Case No. S189275
San Bernardino Superior Court No. SWHSS700444

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

WILLIAM RICHARDS,
Petitioner-Appellee,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA
Respondent-Appellant.

After a Decision by the Court of Appeal of the State of California
Fourth Appellate District, Division Two
Appeal No. E049135

On Appeal from the Superior Court of the State of California
County of San Bernardino
The Honorable Brian McCarville, Judge Presiding
Criminal Case No. FVI00826

THE INNOCENCE NETWORK'S APPLICATION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND APPELLEE WILLIAM RICHARDS; *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND APPELLEE WILLIAM RICHARDS

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TABLE OF CONTENTS

Page

APPLICATION TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICUS CURIAE 1

BRIEF OF AMICUS CURIAE 2

I. INTRODUCTION 2

II. ARGUMENT 7

A. When a trial witness later fundamentally alters the opinion that he rendered, "false evidence" was presented at trial and a habeas petition should be analyzed under section 1473(b)(1) 7

1. A plain reading of section 1473 establishes that evidence is "false" under the statute if it is untrue, deceitful, or incorrect 9

2. Section 1473 plainly applies to both expert and lay testimony 15

3. It is immaterial under a plain reading of section 1473 whether the evidence is false at the time of trial or is determined to be false thereafter 20

4. The legislative history of section 1473 offers further corroboration of an expansive reading of "false evidence." 22

5. Exonerating evidence may be either false, new, or both and should be analyzed accordingly 23

6. Respondent offers no compelling reason to abandon this Court's well-established precedent on the application of the false evidence standard 26

B. Bite mark evidence should be used only to exclude suspects from consideration, not to identify them as the source of a bite mark 28

1. It has not been scientifically proven that bite marks are unique; therefore, statistical evidence about the probability that a set of bite marks came from an individual with a specific dental feature is inaccurate and unreliable. 31

Table of Contents
(continued)

Page

2. Human skin does not reliably imprint bite marks 32

3. There are no standards against which an expert could opine on the consistency of a bite mark with an individual's dentition 35

4. Experts' conclusions may be influenced by contextual bias 36

5. Bite mark comparison techniques should be used only to exclude, not identify, suspects 37

C. Mr. Richards is entitled to habeas relief under section 1473 39

1. Dr. Sperber's and Dr. Golden's trial testimonies were false 39

2. Dr. Sperber's and Dr. Golden's testimonies were substantially material and probative on the issue of Mr. Richards's guilt 40

III. CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

In re Bell
(2007) 42 Cal.4th 630 [67 Cal.Rptr.3d 781] 25, 26

California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.
(1997) 14 Cal.4th 627 [59 Cal.Rptr.2d 671] 10

Ege v. Yukins
(6th Cir. 2007) 485 F.3d 364 41

Ex parte Lindley
(1947) 29 Cal.2d 709 [177 P.2d 918] 8, 25

Ex parte Robbins
(Tex. Ct.Crim.App. June 29, 2011) No. AP-76,464 [2011 Tex. Crim. App. LEXIS 910] 13, 14, 17

In re Hall
(1981) 30 Cal.3d 408 [179 Cal.Rptr. 223] ..... *passim*

In re Hardy
(2007) 41 Cal.4th 977 [63 Cal.Rptr.3d 845] 8

Hassan v. Mercy River Hospital
(2003) 31 Cal.4th 709 [3 Cal.Rptr.3d 623] 9

In re Imbler
(1963) 60 Cal.2d 554 [35 Cal.Rptr. 293] 24

In re Kirschke
(1975) 53 Cal.App.3d 405 [125 Cal.Rptr. 680].....17

Kobzoff v. Los Angeles County Harbor/UCLA Medical Center
(1998) 19 Cal.4th 851 [80 Cal.Rptr.2d 803] 10, 11

Lopez v. Superior Court
(2010) 50 Cal.4th 1055 [116 Cal.Rptr.3d 530] 16

Melendez-Diaz v. Massachusetts
(2009) ___U.S.___ [129 S.Ct. 2527, 174 L.Ed.2d 314].....7

Table of Authorities
(continued)

Page

Moradi-Shalal v. Fireman's Fund Ins. Companies
(1988) 46 Cal.3d 287 [250 Cal.Rptr. 116] 26

People v. Carter
(1997) 58 Cal.App.4th 128 [67 Cal.Rptr.2d 845] 27

People v. Collins
(1968) 68 Cal.2d 319 [66 Cal.Rptr. 497] 41

People v. Collins
(1968) 68 Cal.2d 319 [66 Cal.Rptr. 497] 41

People v. Rubalcava
(2000) 23 Cal.4th 322 [96 Cal.Rptr.2d 735] 27, 28

People v. Trevino
(2001) 26 Cal.4th 237 [109 Cal.Rptr.2d 567] 10

In re Roberts
(2003) 29 Cal.4th 726 [128 Cal.Rptr.2d 762] 8, 40

Rice v. Superior Court
(1982) 136 Cal.App.3d 81 [185 Cal.Rptr. 853]..... 10, 12

In re William Richards (Nov. 19, 2010, E049135) [nonpub. opn.] 39

Russello v. United States
(*1983*) 464 U.S. 16 [104 S.Ct. 296].....17

Smith v. Workers' Comp. Appeals Bd.
(2009) 46 Cal.4th 272 [92 Cal.Rptr.3d 894] 11

Souter v. Jones
(6th Cir. 2005) 395 F.3d 577 [2005 Fed.App. 0027P] 17, 18

State Farm Mutual Auto. Insurance Co. v. Garamendi
(2004) 32 Cal.4th 1029 [12 Cal.Rptr.3d 343] 10

Valley Vista Services, Inc. v. City of Monterey Park
(2004) 118 Cal.App.4th 881 [13 Cal.Rptr.3d 433] 10

Table of Authorities
(continued)

Page

Vasquez v. Hillery
(1986) 474 U.S. 254 [106 S.Ct. 617].....26

Welch v. Texas Dept. of Highways & Public Transp.
(1987) 483 U.S. 468 [107 S.Ct. 2941].....27

In re Wright
(1978) 78 Cal.App.3d 788 [144 Cal.Rptr. 535].....24

LEGISLATIVE HISTORY

Assem. Bill No. 48 (1975-1976 Reg. Sess.) 22, 23

STATUTES

Penal Code
§ 1473 ..... *passim*
§ 1473(b) 15
§ 1473(b)(1) 3, 7, 8
§ 1473(c) 15
§ 1473(d) 22, 24
§ 1473.5 17

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009)..... 12, 14

California Rules of Court
8.204(c)(1) 44
8.520(f) 1

Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academy of Sciences 2009)..... *passim*

Encyclopedia of Forensic Science (2009) Statistical Evidence in Court [Koehler] 30, 41

Table of Authorities
(continued)

Page

Judicial Counsel of California Criminal Jury Instructions (Summer 2011 ed.)
No. 104 20
No. 332 19
No. 333 19

Medwed, *California Dreaming?: The Golden State's Restless Approach to Newly Discovered Evidence of Innocence* (2007) 40 U.C. Davis L.Rev. 1437 ..... 3, 24

Pretty & Sweet, *The scientific basis for human bitemark analysis—A critical review* (2001) 41 Science and Justice 37

Random House Unabridged Dictionary (2d ed. 1987) 12

APPLICATION TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), The Innocence Network requests leave of this Court to file an *amicus curiae* brief in support of Petitioner, William Richards. This application is timely made within thirty days after Mr. Richards filed his reply brief on the merits.

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove they are innocent of crimes for which they were wrongfully convicted. Given the Network's mission, among its chief interests are the legal mechanisms, like habeas corpus under Penal Code section 1473, through which such individuals can challenge their convictions. Thus, this case is important to the Network for the following reasons: it will allow this Court to clarify the standards by which lower courts can meaningfully evaluate habeas claims, and it highlights the dangers of using unreliable forensic science techniques.

This case allows the California Supreme Court to address these two concerns because it involves the application of section 1473 to the fundamental alteration of expert testimony, adduced at trial and material to the verdict, regarding the source of alleged bite marks on the victim's body. Accordingly, the Network submits this amicus brief to aid the Court in determining the proper standard or standards by which to evaluate a habeas

petition involving the fundamental alteration of testimony and to understand the limits of bite mark evidence.

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

The Court of Appeal reversed the trial court's grant of William Richards's habeas petition in large part because it determined that false evidence was not introduced against Mr. Richards at trial, and therefore did not analyze Mr. Richards's petition under Penal Code section 1473. This holding, however, improperly ignores the fact that the experts' fundamental alteration of their trial testimony—that an alleged bite mark on the victim pointed to Mr. Richards as the perpetrator of the crime—demonstrates the trial testimony was false, thus requiring the application of section 1473. The Court of Appeal's holding, therefore, disregarded not only the plain meaning of section 1473 and this Court's previous application of that statute, but also the limited and specific uses of bite mark evidence.

California has long recognized the unfortunate truth that evidence adduced at trial may sometimes be false and lead to the wrongful convictions of innocent people. Over thirty years ago, in an effort to counteract this problem, the state legislature liberalized the standards governing habeas corpus to permit challenges to wrongful convictions involving evidence that was untrue or incorrect. The legislature drafted a broadly worded statute, Penal Code section 1473, which permits "[a] writ

of habeas corpus [to] be prosecuted for . . . [f]alse evidence that is substantially material or probative on the issue of guilt or punishment [that] was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code § 1473(b)(1).) Indeed, one of the most distinguishing features of California's statutory version of habeas corpus is its "permissive definition of the grounds for relief." (Medwed, *California Dreaming?: The Golden State's Restless Approach to Newly Discovered Evidence of Innocence* (2007) 40 U.C. Davis L.Rev. 1437, 1453.)

Consonant with the plain meaning of the statute and the legislature's liberalizing intent, California courts have consistently interpreted section 1473's "false evidence" standard to apply to any evidence at trial later determined to be untrue or incorrect, even where the false evidence resulted from honest mistake or the falsity was not discovered until after trial. This Court used section 1473's false evidence standard to free Gordon Robert Hall, who had been sentenced to life in prison for a murder he did not commit. In that case, the only two eyewitnesses to the killing recanted their trial testimony identifying Hall as the shooter when they realized, post-trial, that they had been mistaken in their identification. (*In re Hall* (1981) 30 Cal.3d 408, 423-25 [179 Cal.Reptr. 223] [hereafter *Hall*].) As with Mr. Richards's case, the fundamental alteration of testimony used to convict Hall fell comfortably within the meaning of "false evidence" under section 1473. Indeed, the fact that the eyewitness

testimonies were found to be false *after* the trial because of an unintentional mistake made *during* the trial was immaterial to this Court's analysis. This Court has not deviated from this broad understanding in the three decades since the law's enactment and should reject Respondent's suggestion to do so now.[1]

False evidence is not limited to eyewitness error; it frequently involves expert scientific testimony, such as the bite mark testimony used to convict Mr. Richards. The Innocence Network has helped exonerate at least twelve people convicted in large part because testifying experts relied on faulty bite mark science to conclude that a mark found on a victim's body matched or was consistent with the defendant's dentition. For instance, Roy Brown was convicted of murder in 1992 and sentenced to 25 years to life in New York state prison. (Innocence Project, *Roy Brown* <http://www.innocenceproject.org/Content/Roy_Brown.php> (as of July 12, 2011) [hereafter *Roy Brown*].) During Brown's trial, prosecutors repeatedly highlighted to the jury several bite marks that appeared on the victim's body. (*Ibid.*) The prosecution's expert, a "bite mark analyst," testified that the seven bite marks on the victim's body were "entirely consistent" with Brown's dentition. (*Ibid.*) The expert also noted an

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[1] Mr. Richards's habeas claims also involve new evidence that may be analyzed under the new evidence standard. As discussed at pages 21-23, *infra*, courts have evaluated habeas claims under one or both standards as appropriate.

"apparent inconsistency," but instead of excluding Brown from suspicion, he claimed it was an "explainable consistency" due to the placement of the bite mark on the victim's curved thigh. (Innocence Project, *Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing* <http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf> (as of July 12, 2011) [hereafter *Wrongful Convictions*].) Roy Brown served fifteen years in prison before DNA evidence proved that the bite mark evidence was false and that he was not the killer. (*Roy Brown*, *supra*.)

In Arizona, Ray Krone was convicted of murder, kidnapping, and sexual assault in 1992 and sentenced to death. At Krone's trial, prosecutors emphasized bite marks that appeared on the victim's breast and neck. A prosecution expert testified he was "certain" (*Wrongful Convictions*, *supra*) that an impression of Krone's jagged teeth in a Styrofoam cup matched bite marks found on the victim's breast and neck. (Innocence Project, *Ray Krone* <http://www.innocenceproject.org/Content/Ray_ Krone.php> (as of July 12, 2011) [hereafter *Ray Krone*].) The expert testified that it was "a very good match," and that a bite mark "has all the veracity, all the strength that a fingerprint would have." (*Wrongful Convictions*, *supra*.) Ray Krone served ten years in prison before DNA evidence proved that the bite mark evidence was false and that Krone was innocent. (*Ray Krone*, *supra*.)

In Mr. Richards's case, as with those of Brown and Krone, the bite mark evidence was false. While bite mark science has the patina of a vigorously tested and accurate discipline like DNA evidence or fingerprint analysis, it is, in fact, highly error-prone and inaccurate, especially when used to inculpate a defendant. Indeed, the National Academy of Sciences ("NAS") recently examined bite mark evidence as part of a congressionally-mandated and congressionally-funded study assessing the use of forensic science techniques in criminal prosecutions. The NAS concluded that bite mark evidence's accuracy and reliability is limited, and therefore should be used only to *exclude* suspects and not to opine on whether they are the source of a bite mark.[2] In this case, the false evidence was substantially material to Mr. Richards's conviction: though the jury failed to reach verdicts in his first two trials, a jury convicted Mr. Richards only after bite mark evidence was admitted in the third trial.

As Brown, Krone, and the many other exonerated individuals can attest, overreliance on bite mark evidence may result in wrongful convictions. Justice Scalia recognized the fundamental problems with faulty forensic science, observing recently that "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." (*Melendez-Diaz v. Massachusetts* (2009)

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[2] See discussion, *infra*, at pp. 25-35.

___U.S.___ [129 S.Ct. 2527, 2537, 174 L.Ed.2d 314].) This is undoubtedly because expert testimony on forensic sciences, like bite mark evidence, can substantially influence the jury. This Court should, then, examine the bite mark evidence presented at Mr. Richards's habeas proceeding as "false evidence" under Penal Code section 1473.

Finally, because this Court framed the question of how to treat fundamentally altered expert testimony in the disjunctive, the Network respectfully submits that this Court may also analyze such testimony under the "newly discovered" evidence standard. Exonerating evidence, as this Court's own precedents demonstrate, can be both false and new. Where such overlap occurs, courts should review habeas petitions under both section 1473's false evidence standard and the "newly discovered" evidence standard.

II. ARGUMENT

A. When a trial witness later fundamentally alters the opinion that he rendered, "false evidence" was presented at trial, and a habeas petition should be analyzed under section 1473(b)(1).

For habeas corpus petitions based on false evidence that was introduced at trial, a court must analyze the claim under the standard set forth in Penal Code section 1473.[3] Amended in 1975, section 1473

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[3] For habeas corpus petitions claiming that reconsideration is warranted because of newly discovered evidence, a different standard applies: the petitioner must prove that the new evidence completely

provides for habeas relief where "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code § 1473(b)(1).) False evidence is "substantially material or probative on the issue of guilt or punishment" if "there is a 'reasonable probability' that, had it not been introduced, the result would have been different." (*In re Roberts* (2003) 29 Cal.4th 726, 741-742 [128 Cal.Rptr.2d 762].) Although this Court has not yet expressly defined when evidence is considered "false" for purposes of granting a habeas petition under section 1473, its prior decisions demonstrate that false evidence includes any testimony that was untrue, deceitful, or incorrect at the time it was given. When, as here, a witness who testified at trial later fundamentally alters his opinion, the original testimony was false. Accordingly, habeas petitions based on such claims should be—and have been—analyzed under section 1473.

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undermines the entire structure of the prosecution's case, is conclusive, and points unerringly to innocence. (*Ex parte Lindley* (1947) 29 Cal.2d 709, 723 [177 P.2d 918] [hereafter *Lindley*].) "Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent. A criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts 'fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence . . . .'" (*In re Hardy* (2007) 41 Cal.4th 977, 1016 [63 Cal.Rptr.3d 845] [citing *Hall*, *supra*, 30 Cal.3d at p. 417].) This Court has defined new evidence as "evidence that could not have been discovered with reasonable diligence prior to judgment." (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016.)

1. A plain reading of section 1473 establishes that evidence is "false" under the statute if it is untrue, deceitful, or incorrect.

False evidence under section 1473 applies to any habeas petition where the evidence challenged was "substantially material or probative on the issue of guilt or punishment" and was untrue or incorrect. Respondent, without providing any actual legal support for its conclusion, claims that an "incorrect statement, innocently made, can[not] amount to 'false' evidence." (Respondent's Answer Brief at p. 26.) But, as discussed below, the legislature added no caveats or limitations to false evidence: it is immaterial whether the false evidence was testimonial or documentary, perjured or unintentional, or known to be false at the time it was introduced. Quite simply, section 1473 requires courts to review under its evidentiary standard any evidence, material to the conviction, that is untrue or incorrect. Indeed, under longstanding rules of statutory construction, there can be no other reading of section 1473.

"Well-established rules of statutory construction require [a court] to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy River Hospital* (2003) 31 Cal.4th 709, 729 [3 Cal.Rptr.3d 623]; see also *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86 [185 Cal.Rptr. 853] ["The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature from a reading of the statute as

a whole so as to effectuate its purpose."].) "In this endeavor the court should first look to the plain dictionary meaning of the words of the statute and their juxtaposition by the Legislature." (*Rice v. Superior Court*, *supra*, 136 Cal.App.3d at p. 86); see also *State Farm Mutual Auto. Insurance Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 Cal.Rptr.3d 343] ["In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose."]; *People v. Trevino* (2001) 26 Cal.4th 237, 241 [109 Cal.Rptr.2d 567] [A court starts "by considering the statute's words because they are generally the most reliable indicator of legislative intent."].)

The statute's words must be construed in context, and the statute and its parts must be read in their entirety and not as independent parts with no relation to one another. (See *People v. Black* (1982) 32 Cal.3d 1, 5 [184 Cal.Rptr. 454]; *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 889 [13 Cal.Rptr.3d 433].) The statute's plain meaning controls the interpretation unless the statute's words are ambiguous. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [80 Cal.Rptr.2d 803].) If the statute's plain meaning is unambiguous, "no court need, or should, go beyond that pure expression of legislative intent." (*Ibid.*; see also *California Teachers Assn.*

v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633 [59 Cal.Rptr.2d 671] ["This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed."].) "In construing a provision, 'we presume the Legislature meant what it said' and the plain meaning governs." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [92 Cal.Rptr.3d 894].)

The language of section 1473 is clear and unambiguous, and therefore the Legislature's plain meaning governs. The statute provides in part:

> (b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> > (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration; or . . .
>
> (c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b).
>
> (d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

(Pen. Code § 1473.)

In ascertaining legislative intent, "the court should first look to the plain dictionary meaning of the words of the statute and their juxtaposition by the Legislature." (*Rice, supra*, 136 Cal.App.3d at p. 86.) According to

the Random House Unabridged Dictionary, the word "false" means "not true or correct; erroneous: a false statement," or "uttering or declaring what is untrue: a false witness." (Random House Unabridged Dictionary (2d ed. 1987) p. 695.) According to Black's Law Dictionary, the word "false" means anything that is "untrue," such as "false statement," or "deceitful," such as "a false witness." (Black's Law Dictionary (9th ed. 2009) p. 677.) Given these definitions, "false" means anything that is untrue, deceitful, or incorrect. And in the context of Mr. Richards's case, a witness who fundamentally alters previous testimony is, at the very least, admitting that the evidence he initially gave was incorrect or untrue. In other words, the fundamental alteration of previous testimony renders that testimony false under section 1473.

This Court has determined that the change in an eyewitness's opinion as to the identity of a perpetrator falls comfortably within the ambit of section 1473. In *Hall*, the prosecution's key witnesses were the victim's two brothers who identified Hall as the shooter. (*Hall*, *supra*, 30 Cal.3d at p. 417.) After trial, however, both brothers changed their testimony in writing and under oath. (*Ibid.*) One brother acknowledged "that he originally thought petitioner was the gunman, but [had] since become convinced of petitioner's innocence because he . . . had the opportunity to more carefully view Sanchez who he now believes is the killer, and because of the substantial discrepancy between petitioner's height and the height of

the gunman." (*Ibid.*) The other brother testified similarly at the habeas proceeding and added that he was so distraught at his brother's death at the time of trial that he was "careless" in deciding which of the murder suspects was the shooter. (*Ibid.*) This Court noted that the referee originally assigned to report to the Court had not considered the expanded definition of "false evidence" under the amendment to section 1473 in finding against Hall on this issue. (*Id.* at 424.) This Court applied the false evidence standard and expressly found that Hall had successfully shown that the fundamental change in the two eyewitnesses' opinion identifying Hall as their brother's killer was false evidence under section 1473. (*Ibid.*) Notably, although the change in the witnesses' opinions was based on their *unintentional mistake*, this Court still determined that their trial testimony was false. (*Ibid.*)

Like California, other courts have held that a witness's fundamental alteration of his trial testimony—even as a result of an innocent mistake—demonstrates that the trial testimony was "false." In *Ex parte Robbins*, for example, the Texas Court of Criminal Appeals (that state's highest criminal appellate court) confronted a situation in which the prosecution's expert testified at trial that the victim's cause of death was asphyxia-related compression of the chest, and that the manner of death was homicide. (*Ex parte Robbins* (Tex. Ct.Crim.App. June 29, 2011) No. AP-76,464 [2011 Tex. Crim. App. LEXIS 910].) After the petitioner was convicted, the

expert altered her opinion and asserted that she could no longer testify with a reasonable degree of certainty that the victim's death *was* caused by compression asphyxia, or that the manner of death *was* homicide. (*Id.* at p. *19.) Rather, the cause and manner of death was, in her expert opinion, "undetermined" at best. (*Ibid.*)

The Texas Court first acknowledged that although "[t]he case law in this area frequently refers to the use of perjured testimony," testimony need not be perjured to be "false" under Texas common law. (*Id.* at p. *36.) "[I]t is sufficient that the testimony [is simply] false." (*Ibid.*) The court then looked to other court decisions and *Black's Law Dictionary* for the definition of "false." (*Id.* at pp. *36-37.) The court concluded that false testimony is "testimony that is untrue," and need not be perjured. (*Id.* at p.*36.) The court further defined false testimony as any that "creates a false impression of the facts." (*Id.* at p. *42.)

Here, Respondent offers no rebuttal to the plain meaning of the statute other than to claim without support that an "incorrect statement, innocently made, can[not] amount to 'false' evidence." (Respondent's Answer Brief at p. 26.) As noted above, this reading is not even remotely consistent with the clear and unambiguous language of the habeas statute or this Court's precedent. Moreover, Respondent wholly ignores the legislature's removal of the requirement that the evidence be knowingly perjured. Subsection (c) clearly and unequivocally makes "immaterial" the

"false nature of the evidence," as well as "[a]ny allegation that the prosecution knew or should have known of the falsity," to "the prosecution of a writ of habeas corpus brought pursuant to [section 1473(b)]." (See Pen. Code § 1473(c).) Thus, the Court should reject Respondent's specious reasoning.

Given the statute's plain meaning, this Court and other courts' precedent, "false evidence" under section 1473 includes any evidence presented at trial and material to the conviction that is incorrect, deceitful, or untrue. Fundamentally altered trial testimony clearly meets this definition and should be analyzed under the false evidence standard of section 1473.

2. Section 1473 plainly applies to both expert and lay testimony.

The unambiguous language used in section 1473 does not, as Respondent suggests, limit habeas relief only to false non-expert-witness or lay testimony. (See Respondent's Answer Brief at pp. 25-28 [suggesting that the statute would only apply to percipient witness testimony].) Section 1473 clearly applies to any evidence adduced at trial, including expert and lay witness testimony, that is false. In Mr. Richards's case, two bite mark experts testified at his trial. The first expert, Dr. Sperber, testified at Mr. Richards's trial that Mr. Richards was the source of the bite mark, and that Mr. Richards had a dentition so unique that only one to two percent of the

population would share it. (R.T. (June 18, 1997) 1212-1214.) The second expert, Dr. Golden, testified at trial that although he could not rule out Mr. Richards as the source of the bite mark, Mr. Richards had a dentition so unique that only two percent of the population would share it. (R.T. (June 26, 1997) 1534-1537.) Ten years later, at Mr. Richards's habeas hearing, both experts testified that they now hold opinions that are diametrically opposite to the opinions they held at trial: they have both ruled out Mr. Richards as the source of the bite mark. (R.T. (January 26, 2009) 91; 110.) These experts' fundamental alterations of their trial testimonies demonstrate that their testimonies were false, and therefore Mr. Richards's claim that he was convicted on the basis of false evidence should be reviewed under section 1473.

There is no textual support for Respondent's argument that habeas relief under section 1473 is limited to false non-expert-witness or lay testimony. The statute speaks only of "evidence;" it does not differentiate between the *type* of testimonial evidence that is alleged to be false. Respondent offers no explanation as to how this Court can ignore the clear wording of the statute. (See *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063 [116 Cal.Rptr.3d 530] [After looking at a variety of extrinsic aids to determine Legislative intent, the court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute,

and avoid an interpretation that would lead to absurd consequences."] [internal quotation omitted].) Moreover, the term "expert testimony" is used elsewhere in the statute, demonstrating that, had the state legislature wanted to limit the false evidence standard to lay testimony, it would have done so explicitly. (See Pen. Code § 1473.5 [permitting in habeas proceedings the introduction of "expert testimony" on battered spouses in certain circumstances]; see also *Russello v. United States* (1983) 464 U.S. 16, 23 [104 S.Ct. 296] ["[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."].)

Courts in California and other jurisdictions have, moreover, previously treated untrue expert witness testimony as "false evidence." (See *In re Kirschke* (1975) 53 Cal.App.3d 405, 411-412 [125 Cal.Rptr. 680]; see also *Ex parte Robbins*, *supra*, 2011 Tex. Crim. App. LEXIS 910 at p. *36 [finding that although "[t]he case law in this area frequently refers to the use of perjured testimony," false evidence does not need to be perjured; rather, "it is sufficient that the testimony [is] false" and analyzing whether the expert's trial testimony was false].) Respondent cites no relevant cases to support its claim to the contrary.[4]

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[4] Respondent cites to *Souter v. Jones* for the proposition that "a changed expert opinion may indeed constitute new evidence."

Respondent, finding no support in the text of the law or in decisions interpreting it, raises the meritless argument that expert testimony, unlike lay testimony, can never be true *or* false because it is merely offered as an "opinion" based on scientific methods. (Respondent's Answer Brief at p. 27.) In support of this argument, Respondent cites to the Criminal Jury Instruction for expert witnesses, which, Respondent claims, instructs jurors not "to evaluate expert witness testimony on a simplistic true/false basis" but rather "to decide the 'meaning and importance of any opinion' by considering 'the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion." (Respondent's Answer Brief at p. 27 [citing CALJIC No. 332 (Summer 2011 ed.)].)

(Respondent's Answer Brief at p. 27.) Souter appealed the denial of his habeas petition on, among other grounds, the fact that the prosecution's experts who testified at trial recanted their testimonies and later claimed that, at the very least, it was "inconclusive" whether the victim's wounds were caused by the alleged murder weapon. (*Souter v. Jones* (6th Cir. 2005) 395 F.3d 577, 583-584 [2005 Fed.App. 0027P].) Though the Sixth Circuit concluded that the experts' changed testimonies constituted "new evidence," the federal court standard would clearly not apply here. As explained, *infra*, at 20-21, the California legislature, in passing Penal Code section 1473, intended to distinguish the standards governing habeas petitions in California by adopting a liberalized version of the federal standard. Thus, the federal new evidence standard would not preclude the application of California's more liberal false evidence standard, or the "newly discovered" evidence standard (or both, depending on the facts of the claim), to habeas petitions brought before California courts.

But Respondent neglects to mention that the first sentence of the jury instruction on expert testimony it cites actually states: "You must consider the opinion[s], but you are not required to accept (it/them) *as true or correct*." (CALJIC No. 332 (Summer 2011 ed.) [emphasis added].) Expert opinion can, thus, be true or false. Furthermore, these same jury instructions also ask no less of jurors in weighing lay witness testimony: they are instructed that they may accept lay testimony as true or correct and that they should consider "the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion." (CALJIC No. 333 (Summer 2011 ed.).) This Court should, therefore, reject Respondent's attempt to deviate from the clear dictates of the statute and find that expert testimony, no less than lay testimony, can be "false" under section 1473.

Finally, *all* evidence that is later found to be untrue, deceitful, or incorrect can be "false" under section 1473. The statute does not limit the finding of false evidence to evidence presented by the prosecution. Indeed, the jury can use *all* admitted evidence to convict a defendant—even evidence presented by the defense. The California Jury Instructions make it clear that so long as the jury considers only a witness's *testimony*, it is free to reject any or all aspects of that testimony, regardless of whether the witness is testifying for the defense or the prosecution: "You must use only

the evidence that is presented in the courtroom [or during a jury view]. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence . . . . Nothing that the attorneys say is evidence . . . . Their questions are not evidence. Only the witnesses' answers are evidence." (CALJIC No. 104 (Summer 2011 ed.).)

3. It is immaterial under a plain reading of section 1473 whether the evidence is false at the time of trial or is determined to be false thereafter.

Notably, the California legislature placed no time requirements or limitations on section 1473 as to when evidence is determined to be false, nor did the legislature require that the false evidence knowingly be offered at trial. Accordingly, it is wholly irrelevant *when* the falsity of evidence was discovered and if the falsity was capable of being known at the time the evidence was adduced at trial or only post-trial. All that matters in the analysis whether the evidence is untrue or incorrect. That is all the plain language demands.

This Court, moreover, has endorsed this understanding. In *Hall*, the petitioner based his claim for habeas relief on, among other grounds, the recantation of the trial testimonies of the only two eyewitnesses to the crime. (*Hall*, *supra*, 30 Cal.3d at p. 417.) These eyewitnesses testified at trial that they identified Hall as the shooter. Years later, during the habeas proceedings, both eyewitnesses acknowledged that it was not until *after*

trial that they realized they were mistaken in their identification. (*Id.* at pp. 417, 423.) Because the law "requires only that the evidence be 'false' and 'substantially material . . . on the issue of guilt or punishment,'" the Court analyzed these recantations under section 1473—the "false evidence" standard. (*Id.* at p. 424.) The identification at trial of Hall as the murderer was incorrect and untrue, even though the brothers did not lie when they testified; rather, they made an "unintentional[]" mistake, which they realized only after Hall's conviction. (*Ibid.*) Accordingly, the Court applied section 1473 to the petitioner's claims and granted habeas relief under that standard. (*Ibid.*)

Finally, this Court's decision in *Hall* to apply section 1473 to evidence that is determined to be false only after trial, did not rest on the *type* of witness who presented the false evidence. That is, this Court did not consider the fact that the fundamentally altered testimony was presented by lay witnesses. Given that, as explained above, the statute treats lay and expert testimony precisely the same, *Hall* should apply similarly in cases where the testimony at issue is scientific or expert in nature. Thus, expert testimony determined to be incorrect or untrue because of advances in science and technology or other intervening events post-trial should be analyzed under section 1473. Given that the statute was meant to be read broadly and not to be, in the words of the California legislature, "construed

as limiting" access to habeas relief, this Court should liberally interpret the law. (Pen. Code § 1473(d).)

4. The legislative history of section 1473 offers further corroboration of an expansive reading of "false evidence."

Although the Court need not consider the legislative history because of the statute's clear and unambiguous language, the legislative history of section 1473 further buttresses Mr. Richards's reading of the law. (Tellingly, Respondent ignores the legislative history entirely.)

The "purpose" of the amendment was to "[p]ermit a petition for a writ of habeas corpus from a conviction based on false evidence." (Assem. Bill No. 48, Purpose (1975-1976 Reg. Sess.) at p. 2.) The amendment would make "significant expansions in the right to base a petition for a writ of habeas corpus upon false evidence: (a) It would make no difference whether the prosecution knew of the falsity[;] (b) *Any* false evidence, not just perjured testimony, would be sufficient." (*Id.*, com. at p. 4. [emphasis in original].) The provision "clearly is a liberalization of existing law." (*Id.* at p. 5.)

The amendment was also clearly intended to break from the federal standard and to make it *easier* for California defendants to obtain habeas relief based on false evidence. "The key distinction between . . . federal decisions . . . and this bill . . . is that the former all involve *prosecutorial misconduct*, while, under the bill, the reasonable doubt standard would

apply *whether or not* use of false evidence by the prosecution had been knowing, negligent, inadvertent, or *totally without fault*." (*Id.* at p. 6 [emphases in original].) Thus, the legislative history further corroborates Mr. Richards's position that the habeas statute on false evidence should be read broadly here to include the fundamentally altered testimony of the bite mark experts at Mr. Richards's trial.

5. Exonerating evidence may be either false, new, or both and should be analyzed accordingly.

This Court granted review in this case in part to answer the question of whether a court should evaluate fundamentally altered expert testimony in a habeas proceeding under the false evidence or newly discovered evidence standard. As articulated above, section 1473's false evidence standard clearly applies in such cases. However, the Network respectfully submits that the question, posed as a disjunctive, need not be answered disjunctively. In fact, as this Court's own precedents demonstrate, courts in habeas proceedings should analyze potentially exonerating evidence that is both false and new under both standards and grant relief where the requirements of one or both have been met. To hold otherwise would be at odds with the clear and unambiguous language of section 1473 and would fundamentally misread this Court's prior decisions.

When the legislature amended section 1473 to liberalize the grounds for habeas petitions to include false evidence, the amended statute

specifically provided that the amendment was not to "be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted." (Pen. Code § 1473(d).) Requiring exonerating evidence to be analyzed only under one standard would limit the grounds for which a petitioner may bring habeas claims and violate the plain meaning of the statute. If an individual has grounds under both the false and new evidence standards, courts should analyze those grounds under each standard separately, and grant relief under one or both as appropriate.[5]

That is indeed what this Court has done when confronted with just this scenario in previous cases. A habeas petition can rest on both false and newly discovered evidence, some or all of which overlap. In such cases, the new claims "constitute distinct grounds for habeas corpus relief, are subject to different legal standards and must be considered separately." (*In re Wright*, *supra*, 78 Cal.App.3d at p. 802 [noting that while the discovery of false or perjured testimony "will almost necessarily involve the discovery of new evidence," these constitute distinct grounds for habeas corpus relief, are subject to different legal standards and must be considered separately] [citing *In re Imbler* (1963) 60 Cal.2d 554, 560-567, 569-570 [35 Cal.Rptr. 293]]; see also Medwed, *supra*, at p. 1453 fn. 81 ["Seeking

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[5] It is also possible for evidence to be not "false" but still "new" because it was discovered after a defendant's conviction and does not directly contradict evidence that was adduced at trial. (Cf. *In re Wright* (1978) 78 Cal.App.3d 788, 809 fn.5 [144 Cal.Rptr. 535] [distinguishing between false and new evidence].)

habeas corpus relief on the basis of false evidence is distinguishable from newly discovered evidence claims."] [citing *Ex parte Lindley*, *supra*, 177 P.2d at pp. 926-927].)

In *Hall*, for example, the Court determined that the same evidence—the two eyewitnesses' changed belief in the identification of Hall as the shooter—was both false *and* "newly discovered" evidence for which habeas relief was warranted. The change in their opinion on the perpetrator's identity meant that their original trial testimony was false, and therefore false evidence had been introduced against the petitioner at trial; at the same time, the fact that their conclusions changed only after the eyewitness' post-trial reflection and examination of additional information meant that their new testimony constituted new evidence. Accordingly, this Court analyzed the same evidence under both standards. (*Hall*, *supra*, 30 Cal.3d at pp. 423-424.)

Likewise, in *In re Bell*, the habeas petition was based on the claim that three eyewitnesses falsely testified at trial that the petitioner was the perpetrator. (*In re Bell* (2007) 42 Cal.4th 630, 637 [67 Cal.Rptr.3d 781].) This Court analyzed the same evidence—the witnesses' alleged recantations of their false trial testimony—under both the "newly discovered evidence" standard and the false evidence standard of section 1473. (*Ibid.*)

6. Respondent offers no compelling reason to abandon this Court's well-established precedent on the application of the false evidence standard.

Respondent essentially asks this Court to overturn several of its longstanding decisions, including *In re Hall* and *In re Bell*. The doctrine of *stare decisis* counsels strongly against overturning this precedent, particularly when Respondent offers no good cause for why these holdings should be overturned. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 [250 Cal.Rptr. 116] ["It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of *stare decisis*, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law."] [citation and quotation omitted]; *Vasquez v. Hillery* (1986) 474 U.S. 254, 265-266 [106 S.Ct. 617] [The "important doctrine of *stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in

appearance and in fact."]; *Welch v. Texas Dept. of Highways & Public Transp.* (1987) 483 U.S. 468, 494-495 [107 S.Ct. 2941] ["[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law. For this reason, any departure from the doctrine . . . demands special justification."] [internal citation omitted].)

In the end, Respondent presents no case law to support its attempts to limit section 1473's broad language regarding "false evidence" and does not (and cannot) explain away the plain meaning of the statute. Its position ultimately distills down to its apparent and profound disagreement with the policy choices of the California legislature, and accordingly its argument should be addressed by that body, not the judiciary. Courts are not the proper mechanism to rewrite an otherwise valid law with which Respondent disagrees. "[T]he role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333 [96 Cal.Rptr.2d 735] [citing *People v. Carter* (1997) 58 Cal.App.4th 128, 134 [67 Cal.Rptr.2d 845]].) Indeed, if Respondent would prefer that the false evidence standard apply only to lay testimony and only where a witness has intentionally provided incorrect or untrue testimony, there are a number of ways to seek these changes. But as this Court has noted, asking the judiciary is not one such way: "We must therefore leave it to the

Legislature to reconsider the wisdom of its statutory enactments." (*People v. Rubalcava*, *supra*, 23 Cal.4th at p. 333.)

B. Bite mark evidence should be used only to exclude suspects from consideration, not to identify them as the source of a bite mark.

The bite mark evidence used to convict Mr. Richards came in two principal forms. First, bite mark experts opined that only a small percentage of the population shared a unique dental feature with Mr. Richards—a feature that matched the alleged bite marks on the victim. Dr. Sperber testified that only one to two percent of the population would have the same dental abnormality as Mr. Richards (R.T. (June 18, 1997) 1212-1213), while Dr. Golden testified that the figure was "maybe" two percent. (R.T. (June 26, 1997) 1537.) Second, Dr. Sperber opined that, in his expert opinion, the bite mark was "consistent" with Mr. Richards's dentition—that is, that Mr. Richards was the source of the bite mark. (R.T. (June 18, 1997) 1214.) Both categories of testimony were false. In fact, bite mark evidence is of such limited forensic value that it should be used only to exclude individuals from consideration, not identify them as the source of a bite mark.

While bite mark evidence seems to be a highly accurate and exact scientific discipline, an exhaustive study by the National Academy of Sciences ("NAS") demonstrated conclusively that it is not. In 2005, Congress authorized the NAS to examine the strengths and weaknesses of

forensic science as it is used in criminal prosecutions. (Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academy of Sciences 2009) [hereafter *NAS Report*].) The *NAS Report* raised concerns over the accuracy and reliability of various forensic disciplines, extensively citing their lack of exposure to stringent scientific scrutiny. (*Id.* at pp. 42-44.) As of November 2008, 223 people had been exonerated through post-conviction DNA analysis. (*Id.* at p. 42.)[6] The Report noted that this growing number of exonerations is "uncovering a disturbing number of wrongful convictions—some for capital crimes—and exposing serious limitations in some of the forensic science approaches commonly used in the United States." (*Ibid.*)

There are two categories of forensic science that demonstrate that a specimen found at a crime scene originates from a particular source: (1) laboratory-based disciplines—such as DNA, toxicology, and drug analysis—and (2) disciplines based on expert interpretation of observed patterns—such as fingerprints, writing samples, tool marks, and bite marks. (*Id.* at p. 7.) The laboratory-based disciplines produce more trustworthy

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[6] The Innocence Project reports that 273 people have been exonerated through post-conviction DNA analysis. (Innocence Project, *Innocence Project Case Profiles* < http://www.innocence project.org/know/> (as of July 6, 2011).)

results because their methods of evidence collection, analysis, and reporting are supported by ample scientific evidence. (*Ibid.*) Of all the forensic disciplines, DNA analysis is the most reliable forensic technique because DNA experts have incorporated proficiency testing, probability calculations, error rate statistics, and laboratory accountability measures to greatly diminish the margin of error in reporting matches between DNA evidence found at the scene and the identified source. (*Id.* at p. 41.) By comparison, bite mark evidence is being introduced at trial without offering the jury "any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." (*Id.* at p. 108.)

In addition, although most bite mark experts testify that a particular bite mark came from a particular source, such source or match identifications are generally inappropriate. (Encyclopedia of Forensic Science (2009) Statistical Evidence in Court [Koehler] [hereafter Koehler].) The frequent use of source identifications by experts is particularly disturbing given that such testimony "could be dispositive in a host of criminal cases." (*Id.* at p. 1.) The fact is that bite mark "experts" simply "cannot know that a marking is unique to a particular source, particularly when they have only examined a small fraction of possible sources. As a rule, source certainty statements are inappropriate and only obfuscate the probabilistic nature of the forensic science enterprise." (*Id.* at p. 3.) Thus, the NAS recommended that, because of the discipline's inaccuracy and

unreliability, the only probative use of bite mark comparison techniques in criminal prosecutions should be in *excluding* an individual from suspicion, rather than using these techniques to *identify* a suspect—as Dr. Sperber did at Mr. Richards's trial—as the source of a bite mark. (See *NAS Report*, *supra*, at p. 176.)

1. It has not been scientifically proven that bite marks are unique; therefore, statistical evidence about the probability that a set of bite marks came from an individual with a specific dental feature is inaccurate and unreliable.

There are serious problems with the analysis and reporting of bite mark comparisons. Bite mark identification assumes that human dentition is unique, like a fingerprint, but that assumption has *never* been tested, let alone proven, by a comprehensive study of the dentitions of large populations. (*NAS Report*, *supra*, at pp. 173-175.) Unlike DNA analysis, bite mark comparison is not supported by any science indicating what percentage of the general population could have produced that bite mark. (*Id.* at p. 174.) Nor is there any scientific basis for the belief that an expert can identity an individual to the exclusion of all others. (*Id.* at p. 176.) The American Board of Forensic Odontologists ("ABFO") guidelines state that "[t]erms assuring unconditional identification of a perpetrator, or without doubt, are not sanctioned as a final conclusion." (*Id.* at p. 175.)

However, many experts testify that they identified the *source* of a bite mark, even though there is no scientific evidence to support the theory

that bite mark comparison is even capable of producing a conclusive match and even though no statistics support this kind of testimony. Indeed, Dr. Sperber conclusively stated that the bite marks were consistent with Mr. Richards's dentition, and that Mr. Richards had a dentition so unique that only one to two percent of the population would have it. (R.T. (June 18, 1997) 1212-1214.) Dr. Sperber later admitted that he should not have testified as to this statistic because it was scientifically inaccurate. (R.T. (January 26, 2009) 74.) He was unaware of any studies that would support such a statistic at the time he testified, and he admitted that the ABFO finds such testimony to be inappropriate in the absence of any scientific studies or statistical data. (*Ibid.*)

2. Human skin does not reliably imprint bite marks.

There are serious problems with the ability of human skin to accurately imprint a bite mark. A number of factors inherent in bite mark analysis "severely limit the validity of forensic odontology." (*NAS Report*, *supra*, at pp. 173-74.) The passage of time, the variable elasticity of human skin, the rate of swelling and healing, and any unevenness in the surface bite all distort the bite mark and impair the expert's ability to make an accurate determination. (*Id.* at p. 174.) No one has analyzed exactly how skin distortion impacts the accuracy of the match. (*Id.* at p. 175.) Distortions in photographs and subtle shifting in the suspect's dentition over time may further limit the accuracy of the results. (*Id.* at p. 174.)

There is no standard setting the type, quality, and number of individual characteristics qualifying a bite mark as having sufficient evidentiary value, so there is no distinction between bite marks suitable for analysis and those with insufficient detail. (*Id.* at p. 176.)

Forensic odontologists at the Laboratory for Forensic Odontology Research at the State University of New York, Buffalo studied the issue of bite mark comparison's capacity to positively identify the perpetrator of a crime to the exclusion of all others. (University at Buffalo, State University of New York, *Bitemark Evidence and Analysis Should Be Approached with Caution, According to UB Study* (Sept. 16, 2009) <http://www.buffalo.edu/news/10446> (as of August 2, 2011) [hereafter SUNY Buffalo Study].) Because it was also released in 2009, the same year as the NAS Report, the SUNY Buffalo study was not considered in the NAS Report; however, it confirmed the NAS Report's doubts regarding the skin's ability to preserve the necessary detail in bite mark impressions. (*Ibid.*) Researchers divided one hundred stone models of human dentition into ten subgroups, based on the misalignment patterns of the teeth, then randomly selected one model from each subgroup to press bite marks onto cadaver skin. (*Ibid.*) The bite marks were photographed and compared to the stone models using overlays created with photographic software. (*Ibid.*)

The SUNY Buffalo study was among the first to use human cadaver skin to test the bite marks, rather than animal skin or non-elastic materials

like wax or Styrofoam. (*Ibid.*) The cadaver skin is more akin to the living skin in real bite mark situations, and therefore produced the best possible conditions for measurement. (*Ibid.*) Distortion in the bite marks led researchers to find erroneous matches, even from different alignment subgroups. (*Ibid.*) It is important to remember that in the field, living skin may bleed or bruise when bitten, and the added distortion makes it even more difficult to accurately analyze the bite mark. (*Ibid.*) Even without the confusing effects of bleeding or bruising, researchers found that it was difficult to distinguish which set of teeth made the bite marks when the dental alignments were similar. (*Ibid.*)

Ten years after testifying that Mr. Richards was the source of the bite mark, Dr. Sperber recanted his testimony and conclusively stated that he would not testify now as he did at trial. (R.T. (June 18, 1997) 1208.; R.T. (January 26, 2009) 74.) Dr. Sperber stated that he "should not have" testified as to the percentage, reiterated how "unreliable and inaccurate" the photograph of the bite mark was, and determined that the bite mark could have been caused by someone *without* Mr. Richards's dental abnormality. (R.T. (January 26, 2009) 74-84.) The alleged "abnormality" in the bite mark could have been caused by a barrier, like a piece of clothing, that got in the way of the victim's skin and the biter's teeth, obfuscating the details of the entire bite mark. (R.T. (January 26, 2009) 72.) Dr. Sperber's recantation demonstrates the bite mark itself poorly imprinted the biter's

teeth and exemplifies the inherent problems with the use of bite mark evidence to identify a specific individual as the source of the mark.

3. There are no standards against which an expert could opine on the consistency of a bite mark with an individual's dentition.

The ABFO established a list of comparison methods in an effort to standardize the analysis, but these guidelines fail to provide criteria guiding an expert in how to use a particular method in a particular situation. (*NAS Report*, *supra*, at p. 174.) There is no science on the "reproducibility of the different methods of analysis that lead to conclusions about the probability of a match." (*Ibid.*) Even when using the ABFO's guidelines, "different experts provide widely differing results and a high percentage of false positive matches of bite marks using controlled comparison studies." (*Ibid.*) Nevertheless, many testifying experts fail to acknowledge the possibility of error or uncertainty. (*Id.* at p. 47). Many experts testify that "others in their field would come to the exact same conclusions about the evidence," even though assertions of a perfect match "contradict the findings of proficiency tests that find substantial rates of erroneous results" in bite mark analysis. (*Ibid.*)

Though not "junk science," bite mark science is methodically flawed because there are no standards against which an expert could opine on the consistency of a bite mark with a suspect's dentition. As Mr. Richards noted in his opening brief, the prevailing view continues to be that "crime-

related bite marks are grossly distorted, inaccurate, and therefore unreliable as a method of identification." (Petitioner's Opening Brief at p. 35.) Even today, there is simply no evidence that establishes a scientific basis for bite mark comparison's ability to positively identify an individual to the exclusion of others.

4. Experts' conclusions may be influenced by contextual bias.

Like other forensic methods that rely on expert interpretation, forensic odontology is prone to expert bias. (*NAS Report*, *supra*, at p. 174.) Bite mark evidence is often associated with highly sensationalized and prejudicial cases involving homicide and sexual assault. (*Id.* at p. 175.) An expert can therefore experience a great deal of pressure to match the bite mark to a suspect. (*Ibid.*) In general, forensic experts may experience "cognitive bias" if the police tell them who their main suspect is before the expert examines the bite mark. (*Id.* at p. 122.) Just as an eyewitness can be influenced by a suggestive police line-up, forensic scientists can commit errors in judgment if they are asked to compare two particular fingerprints or bite marks—one from the crime scene and one from the suspect—rather than comparing the crime scene sample against a larger group of fingerprints or bite marks. (*Id.* at p. 123.) Very rarely are bite marks compared against a number of dental casts in addition to the dentition belonging to the suspect. (*Id.* at p. 174.) The expert who knows that the

dental mold belongs to the police's main suspect, rather than an anonymous exemplar, is more likely to find a match. (*Id.* at p. 123.)

5. Bite mark comparison techniques should be used only to exclude, not identify, suspects.

The NAS Report concluded that despite the inherent weaknesses involved in using bite mark comparison to positively identify an individual, it is "reasonable to assume that the process can sometimes reliably exclude suspects." (*NAS Report*, *supra*, at p. 176.) But no evidence currently establishes a scientific basis for bite mark comparison's ability to positively identify an individual to the exclusion of all others. (*Ibid.*) That was the case in 2001, where a study "revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bite mark comparisons." (*Ibid.* [citing Pretty & Sweet, *The scientific basis for human bitemark analysis—A critical review* (2001) 41 Science and Justice].) The NAS report concluded that more research is necessary to "identify the circumstances within which the methods of forensic odontology can provide probative value." (*NAS Report*, *supra*, at p. 176.)

Similarly, the SUNY Buffalo researchers concluded that bite marks should be carefully evaluated in criminal investigations where perpetrator identity is the focus of the case. (SUNY Buffalo Study, *supra.*) In the process of examining and reproducing many of the problematic results that could, in a real case, lead to a wrongful conviction, Raymond G. Miller,

D.D.S., the lead author of the study, acknowledged the "serious consequences of a misidentification for the accused, the victim, the families involved, the justice system and the possibility that the perpetrator is still at large." (*Ibid.*) At this stage in its scientific development, the discipline's only probative use in criminal prosecutions is using bite mark comparison techniques to exclude an individual from suspicion.

The misapplication of bite mark science to attempt to identify individuals positively has had significant and dire consequences. Indeed, in this case, Dr. Sperber and Dr. Golden admitted that the opinions they rendered at trial were false. Dr. Sperber, after testifying that Mr. Richards was the source of the bite mark, and Dr. Golden, after testifying that he could not exclude Mr. Richards as the source of the bite mark, have both now concluded the opposite: they have ruled out Mr. Richards as the source of the bite mark. (R.T. (January 26, 2009) 91; 110.) As noted above, there are many cases in which a person was convicted after an expert testified that a bite mark "matches" or is "consistent" with a suspect's dentition, and DNA evidence later exonerated that individual. Mr. Richards was also convicted on the basis of false bite mark evidence, and his conviction deserves review under section 1473.

C. Mr. Richards is entitled to habeas relief under section 1473.

Based on the definitions of "false evidence" articulated above, as well as the inherent unreliability of using bite mark comparison techniques to determine a source of a bite mark, Dr. Sperber's and Dr. Golden's testimonies constitute "false evidence," and these claims in Mr. Richards's habeas petition should be reviewed under section 1473. Accordingly, Mr. Richards need only establish that this false evidence was "substantially material or probative on the issue of [his] guilt or punishment." (Pen. Code § 1473.)

1. Dr. Sperber's and Dr. Golden's trial testimonies were false.

The Court of Appeal applied only the "newly discovered" evidence standard to Mr. Richards's claims because it concluded, incorrectly, that Mr. Richards failed to demonstrate that the bite experts' testimony at his trial was "false evidence." (*In re William Richards* (Nov. 19, 2010, E049135) [nonpub. opn.].) According to the Court of Appeal, the testimonies offered by Dr. Sperber and Dr. Golden were not false; they were "true and valid," and Mr. Richards "merely offered new expert testimony on how to interpret the evidence." (*Id.* at p. *12.)

But in reaching this conclusion, the Court of Appeal ignored the fact that both experts' opinions are now diametrically opposite to the opinions they held at trial. First, Dr. Golden previously testified that he could not

rule out Mr. Richards as the source of the bite mark; he later testified that he conclusively ruled out Mr. Richards as the biter. Second, Dr. Sperber previously testified that the bite mark was consistent with Mr. Richards's dentition; he later testified, like Dr. Golden, that he has now conclusively ruled out Mr. Richards as the source of the bite mark. Third, Dr. Sperber previously testified that the bite mark evidenced a dentition so unique that only one to two percent of the population would have it; he later testified that those statistics had no scientific or statistical basis, and that the bite mark could have been caused by someone without Mr. Richards's dental abnormality. Finally and most importantly, both Dr. Sperber and Dr. Golden testified that the testimonies they gave at trial were incorrect, and that they would not testify the same way today. Their trial testimonies constitute false evidence.

2. Dr. Sperber's and Dr. Golden's testimonies were substantially material and probative on the issue of Mr. Richards's guilt.

The false bite mark evidence directly and materially led to Mr. Richards's conviction. False evidence is "substantially material or probative on the issue of guilt or punishment" if "there is a 'reasonable probability' that, had it not been introduced, the result would have been different." (*In re Roberts*, *supra*, 29 Cal.4th at pp. 741-742.) Mr. Richards was tried three times, and was convicted only after the third trial, during which bite mark evidence—including the testimonies of Dr. Sperber and

Dr. Golden—was offered for the first time. The prosecution emphasized to the jury the testimony of Dr. Sperber, one of the country's leading experts on bite mark evidence: that the biter had a unique dental abnormality shared only by one to two percent of the population, and that Mr. Richards had this same abnormality. This was the most conclusive evidence that the jury heard; the rest of the evidence against Mr. Richards was circumstantial.

In addition, there is evidence that statistical evidence, particularly statistical evidence that claims to show a "match" between a piece of physical evidence found at a crime scene and a potential source, plays a disproportionate role in jury's estimation and thus can greatly affect the outcome of a trial. (See, e.g., Koehler, *supra* [concluding that juries tend to put great weight on statistical "match" evidence].) Statistical evidence that has no scientific basis has a particularly negative effect on the fact-finding process because of its inherent unreliability and misleading nature. (See, e.g., *People v. Collins* (1968) 68 Cal.2d 319, 327-33 [66 Cal.Rptr. 497] [reversing a conviction based largely on statistical evidence that the court found "lacked an adequate foundation both in evidence and in statistical theory"]; *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 370-80 [agreeing with the district court that the prosecution's bite mark expert's testimony that the defendant's dentition matched a bite mark on the victim, and that there was only a 3.5 million to one chance that someone other than the defendant

made the mark, was "unreliable and grossly misleading" and "violate[d] fundamental concepts of justice"].)

Finally, Mr. Richards was not convicted until his third trial, when bite mark evidence was, *for the first time*, offered to the jury. The first two trials, during which bite mark evidence was not presented, resulted in hung juries. The false statistic that Mr. Richards's dental abnormality could be found only in one to two percent of the population, coupled with Dr. Sperber's conclusion the bite mark was "consistent" with Mr. Richards's dentition, made for damning false evidence: after not being able to reach a verdict *twice*, the jury finally convicted William Richards.

III. CONCLUSION

In light of the plain meaning of Penal Code section 1473 and the experts' recantation of their trial testimony, *amicus curiae* The Innocence Network urges this Court to reverse the Court of Appeal's judgment, apply section 1473 to Mr. Richards's claim that false evidence—in the form of false expert testimony—was presented against him at trial, and grant Mr. Richards the relief he seeks.

Dated: August 5, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(California Rule of Court 8.204(c)(1))

The text of The Innocence Network's *Amicus Curiae* Brief in Support of petitioner-appellee William Richards consists of 9,857 words as counted by Microsoft Word 2007, the word-processing program used to generate this brief.

Dated: August 5, 2011

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CERTIFICATE OF SERVICE

I, Cynthia Cornell, declare:

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley LLP, 101 California Street, 5th Floor, San Francisco, California 94111-5800. My e-mail address is ccornell@cooley.com. On the date set forth below I served the following document:

THE INNOCENCE NETWORK'S APPLICATION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND APPELLEE WILLIAM RICHARDS; *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND APPELLEE WILLIAM RICHARDS

BY U.S. MAIL – CCP § 1013a(1). I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California on the following parties in this action:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at San Francisco, California on August 5, 2011.

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