

*“The Constitutional right to a fair trial. Does it require that the Prosecution present valid and reliable forensic evidence at trial?”*

By Michael Bowers

A recent California Supreme Court case State v. William Richards showcases numerous errors in judicial interpretation regarding egregious forensic errors that led to Richards’ conviction for murder in 1997.<sup>1</sup> The Court’s mis-statements on forensic scientific validity (i.e., “what is “false” science?”), its minimization of the degrading effect bad forensics had on the jury’s deliberations and its restricting determination as to what is sufficient proof for a defendant’s claim of actual innocence demands a Constitutional review.

The 50<sup>th</sup> anniversary of *Gideon v. Wainright* reinforces the Constitution’s safeguard of a defendant’s right to legal counsel when life and liberty are at stake. The statistically significant body of empirical data available from the ever-increasing number of exoneration cases and false arrests (through the use of DNA testing among other post conviction exculpatory evidence)

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<sup>1</sup> In re WILLIAM RICHARDS; on Habeas Corpus; S 189275; Ct.App. 4/2 E049135; San Bernardino County Super. Ct. No. SWHSS700444.

reveals that the acceptance of bad forensic methods and testimony contributed to these false outcomes for criminal defendants. The judicial system continues to struggle to recognize and to admit and then to codify a sensible response to the fundamental damage caused by these false forensic opinions. The Richards decision reveals another part of the forensic science/legal disconnect which is moving away from the established fairness or due process legal standard.

Why should an expert's opinion called "forensic science" be exempt from a scientific review within this procedural context? Truth is a fundamental right available to a defendant in the post-conviction process. The following serves as an example for this argument.

### The William Richards Story

Shortly before midnight on August 10, 1993, William Richards summoned police to the trailer where he and his wife, Pamela, lived in a rural desert area of San Bernardino County. Richards said his wife had been attacked by an unknown person and led the officer to Pamela's body outside their trailer. The woman had massive head injuries.

The scene was not processed by police until after sunrise the following morning when the county coroner removed the body and detectives

arrived. The victim was left unprotected during the night except for a security officer stationed at the entrance to the property along a highway. Due to the lax security, several dogs found the body during the night and partially buried it.

*Police omissions and misdirection of investigatory interest*

The officer who first responded considered Richards the prime suspect because he had blood on his clothes and he was not significantly despondent over the death of his wife. The officer, in an act of forensic magic, visually determined on the scene that the woman had been recently murdered, thus conveniently thwarting the husband's time alibi (he came home from work and found her body). Detectives concurred. The District Attorney concurred and Richards was eventually convicted of first degree murder (after four trial attempts) and sentenced to 25 years to life in prison.

Admission of the officer's statements regarding the following should have been considered suspect at trial:

1. His "expertise" on time of death (TOD) was later admitted at trial as being based on attending a first aid class in the military. This nicely avoided the improper security of the

scene and failure of the Sheriff- Coroner to establish TOD estimates near the time of first contact at the scene.

2. Tests regularly conducted in death investigations to establish TOD ( recording core, body and liver temperatures) were not performed, leaving the first responding officer's opinion that the victim was not dead very long the only opinion available.
3. His observations of inappropriate behavior of the husband at the scene were clearly an attempt to discredit the husband without any basis of reliability. The DA did proffer him as an expert trained to psychologically profile persons considered as suspects in a crime.

*Bitemark analysts*

Yet another forensic misdirection occurred in the 4<sup>th</sup> trial, when Richards was finally convicted. The prosecution brought in new evidence of a bitemark on the victim.

More than 20 cases of false convictions and false arrests have been the result of inaccurate bitemark testimony. Defendants in Arizona and Mississippi spent years on death row until being released. In spite of these cases, and despite the 2009 National Academies of Science Report<sup>2</sup> criticizing bitemark identifications, all 50 states continue to allow this type of unreliable, unsupported scientific evidence to be admitted.

After three previous trials without such evidence, a prosecution bitemark expert confidently stated the victim had a human bitemark on the top of her hand between her right thumb and forefinger. The expert said that one particular upper eyetooth did not leave an expected (to him) mark and that the tooth must have been shorter than two adjacent teeth. The expert said Richards had a tooth that fit that description and that Richards was the source of the bitemark. The bitemark expert testified that only a very small percentage (one or two in a group of 100) possess this type of dental anomaly.

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<sup>2</sup> “Strengthening Forensic Sciences in the United States: A Path Forward. [www.napu.com](http://www.napu.com). “[experts] differ widely in their evaluation of the same bitemark evidence, which has led to questioning of the value and scientific objectivity of such evidence.” Page 176. Quoting: C.M. Bowers, 2006, Problem-based analysis of bitemark misidentification: The role of DNA. Forensic Science International 159 Supplement 1:s104-109.

California courts mistakenly call bitemarks “circumstantial evidence.”<sup>3</sup> It is much more than that. This testimony about the bitemark purported to link Richards to the murder as if it were a fingerprint. A defense bitemark analyst testified that the injury was a human bitemark, but that there were no common features between the victim’s wound and Richards’ teeth, so therefore, Richards did not make the bitemark.

*Appellate efforts to achieve exoneration of the husband*

The defense filed numerous post-conviction requests for DNA testing of various evidence, including a hair found under the victim’s fingernail that was nearly one inch long. DNA testing revealed this hair was from an unknown male – not Richards. The tests revealed a male profile on the murder weapon (a stepping stone used to bludgeon the victim) excluding Richards. Subsequently the bitemark analysts both recanted their trial opinions and admitted that even if the bitemark were a human bitemark, it could not have been made by Richards’ dentition. Moreover, the prosecution’s expert admitted that no statistical data exists to support his trial testimony. Despite this new evidence and expert reassessment, the prosecution continues to support the conviction.

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<sup>3</sup> Ibid. Page 1. Line 1.

The DA argued on appeal that no “new” evidence regarding the bitemark should be considered. In rejecting Richards’ appeal, the Supreme Court held that the expert recantations and DNA exclusion are still suspect (according to the DA, the male DNA from the murder weapon was a product of contamination and the hair extracted from under the victim’s fingernail was simply “historical” and therefore not a product of the violent struggle).

The court also authored a new threshold—requiring that “new evidence” regarding expert testimony establish that the convicting evidence was objectively false. This essentially removes the judicial standard of “beyond reasonable doubt” and imposes a much more demanding new appellate standard.

This ruling creates an artificial standard of post-conviction proof of innocence that is virtually unattainable in the general scientific community, unheard of in the legal community and further increases a defendant’s burden of proof to legally impossible levels. The California court advocates finality to the conviction and due process while the defendant continues to struggle for justice. Which value is superior?

