by Detective Bradford, Defendant said and later repeated that he came home from work in his truck, entered the property, and discovered his wife, who was naked from the waist down, in front of their trailer lying face down. Defendant said he

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[5] "Defendant was arrested on September 3, 1993."

rolled her over and cradled her, and his hands went into the large hole in her head. Defendant then spoke with Eugene Price on the telephone about five to ten minutes after he arrived home. Defendant stated that after speaking with Price he cradled his wife again while waiting for the police to arrive. Defendant denied any knowledge of his wife's murder. He stated that he could not find anything missing at the residence. He said that both he and his wife were proficient with firearms and that he owned many guns.

"Detective Bradford collected the clothes worn by Defendant the night of the murder. At his instruction, pictures were taken of Defendant's body the day after the murder. There were no visible marks on his body. Detective Parent has seen many cases where the murderer is not injured at all.

"The day after the murder, Detectives Bradford and Parent went to Schuller Manufacturing, Defendant's employer in Corona. They discovered that on the day of the murder, Defendant clocked in at 2:42 in the afternoon and clocked out at 11:03 that night.

"Sheriff's Homicide Investigator John Navarro exited Schuller Manufacturing on August 17, 1993, at approximately 11:03 p.m. After taking three minutes to walk to his unmarked Ford Taurus, Navarro left the parking lot at about 11:06 and drove a quarter mile to the Interstate 15 North on-ramp. Driving at the speed of traffic, between 60 and 70 miles per hour, Navarro drove on Interstate 15 North, turned right on Highway 138 and traveled towards Lake Silverwood to the Summit Valley exit. Having driven a total of 45 miles, Navarro arrived at Defendant's residence at 11:47, 41 minutes after he left the parking lot.

"Dan Gregonis has been a criminalist in the sheriff's crime laboratory for almost 18 years. On August 11, 1993, around 3:50 in the morning, Gregonis arrived at the crime scene. Gregonis collected blood from the crime scene, including from the wooden porch, soil around the victim's body, the sleeping bag, the pool of blood around the victim's body, the pillow cases, the victim's shoes, the stepping stones, the cinder block, the telephone, the victim's pants, and Defendant's clothes. There was evidence of crime scene manipulation. The victim's panties were in the camper, and her pants were by the generator. A sex kit was performed on the victim and the results were negative for semen or any other evidence of sexual assault.

"Gregonis collected two fingertips with broken fingernails from the victim's autopsy. There was a tuft of 14 or 15 light blue, cotton fibers jammed into one of the nails. 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, but there were no significant differences.

"Gregonis testified that low energy blood spatter operates by gravity alone, such as blood dripping. It leaves large drops, half-an-inch to three quarters of an inch in size. In medium energy spatter, an object hitting something causes blood to spurt out from the blood source into smaller drops. High energy spatter, usually caused by a gunshot, causes blood to break into very small particles less than a millimeter. When blood in flight comes into contact with something at an angle, it can be determined what direction the blood came from. A transfer stain is not spatter, but occurs when an object simply

comes into contact with a blood source. A smear is transfer stain that occurs when the object touches the blood source while in motion.

“There were 30 to 40 blood stains on the victim’s pants, of which 12 consisted of medium energy spatter. There was no spatter on her bare legs. Gregonis opined that the victim was wearing her pants when her skull was caved in.

“The stepping stones contained medium energy blood spatter. Gregonis opined that the stepping stones were not dropped on victim’s head, but were close to the impact. The cinder block was slightly broken, had an area of saturated blood, and also contained a very low angle medium energy spatter. Based on the blood, the medium energy spatter, and hairs taken off the block, Gregonis opined that the cinder block was used to bash in the victim’s head. Gregonis also opined, based on the amount of medium energy blood spatter and pooled blood on it, that one of the stepping stones may also have been thrown or dropped on the victim’s head.

“Medium energy blood spatter was found on Defendant’s right shoe. There were two medium energy spatter stains on Defendant’s pants. The two stains were from different directions, suggesting two separate medium energy events, such as two objects hitting the victim’s head. There was also medium energy spatter stains on the porch. In Gregonis’s opinion, based on the blood spatter evidence, Defendant could have been the person who threw the cinder block and/or stepping stone on the victim’s head. A cinder block acts as a shield to block most blood that would fly back towards the person holding it. This could explain the small amount of blood spatter on Defendant and the porch.

“The night of the murder, there was transfer blood on Defendant’s shirt, but no spatter. Gregonis knew Defendant had told Detective Bradford that he kneeled down and cradled his wife’s head against his right shoulder after he arrived home from work. Gregonis recreated the murder by filling a dummy with human blood and agarose, a gelatin-like substance that simulated a brain inside the dummy’s head, and having a criminalist wear clothing similar to what Defendant was wearing the night of the murder. Gregonis then bashed the dummy’s head with a cinder block and had the criminalist cradle the dummy similar to how Defendant described. The criminalist’s shirt stained in areas similar to Defendant’s shirt, but the criminalist’s shirt contained much more blood and staining in the right breast area than Defendant’s shirt. The criminalist’s pants contained dripping from the cavity of the head, but Defendant’s pants had no such drip patterns.

“Gregonis performed another test and discovered that in gravel and dirt similar to the crime scene, blood could only be transferred onto blue denim such as Defendant’s shirt for about 12 minutes. Blood coagulates in anywhere from three to fifteen minutes depending on the circumstances.

“David Stockwell, a criminalist in the sheriff’s crime laboratory specializing in forensic serology and DNA analysis, analyzed the blood stains collected by Gregonis. Almost all of the stains from the crime scene were consistent with the victim’s blood, and not Defendant’s. This included blood underneath two of the victim’s fingernails, two blood stains on the telephone, blood spots of one of the victim’s shoes, blood on the sleeping bag in which the victim’s body was found, fourteen blood stains on the victim’s

jeans, and three blood stains on Defendant's pants. Defendant's blood was consistent only with two blood stains on his pants, and those stains could not be dated. There was no blood evidence of a third person being present during the crime.

"Frank Sheridan, Chief Medical Examiner for the Coroner's Office of San Bernardino County, performed an autopsy on the body on August 13, 1993. Her body displayed defensive wounds, bruising, and lacerations and abrasions to the face. She had also been manually strangled, and had suffered a massive blunt trauma injury to her skull.

"Dr. Sheridan's opinion[] that the victim had been manually strangled was based on various injuries to her neck which included external bruising, internal hemorrhaging and the breaking of her hyoid bone. He opined that the injuries to the victim's neck would have been fatal even without the blunt-force trauma to her head. With constant pressure on the neck, a person will lose consciousness in 20 to 30 seconds. If the pressure is continued, brain death will occur in two and one-half to three minutes. After brain death, the heart can beat for a short time. Dr. Sheridan also explained the agonal state, which is characterized by a very slow erratic heartbeat and very low blood pressure just before a person dies.

"The blunt-force trauma injury to the victim caused bruising, a large laceration, extensively fractured the left side of her skull from front to back, and crushed her brain. Dr. Sheridan opined the trauma would have killed the victim even without strangulation. She was either dead or in the agonal state when the blunt-force injury was inflicted because there was little bleeding and bruising. The strangulation came first, followed

contemporaneously within minutes by the blunt-force trauma while the victim was agonal or dead. No signs of forced sex were discovered.

“Lividity is the discoloration of the skin caused by gravity pulling the blood down into the lowest parts of the body after the heart stops beating. It takes at least two hours for lividity to be obvious to an observer, and it becomes fixed at six to ten hours. The amount of lividity is proportionate to the amount of blood remaining in the body after death. This means after the victim died, she was lying on her back at least long enough for the lividity to form. No lividity was found in the front of the victim’s body.

“Indentations in the skin remain after death due to lack of circulation. The victim’s body had gravel and stone marks in the lower back and buttock area with no inflammation, indicating they were created postmortem. There were no indentations on her front side, indicating that after death she did not face downward. Also, a number of abrasions were possibly consistent with dragging the body postmortem.

“Dr. Sheridan gave no opinion as to the victim’s time of death.

“Norman Sperber, forensic odontologist (dentist), is, among other things, the chief forensic dentist of San Diego and Imperial Counties. Dr. Sperber made an impression of Defendant’s teeth. Defendant’s lower right canine tooth was unusual, because it protruded and was lower than the other teeth in his lower jaw. The other canine tooth was normal. The condition is very rare, shared by very few, possibly two, out of a hundred people. After studying an autopsy photograph, Dr. Sperber opined that a mark on the victim’s hand was a human bite mark consistent with the abnormality of Defendant’s teeth. Dr. Sperber was not absolutely certain it was Defendant’s bite mark

because the angle in which the picture of the bite mark was taken made it impossible to determine.

"Eugene Price knew the victim for a year and a half before she was murdered. They were friends until March of 1993, when the relationship became more intimate and sexual in nature. This level of intimacy lasted until she was murdered. About three weeks to a month before her murder, the victim showed Price the letter detailing the property division later found by the detective in her purse. Price told her to consult an attorney regarding the note.

"The day before the murder, Price was in Camarillo and Oxnard looking for an apartment because the victim was going to move in with him. That night, the victim left a message on Price's answering machine at approximately 7:00 or 7:30 p.m. asking Price to call her back at her residence. He called her back that night between 9:30 and 10:00 p.m., but the line was busy. Price continued calling and receiving a busy signal. He called the phone company to assist him. Around 11:55 to midnight, Price called and Defendant answered the phone. Defendant, sounding stressed and agitated, answered, 'Hello.' Price asked to speak with the victim. Defendant replied, in a matter of fact voice, '[S]he is dead.' After realizing Defendant was not joking, Price asked what had happened. Defendant, sounding anxious, stated that his wife's head was bashed in and her eye was hanging out of its socket. Price told Defendant to call 9-1-1. Defendant called 9-1-1 at 11:58 p.m., followed soon thereafter by calls at 12:06 and 12:33 a.m.

"In June 1993, Betsy Otte was a teller and new accounts representative for the Hesperia Branch of Great Western Bank. Defendant and his wife had a joint checking

and a joint savings account with the bank. In June of 1993, Defendant closed out the joint accounts and said from that day forth he would have an individual account. Defendant said he felt his wife was irresponsible with money, and that he was tired of having to support himself, her, and the man she was having an affair with. Defendant stated he was only going to support himself. On a later occasion in June, Defendant spoke with Otte and said he was saving money to give to his wife and her boyfriend so they could establish their own place.

"On September 3, 1993, Sheriff's Homicide Detective Kathleen Cardwell spoke with Defendant about how much time Defendant needed to drive from Summit Valley to his job in Corona. Defendant said 2:15 p.m. was the latest he could leave his home and make it on time to work in Corona. Defendant also told Detective Cardwell that the financial conditions of his marriage were not the best. Defendant stated his wife had handled the finances until recently when he discovered she had allowed the payments on Defendant's Ford Ranger to lapse, causing the original $14,000 loan to have an additional $11,000 added onto it. Defendant said he was afraid his wife was going to leave him because she would repeatedly come home and tell him about her sexual encounters with Price. Defendant was bothered by his wife's sexual encounters.

"Steve Browder is a recovery agent and repossessor for an agency in Palm Springs. Browder was assigned to go to Defendant's residence and repossess his Ford Ranger. He arrived in the early morning daylight on the day before the murder. The driveway was steep and extended 50 yards from the main road to the residence. The residence was at the top of the driveway on a plateau. Browder's vehicle had difficulty

ascending the driveway. Browder did not repossess the Ranger after Defendant called the finance company.

"*The Defense:*

"Wayne Kozica, the victim's brother, spoke with her at approximately 7:15 to 7:30 p.m. the night of the murder and she seemed normal at that time. She told him that she and Defendant had been arguing, and he offered to let her stay with him in San Diego.

"Arthur Quas knew Defendant and the victim. The night of the murder, he called Defendant at home just before 10:00 p.m. The phone rang four or five times, then there were two clicks and a dial tone. Quas called again and received no answer. Both Defendant and the victim would have flings lasting a few days, but then go on with each other.

"Paul Rios worked with Defendant at Schuller Manufacturing. He saw Defendant at work three times on the day of the murder. Defendant's demeanor was similar to most days. On previous occasions, Defendant openly spoke of affairs, so Rios thought he was a swinger.

"Robert Gager started employment at the Olive Garden as the victim's general manager three weeks before her murder. He spoke with her around 5:30 p.m. on the day of her murder and she sounded fine. She was not scheduled nor did she work on the day she was killed.

"Gregory Randolph was the deputy coroner investigator at the time of the murder. He arrived on scene about 10:00 a.m. on the day after the murder. He stated that he was

not requested until that time by the homicide detail. The body was cool to the touch and was in advanced stages of rigor mortis.

"In 1997, Christian Filipiak, a defense investigator, left Schuller Manufacturing at 11:06 p.m. and drove the same route as Navarro. Driving with the cruise control set at 60, 65 and 70 miles per hour, it took him 52 minutes, 48 minutes, and 44 minutes respectively to arrive at the residence.

"Griffith Thomas, a physician specializing in pathology and forensic pathology, explained that time of death is a very complex study. Factors include rigor mortis, lividity, and core body temperature. The closer observations are made to the time of death, the more accurate the findings will be. He opined that it cannot be said when death occurred in this case, but many of the victim's contusions occurred several hours before her death.

"Dr. Gregory S. Golden, a dentist and chief odontologist for San Bernardino County, compared models of Defendant's teeth with a similar photograph to the one studied by Dr. Sperber of the victim's body. Dr. Golden could not eliminate Defendant as a suspect, but then did further studies. In 15 sets of models of patients he had treated, he randomly picked, in half an hour, five people whose teeth were similar to Defendant's. He opined that by itself, the bite-mark evidence should be disregarded because of the generic nature of the bite and the low value of the photograph. On cross-examination,

Dr. Golden stated that Defendant's under-erupted, displaced canine tooth would only be found in about two percent of the population." (*People v. Richards*, *supra*, E024365.)[6]

III. FACTS PRESENTED AT THE HEARING ON DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

A. The Defense Case

At the evidentiary hearing, Dr. Sperber claimed that the bite mark photography that he relied on for his testimony in the 1997 trial was distorted and "the position of the ruler with regards to the camera and with regard to the skin" was not very well done. Thus, he testified that he should not have stated any percentages 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

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[6] During oral argument, defense counsel criticized our quoting the facts set forth in our prior opinion in *People v. Richards*, *supra*, E024365. We note our prior opinion addressed Defendant's claim that the evidence was insufficient to support his conviction of first degree murder. Given the applicable standard of review applied to such issue (*People v. Kelly* (2007) 42 Cal.4th 763, 787, 788), we find defense counsel's criticism to be misplaced.

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 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.[7] 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."[8] 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

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[7] Because the court 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.

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.

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 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[9] in nature, largely due to its length (two centimeters), 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.

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.

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

A Department of Justice analysis concluded that the DNA present upon the 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 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 has [*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 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* 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 claim, for example, it does not contend the first bite was rotten." (*Lawley*, *supra*, 42 Cal.4th at pp. 1240-1241.)

Defendant contends this court must not read *Lawley* too broadly. He claims the cases cited by *Lawley*, which discuss false evidence, spelled out the less stringent standard, i.e., that false evidence must be substantially material or probative on the issue

of guilt. (*In re Pratt* (1980) 112 Cal.App.3d 795, 865; *In re Hall* (1981) 30 Cal.3d 408, 425 (*Hall*); *In re Malone* (1996) 12 Cal.4th 935, 966; *In re Roberts* (2003) 29 Cal.4th 726, 741-742; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1232; and *In re Bell* (2007) 42 Cal.4th 630, 638.) Thus, he argues the Supreme Court's dicta in *Lawley* did not serve to render section 1473 and the existing case law void. Defendant's argument is misplaced. According to Defendant, false evidence was used at his 1997 trial to support the jury's finding of guilt. As discussed below, we do not agree the evidence was false. Rather, we conclude the evidence offered in 1997 was true and valid; Defendant merely offered new expert testimony on how to interpret the evidence. As such, we treat the new expert testimony as new evidence.[10]

Accordingly, as the People point out, defendant had to show the trial court that "his (1) newly discovered evidence (2) undermined the prosecution's ***entire*** case ***and*** (3) the evidence had to point ***unerringly*** to his innocence." (*In re Johnson* (1998) 18 Cal.4th 447, 460-462; *Hall*, *supra*, 30 Cal.3d at pp. 415-417, 424; *In re Weber* (1974) 11 Cal.3d 703, 724 (*Weber*).)

B. Analysis

In analyzing the evidence offered at the evidentiary hearing, we are mindful that "newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. [Citations.] '[A]

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[10] We note Defendant also recognizes that new bite mark evidence was introduced.

criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' [Citation.]" (*In re Clark* (1993) 5 Cal.4th 750, 766.)[11]

1. Bite mark evidence

The testimonies of Drs. Sperber, Golden, Johansen, and Bowers at the evidentiary hearing regarding the injury on victim's hand did not constitute new evidence. Dr. Sperber testified about the fact that the photography he relied upon in 1997 was distorted. He provided the same opinion about the photography in 1997. In Dr. Sperber's declaration in support of the petition, he stated that the photograph "should never have been relied upon as conclusive evidence of [Defendant's] guilt." However, in 1997 he did not claim the photograph was conclusive evidence of Defendant's guilt. Instead, he testified there were four levels he uses when rating and comparing the teeth of a person to the bite mark, namely, inconsistent, consistent, probable, and "reasonable doubt certainty." Of those four levels, his 1997 opinion was that Defendant's teeth were consistent, which means he could have been the source of the mark. Regarding the quality of the photograph, Dr. Sperber rated it as a six or seven on a scale of one to ten.

[11] During oral argument, defense counsel maintained that new evidence was introduced to contradict the evidence presented at trial. We disagree. As we discuss below, the evidence previously relied upon by the experts was never presented as conclusive evidence of Defendant's guilt. There was no testimony that Defendant unequivocally murdered the victim.

His declaration did not recant his trial testimony. Instead, the main point of his declaration was that he should not have testified that "very few, maybe one or two, or less, out of one hundred people will have an under erupted canine similar to the one of [Defendant]."

Dr. Golden testified in 1997 that he and Dr. Sperber did not differ in their opinion, i.e., they agreed the photography was "somewhat less than ideal evidence," that it was a generic bite, they could not rule Defendant out as a suspect, they could not rule many other individuals out as suspects, and that they tended to disregard the bite mark as evidence. He also opined that, while there is some consistency between Defendant's teeth impression and the bite mark, if this were the only evidence to prove that Defendant killed victim, it must be "thrown out." In 1997 Dr. Golden found the bite mark evidence to be basically irrelevant. At the evidentiary hearing, the doctor testified the mark may have been a dog bite; however, he also maintained that his initial opinion that victim's hand injury was a human bite mark had not changed. Although the photograph was distorted, Dr. Golden made no attempt in 1997 to remedy the distortion.

Dr. Johansen did not testify at the 1997 trial. His testimony at the evidentiary hearing concerned his use of Adobe Photoshop to rectify digital distortion in photographs. He could not explain how the program worked. Rather, he merely stated that he looks at an image for distortion and then corrects it with Adobe Photoshop's distort function. This "Adobe Photoshop technique" 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 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 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[12] 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 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.

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 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

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

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.[13] Dr. Bowers testified that the still photograph showed the fibers, whereas the autopsy photograph had not. Defendant thus implied that Gregonis had planted the fibers.

The trial court found Defendant had "failed to establish that . . . Gregonis[] presented perjured or planted evidence in this case." However, the court opined that the fibers evidence raised "factual concerns." Defendant thus claims that "another pillar from the prosecution's case was undermined by the evidence presented at the hearing." We disagree.

Gregonis explained the reason why the fibers were not initially found. Specifically, he stated that his first examination of victim's fingernails was cursory. However, on the second examination, he used the stereomicroscope "looking for tissue and stuff and such that [he] might take on to typing." Upon finding the fibers, he "felt that the manner which they were actually in the crack of the fingernail was significant enough to document with the video camera . . . ." Thus, he attached the video camera to the stereomicroscope. He then compared the fibers to the clothing items that came from Defendant. Going back to the 1997 trial testimony, we note that Gregonis could not say

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[13] Gregonis testified that a stereomicroscope is a "low power microscope that allows . . . a 10 to 100 magnification of an object so that you can see details better."

definitively that the fibers came from Defendant's shirt. (*People v. Richards*, *supra*, E024365, p. 8.)

Nothing offered at the hearing regarding the fibers evidence clearly demonstrated Defendant's innocence. Again, "newly discovered evidence will not undermine the case of the prosecution so as to warrant habeas corpus relief unless (1) the new evidence is conclusive, and (2) it points unerringly to innocence." (*Weber*, *supra*, 11 Cal.3d at p. 724.)

5. Adobe Photoshop evidence and *Kelly-Frye* standards

Assuming this court affirmed the trial court's decision to grant Defendant's petition, the People also challenge the admitted testimony regarding Adobe Photoshop evidence on the grounds that it did not meet *Kelly-Frye* and Evidence Code standards. Because we have concluded the trial court erred in finding that 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 need not reach the merits of this issue.

C. Summary

The case against Defendant was based entirely upon circumstantial evidence. We are mindful that in such case "'. . . we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. [Citation.]' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290.) In examining the evidence, we focus on the evidence that did exist rather than on the evidence that did not. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299.) The scope

of the evidence includes both the evidence in the record as well as "reasonable inferences to be drawn therefrom." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.)

Here, Defendant had the motive and the opportunity. A divorce was imminent. Defendant closed the joint banking account and instructed the teller that from that day forward he would have an individual account. He stated he was tired of victim's financial irresponsibility and he was tired of supporting her and the man she was having an affair with. He also indicated he was saving money so that victim and her boyfriend could establish their own place. Regarding the crime scene, Defendant was able to determine what happened to victim despite the fact that it was dark and the only power on at the residence was supplied by a generator. When Deputy Nourse told Defendant they needed to leave the crime scene so he could secure it, Defendant 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." (*People v. Richards*, *supra*, E024365, pp. 4, 13-14.) All footprints were accounted for, and a search of the surrounding area revealed that there was no indication that anyone (other than Defendant and the officers) approached the residence. (*People v. Richards*, *supra*, E024365, p. 6.)

In addition to the above, there was the blood splatter evidence. The bite mark evidence was never conclusive, nor was the hair or fibers evidence. While Defendant's petition suggested that certain evidence against him was weak, the fact remains those weaknesses were brought out during the trial. Even with the weaknesses, there was sufficient circumstantial evidence to establish Defendant's guilt. The new evidence offered by Defendant in support of his petition failed to undermine the prosecution's

entire case and point unerringly to his innocence. (*In re Johnson*, *supra*, 18 Cal.4th at pp. 453-454.)

V. DISPOSITION

The superior court's order granting Defendant's petition for writ of habeas corpus is vacated, and the superior court is directed to enter an order denying the petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.