IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**WILLIAM TUPUA SATELE,**

Petitioner,

v.

**SUPERIOR COURT OF LOS ANGELES COUNTY,**

Respondent.

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Real Party in Interest.

Case No. S248492

2d Dist. No. B288828

LASC No. NA039358

[CAPITAL CASE]



Original Proceedings
From the Los Angeles County Superior Court
The Honorable Laura Laesecke, Judge Presiding

**Return to Petition for Writ of Mandate**

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## INTRODUCTION

Defendant/Petitioner William Satele (Petitioner) and his co-defendant Daniel Nunez were convicted in the Los Angeles Superior Court, after a trial by jury, of two counts of capital murder, stemming from a drive-by shooting that occurred on October 29, 1998. (Los Angeles Superior Court case NA039358.) The jury returned guilty verdicts and found special circumstances to be true, on July 6, 2000. Both defendants were sentenced to death, following a sentencing hearing on September 14, 2000. On July 1, 2013, this Court struck one special circumstance, but otherwise affirmed both convictions, in the case of *People v. Nunez and Satele* (2013) 57 Cal.4th 1 (*Satele*).

On October 23, 2017, Petitioner filed a motion to have the murder weapon and bullet fragments tested by a "confidential defense expert" pursuant to Penal Code section 1054.9. (Motion; Petition for Writ of Mandate (B288828), Exhibit B.) The People filed an Opposition to the motion in the Superior Court on or about December 5, 2017, and argued that the defense failed to make the requisite showings of good cause and reasonable necessity entitling them to the order sought. Petitioner's showing presented in his motion filed in the trial court simply stated that

"habeas counsel is not able to obtain the physical evidence from trial counsel since it was never in trial counsel's possession." Petition for Writ of Mandate (B288828), Exhibit B, p. 4. The People's Opposition noted that no supporting documents or exhibits were submitted in support of the Motion, beyond a conclusory declaration from Counsel. (Petition for Writ of Mandate, B288828, Exhibit C: Opposition.) Counsel's declaration merely concluded that in to order examine whether there was error in the People's Expert's conclusion at trial, "it is necessary to have a defense expert examine the evidence." Counsel's declaration failed to point out that Petitioner's own defense expert had examined the evidence at the time of the trial and *agreed* with the prosecution's expert's conclusion that the ballistics were a match. (Reporter's Transcript (RT), Petitioner's Lodged Document in B288828, at pp. 6-7.)

The Los Angeles Superior Court conducted a hearing on the motion for discovery on February 1, 2018. (RT; Petitioner's Lodged Document, B288828.) On that same date, as a part of their discovery response, the People turned over in-excess-of a thousand pages of material, comprised of the Los Angeles Police Department (LAPD) Murder Book, to Counsel. (*Id.* at pp. 2-5.) When Counsel stated that he was unfamiliar with the contents of the evidence turned over by the People in the LAPD Murder Book, the People suggested that Counsel review the material prior to litigating his discovery request to retest the ballistics evidence, and suggested that the trial court continue the hearing to enable Counsel to do so. Counsel declined to do so and simply went forward with the discovery hearing with an admittedly less-than-complete understanding of what he possessed. (See *id.* at p. 5:22-28.) Counsel conceded during that hearing that Petitioner's previously retained ballistics expert, Mr. Butler, agreed with both prosecution experts that the ballistics were a match. (*Id.* at pp. 6-7, 11.) Petitioner made no further *supported* showing as to why further testing was necessary or why he might expect a different result from the answer provided by his previous expert. The court held that Petitioner failed to make a showing of good cause to retest the evidence, and denied the motion. (*Id.* at p. 40.)

Petitioner filed a Petition for Writ of Mandate in the Court of Appeal, Second Appellate District, on March 19, 2018. (B288828, Docket, http://appellatecases.courtinfo.ca.gov.) On March 21, 2018, he supplemented his petition with the Reporter's Transcript from the hearing. (*Ibid.*) The petition was summarily denied on April 19, 2018. (*Ibid.*) The Petition for Review was filed on April 27, 2018. On May 29, 2018, this Court requested an Answer from Real Party in Interest (the People). (S248492, Order.) The People filed an Answer on June 5, 2018. Petitioner filed a Reply on June 15, 2018. This Court issued an Order to Show Cause on July 11, 2018.

A sentenced capital defendant is entitled to post-conviction discovery, including "access to physical evidence," pursuant to Penal Code[1] section 1054.9, subdivision (c), upon a showing of good cause and reasonable necessity, after other pre-requisite requirements are met. (§ 1054.9, subd. (c).) Petitioner's written motion and his oral argument presented during the hearing failed to demonstrate good cause for testing the firearm and bullet fragments, as required under the statutory requirements of section 1054.9, subdivision (c). Petitioner so-much-as conceded this during oral argument, admitting that he needed to "come up with something." Petitioner failed to support his Motion with supporting documentation setting forth good cause, and even after the People's Opposition raised that issue - and the People suggested that Counsel take additional time to review the discovery in order to make his showing - Petitioner failed to present supporting documentation supporting a finding of good cause at the hearing on the Motion.

Neither error by the trial court nor the Court of Appeal is supported by the record from the trial court. Petitioner failed to present the trial court with any evidence in support of his claim that good cause existed for his request, and the trial court properly denied the motion on that basis. The Court of Appeal properly denied the Petition for Writ of Mandate. The petition for writ of mandate should be denied.

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

The People further note that both the Petition for Review and Petitioner's Reply contain lengthy arguments and references to documents that were *never presented* to the trial court, a point that Petitioner concedes. (See Reply, p. 5.) Why Petitioner chose to seek a Petitioner for Review here instead of simply seeking a re-hearing in the trial court is unknown. This Petition for Review - alleging error by the trial court - is properly limited to the record *actually presented* in the trial court. Supplying this Court with *additional documentation* that was never presented to the trial court is improper unless Petitioner is bringing his discovery motion before this Court in the first instance. Petitioner's briefs do not support the latter of these two constructs, and this Court has clearly stated its preference that post-conviction discovery issues be litigated in the trial courts and not presented to this Court in the first instance. (*In re Steele* (2004) 32 Cal.4th 682. 691 ("We believe that when ... no execution is imminent, the discovery motion should first be filed in the trial court that rendered the underlying judgment.").) If Petitioner wishes to supplement his showing in support of his sought discovery, he should do so in the Los Angeles Superior Court, and not here for the first time. This Court's role at this juncture, is to simply examine the trial court's ruling for error, not to litigate the discovery motion based upon a new showing in the first instance.

The People respectfully submit that this Court should deny the petition for writ of mandate. Thereafter, if Petitioner wishes to make a more complete showing he should return to the trial court and do so, instead of supplementing his incomplete record here for the first time.

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## STATEMENT OF FACTS

*The Underlying Conviction - Guilt Phase Evidence*

The following factual summary is adapted directly from this Court's Opinion in *Satele*, *supra*, 57 Cal.4th at pp. 5-20.

On October 29, 1998, about 11:00 p.m., a Black couple, Edward Robinson and his girlfriend Renesha Ann Fuller, were shot and killed outside Robinson's town house at 254th Street and Frampton Avenue in Harbor City, in the County of Los Angeles. Robinson's sister heard the shots, looked out her second-story window, and saw a big, older model car with horizontal taillights driving away. Four shell casings were found at the scene. An autopsy revealed that Robinson was shot three or four times. Fuller was shot twice, but one of the bullets may have first traveled through Robinson.

Ernie Vasquez, who was in the area that night, testified that even though few cars were on the road the night of October 29, 1998, on several occasions during a period of 15 to 20 minutes he saw an older Buick Regal or similar model sedan, burgundy or dull red in color, driving near the area of the murders. The car had horizontal taillights. Vasquez later identified Juan Carlos Caballero as the driver. (Caballero was murdered shortly after the murders in this case.) Persons resembling defendant Satele (also known as "Wilbone") and defendant Nunez (also known as "Speedy") were, respectively, in the front passenger seat and backseat of the vehicle. After about 11:00 p.m., while Vasquez was parked in a hotel driveway, he heard shots, ducked down, and then drove away. After driving for about a minute, he saw a body lying in the road, and stopped to assist the victim, later identified as Robinson.

Around midnight that same night, about an hour after Robinson and Fuller were murdered, Joshua Contreras met both defendants and Caballero at a neighborhood park. Both defendants and Contreras were members of the West Side Wilmas gang. Contreras heard defendant

Satele say, "We were out looking for niggers," and heard Satele or Nunez say, "I think we hit one of 'em."

The next evening, Contreras was at a friend's house with several people, including both defendants. Satele appeared nervous, and told Contreras that the murders of the "Black guy and Black girl" that he had shot were "in the news." Satele told Contreras "he was driving right there in Harbor City and he saw a Black guy or Black girl hugging or kissing or something and he just shot them."

Later that night around 3:40 a.m., Los Angeles Police Officers Adam Greenburg and Vinh Nguyen were in a marked police car when they saw a car, later identified as a four-door Chrysler, driving with its headlights off. The Chrysler pulled over to the curb. As the officers pulled in front of the Chrysler and activated their car's emergency lights, three occupants fled the Chrysler. Officer Greenburg identified defendant Nunez as the person who had been driving and defendant Satele as the person who had been seated in the front passenger seat. The police pursued Satele and arrested him. On the Chrysler's driver's seat was a white baseball cap with the word "West" on the front and the name "Speedy" on the back. Between the driver's and passenger's seats was a large semiautomatic Norinco Mak-90, an AK-47-type assault rifle. The rifle was identified as the murder weapon through ballistics testing. A magazine attached to the weapon contained 26 live rounds of jacketed hollow-point cartridges; the magazine was capable of carrying 30 rounds.

Joshua Contreras, who had joined the West Side Wilmas gang shortly before the two murders, told police that both defendants were "riders" - persons who "kill[ed] their enemies" - and that they had an AK-47 rifle they called "Monster." Contreras saw defendant Satele put the AK-47 into the "car that Speedy [(defendant Nunez)] had" shortly before defendant Satele was arrested. (At trial, Contreras denied or claimed not to remember his statements to police, and those statements were introduced as prior inconsistent statements.)

On December 3, 1998, several weeks after the two murders, Ernie Vasquez and defendant Satele were in a cell in a Los Angeles County jail.

When Satele heard that Vasquez was from Harbor City, he asked if Vasquez had heard about the killings there. When Vasquez said, "I think so, yes" or "something ... to that nature," Satele said, "Well, we did that," or possibly "I did that," adding, "I AK'd them," or "We AK'd them." Vasquez mentioned these statements to police officers on January 6, 1999, after his fingerprint had been found on victim Fuller's car. At Vasquez's request, he was then transferred to the Lynwood jail, which was closer to his home.

On January 7, 1999, defendant Nunez, who was a trusty at Lynwood jail, approached Vasquez. Nunez asked if Vasquez was from Harbor City, and Vasquez said, "Yes." Nunez said he had killed "those niggers ... in your neighborhood." Nunez mentioned that he had been driving down the street when one of the victims "looked at him wrong," so Nunez "turned back around and blasted" the victim.

On February 9, 1999, Los Angeles Police Detective Robert Dinlocker showed both defendants a photograph of the four-door Chrysler in which they were seen on the night after the murders, and asked them if that car was used in the homicide. Two days later, defendants were falsely told they were going to be booked on murder charges; while being transported together to and from the courthouse their conversations were recorded. Defendant Satele said: "I not even really sweating it dog, because all that shit that they got, that shit's wrong.... But if them mother fuckers would have shown me the car that we fuckin' actually did that shit in, fuck, I'd be stressing like a mother fucker."

Ruby Feliciano testified that she owned the four-door Chrysler in which defendants were seen on the night after the murders. A week earlier, she had taken the car to defendant Nunez for repairs, and he had promised to return the car that evening. Nunez did not do so, and when she later told Nunez she was going to report her car as stolen, he threatened her life. After the car was impounded by police shortly after the two murders, Feliciano received a telephone call from Nunez's girlfriend; Nunez, who was in jail, was also on the line. During this

three-way conversation, Nunez asked Feliciano to change what she had told the detectives, and his girlfriend asked Feliciano to say that she had spoken to Nunez and his girlfriend at a certain time on the night police recovered the car, and that Nunez had been home at the time.

The prosecution presented evidence of defendant Nunez's animus against Blacks. Esther Collins, who is Black, testified that in September 1997, defendant Nunez, who was intoxicated, came up to her in her garage and, calling her a "nigger," asked for money or drugs. When Collins said she had none, Nunez again called her a "nigger" and spat on her. He then hit Collins in the mouth with a hard object, fracturing her jaw, and said, "Nigger, get up nigger." Collins's husband, who is also Black, came out to the garage with a "pop gun" in an effort to scare Nunez off. Nunez laughed at him, threw "the word 'nigger' around," and left. Collins, who was afraid of the West Side Wilmas gang (of which Nunez was a member), did not report the incident to the police that day because she did not want trouble.

At the time Collins testified against defendants, she was incarcerated. She testified that on one occasion when she and defendant Nunez were on the bus from jail to court, he said, "Are you testifying? Don't testify. Something like that." Nunez also asked, "Where is your son? Is he in custody?" Collins denied she was personally afraid to testify, but said she feared reprisal against her son, who was also in prison, because "[i]t's a black and racial thing in jail." Los Angeles District Attorney's Office Investigator John Neff testified he had spoken to Collins the week before her testimony. Collins told him she was afraid to testify because, while on the transportation bus, "one of the defendants had made a veiled threat by asking how her son was," and then saying, " 'You're not going to testify, are you?' "

The prosecution presented evidence that West Side Wilmas gang members other than defendants had committed assaultive crimes, and the prosecution introduced records of convictions for purposes of proving the gang allegation. Los Angeles Police Officer Julie Rodriguez testified as an expert on the West Side Wilmas gang. She said the gang's primary

activities are "anything that's going to benefit the gang," including murder. The area of the two murders was claimed by rival gangs. Murdering a Black couple with no gang ties would cause defendants to "move ... up in the gang." In her view, if these defendants murdered Robinson and Fuller, they did so with the specific intent to promote, further or assist in the criminal activity of West Side Wilmas gang.

Los Angeles County Deputy Sheriff Scott Chapman, who was assigned to the gang unit at the Men's Central Jail, testified that while rival gang members in the street will attack each other, "[o]nce they come into county jail it becomes a race issue ... [and] [t]hey bond together to protect themselves." Hispanic gangs sometimes include persons who, like defendant Satele, are of Samoan descent. Further, Los Angeles County Deputy Sheriff Larry Arias testified that on November 9, 1999, he was escorting a Black inmate named Keys in the Men's Central Jail. Keys, who was "waist chained" and could not raise his hands to his face, was punched in the face by defendant Satele and fell to the ground. Keys had not provoked the attack.

David Butler, a firearms examiner, retired Los Angeles police officer, and "distinguished member" of the Association of Firearm and Tool Mark Examiners, testified on behalf of the *defense*, and testified that the casings found at the murder scene bore marks *consistent* with having been fired from the gun found in the car in which Petitioner was riding the night after the two murders. The magazine attached to this gun held 30 rounds. The bullets contained steel penetrators, and were originally designed to penetrate light armor on military vehicles. In Butler's view, the shooter was fairly stationary when the shooting occurred.

Evidence introduced during Penalty Phase included information that when defendant Satele was 16, he was arrested for carrying a gun, and he was placed in a military boot camp for about four months. Further, a psychiatrist who interviewed Satele, administered the Minnesota Multiphasic Personality Inventory test to defendant Satele, and the test results indicated that Satele was "highly pathological," might be psychotic, and exhibited a borderline personality disorder.

*The Motion for Section 1054.9 Discovery*

On October 23, 2017, Petitioner filed a motion to have the murder weapon and bullet fragments tested by a "confidential defense expert" pursuant to section 1054.9. (Motion; Petition for Writ of Mandate (B288828), Exhibit B.) The Motion was cursory, consisting of a one-page notice, a half-page declaration from counsel, and Points and Authorities consisting of a page-and-a-half. (*Ibid.*) The Motion stated:

> This motion is based on grounds that: (1) confidential examination and testing of such physical evidence is necessary to investigate, prepare and file a timely, exhaustive and complete petition for writ of habeas corpus; (2) defendant is entitled to the right to present evidence in one's own defense, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, and 24.

(*Id.* at p. 2.)

Counsel's Declaration in support of the motion merely stated that:

> 2. I am informed and believe that a forensic examination of the ballistics evidence by a confidential defense expert is necessary to the preparation of a petition for writ of habeas corpus. The prosecution called a ballistics expert at trial to testify that the casings and bullets admitted as exhibits at trial were fired by the alleged murder weapon "to the exclusion of all others." In order to investigate the validity of that claim, it is necessary to have a defense expert examine the evidence.

(Declaration of Stephen K. Dunkle, Motion, p. 3.) Conspicuous in its absence was a declaration from a ballistics expert that either the original test results were flawed or that technological advances now exist that would disprove the original test results or impeach the People's and Defense's experts at trial (both of whom reached the same conclusion).

Petitioner's Points and Authorities cited the applicable section under which he sought discovery, section 1054.9, and simply stated:

> In this case, [section 1054.9] subdivision (a) is satisfied because [Petitioner] is preparing a post-conviction writ of habeas corpus in a case in which a sentence of death has been imposed and habeas counsel is not able to obtain the physical evidence from trial counsel since it was never in trial counsel's possession.

(Motion, p. 4.) No further showing was presented regarding good cause or the necessity of the evidence. No additional supporting documents or exhibits were presented to the trial court. (B288828: Petition, Exhibits.)

*The People's Opposition*

The People filed an Opposition to the Motion on or about December 5, 2017. (Opposition; Petition for Writ of Mandate (B288828), Exhibit C.) In their Opposition, the People cited section 1054.9, subdivision (c), and argued that the defense failed to make the requisite showings of both good cause and reasonable necessity entitling them to the order sought, and further noted that no supporting documents or exhibits were submitted in support of the Motion, beyond the conclusory declaration from counsel. (*Id.* at p. 4.) The People's position was that "The Defense has not sufficiently established good cause that access to the physical evidence is reasonably necessary and therefore, the Defense's request should be denied."[2] Further, the People argued that: "The Defense does not attempt to articulate - with supporting facts - how

[2] It is noteworthy that between the dates of approximately December 5, 2017, when the People's Opposition was filed, and February 1, 2018, when the hearing on the motion was held, the Defense did not file a Reply to the People's Opposition, nor did they submit any additional exhibits or documentary evidence in support of their Motion.

there is any good cause, nor why the requested examination is material to their habeas petition." (*Id.* at p. 5.)

The People did not argue below - nor do they argue here - that Petitioner did not meet the initial foundational requirements set forth in section 1054.9, subdivisions (a) or (b); rather the People argued only that the defense failed to meet the additional required showings of good cause and reasonable necessity, which are statutorily required when seeking post-conviction access to physical evidence, pursuant to section 1054.9, subdivision (c). (Opposition p. 4.) The People further pointed out that the original prosecutor was not available to litigate the post-conviction discovery claims[3] and the original trial court Judge, the Honorable Tomson Ong, had been removed from the case by the defense via an affidavit filed pursuant to Code of Civil Procedure section 170.6. (*Id.* at p. 5.) These developments - which are not unusual in post-conviction capital case litigation - underscore the importance of the defense establishing its required showing under section 1054.9, subdivision (c).

Further, after pointing out the perceived deficiencies in Petitioner's initial motion, the People went on to address how the physical examination of evidence should be conducted "assuming arguendo that the Defense can meets its burden of sufficiently demonstrating facts and exhibits that sufficiently establish good cause and materiality that necessitate access to the requested physical evidence...." (Opposition, p. 6.) While the People's Opposition stopped short of conceding that a successive discovery motion can be brought under section 1054.9, that is certainly an open question, albeit a premature one, since the instant procedural posture does not yet present that scenario. The trial court - in fact - indicated that it was denying the defense discovery motion "without prejudice." (RT p. 4.) The People are further aware that this Court has specifically left open the question of whether a successive, supported

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[3] The trial was originally conducted by then-Deputy District Attorney Scott Millington. Mr. Millington is currently a sitting judge on the Los Angeles Superior Court, having been appointed to the bench by the Governor on February 16, 2005.

discovery motion can be brought pursuant to section 1054.9. (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 308 (*Catlin*) ("The question whether a court may deny multiple discovery motions as successive is not before us, and we therefore do not address it.") While that question will no-doubt be resolved by this Court in the future, this case does not yet present facts which allow the fair determination of that important question, and today is therefore not the day to resolve that issue.

*The Los Angeles Superior Court's Ruling on the Motion*

The Los Angeles Superior Court conducted a hearing on the Motion on February 1, 2018. (RT: Petitioner's Lodged Document, B288828.) The court held that Petitioner failed to make a showing of good cause, and denied the motion. (*Id.* at p. 40.)

At the outset of the hearing, the court noted that, regarding a different portion of the discovery request, the People had provided defense counsel with 1,001 pages of discovery, including some material that had been reviewed by the court in camera. (RT pp. 2-4.) The court also noted that it had previously held a telephonic hearing with counsel regarding the defense request to retest the ballistics evidence. (*Id.* at p. 4.)[4] During that prior telephonic hearing, the court denied the defense request to retest the ballistics evidence "without prejudice." (*Ibid.*)

The defense indicated that it had received reports from ballistics experts Starr Sechs, Patrick Ball, and defense ballistics expert Mr. Butler, who was previously retained by Petitioner at trial. (RT pp. 5-7.) There is no indication in the record or exhibits before this Court that the defense provided those reports to the trial court in support of its Motion. However, the defense conceded during the hearing that all three of those experts, *including Petitioner's own expert*, agreed that the ballistics evidence recovered at the scene matched the firearm recovered from

[4] If that conference was reported, a transcript has not been provided to this Court by Petitioner.

Petitioner, and defense counsel further admitted that defense expert Butler's testimony "corroborate[d]" the testimony from the People's expert, Patrick Ball, that the ballistics evidence "is a match." (*Id.* at p. 7.) In response to the defense request, the court inquired, "What is this accomplishing? ... Why are we creating a third (sic)[5] report?" (*Id.* at p. 9.) The defense postulated that they might, in theory, find an expert who disagreed that the ballistics matched, but described this only as a 'possibility,' and offered nothing concrete to support the conclusion that such would *actually* be the result in *this* case. (*Id.* at p. 11; see also *id.* at p. 33.) A defense investigator viewed the evidence with counsel in the Superior Court Evidence Room, and took photographs. (*Id.* at p. 27.)

The People responded that the defense failed to make a showing of good cause, based upon what they had presented to the court thus far, and that their currently-unsupported request was based upon a showing that amounted to "pure speculation." (RT p. 26.) The court agreed and found that the defense argument amounted to: "Gee, Judge, there is no harm." (*Id.* at p. 30.) The defense argued, generically, that there had been advances in technology since the ballistics evidence was originally tested, but offered no evidence to support a conclusion that the test results here might be different as a result, and conceded, "Is that going to do it? I don't know." (*Id.* at p. 35.) Defense Counsel conceded that defense claims were required to be substantiated. (*Id.* at p. 36.) Counsel stated:

> We have to come up with something, if there is anything to come up with. If there isn't, that's fine. We'll move on. We'll do something else. That obviously happens a lot, where we go and we look at part of the case and we say, "Okay. We thought there was something there, and there wasn't."

(*Ibid.*)

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[5] Given that defense counsel conceded that he already had reports from three prior experts (*id.* at pp. 5-7), his request to have the evidence examined by a fourth expert would presumably result in a fourth report.

The People responded that the defense bears the burden to demonstrate good cause and reasonable necessity, and that they had failed to establish either. (RT p. 37.) The defense offered no proof that the opinions of either the prosecution or defense experts were deficient, and therefore they failed to demonstrate good cause as required by statute. (*Ibid.*) The trial court found that the defense failed to make an actual, supported showing of "good cause" as required by the statute. (*Id.* at p. 40.) Accordingly, the court denied the motion on that basis. (*Ibid.*)

*The Court of Appeal's Ruling on the Writ*

Petitioner filed a Petition for Writ of Mandate in the Court of Appeal, Second Appellate District, Division 3, on March 19, 2018. (Writ. B288828.) Attached to the writ were three exhibits: A) A two-page letter seeking discovery; B) A five-page motion seeking discovery (Motion) and a proposed order; and C) The People's Opposition to the Motion, consisting of nine pages (Opposition). On March 21, 2018, Petitioner filed a copy of the Reporter's Transcript from the February 1, 2018, hearing on the Motion. (RT.) On April 19, 2018, the Court of Appeal denied the Petition for Writ of Mandate. (Petition for Review, S248492, Exhibit A.)

*Petition for Review*

On April 27, 2018, Petitioner filed the instant Petition for Review. (Petition for Review, S248492.) The Petition contains no enumerated allegations. On May 29, 2018, this Court requested an Answer to the Petition for Review. The People filed an Answer and this Court issued an Order to Show Cause. This Return is respectfully filed in response.

## RETURN

Real Party in Interest, People of the State of California (the People), respond to Petitioner's enumerated allegations, and admit, deny, and/or allege as follows[6]:

I. The People admit that Petitioner was convicted of two counts of first degree murder with personal use and gang enhancements, and sentenced to death in the underlying case, NA039358, and that this Court affirmed his conviction and sentence in *Satele, supra*, 57 Cal.4th 1. The People further allege that the California Attorney General represents the People in the pending Petition for Writ of Habeas Corpus in case S214846.

II. The People admit that Petitioner sough post-conviction discovery, and allege that on February 1, 2018, the People turned over one thousand pages of discovery to Petitioner, comprised of the LAPD Murder Book, pursuant to his discovery request. (See: RT at pp. 2-4.)

III. The People admit that Peptomer's request for post-conviction discovery included the listed items pertaining to the ballistics evidence in the underlying case, as alleged.

IV. The People admit that the trial court denied Petitioner's Motion to test the ballistics, and allege that the court's stated basis for doing so was that Petitioner failed to meet his burden to demonstrate "good cause to believe that the

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6. Petitioner's filing in the Court of Appeal, B288828, was entitled "Petition for Writ of Mandate," and this portion of the Return is submitted in response to the allegations contained therein.

access to the physical evidence is reasonably necessary for the Defendant to get relief." (RT p. 40.) The People allege that the Reporter's Transcript from the hearing was filed with the Court of Appeal on March 21, 2018. (B288828, Lodged transcript.)

V. The People admit that Respondent is the Superior Court and that it had jurisdiction over the discovery hearing and order below. The People allege that they are the Real Party in Interest. The People further allege that the Attorney General represents the People in the pending state habeas petition in case S214846, and that petition is before this Court and not the trial court. The Los Angeles Superior Court was therefore not in possession of the Exhibits, filed with the pending habeas petition on June 8, 2018, at the time that the trial court ruled upon the Motion. The People allege that the Judge who heard the underlying trial was the Honorable Thompson Ong, and not Judge Laura Laesecke.

VI. The People admit that Petitioner may bring a writ following the denial of his motion for discovery by the trial court.

VII. The People deny that Judge Laesecke's ruling was contrary to law, an abuse of discretion, or made in excess of the court's jurisdiction. The People allege that Judge Laesecke both understood and followed the requirements of section 1054.9, subdivision (c), and that the trial court was required to grant Petitioner's motion, "only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief." (§ 1054.9, subd. (c).) The People further allege that the trial court carefully and conscientiously

considered the motion and the arguments made by Counsel and denied Petitioner's Motion upon a finding that Petitioner had failed to carry his burden to make the required showing under section 1054.9, subdivision (c). The trial court acted within the confines of the applicable statute, and it simply required Petitioner to follow the basic requirements established by the state Legislature in enacting that law. (*Ibid.*) Petitioner failed to do so.

VIII. The People admit that no other writ has been filed by Petitioner relating to this matter but *deny* that this is Petitioner's sole remedy. Instead, the People allege that if Petitioner believes he can make a more complete showing, then he should return to the trial court and make a more complete showing there. The People allege that no published decision holds that a motion for post-conviction discovery under section 1054.9 can only be brought once, and further allege that this Court has specifically left open the question of whether a successive, supported discovery motion can be brought pursuant to section 1054.9. (*Catlin v. Superior Court, supra*, 51 Cal.4th at p. 308.)

IX. The People submit that the requirements of section 1054.9, subdivision (c), establish a basic gate-keeping function that is intended to allow trial courts to weed out baseless discovery requests in post-conviction proceedings. Trial courts are already flooded with post-conviction litigation in capital cases, and needless or unsupported discovery requests only delay proceedings. The statute at issue was enacted with a minimum hurdle that litigants must clear in order to access physical evidence for testing (or, as here,

retesting). (§ 1054.9, subd. (c).) Certainly, this requirement is not insurmountable; however, it is also not mere surplussage in the statute.

X. The People allege that the enactment of section 1473 did not modify section 1054.9. Further, Petitioner's argument that section 1473 "provides for relief upon a showing that the prosecution's expert's opinion offered at trial has been undermined by later scientific research or technological advances" is purely academic because Petitioner made absolutely no supported showing of that at the hearing on his motion for discovery. (RT.) If Petitioner had made such a showing, supported by some evidence, such as a declaration or testimony from an expert in the field that scientific advances undermined the conclusion of the ballistics experts who testified at trial [including Petitioner's own expert, who corroborated the Prosecution's expert's conclusion (see RT at pp. 6-7, 9, 21-22)], then Petitioner's claim would be well-taken. But he failed to make such a showing. The trial court stated in its ruling that if Petitioner had shown that "there was some kind of technological advancement" or "an error" then "that would be something I could point to and say, 'yes, I see your point.'" (*Id.* at p. 30.) But Petitioner failed to make such a showing and the trial court denied the motion to retest the ballistics on that basis. (*Id.* at pp. 30, 40.) Counsel so-much-as-admitted that the entire basis for his request was "speculation." (*Id.* at p. 36.) In the complete absence of a showing that the testimony of the experts was suspect or

undermined by later technology, Petitioner's section 1473 argument is purely academic and is not ripe for review.

XI. The Petition for Review and Reply each contain lengthy discussions about technological advances and scientific research in the field of ballistics. (Petition for Review, pp. 10-19.) The People allege the trial court record provided in support of the writ establishes that neither of those discussions, nor the supporting documentation referred to therein, were presented to the trial court. (See Petition for Writ of Mandate; Exhibits.) Rather, they are presented to this Court for the first time, and do not constitute a basis upon which to allege error by the trial court below.

XII. The People submit that this Court should deny the relief requested, because Petitioner failed to carry his burden in the trial court to demonstrate "good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief" as required by the statute. (§ 1054.9, subd. (c).) Nothing on the face of the statute prohibits Petitioner from returning to the trial court and making a supported showing in compliance with the statute.

XIII. In support of the allegations submitted herein, the People hereby incorporate the attached Points and Authorities as set forth *in haec verba*.

//

//

Wherefore, it is prayed that the Petition be denied.

Respectfully submitted,

Jackie Lacey
District Attorney of
Los Angeles County

By Phyllis C. Asayama

Phyllis C. Asayama
Deputy District Attorney

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## POINTS AND AUTHORITIES

### I

### SECTION 1054.9, SUBD. (C), PROVIDES FOR ACCESS TO PHYSICAL EVIDENCE FOR EXAMINATION AND TESTING, IN A POST-CONVICTION CAPITAL CASE, UPON A SHOWING OF GOOD CAUSE AND REASONABLE NECESSITY

Section 1054.9 provides for post-conviction discovery in a case where the death penalty or a life-sentence has been imposed. The instant capital murder case is such a qualifying case under section 1054.9. Section 1054.9, subdivisions (a) and (b), set forth the *general* prerequisites for discovery under the section, and provide:

> (a) Upon the prosecution of a post-conviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).
>
> (b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(§ 1054.9, subd. (a), (b).)

The People did not oppose Petitioner's request for discovery under section 1054.9, subdivision (a) or (b), and provided over a thousand pages of discovery to Petitioner at the same hearing, pursuant to Petitioner's other requests made pursuant to those two subdivisions.

Section 1054.9, subdivision (c), controls a petitioner's post-conviction access to physical evidence, and is the subdivision at issue in the matter before this Court. That subdivision provides for access to evidence for purposes of post-conviction testing only upon a showing of "good cause" and "reasonable necessity." (*Ibid.*) Section 1054.9, subdivision (c), provides, in relevant part[7]:

> (c) In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant *only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief.*

(§ 1054.9, subd. (c), emphasis added.)

The language of the statute is clear and unambiguous. "If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Catlin, supra*, 51 Cal.4th at p. 304.) The statute simply requires defendant seeking access to physical evidence, such as the firearms and ballistics evidence sought here, to show good cause for the request and demonstrate that it is reasonably necessary to support a post-conviction claim for relief brought by way of a writ of habeas corpus or motion to vacate judgment. (§ 1054.9, subd. (c).)

This Court has held that discovery may be sought in preparation of a habeas claim. (*In re Steele, supra*, 32 Cal.4th at p. 691.) However, this Court has also held that the statute limits post-conviction discovery and does not provide for "free-floating" discovery. (*Id.* at p. 695; see also *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899 (*Barnett*).) With

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[7] One additional sentence, at the end of subdivision (c), addresses the testing of DNA evidence, and is not relevant here.

this in mind, the People respectfully submit that the "good cause" and "reasonable necessity" requirements, set forth in section 1054.9, subdivision (c), plainly and simply require that those two basic showings be made by a moving petitioner before access to physical evidence may be ordered pursuant to the statute. (§ 1054.9, subd. (c).) As this Court noted in *Barnett*, the requirements in the section are not insurmountable, but are to be reasonably followed based upon the clear wording of the statute. (*Barnett*, *supra*, 50 Cal. 4th at p. 900 ("the standard is logical, not impossible.") Given the wide-ranging requests for post-conviction discovery in capital and life-sentence cases, the Legislature's enactment of the foundational requirements of "good cause" and "reasonable necessity" facially require a reasonable showing that a petitioner must make prior to gaining access to evidence for examination or testing. (§ 1054.9, subd. (c).) The purpose behind the requirement is self-evident. The gate-keeping function of the twin-requirements reasonably ensures that unsupported or unnecessary discovery requests do not clog the courts or delay post-conviction litigation.

## II

## A DISCOVERY ORDER IS REVIEWED FOR ABUSE OF DISCRETION

Generally, discovery orders are reviewed for abuse of discretion.

> An appellate court "generally review[s] a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Furthermore, " 'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566 (*Denham*).)

(*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.)

Similarly, a trial court's ruling regarding a showing of "good cause" is generally reviewed for abuse of discretion. (See e.g. *People v. Laursen* (1972) 8 Cal.3d 192, 204 (the finding regarding good cause for a motion to continue made pursuant to section 1050, is reviewed for abuse of discretion); accord *People v. Serrata* (1976) 62 Cal.App.3d 9, 16.) The People accordingly submit that the trial court's finding regarding the lack of showing of good cause should be reviewed for abuse of discretion.

"[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Gimenez* (1975) 14 Cal.3d 68, 72.) The trial court's ruling is presumed to be correct and Appellant has the burden of overcoming that presumption. (*Denham, supra*, 2 Cal.3d at p. 564.) Further, "It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties." (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032; Evid. Code, § 664 [Official duty is presumed to be regularly performed.].)

## III

## THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PETITIONER FAILED TO DEMONSTRATE GOOD CAUSE IN SUPPORT OF HIS MOTION

The trial court found that Petitioner failed to demonstrate good cause in support of his request to test the ballistics evidence. (RT p. 40.) The record that has been supplied to this Court from the hearing below[8]

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8. Petitioner has belatedly asked this Court to take judicial notice of its file regarding the Petition for Writ of Habeas Corpus filed under case S214846. (Petitioner's Reply Brief, fn. 1.) Neither the habeas petition nor its exhibits have been served upon the undersigned agency; the habeas petition is being handled by the Office of the Attorney

clearly supports the trial court's conclusion. Pursuant to the statute, Petitioner was required to demonstrate to the trial court "a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief." (§ 1054.9, subdivision (c).) Petitioner clearly failed to do so.

Petitioner's Motion was completely devoid of exhibits or declarations establishing good cause. (See Petition for Writ of Mandate, B288828, Exhibit A, Motion.) The Motion merely noted - generically - that testing was "necessary" to the preparation of a writ of habeas corpus, with no further *specific* showing. (*Ibid*; see also *Barnett, supra*, 50 Cal.4th at p. 899 (In discussing the requirements of section 1054.9, "we repeatedly used the word 'specific.' ").) Petitioner's Motion was accompanied by a Declaration from counsel Stephen K. Dunkle, but that declaration similarly stated that testing was "necessary" without any further *specific* proof or showing of good cause. (See Petition for Writ of Mandate, B288828, Exhibit A, Declaration of Stephen K. Dunkle.)

Petitioner admitted at the hearing on the motion that he possessed reports from three separate ballistics experts, including the ballistics expert retained by Petitioner at trial (RT pp. 5-7), yet he did not attach those reports as exhibits to his motion. No documentary evidence beyond the purely conclusory Declaration of counsel was submitted to the trial

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General. The People reasonably anticipate that the record in that case contains thousands of pages. For purposes of Petitioner's claim in *this* Petition, the bulk of the habeas file is irrelevant unless there is a document contained therein that was *actually presented* to the trial court in support of Petitioner's good cause showing. Absent Petitioner identifying such a document and demonstrating that it was *actually presented* to the trial court in support of his motion, this Court should not consider the contents of the habeas file in determining whether the trial court committed error in denying Petitioner's discovery request under section 1054.9, subdivision (c).

court to establish good cause for the request. Certainly, a completely conclusory and non-specific declaration is insufficient as a matter of law to establish good cause. To hold that a single, unsupported, conclusory sentence from Counsel establishes "good cause" for testing, would render the statutory requirement meaningless.

Conspicuous in its absence was - for example - a declaration or testimony from a ballistics expert that the original test results were flawed, or that technological advances now exist that would disprove the original test results or impeach the People's and Defendant's experts at trial. This is particularly important since, at trial - as Petitioner conceded at the hearing - both the People's ballistic expert *and Petitioner's own retained ballistics expert agreed* that the ballistics evidence matched the assault rifle recovered from the car in which Petitioner was arrested. (RT pp. 6-7.) Petitioner admitted that his own expert "corroborated" the testimony of the People's expert at trial. (*Ibid.*) Following that concession, the trial court fairly inquired of Petitioner, "What is this accomplishing? ... Why are we creating a third report?" (*Id.* at p. 9.) In response, Petitioner conceded that his request to retest the ballistics evidence was simply based upon *speculation*. (See *id.* at pp. 30, 36.) Petitioner's lack of a concrete, supported showing of good cause was a proper basis for the denial of his motion. As noted by the trial court, the argument that "there is no harm" in the testing, is simply not sufficient to create an affirmative showing of good cause as required by the statute. (*Id.* at pp. 30, 40.)

Petitioner was statutorily required to establish "good cause" and "reasonable necessity" for his request to test the physical ballistics evidence introduced at trial. (§ 1054.9, subdivision (c).) He failed to do so. Given the complete lack of showing of good cause, the trial court did not abuse its discretion in denying Petitioner's motion on that ground. (RT at p. 40.)

That is not to say that the requisite showing required is impossible to attain. As this Court stated in *Barnett, supra*, 50 Cal.4th at pp. 899-900, the legislative intent of the statute "is to make section 1054.9 an efficient method of discovery," and that the statutory requirements setting forth the preliminary showing a defendant must make are intended to be "logical, not impossible." (*Barnett, supra*, 50 Cal.4th at pp. 899-900.) Had Petitioner presented evidence to the trial court that supported his late arguments presented in his Petition and Reply here, he may well have made the required showing, but he failed to do so, and the trial court is not to blame for Petitioner's failure below.

Further, Petitioner is not facially statutorily barred by the section from presenting a perfected claim in the trial court. (§ 1054.9.) As noted above, this Court has specifically left open the question as to whether a successive motion for discovery can be brought under section 1054.9. (*Catlin, supra*, 51 Cal.4th at p. 308.) Given that unresolved question, the People's Opposition to the motion below went on to address the procedural aspects of conducting such testing, "assuming arguendo that the Defense can meet its burden ...." (Opposition p. 6.) The People presume that where an issue regarding the validity of an expert opinion truly exists, a petitioner should be able to make a showing entitling him or her to access to physical evidence, as provided by the statute. However, such access is properly denied where a petitioner fails to make the minimum showing required by law.

Undoubtedly, this Court will examine what constitutes a showing of good cause on a case-by-case basis in the future. Today, this Court need only hold that the statute means what it says, and that a lack of a specific, supported showing is insufficient as a matter of law to meet the requirement of "good cause" which would grant a petitioner access to physical evidence, under section 1054.9, subdivision (c).

## IV

## SECTION 1473 DID NOT MODIFY SECTION 1054.9 OR THE SHOWING REQUIRED OF A PETITIONER TO ACCESS PHYSICAL EVIDENCE

Petitioner asks this Court to address the intersection between section 1473 and section 1054.9. Section 1473 provides in full:

(a) A person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of 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 a hearing or trial relating to his or her incarceration.

(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.

(3)

(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

(B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in paragraphs (1) and (2) of subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to paragraph (1) or (2) of subdivision (b).

(d) This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies.

(e)

(1) For purposes of this section, "false evidence" includes 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.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates his or her original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

(§ 1473.)

Section 1473 was the subject of amendments by the Legislature in 2014 and 2016, which primarily defined "false evidence" and "new evidence," respectively. (2014 Cal. Stats. ch. 623; 2016 Cal. Stats. ch. 785.) On its face, section 1473 does nothing to modify a petitioner's right or access to post-conviction discovery. (§ 1473.) In fact, section 1473 is entirely silent as to the topic of discovery in support of petition for writ of habeas corpus. Had the Legislature intended to modify section 1054.9 through provisions of section 1473, it would have done so. Clearly, the Legislature was aware of the provisions contained within section 1054.9, which it enacted in 2002. (2002 Cal. Stats. ch. 1105.) The People submit that the *lack* of language within section 1473 modifying section 1054.9 indicates the Legislature's intent to leave section 1054.9 unchanged. Further, the two sections can be read in harmony with one-another, yet still operate separately to achieve their own independent goals.

Moreover, one need look no further than section 1054.9 itself to divine that section's requirements. While our state Legislature has occasionally demonstrated the ability to produce statutory language that begs for judicial interpretation, section 1054.9 is a relative model of

clarity: "[A] court may order that the defendant be provided access to physical evidence for the purpose of examination ... only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief." (§ 1054.9, subd. (c).) Further, the term "a showing of good cause" is a familiar phrase that trial courts routinely use. Accordingly, the standard rules of statutory construction, announced by this Court, apply:

> "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' [Citation.]"

(*Catlin*, *supra*, 51 Cal.4th at p. 304.)

Under the plain language of section 1054.9, Petitioner was required to establish "good cause" and "reasonable necessity" in order to test the ballistics evidence. (§ 1054.9, subdivision (c).) He failed to competently demonstrate either in the trial court below, and the trial court properly denied his motion as a result. (RT at p. 40.)

Petitioner claims that "the only way that Petitioner can obtain such an opinion" that the expert "opinion given at trial can later be deemed 'false evidence' " is "to have his own expert examine the physical evidence." (Petition for Review, p. 8.) This claim is both circular and false. First, it is circular, because it says, in summary, "the only way I'm able to get an order to test the evidence is if I test the evidence first." Section 1054.9, subdivision (c), clearly requires otherwise. Second, that argument is also incorrect, because it ignores the primary operational factor that "later scientific research or technological advances" *exist*

which might cause an expert to question the validity of the tests performed on the evidence at trial. (§ 1473.) Petitioner's argument also ignores the fact that his own expert, Mr. Butler, *previously examined* the evidence at trial. (RT pp. 6-7.)

This Court demonstrated what a supported showing looks like in *In re Richards* (2016) 63 Cal.4th 291, 310:

> [T]he evidence petitioner presented in the ... habeas corpus proceedings also established that new technological advances undermined Dr. Sperber's trial testimony. Technology that was not available at the time of petitioner's 1997 jury trial was used to correct the angular distortion of the lesion depicted in the autopsy photograph. That corrected photograph informed the opinions of the experts at the habeas corpus proceedings.
>
> In light of the corrected photograph, Dr. Sperber and Dr. Golden testified that they would exclude petitioner's teeth as the source of the lesion. .... [¶] As a result, petitioner has shown that Dr. Sperber's trial testimony constituted false evidence because that opinion has "been undermined by later scientific research or technological advances." (§ 1473, subd. (e)(1).)

(*In re Richards*, *supra*, 63 Cal.4th at p. 310.)

Here, had Petitioner - for instance - submitted a declaration from an expert - or called one to testify at the hearing - to establish that "later scientific research or technological advances" exist which called into question the methods used to test the evidence at the time of trial, or which undermined the opinions of the experts who testified at trial, such a showing would likely have sufficed and resulted in Petitioner being granted access to the sought evidence. Instead, Petitioner made no supported showing in the trial court, and simply presented a concededly-speculative argument in support of his motion. (See e.g. RT at p. 36: "We

have to come up with something, if there is anything to come up with. If there isn't that's fine. We'll move on. We'll do something else. That obviously happens a lot....".)

The Petition for Review contains a lengthy discussion about technological advances and scientific research in the field of ballistics. (Petition for Review, pp. 10-19.) That discussion and the supporting documentation referred to therein, is conspicuously absent from either Petitioner's moving papers in the trial court or the trial court record provided in support of the writ. (See Petition for Writ of Mandate: Exhibits.) Additionally, Petitioner's Reply Brief spends four more pages discussing evidence and reports that also were never before the trial court. (Reply at pp. 9-13.) Petitioner concedes in his Reply Brief that "Petitioner recognizes that it may not be technically appropriate to augment the factual showing in the Petition for Review with new factual matters." (Reply at p. 6.) The People agree. It is improper to support a writ alleging trial court error with materials that were not provided to the trial court. Such materials should have been provided to the trial court in support of Petitioner's showing there, not presented here in the first instance. Petitioner should have completed the discovery process and supported his motion properly in the trial court. To attempt to make his showing here, for the first time, by way of a writ, is improper.

"Good cause" is not an insurmountable hurdle. But it requires more than the unsupported and conclusory showing made by Petitioner in the trial court. The "good cause" requirement mandates a minimal showing to weed out baseless requests. If a petitioner makes a showing of good cause for a request under section 1054.9, he or she should be granted access to physical evidence. However, access to physical evidence for purposes of testing is properly denied where a petitioner fails to make the minimum showing required by law.

## CONCLUSION

The trial court committed no error. Petitioner failed to carry his burden in the trial court to make the basic, statutorily required, prerequisite showing of good cause and reasonable necessity to obtain access to the physical ballistics evidence. The trial court properly denied his Motion on that basis. Petitioner fails to demonstrate that the trial court abused its discretion in denying his motion because his showing below was plainly insufficient. The plain wording of the statute required Petitioner to make a showing of good cause in the trial court, and he failed to do so. This Court should deny the requested relief. If Petitioner can demonstrate good cause in the future, he should return to the trial court and present his supported showing there.

Respectfully submitted,

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District Attorney of
Los Angeles County

By Phyllis C. Asayama

Phyllis C. Asayama
Deputy District Attorney

Scott D. Collins
Deputy District Attorney

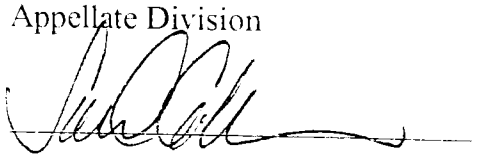
Attorneys for Real Party in Interest

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.485 and 8.204 of the California Rules of Court, the enclosed Return and Answer to Petition for Review is produced using 13-point Roman type, and contains approximately 9,700 words, including footnotes, and excluding tables, caption, and signature block, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: This 9th day of August, 2018

Los Angeles County
District Attorney's Office
Appellate Division



Scott D. Collins
Deputy District Attorney
Attorney for Real Party in Interest

## DECLARATION OF SERVICE BY MAIL

***William Satele v. Superior Court of Los Angeles County***
**Case No. S248492; B288828; LASC NA039358**

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled **RETURN AND ANSWER TO PETITION FOR REVIEW** by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the County and City of Los Angeles, California, addressed as follows:

Hon. Lee Edmon, Presiding Justice
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Second Appellate District - Division 3
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Los Angeles, CA 90013

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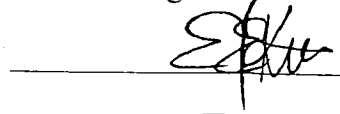
Executed on August 9, 2018, at Los Angeles, California.



Esmeralda Ek