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Chapter 623: Giving the Wrongfully Convicted a Better Chance at Review

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**Chapter 623: Giving the Wrongfully Convicted a Better
Chance at Review**

Natasha Machado

Code Section Affected

Penal Code § 1473 (amended)
SB 1058 (Leno); 2014 STAT. Ch. 623.

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I. INTRODUCTION

On August 10, 1993, Pamela Richards was murdered.¹ William Richards, her husband, claimed that she was already dead when he returned home from work.² William Richards was charged with Pamela’s murder, but the first trial’s jury was unable to reach a verdict.³ After a second trial ended before a jury could even be selected, a third trial also ended when the jury failed to reach a verdict.⁴

In Richards’ fourth trial, the prosecution, for the first time, introduced testimony from a dental expert that, based on a photograph, there was a human bite mark on the victim’s hand at the time of her death.⁵ Additionally, the dental expert testified that despite some distortion in the photo, Richards had an unusual dentition that “might” only occur in two percent or less of the general population

1. In re Richards, 55 Cal. 4th 948, 952, 289 P.3d 860, 864 (2012).

2. *Id.* at 952, 289 P.3d at 864.

3. *Id.* at 955, 289 P.3d at 865.

4. *Id.* at 955, 289 P.3d at 865.

5. *Id.* at 951, 289 P.3d at 863.

and appeared to match the photographed bite mark.⁶ In response, the defense’s expert witness testified that after review of fifteen teeth impression models, five were “‘consistent with’ the mark” and thus the “bite-mark evidence was inconclusive and should be disregarded, in part because of the angular distortion in the photograph of the mark.”⁷ After hearing the various testimonies, the jury found Richards guilty of murder.⁸

Ten years later, Richards filed a writ of habeas corpus when emerging photograph technology led four dental experts, including the two expert witnesses who testified at Richards’ trial, to agree that the link between Richards and the bite mark on the victim was erroneous.⁹ The prosecution’s expert from the original trial also conceded that his statement regarding the irregularity of Richards’ dentition was “not scientifically accurate.”¹⁰ Unlike other inmates’ habeas corpus petitions that commonly claimed that expert testimony used at trial was false, in *In re Richards* the prosecution’s expert witness had repudiated his statement and significant advances in technology relevant to the experts’ testimonies had occurred.¹¹

While the Superior Court granted Richards a new trial based on the experts’ new testimony, the California Supreme Court, in a 4-3 decision, held that because the new testimony neither proved that the original expert testimony was “objectively false” nor “point[ed] unerringly to innocence or reduced culpability” that Richards was not entitled to habeas corpus relief.¹²

Law professor Gerald F. Uelman called *Richards*’ “novel” holding¹³ “the worst opinion of the year.”¹⁴ Legislators apparently agreed, and in response, enacted Chapter 623 to make it easier for inmates convicted by later repudiated

6. *Id.* at 955, 289 P.3d at 865.

7. *Id.* at 956, 289 P.3d at 866.

8. *Id.* at 951, 289 P.3d at 863.

9. *Id.* at 974–75, 289 P.3d at 878–79.

10. *Id.* at 956, 289 P.3d at 866.

11. *See, e.g.*, *In re Imbler*, 60 Cal. 2d 554, 567, 387 P.2d 6, 13 (1963) (denying the petition for habeas relief because the petitioner did not show that the false testimony undermined the prosecution’s case and petitioner failed to challenge the expert’s testimony at trial); *In re Kirschke*, 53 Cal. App. 3d 405, 413, 125 Cal. Rptr. 680, 685 (Ct. App. 1975) (denying a habeas corpus petition because the false testimony did not deny petitioner’s right to a fair trial as petitioner could have rebutted the testimony during the original trial); *In re Roberts*, 29 Cal. 4th 726, 746–47, 60 P.3d 165, 177 (2003) (denying a writ of habeas corpus for failing to meet the standards of a preponderance of the evidence in proving false evidence); *In re Bell*, 42 Cal. 4th 630, 637, 170 P.3d 153, 161 (2007) (denying a writ of habeas corpus for failing to show a falsity in eyewitness testimony); *In re Hardy*, 41 Cal. 4th 977, 1016, 163 P.3d 853, 882 (granting a petition in part for ineffective representation and denying in part for failing to show falsity in lay person testimony).

12. *Richards*, 55 Cal. 4th at 966–67, 289 P.3d at 873.

13. *Id.* at 971, 289 P.3d at 876 (Liu, J., dissenting).

14. Gerald F. Uelman, *New Balance at the California Supreme Court*, CAL. LAWYER (Aug. 2013), https://www.callawyer.com/Clstory.cfm?eid=930177&wteid=930177_New_Balance_at_the_California_Supreme_Court (on file with the *McGeorge Law Review*).

or undermined expert testimony to have their petitions for habeas corpus reviewed, effectively overruling *Richards*.¹⁵

Experts are an invaluable part of the criminal justice system, providing “scientifically sound and unbiased testimony.”¹⁶ However, experts occasionally later repudiate their testimony or advances in science and technology undermine prior expert testimony given at trial.¹⁷ Although criminal cases require a standard of proof “beyond a reasonable doubt,” wrongful convictions still occur.¹⁸ Recognizing the need for imprisoned persons to have their convictions reviewed, the Legislature enacted Penal Code section 1473, authorizing the prosecution of a writ of habeas corpus.¹⁹ A writ of habeas corpus allows the court to review a conviction if, at trial, the prosecution introduced false evidence that was material to the issues of guilt or punishment.²⁰

As science advances, more theories become outdated and expert testimony relying on these theories becomes less trustworthy.²¹ A 2009 study by the National Academy of Sciences found that most forensic expert witnesses “overstated the certainty of their findings and that some areas of forensics, including compositional ballistics, bite mark matching, handwriting analysis, and burn pattern analysis, were ‘without scientific merit.’”²² For example, one of the most well-known and significant advances in science was the development of DNA analysis, which undermined many previous methods of analysis and called prior expert testimony based on earlier methods into question.²³

Prior to *Richards*, California courts had treated recanted or repudiated expert and lay witness testimony the same, but the *Richards* majority “effectively

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1058, at 4 (June 10, 2014).

16. Comm. on Med. Liab. and Risk Mgmt., *Policy Statement—Expert Witness Participation in Civil and Criminal Proceedings*, 124 PEDIATRICS 428, 428 (2009), available at <http://pediatrics.aappublications.org/content/124/1/428.full.pdf+html> (on file with the *McGeorge Law Review*).

17. See, e.g., *Richards*, 55 Cal. at 951–52, 289 P.3d at 863 (noting that the expert who had testified during the trial no longer supported his testimony and that other “experts agreed, based on newly available computer technology, that the prosecution’s expert had testified inaccurately at trial”).

18. See *DNA Exonerations Nationwide Fact Sheet*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Aug. 14, 2014) (on file with the *McGeorge Law Review*) (stating that there have been 317 wrongful convictions exonerated through DNA technology since 1989).

19. 1872 Cal. Stat. ch. 614, § 86, at 454 (adding CAL. PENAL CODE § 1473).

20. *Id.*

21. See, e.g., Radley Balko, ‘Shaken Baby Syndrome’ and the Flawed Science in Our Criminal Courts, WASH. POST (Feb. 21, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/02/21/shaken-baby-syndrome-and-the-flawed-science-in-our-criminal-courts/> (on file with the *McGeorge Law Review*) (discussing new research undermining the diagnosis of shaken baby syndrome).

22. Radley Balko, *California’s Senate Has Approved an Important New Forensics Bill*, WASH. POST (Apr. 11, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/04/11/californias-senate-has-approved-an-important-new-forensics-bill/> (on file with the *McGeorge Law Review*) (citing COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY. ET AL., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009)).

23. See *id.* (discussing DNA testing and how it has shown the flaws of other theories and methods of analysis).

narrow[ed] the availability of habeas corpus relief when the allegedly false testimony was offered by an expert rather than a lay witness.”²⁴ In light of current scientific advances and this case, one supporter of Chapter 623 suggested, “Now that we know that the criminal justice system is prone to error, perhaps it’s time to revisit the post-conviction emphasis on finality, particularly in cases decided on evidence that science later calls into doubt.”²⁵ In revisiting the interplay between repudiated or undermined expert testimony and habeas corpus petitions, the Legislature elected to make habeas corpus relief easier for individuals to obtain when expert witnesses repudiate their testimony or advances in science or technology undermine expert testimony previously used to convict them.²⁶

II. LEGAL BACKGROUND

California Penal Code section 1473 enables individuals to challenge their incarceration by filing a writ of habeas corpus.²⁷ While an inmate may file a writ of habeas corpus based on any grounds, when false evidence is used during a trial or new evidence emerges that may establish an inmate’s innocence, courts have granted habeas corpus relief, providing inmates with new trials.²⁸ In determining whether to grant a writ of habeas corpus, courts objectively look to the totality of the circumstances.²⁹ Until the 2012 California Supreme Court’s decision in *Richards*, California courts had treated repudiated testimony from lay and expert witnesses the same when determining whether “false evidence” had been introduced at trial.³⁰ However, following *Richards*, petitioners for a writ of habeas of corpus were required to meet a higher burden of proof when expert witness testimony was repudiated or undermined than when lay witness testimony was repudiated.³¹

“A writ of habeas corpus may be prosecuted [if] . . . [f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration.”³² “False evidence is substantially material or probative if there is a reasonable probability that, had it not been introduced, the result would have been different.”³³ In contrast, courts may also grant habeas corpus relief if new evidence is introduced that “undermine[s] the entire prosecution case and point[s]

24. In re *Richards*, 55 Cal. 4th 948, 972, 289 P.3d 860, 877 (2012) (Liu, J., dissenting).

25. Balko, *supra* note 21; *see also* Balko, *supra* note 22 (calling Chapter 623 “a sensible bill that will at least address the most egregious cases”).

26. CAL. PENAL CODE § 1473(e)(1) (amended by Chapter 623).

27. *Id.* § 1473 (West Supp. 2015).

28. *Richards*, 55 Cal. 4th at 959–60, 289 P.3d at 868.

29. In re *Sassounian*, 9 Cal. 4th 535, 544, 887 P.2d 527, 532–33 (1995).

30. *Richards*, 55 Cal. 4th at 971, 289 P.3d at 876 (Liu, J., dissenting).

31. *Id.* at 971, 289 P.3d at 876.

32. PENAL § 1473.

33. *Richards*, 55 Cal. 4th at 961, 289 P.3d at 869.

unerringly to innocence or reduced culpability.”³⁴ Thus, a habeas corpus claim involving false evidence is more likely to be successful than a claim based on new evidence because a false evidence claim only requires a showing that there was a “reasonable probability” that it would affect the outcome of the trial, which is an easier burden to meet than showing that the new evidence “point[s] unerringly to innocence.”³⁵

The California Supreme Court has noted, “Expert opinion is qualitatively different from eyewitness testimony and from physical evidence.”³⁶ As experts must usually base their opinion testimony on current “evolving theories, assumptions, or methods,” “an expert witness’ opinion may change over time without that change implying any lack of integrity on the expert’s part.”³⁷ In *Richards* the majority held that courts should only analyze a repudiated or undermined opinion by an expert witness under the lower false evidence standard if it can be shown that the expert’s original testimony was also “objectively untrue.”³⁸ The court explained, “When, however, there has been a generally accepted and relevant advance in the witness’s field of expertise, or when a widely accepted new technology has allowed experts to reach an objectively more accurate conclusion, a strong reason may exist for valuing a later opinion over an earlier opinion. If, and only if, a preponderance of the evidence shows that an expert opinion stated at trial was objectively untrue, the false evidence standard applies.”³⁹

Therefore, following *Richards*, petitioners attempting to classify recanted expert testimony as false evidence had to not only show that “there [was] a ‘reasonable probability’ that, had it not been introduced, the result would have been different,” but also both that there have been significant scientific or technological advances to explain the repudiation and that the original expert testimony was “objectively untrue.”⁴⁰

As a result, prior to Chapter 623, repudiated or undermined expert testimony was, absent significant advances in scientific research or technological innovations, considered new evidence and required the individual seeking a writ of habeas corpus to meet a greater burden than if a lay witness had repudiated their statement or false physical evidence was used against them.⁴¹

34. *In re Clark*, 5 Cal. 4th 750, 766, 855 P.2d 729, 739 (1993).

35. *Richards*, 55 Cal. 4th at 959–60, 289 P.3d at 868.

36. *Id.* at 962, 289 P.3d at 870.

37. *Id.* at 962, 289 P.3d at 870.

38. *Id.* at 962, 289 P.3d at 870.

39. *Id.* at 963, 289 P.3d at 871.

40. *Id.* at 963, 289 P.3d at 871.

41. *Id.* at 963, 289 P.3d at 870–71.

III. CHAPTER 623

In effect, Chapter 623 amends Penal Code section 1473 to reverse *Richards*.⁴² Chapter 623 explicitly defines “false evidence” for the purposes of a writ of habeas corpus to include repudiated expert testimony and expert testimony that is “undermined by later scientific research or technological advances.”⁴³ Under Chapter 623, courts will now apply the more liberal false evidence standard to writs of habeas corpus that are based on repudiated or undermined expert testimony.⁴⁴ When this repudiated expert testimonial evidence is “substantially material or probative on the issue of guilt or punishment,” courts will grant habeas relief.⁴⁵ Chapter 623 does not limit the remaining grounds for which a convicted defendant can petition for a writ of habeas corpus nor does it change or create any additional liabilities for experts that testify or offer opinions.⁴⁶

IV. ANALYSIS

Senator Leno introduced Chapter 623 to ensure that courts evaluate repudiated expert testimony under the same standard as recanted lay testimony.⁴⁷ Senator Leno declared that the law’s failure to treat repudiated lay and expert testimony the same was an “unjust distinction” and a “contradictory interpretation [that was] unreasonable and exacerbate[d] the problem of wrongful convictions.”⁴⁸ Chapter 623 makes it easier for petitioners to introduce repudiated or undermined expert testimony under the false evidence standard, eliminating the court’s distinction between expert testimony and lay testimony.⁴⁹

Part A of this section explains how perjury laws and repudiated and undermined expert testimony intersect, addressing claims that Chapter 623 was unnecessary. Part B notes that technology and scientific methodology are advancing quickly, making more frequent habeas corpus reviews of past expert

42. Balko, *supra* note 22.

43. CAL. PENAL CODE § 1473(e)(1) (amended by Chapter 623).

44. *Id.* § 1473(b) (amended by Chapter 623).

45. *Id.*

46. *Id.* § 1473(d), (e)(2) (amended by Chapter 623).

47. See Press Release, Mark Leno, Senator, Cal. State Senate, Leno Bill Helping to Prevent Wrongful Convictions Heads to Governor (Aug. 13, 2014), *available at* <http://sd11.senate.ca.gov/news/2014-08-13-leno-bill-helping-prevent-wrongful-convictions-heads-governor> (on file with the *McGeorge Law Review*) (noting the different standard applying to experts and lay witnesses).

48. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1058, at 2 (June 13, 2014).

49. Compare *In re Richards*, 55 Cal. 4th 948, 963, 289 P.3d 860, 871 (2012) (“When, however, there has been a generally accepted and relevant advance in the witness’s field of expertise, or when a widely accepted new technology has allowed experts to reach an objectively more accurate conclusion, a strong reason may exist for valuing a later opinion over an earlier opinion. If, and only if, a preponderance of the evidence shows that an expert opinion stated at trial was objectively untrue, the false evidence standard applies.”), with PENAL § 1473(e)(1) (amended by Chapter 623) (“[F]alse 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.”).

opinion likely necessary to root out wrongful convictions. Part C examines how future courts may interpret Chapter 623.

A. *Do Perjury Laws Serve the Same Purpose as Chapter 623?*

The California District Attorneys Association (CDA), in opposition of Chapter 623, argued that the bill was unnecessary as perjury laws already addressed repudiated expert testimony.⁵⁰ The California Penal Code requires that a prosecution for perjury show that the witness “willfully and contrary to the oath, states as true any material matter which he or she knows to be false.”⁵¹ While an expert witness that knowingly lies in their testimony could be prosecuted under the perjury statute, testimony an expert believes to be true at the time could not be grounds for a perjury conviction, as he or she was not making willful misrepresentations.⁵² Thus, perjury statutes ensure that expert witnesses do not knowingly misrepresent scientific conclusions, but do not protect defendants from incorrect expert testimony given in good faith.⁵³ One California court explained, “An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error.”⁵⁴ Therefore, Chapter 623 extends defendant protection beyond the perjury statute, making it easier for an inmate to challenge their conviction when expert testimony is made in good faith and is later repudiated or undermined.⁵⁵ While the CDA claimed that labeling repudiated expert testimony as “false evidence” implies that the expert had testified with “nefarious intent,”⁵⁶ Chapter 623 assumes that the original testimony was made in good faith, protecting the credibility and reputation of expert witnesses.⁵⁷

B. *How Prevalent are Forensic Science Errors?*

Ronald Huff, Director of the Criminal Justice Research Center and the School of Public Policy and Management at Ohio State University, along with two professors of sociology, conducted a study of judges, attorneys, law enforcement officers, and state attorneys general regarding wrongful convictions in the United

50. See interview with Sean Hoffman, Legislative Dir., Cal. Dist. Attorneys Ass’n, in Sacramento, Cal., (July 31, 2014) (notes on file with the *McGeorge Law Review*) (arguing Chapter 623 is unnecessary by likening it to established perjury laws).

51. PENAL § 118 (West 2012). “An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.” *Id.* § 125.

52. *Id.* § 118.

53. *Id.*

54. *In re Imbler*, 60 Cal. 2d 554, 567, 387 P.2d 6, 12 (1963).

55. PENAL § 1473(e)(1) (amended by Chapter 623).

56. See interview with Sean Hoffman, *supra* note 50 (arguing that the repudiated testimony should be defined more explicitly as something other than “false”).

57. PENAL § 1473(e)(1) (amended by Chapter 623).

States.⁵⁸ To conduct the study, the authors sent 353 questionnaires to criminal justice personnel asking for an estimate of the number of wrongful convictions in the United States.⁵⁹ Based on these estimates, the authors concluded that courts wrongly convict more than 10,000 people of serious crimes every year.⁶⁰ The main cause of wrongful convictions is believed to be eyewitness misidentification⁶¹ and the second leading cause is forensic science errors.⁶² When science and technology advance and expose forensic science errors that led to a prior criminal conviction, Chapter 623 makes it easier for inmates to obtain habeas corpus relief.⁶³

In 2004, the State Senate established the California Commission on the Fair Administration of Justice (CCFAJ) to review the criminal justice system after approximately 100 prisoners were exonerated when the legislature authorized post-conviction DNA testing.⁶⁴ Through extensive research, the CCFAJ identified deficiencies in crime laboratory operations, finding that “[t]here are no generally recognized standards to define who is qualified to perform analysis of evidence in any particular scientific discipline.”⁶⁵ The CCFAJ recommended a certification program for criminalists as well as formulating standards for crime laboratories “to minimize the risk of wrongful conviction[s].”⁶⁶ However, the American Board of Criminalists’ certification process remains voluntary.⁶⁷

58. Tom Spring, *10,000 Innocent People Convicted Each Year, Study Estimates*, RESEARCH NEWS, <http://researchnews.osu.edu/archive/ronhuff.htm> (last visited Nov. 2, 2014) (on file with the *McGeorge Law Review*).

59. C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 54–55 (1996). With 353 questionnaires sent out, only 229 responses were returned. *Id.*

60. *Id.* at 62. The study estimated conservative values by restricting the number of study participants who were more likely to give higher responses, such as by limiting public defenders to only 9% of the study pool. *Id.* at 55.

61. *Id.*; *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Aug. 5, 2014) (on file with the *McGeorge Law Review*).

62. *Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited on Nov. 2, 2014) (on file with the *McGeorge Law Review*).

63. CAL. PENAL CODE § 1473 (amended by Chapter 623).

64. See S.R. 44, 2003–04 Leg., Reg. Sess. (Cal. 2004). The CCFAJ studied and reviewed the criminal justice administration in California including research and the views and opinions of judges, lawyers, scholars, elected officials, and law enforcement to determine how the process has failed previously, leading to wrongful convictions and executions, and establish ways of making improvements. *Id.*

65. CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 61 (Gerald Uelmen & Chris Boscia eds.), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (on file with the *McGeorge Law Review*) (detailing the changing sciences and technologies).

66. *Id.* at 58. Criminalists typically have a baccalaureate degree in an area of science such as biology, forensic science, chemistry, or criminalistics and examine evidence based on scientific methods and techniques. *Criminalistics Information*, CAL. ASS’N OF CRIMINALISTS, <http://www.cacnews.org/membership/criminalistics.shtml> (last visited Aug. 5, 2014) (on file with the *McGeorge Law Review*). Criminalistics is in the field of forensic sciences and includes the review of evidence to determine its relevance to a crime, including. *Id.*

67. *What is the American Board of Criminalistics?*, AM. BOARD OF CRIMINALISTICS, <http://www>.

Supporters of Chapter 623 assert that it allows a remedy for expert forensic evidence that is later disproved or found erroneous.⁶⁸ Katherine Williams, legislative advocate for the American Civil Liberties Union of California, which supported Chapter 623, states, “This bill allows us to fix our mistakes [and] it opens the courthouse doors once more so that innocent people who have been wrongly convicted because of someone else’s error will have a chance to clear their name and regain their freedom.”⁶⁹

Reviews of convictions where modern DNA analysis techniques are available allow courts to discover previous forensic errors.⁷⁰ With over 300 exonerations, the Innocence Project discovered forensic testing errors in sixty-three percent of the DNA-acquitted cases studied.⁷¹ However, where DNA analysis is unavailable, courts have been more reluctant to review cases.⁷² Chapter 623 makes it easier for inmates to have their cases reviewed when DNA evidence may not be available and forensic science errors may have been made by lowering the standard of review inmates must meet.⁷³

C. Does Chapter 623 Create a Workable Standard?

While Chapter 623 makes it easier for inmates who were convicted using now-repudiated expert testimony or now-undermined “scientific research or technological advances,”⁷⁴ the CDAA argued that it is unclear when courts will consider expert testimony “repudiated” or “undermined.”⁷⁵

First, the CDAA were concerned that some experts could merely “change their minds” and repudiate their testimony, creating a stronger basis for habeas corpus relief under Chapter 623.⁷⁶ The majority in *Richards* also noted that experts may simply change their mind after testifying and repudiate their statements without any factual basis for doing so.⁷⁷ Additionally, one could hypothesize that an expert witness may, influenced by guilt over the effects of their actions, simply choose to repudiate prior testimony. The *Richards* majority dismissed the claim that there was greater value in an expert witness’ repudiation

criminalistics.com/ (last visited Oct. 13, 2014) (on file with the *McGeorge Law Review*).

68. See Press Release, Mark Leno, *supra* note 47 (noting that law prior to Chapter 623 allowed a remedy for false evidence but not expert forensic testimony that is later determined erroneous).

69. *Id.* (quoting Williams).

70. See Balko, *supra* note 22 (highlighting the discrepancy in review of cases through DNA analysis and other methods of analysis).

71. CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *supra* note 65, at 59.

72. See Balko, *supra* note 22 (noting the reluctance of the court to review forensic error cases without DNA analysis).

73. *Id.*

74. CAL. PENAL CODE § 1473(e)(1) (amended by Chapter 623).

75. Interview with Sean Hoffman, *supra* note 50.

76. *Id.*

77. *In re Richards*, 55 Cal. 4th 948, 963, 289 P.3d 860, 870 (2012).

than their initial testimony merely because it comes later.⁷⁸ In response, the dissent explained that just as expert testimony is based on the witness' perception of the facts, a lay witness' testimony is also based on their perception of the facts of the case, yet courts defer to a lay witness' latter perception when they repudiate their testimony and as a result, courts should treat repudiated expert testimony in the same manner.⁷⁹ Alexander Simpson, Associate Director of the California Innocence Project, agrees, noting that under the California Evidence Code expert testimony already must meet a higher standard for admissibility than lay witness testimony.⁸⁰ Accordingly, Simpson asserts that after reaching the standard for admissibility as "qualified to give an opinion . . . he or she is [thus] qualified to repudiate that opinion."⁸¹

Chapter 623 merely makes it more likely that repudiated expert testimony will trigger a retrial.⁸² As such, it remains to be seen whether courts' increased esteem for expert testimony will trigger more experts to repudiate their testimony for reasons other than to serve the truth.

Second, opponents of Chapter 623 argued that it failed to offer courts proper guidance as to what it takes for expert testimony to be "undermined."⁸³ Elizabeth Watson, Legislative Director for Senator Mark Wyland, who opposed Chapter 623, stated, "[T]he bill should, and could have been, structured in such a way that it does not open the door for the guilty to receive new trials merely because of a claim that scientific or technical evidence presented at their trial was less reliable than currently available science or technology."⁸⁴

California courts have not yet dealt with the novel question of when scientific evidence or technological advances have undermined expert testimony sufficiently to justify a retrial, leaving courts with the task of interpreting the Legislature's intent.⁸⁵ However, courts frequently evaluate the reliability of scientific evidence.⁸⁶ Further, in evaluating newly discovered evidence as it

78. *Id.* at 963, 289 P.3d at 870–71.

79. *Id.* at 973, 289 P.3d at 878 (Liu, J., dissenting) ("There is no reason to treat expert testimony differently. Just as the truth or falsity of eyewitness testimony under section 1473(b) depends on the truth or falsity of underlying facts concerning the witness's perceptual abilities, the truth or falsity of expert testimony depends on the truth or falsity of underlying facts essential to the expert's inferential method and ultimate opinion.").

80. E-mail from Alexander Simpson, Assoc. Dir., Cal. Innocence Project, to Natasha Machado, *Greensheets* Staff Writer, *McGeorge Law Review* (Sept. 9, 2014, 17:15 PDT) (on file with the *McGeorge Law Review*); see CAL. EVID. CODE § 801 (West 2014).

81. E-mail from Simpson, *supra* note 80.

82. PENAL § 1473(e)(1) (amended by Chapter 623).

83. See interview with Sean Hoffman, *supra* note 50 (discussing the concerns that Chapter 623 does not explicitly state the standards that it creates).

84. E-mail from Elizabeth Watson, Legislative Dir. for Cal. Senator Mark Wyland, to Natasha Machado, *Greensheets* Staff Writer, *McGeorge Law Review* (Sept. 9, 2014, 16:40 PDT) (on file with the *McGeorge Law Review*).

85. *Id.*

86. See, e.g., *People v. Axell*, 235 Cal. App. 3d 836, 860, 1 Cal. Rptr. 2d 411, 426 (Ct. App. 1991) ("Thus, the defense witnesses' testimony on the issue of general acceptance did not undermine the validity of

relates to petitions for writs of habeas corpus, courts already evaluate whether it “undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability.”⁸⁷ Thus, courts appear capable of evaluating scientific evidence and determining if evidence undermines other evidence as it was presented at trial.⁸⁸

V. CONCLUSION

Richards held, “If, and only if, a preponderance of the evidence shows that an expert opinion stated at trial was objectively untrue, the false evidence standard applies.”⁸⁹ Under the false evidence standard, “so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate.”⁹⁰ Following Chapter 623, in order to access the false evidence standard, inmates need only to show that “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,” were used against them and that it is reasonably likely that evidence affected the outcome of the trial.⁹¹ Thus, under the more lenient current standard, inmates now need not show that the expert testimony used against them was “objectively untrue,” but only that it was repudiated or undermined.⁹²

Because science and technology are constantly changing, greater access to habeas corpus relief for inmates whose convictions are based on repudiated or undermined expert testimony is imperative and ensures that justice is served.⁹³

As a result of Chapter 623, on March 18, 2015, the California Supreme Court decided unanimously to rehear William Richards’ habeas corpus claim.⁹⁴

the trial court’s determination that forensic use of RFLP analysis is generally accepted in the relevant scientific community. A determination of reliability cannot rest solely on a process of ‘counting (scientific) noses.’”)

87. *In re Richards*, 55 Cal. 4th 948, 960, 289 P.3d 860, 868 (2012).

88. *See, e.g., id.* at 966, 289 P.3d at 873 (evaluating whether new expert testimony sufficiently undermined trial evidence to trigger a retrial under prior law).

89. *Id.* at 963, 289 P.3d at 871.

90. *Id.* at 961, 289 P.3d 869–70.

91. CAL. PENAL CODE § 1473(e)(1) (amended by Chapter 623).

92. *Id.*

93. *See DNA Exonerations Nationwide Fact Sheet*, *supra* note 18 (stating that DNA technology has exonerated 317 wrongfully convicted prisoners).

94. Maura Dolan, *California High Court Agrees to Reconsider 1993 Murder Case*, L.A. TIMES (Mar. 18, 2015, 3:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-bite-mark-court-20150318-story.html> (on file with the *McGeorge Law Review*).