SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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S.Ct. Case No. _____
2d Crim. No. B288828
S.Ct.No. NA039358
(Los Angeles County)
[CAPITAL CASE]

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM TUPUA SATELE ,

Petitioner

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent;

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

PETITION FOR REVIEW

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President's Council of Advisors on Science and Technology (PCAST), Ensuring Scientific Validity of Feature-Comparison Methods (Sept. 2016).. 16-18

TO THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner William Satele, through his attorneys, Robert M. Sanger and Sanger Swysen & Dunkle, and pursuant to Rule 8.500(a)(1), petitions for review of the Court of Appeal's order issued on April 19, 2018 summarily denying his Petition for Writ of Mandate. (Exhibit A, order attached.) Mr. Satele does so on the grounds that this case contains a matter of first impression in that this Court has never addressed whether Penal Code § 1054.9 compels the release of physical evidence for examination by a defense expert in light of the 2014 amendment to Penal Code § 1473 which 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.

ISSUE PRESENTED FOR REVIEW

This case presents the following issue for review:

1. **Whether Penal Code § 1054.9 compels the release of physical evidence for examination by a defense expert where such examination is reasonably necessary to establish that the prosecution's expert's opinion offered at trial has been**

undermined by later scientific research or technological advances?

INTRODUCTION

Petitioner is the defendant in a post-conviction death penalty case. His petition for writ of habeas corpus is due in this Court on June 10, 2018. At Petitioner's trial, a prosecution ballistics expert testified that a firearm found in Petitioner's vehicle matched the firearm which fired the shell casings found at the scene of the killing "to the exclusion of all others." In order to make a claim that the expert's testimony has been has been undermined by later scientific research or technological advances, Petitioner needs to have the opportunity to have his own expert examine the ballistics evidence.

Petitioner first sought to obtain access to the physical testing by making an informal request to the District Attorney. When that was unsuccessful, counsel filed a Motion for an Order Requiring Production of Physical Evidence for Testing by a Confidential Defense Expert (Penal Code § 1054.9(c)) in the trial court which was denied. The motion sought an order allowing a defense expert to conduct examination and testing of the shell casings and bullets that the prosecution's trial expert stated matched a firearm found in Petitioner's vehicle. That request was denied by

the trial court. Counsel for Petitioner asked the court to allow a defense expert to inspect all the ballistics evidence with LAPD present. That request was denied. Counsel for Petitioner asked the court to allow a defense expert to go to the evidence storage room maintained by the court to view the ballistics evidence received in evidence during the trial and to remove the evidence from the envelopes it is stored in in the presence of the LAPD. That request was denied. Petitioner then filed a Petition for Writ of Mandate which was summarily denied by the Court of Appeal.

As this Court recognized in *In re Richards* (2016) 63 Cal.4th 291, the 2014 amendment to Penal Code § 1473, one of the ways an expert opinion given at trial can later be deemed "false evidence" is if the opinion given at trial is undermined by subsequent "scientific research or technological advances." (Penal Code § 1473(e)(1).) In this case, the only way Petitioner can obtain such an opinion is to have his own expert examine the physical evidence previously examined by the prosecution's expert. Thus, releasing the physical evidence so that he can conduct that examination is reasonably necessary to his effort to obtain relief pursuant to Penal Code § 1054.9(c). Therefore, this Court should grant review to address whether Penal Code § 1054.9 compels the release of physical evidence for examination by a defense expert where such examination is

reasonably necessary to establish that the prosecution's expert's opinion offered at trial has been undermined by later scientific research or technological advances.

STATEMENT OF FACTS

Petitioner and his co-defendant Daniel Nunez were sentenced to death after being convicted of the 1998 killings of a man and a woman in Harbor City. (*People v. Nunez* (2013) 57 Cal.4th 1.) Four shell casings were found at the scene of the killings. (*People v. Nunez*, *supra*, 57 Cal.4th 1, 6.) When Petitioner was arrested an AK–47–type rifle was found in the vehicle occupied by him and his co-defendant. (*Id*. at 7.) The rifle was identified as the murder weapon through ballistics testing. (*Ibid*.) At trial, the prosecution called a ballistics expert 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." (RT 1979:5-7.)

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REASONS FOR GRANTING REVIEW

I.

THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER PENAL CODE § 1054.9 COMPELS THE RELEASE OF PHYSICAL EVIDENCE FOR EXAMINATION BY A DEFENSE EXPERT WHERE SUCH EXAMINATION IS REASONABLY NECESSARY TO ESTABLISH THAT THE PROSECUTION'S EXPERT'S OPINION OFFERED AT TRIAL HAS BEEN UNDERMINED BY LATER SCIENTIFIC RESEARCH OR TECHNOLOGICAL ADVANCES

A. Penal Code §§ 1054.9(c) and 1473(e)(1) Should Be Considered in Tandem to Require that a Defendant Prosecuting a Habeas Petition in a Capital Case Be Allowed Access to Physical Evidence Where it Can Be Shown that Such Evidence Is Reasonably Necessary to Establishing that Expert Testimony Offered at Trial Was False

Penal Code § 1054.9 states that, 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 must order that the defendant be provided reasonable access to such discovery materials. (Penal Code § 1054.9(a); *In re Steele* (2004) 32 Cal.4th 682, 690.) The trial 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. (Penal Code § 1054.9(c).)

The potential grounds for relief available to a defendant prosecuting a habeas corpus petition include the relief offered under Penal Code § 1473. Penal Code § 1473 provides that a writ of habeas corpus may be prosecuted, among other reasons, where "[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." (Penal Code § 1473(b)(1).) In 2014, the Legislature responded to this Court's decision in *In re Richards* (2012) 55 Cal.4th 948 (*Richards I*) by amending section 1473 to state that "'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the

opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." (§ 1473(e)(1), as added by Stats.2014, ch. 623, § 1.) The plain meaning of the amendment to section 1473 makes it clear that an expert opinion given at trial can later be deemed "false evidence" under two circumstances: (1) if the expert repudiates his or own opinion given at trial; or (2) if the opinion given at trial is undermined by subsequent "scientific research or technological advances." (§ 1473(e)(1).) (*In re Richards* (2016) 63 Cal.4th 291, 309 (*Richards II*).)

In a case such as this, Penal Code § 1054.9(c) must be read together with Penal Code § 1473(e)(1) in order to give the defendant a meaningful opportunity to obtain the discovery necessary in order to demonstrate that false evidence was presented at his trial. Petitioner was convicted of murder and received a death sentence after a trial which included testimony by a prosecution ballistics expert that the casings and bullets admitted as exhibits at trial were fired by the alleged murder weapon found in Petitioner's vehicle "to the exclusion of all others." (RT 1979:5-7.) In the course of preparing a Petition for Writ of Habeas Corpus challenging that conviction and sentence, Petitioner's counsel attempted informally to gain access to those materials so that a defense expert could apply subsequent scientific research and technological advances to undermine the opinion

that the firearm was the murder weapon "to the exclusion of all others." When that effort was unsuccessful, a motion was filed. The trial court denied the motion and refused to allow defense counsel to conduct testing on the ballistics evidence. A petition for writ of mandate was filed in the Court of Appeal which was summarily denied. Unless review is granted and Petitioner is provided the opportunity to have an expert examine the physical evidence pursuant to Penal Code § 1054.9(c), Petitioner has no meaningful opportunity to seek relief pursuant to Penal Code § 1473(e)(1).

B. The Field of Firearm Comparison Has Been Undermined by Subsequent Scientific Research and Advances in Technology

There have been significant scientific research and technological advances in the area of firearm comparison since Petitioner's trial. In 2008, a committee of scientists and statisticians assembled by the National Research Council (NRC),[1] acting at the request of the Department of Justice, issued a report on bullet pattern-matching analysis, Ballistic

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[1] The NRC is a component of the National Academy of Science, which was created by congressional charter in 1863 to "investigate, examine, experiment, and report upon any subject of science." Act to Incorporate the National Academy of Sciences, sec. 3, 12 Stat. 806 (1863), http://www.nasonli.html. The NRC was established in 1916 "to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government." National Research Council, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, Ballistic Imaging iii (2008).

Imaging [hereinafter Ballistics Imaging].)

The NRC Committee concluded that no scientific foundation existed permitting an expert to declare, with any degree of certainty, individualization based on firearms comparison. The committee determined that "the validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks ha[s] not yet been demonstrated." (*Id*. at 3, 81.)

The Committee also expressed serious concerns about firearms examiner's claim of a zero-error rate in the field. It noted that examiners regularly presented statements of unqualified certainty while declaring that ammunition "matched" a firearm. They "tend," in other words, "to cast their assessments in bold absolutes, commonly asserting that a match can be made 'to the exclusion of all other firearms in the world.'" (*Id*. at 82.) The authors did not mince words in discounting this testimony: "Such comments cloak an inherently subjective assessment of a match with an extreme probability statement that has no firm grounding and unrealistically implies an error rate of zero." (*Id*.) The report concluded: "Conclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated." (*Id*.)

In 2009, another committee of the National Academy of Sciences

issued a critical report of pattern-matching sciences, and the authors did not spare toolmarks from their strongly worded critique. (National Research Council of the National Academy of Sciences, Committee on Identifying the Needs of the Forensic Science Community, Strengthening Forensic Science in the United States: A Path Forward (2009).) The report found the field lacked any evidence showing that examiners could reliably and repeatedly reach a conclusion of a match. The field did not even purport to have a specific methodology followed by all examiners. "Toolmark and firearms analysis... lacks... a precisely defined process," and while the Association of Firearm and Toolmark Examiners (AFTE) has adopted a theory of identification, it "does not provide a specific protocol." (*Id*.) The field has no specific, empirical data for an examiner to adhere to when concluding that toolmarks have "sufficient agreement," and instead, defines the phrase as "when it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool." (*Id*.) The meaning of "sufficient agreement did not depend on data, but on the examiner's "own experience." (*Id*.)

Even when examiners utilize ballistics imaging technology and databases in finding "possible candidate matches between pieces of

evidence," "the final determination of a match is always done through direct physical comparison of the evidence by a firearms examiner, not the computer analysis of images." (*Id*. at 153.) This created a grave risk of bias and an understatement of error rates. The report issued a powerful conclusion: Firearms examination was not a generally accepted science because it had a "fairly limited" scientific knowledge base and lacked a "precisely specified, and scientifically justified, series of steps that lead to results with well-characterized confidence limits." (*Id*.)

In 2016, the President's Council of Advisors on Science and Technology (PCAST) issued a Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (Sept. 2016). This committee was convened to evaluate what steps should be taken following the aftermath of the highly critical 2009 NAS Report "to ensure the validity of forensic evidence used in the Nation's legal system." The result was this PCAST report in which committee members evaluated six "forensic feature comparison" disciplines, including firearms comparison, in order to determine whether such disciplines had been established to be valid and reliable, foundational requirements for admissibility in the courts. (PCAST Report.)

PCAST examined whether each forensic discipline met two key

requirements for scientific validity: “foundational validity” - that the method can, in principle, be validly applied - and “validity as applied” - that the method has been reliably applied in practice (PCAST at 56.) To be “foundationally valid,” a field must utilize a method that has been subject to “empirical testing by multiple groups, under conditions appropriate to its intended use.” (*Id.* at 5.) The studies must also provide “valid estimates of the method accuracy,” demonstrating how often an examiner is likely to draw the wrong conclusions. (*Id*. “Without appropriate estimates of accuracy, an examiner's statement that two samples are similar - or even indistinguishable - is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact. The second requirement for scientific acceptance, “validity as applied,” requires that the method or technique be “reliably applied in practice.” (*Id*. at 4-5.). Each examiner must be capable of reliably applying the method, and he or she must have actually reliably applied the method.

Firearms comparison is a forensic feature comparison method that attempts to establish that a bullet or casing was fired from a particular weapon. The discipline is based on the theory that the toolmarks produced by different firearms vary substantially enough such that firearms examiners are able to match casings and bullets to the guns from which they were

fired. (*Id*. at 104.) Specifically, firearms examiners examine bullets and casings for class characteristics in order to determine whether the bullet or casing could have been fired from a weapon of a particular make and model. Class characteristics are predetermined and occur before manufacturing. (*Id*.) If the class characteristics are the same, the examiner conducts a side by side comparison of the evidence to a bullet or casing test fired from the relevant weapon. This examination requires the examiner conduct a subjective comparison using a comparison microscope of "striae" that occur when a bullet is fired from a gun. (*Id*.) The Association of Firearms and Toolmark Examiners allow an examiner to declare that a bullet was fired from a particular gun when there is "sufficient agreement," where "sufficient agreement" is defined as the examiner being convinced that the items are extremely unlikely to have a different origin." (*Id*.) PCAST was highly critical of this circular reasoning.

Both NRC Committees and the PCAST Committee, after reviewing all available firearms comparison studies, concluded unequivocally that although the current state of science may permit firearms examiners to conclude that a piece of ammunition was fired from a certain class of firearms, insufficient evidence exists to demonstrate firearms examiners can validly and reliably conclude that a bullet or casing was fired from a

specific individual firearm to the exclusion of all others. In other words, it would be speculation and conjecture and without a sufficient foundation to state that a particular firearm fired the shell casings at issue "to the exclusion of all others."

C. Access to Physical Evidence Pursuant to Penal Code § 1054.9(c) Is Reasonably Necessary to Apply Subsequent Scientific Research and Advances in Technology to Demonstrate that False Evidence Was Offered at Trial

In this case, the potential for relief under Penal Code § 1473(e)(1) based on a showing that the trial expert's testimony was false based upon scientific research or technological advances is illusory if Petitioner is not allowed access to the physical evidence for examination under Penal Code § 1054.9(c). The 2014 amendment to Penal Code § 1473(e)(1) provides that one of the grounds to obtain relief is to show that advances in science and technology may be used to establish that what was once deemed to be a valid expert opinion is now false. However, as a practical matter, the only way to make that determination in a case such as this is to have an expert who is familiar with the current state of scientific research and technological advances conduct a present examination of the relevant physical evidence. Absent that opportunity, there is no way for Petitioner to

seek the relief offered under Penal Code § 1473(e)(1).

Here, counsel for Petitioner first asked the court to allow a defense expert to inspect and test the firearm and other ballistics evidence in the case. That request was denied. Counsel next asked the court to allow a defense expert to inspect all the ballistics evidence with LAPD present. That request was denied. Counsel then asked the court to allow a defense expert to go to the evidence storage room maintained by the court to view the ballistics evidence received in evidence during the trial and to remove the evidence from the envelopes it is stored in for viewing in the presence of the LAPD. That request was denied. We respectfully submit that Penal Code § 1054.9(c) must allow the sort of access to physical evidence requested here when read in conjunction with Penal Code § 1473(e)(1).

Review is necessary so that this Court can resolve the issue of whether Penal Code § 1054.9 compels the release of physical evidence for examination by a defense expert where such examination is reasonably necessary to establish that the prosecution's expert's opinion offered at trial has been undermined by later scientific research or technological advances.

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CONCLUSION

For the reasons stated above, Petitioner respectfully requests that review be granted.

DATED: April 27, 2018

Respectfully submitted,

SANGER SWYSEN & DUNKLE
Robert M. Sanger
Stephen K. Dunkle

By: /s/
Stephen K. Dunkle
Attorneys for Petitioner,
William Satele

CERTIFICATE OF WORD COUNT

California Rules of Court, Rule 14 (c)(1)

I have run the "word count" function in WordPerfect Office X6 and hereby certify that this brief contains 3,357 words, including footnotes.

Dated: April 27, 2018

/s/
Stephen K. Dunkle

EXHIBIT A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL – SECOND DIST.
FILED
Apr 19, 2018
JOSEPH A. LANE, Clerk
VGray Deputy Clerk

WILLIAM TUPUA SATELE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	B288828 (Super. Ct. No. NA039358) (Laura L. Laesecke, Judge) ORDER

THE COURT:

We have read and considered the petition for writ of mandate filed March 19, 2018, and the reporter's transcript filed on March 21, 2018. The petition for writ of mandate is denied.

Edmon Egerton Dhanidina

EDMON, P. J. EGERTON, J. DHANIDINA, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On April 27, 2018 I served the foregoing document entitled: **PETITION FOR REVIEW** on the interested parties in this action by depositing a true copy thereof as follows:

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Executed April 27, 2018 at Santa Barbara, California.

/s/
Jake Swanson

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-EN0BNRCH**
Lower Court Case Number:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Date

/s/Stephen Dunkle
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Dunkle, Stephen (227136)
Last Name, First Name (PNum)

SANGER SWYSEN & DUNKLE
Law Firm