SB 1058: Wrongful Convictions Involving Improper Forensic Science

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Sponsors: California Innocence Project and Northern California Innocence Project

1. PROBLEM: In California, incarcerated individuals whose original conviction was based on science or technology that has been substantially undermined by new scientific and technological advances are left with no remedy to challenge their conviction, under the California Supreme Court's interpretation of "false evidence" in *In re Richards*.

California Penal Code section 1473(b)(1) defines false evidence as "evidence which is substantially material or probative on the issue of guilt or punishment [and] was introduced against a person at any hearing or trial relating to his incarceration."

If an incarcerated person is able to demonstrate to a court that there is a "reasonable probability" that, had the false evidence not been introduced, the result would have been different – the court can make the determination that the original conviction was wrongful and the incarcerated person's conviction should be reversed.[1]

However, based upon the California's Supreme Court's interpretation of 1473 in *In re Richards*, current law does not account for the occasion in which a forensic expert testifies at trial as to specific forensic facts, which are later found to be unsubstantiated or disproved, either by the expert himself or by the general scientific community.[2]

If a witness testifies against you at trial [saying they saw you commit the crime], and later recants his or her testimony [saying they lied], a judge may reverse your conviction if it served as the basis for your conviction.

But, if an expert testifies based on their analysis that your DNA is a match to the DNA profile found at the scene, and then later the expert takes another look and determines that your DNA doesn't match at all (*under the Supreme Court's interpretation*) you're not entitled to the same remedy. This contradictory interpretation is unreasonable and exacerbates the problem of improper or invalidated science serving as the basis of wrongful convictions.

Furthermore, the problem worsens, considering two troubling facts:

i. Forensic science testing errors are the second most common reason for the wrongful conviction of innocent men and women in the United States.[3]

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[1] Uelmen, Gerald "New Balance at the Supreme Court" California Lawyer Magazine (August 2013). http://goo.gl/m0BcGk.

[2] *In re Richards*, 55 Cal.4th 948 (2012).

[3] California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding Forensic Scientific Evidence." May 8, 2007. http://goo.gl/cpgm6X.

ii. There are no universal certification standards for criminalists in California, nor is there a mandatory requirement that all criminal laboratories meet minimum standards

With the likelihood that wrongfully incarcerated people remain in prison and the possibility that the lack of universal criminology standards could continue to cause wrongful incarcerations, the need for a remedy to challenge these convictions is momentous.

2. BACKGROUND RESEARCH:

In re Richards, 55 Cal.4th 948 (2012) found that in a habeas petition the "false evidence standard is not met" just because new technology causes an expert to reject his or her earlier testimony. The fact that expert has changed his or her opinion has no bearing on the validity of the original opinion. This was a significant change in the law. Prior to Richards, cases in which technology or science had changed were brought successfully.

As science changes, theories used by experts in trials becomes outdated. For example outdated or flawed "science" used by arson investigators has caused the state of Texas to review 1085 Texas arson convictions. (http://www.ipoftexas.org/statewide-arson-review) And, questions have been raised about the science of "shaken baby syndrome" as used in criminal convictions. (see, for example Balko, Radley, "Shaken Baby Syndrome and the Flawed Science in Criminal Courts." The Washington Post http://www.washingtonpost.com/news/the-watch/wp/2014/02/21/shaken -baby-syndrome-and-the-flawed-science-in-our-criminal-courts/)

In fact, prior to the 2012 decision in *Richards*, innocent individuals could and often did successfully challenge their convictions when scientific and technological advances had substantially undermined the evidence underlying their original conviction. Such was the case with Kenneth Marsh.

Marsh was convicted in November 1983 for the death of 33-month-old Phillip Buell, who died 10 months earlier from a head injury sustained when he fell off a couch and hit his head on a brick hearth. Although the incident was originally treated as an accidental fall by the San Diego Police Department, San Diego prosecutors later charged Marsh with the murder of young Phillip. At trial, the prosecution's medical experts claimed that the only way Phillip could have sustained the injuries was through abuse.

Marsh filed a petition for writ of habeas corpus in October 2002 seeking a new trial after evidence was uncovered that proved Marsh's innocence. Based on the false evidence provided at Marsh's original trial, his habeas petition was granted and new charges were dismissed – he is now a free man. Had Marsh's case been decided today, it is possible that he would remain in prison for the tragic accidental death of Buell. *Marsh v. County of San Diego*, 2007 WL 173864

3. PREFERRED SOLUTION:

Senator Mark Leno (D, San Francisco), introduced SB 1058 sponsored by the California Innocence Project at California Western Law School and the Northern California Innocence

Project at University of Santa Clara School of Law in conjunction with the McGeorge School of Law Legislative and Public Policy Clinic.

This bill is supported by the sponsoring organizations as well as: Ella Baker Center for Human Rights; ACLU of California; California Public Defenders Association; California Attorneys for Criminal Justice; Legal Services for Prisoners with Children; Friends Committee on Legislation; California Catholic Conference; Taxpayers for Improving Public Safety.

The bill is opposed by the California District Attorneys Association. They argue that by categorizing evidence as "false" that it implies nefarious intent.

However, under Penal Code Section 1473, it is not a matter of whether someone perjured themselves at the original trial, but it is matter of whether perceptual ability comes into question so as to render the evidence no longer certain. Advancements in science, technology and expertise may have undermined original expert testimony so substantially that there is no way it could serve as the basis for a conviction as it once did – this is the scenario that SB 1058 seeks to address. It might seem over simplified, but expert opinion can later be determined to be false because it no longer stands true – it doesn't have to be false because somebody lied.

Furthermore, CDAA argues that Penal Code Section 1473 is already permissive enough. That is, in fact, not true. An individual may file a writ under current law, but that writ will not even be considered in light of the *In Re Richards* decision. The *Richards* decision means that there is **no viable method** for challenging your conviction **if it was based on faulty science**. If an expert testifies the DNA is a match to a defendant, and later realizes the DNA actually exonerates the defendant, the defendant can't get his conviction reversed. If an expert testifies that science shows the defendant committed the crime, and later that science is invalidated, the defendant can't get his conviction reversed. This legislation would make sure that people whose convictions are based on faulty or wrong science could get their case heard in court.

In fact, Ken Marsh's attorney and the Associate Director of the California Innocence Project testified in the Senate Public Safety committee on April 8, 2014 that he would have not filed Marsh's case today given current California law. Marsh would still be in prison if today's law applied 10 years ago.

4. SB 1058:

SB 1058 provides that for purposes of a writ of habeas corpus "false evidence" shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

SECTION 1. Section 1473 of the Penal Code is amended to read:
1473. (a) Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, pretense, may prosecute a writ of habeas corpus, corpus to inquire into the cause of such his or her imprisonment or restraint.

(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 a hearing or trial relating to his or her incarceration; or
(2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.
(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) This section shall not 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.
(e) For purposes of this section, "false evidence" shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

5. ALTERNATIVE SOLUTIONS:

Given the unwillingness of groups like the California Innocence Project to bring claims under false expert testimony in light of current law established under *In re Richards*, it seems unlikely that the interpretation would be challenged in the courts. In order to change the law, another legislative push would have to take place if SB 1058 fails in 2014.

6. WORK REMAINING:

SB 1058 has passed out of the Senate (the house of origin), and as of May 12th, has been referred to the Assembly Committee on Public Safety. However, it remains in the legislative process, with final approval by the Governor still needed. If the bill were to fail in the Assembly or fail to successfully obtain the Governor's signature, another legislative attempt would have to be attempted. CDAA should be contacted in order to further discuss and clarify its opposition to the bill. As it currently stands, CDAA is in opposition, as noted above, but may be amenable to taking a neutral position if further clarification is provided.

Future legislative efforts could be developed around a more comprehensive approach to the method in which writs of habeas corpus petitions are prosecuted, not just in the false evidence statutory scheme, but also including the standard of *new evidence* (pointing unerringly to innocence).