SUPREME COURT
FILED
AUG 29 2018
Jorge Navarrete Clerk
Deputy

S.Ct. Case No. S248492
2d Crim. No. B288828
S.Ct.No. NA039358
(Los Angeles County)
[CAPITAL CASE]

CRC 8.25(b)

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.

TRAVERSE TO REAL PARTY'S RETURN

SANGER SWYSEN & DUNKLE
*Robert M. Sanger, SBN 058214
Stephen K. Dunkle, SBN 227136
125 E. De La Guerra Street, Ste 102
Santa Barbara, California 93101
Tel.: (805) 962-4887
Fax: (805) 963-7311
rmsteam@sangerswysen.com
Attorneys for Petitioner,
William Satele

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Stephen K. Dunkle, SBN 227136
125 E. De La Guerra Street, Ste 102
Santa Barbara, California 93101
Tel.: (805) 962-4887
Fax: (805) 963-7311
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Attorneys for Petitioner,
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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 respectfully submits this Traverse to Real Party's Return to Petition for a Writ of Mandate ("Return"), filed with this Court on August 13, 2018.

TRAVERSE

I. Incorporation by Reference

By this reference, Petitioner expressly incorporates and realleges each fact alleged in the Petition for Writ of Mandate ("Petition"), filed in the Court of Appeal on March 19, 2018, the Petition for Review, filed in this Court on April 27, 2018, the Amended Petition for Writ of Habeas Corpus in Case No. S214846, filed in this Court on June 8, 2018, the Reply to Answer to Petition for Review, filed in this Court on June 15, 2018, and all exhibits filed in support of his claims for relief, as if each fact, allegation, exhibit, and legal argument were fully set forth in this Traverse. (See *People v. Romero* (1994) 8 Cal.4th 728, 739.)

II. Response to Real Party's Allegations

1. Petitioner admits that he was convicted of two counts of first degree murder with personal use of a firearm and gang enhancements, and sentenced to death in the underlying case, NA039358, and that this Court affirmed his conviction and sentence in *People v. Nunez and Satele* (2013) 57 Cal.4th 1. Petitioner admits that the California Attorney General represents the People in the pending Petition for Writ of Habeas Corpus in Case No. S214846.

2. Petitioner admits that he sought post-conviction discovery and 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.

3. Petitioner admits that his request for post-conviction discovery included the listed items pertaining to the ballistics evidence in the underlying case.

4. Petitioner admits that the trial court denied his motion for access to ballistics evidence and that the court's stated basis for doing so was that that Petitioner failed to meet his burden to demonstrate "good cause to believe that access to

the physical evidence is reasonably necessary for the Defendant to get relief." (RT p. 40.) Petitioner admits that the Reporter's Transcript from the hearing was lodged with the Court of Appeal on March 21, 2018.

5. Petitioner admits that Respondent is the Superior Court and that it had jurisdiction over the discovery hearing and order below. Petitioner admits that the People are the Real Party in Interest. Petitioner admits that the Attorney General represents the People in the pending state habeas petition in Case No. S214846, and that the petition is before this Court and not the trial court. Petitioner denies in part and admits in part that the Los Angeles Superior Court was not in possession of the exhibits filed with the pending habeas petition on June 8, 2018 at the time the trial court ruled on the motion. With regard to the exhibits referred to in the Reply to Answer to Petition for Review, Petitioner alleges that the trial court was in possession of his Notice of Joinder to Motion to Compel Discovery which was filed in the trial court on August 16, 2017. (Exh. 40 to Amended Petition for Writ of Habeas Corpus,

SATELE_HAB_000480-493.) Petitioner alleges that the information contained in the exhibits consisting of transcripts of hearings presided over by the trial court was in the possession of the trial court by virtue of the trial court presiding over those hearings. Petitioner alleges that Exhibit 44 to his habeas petition is the transcript of the hearing on December 11, 2017 before the trial court. Petitioner alleges that Exhibit 33 to his habeas petition is the transcript of the hearing on January 12, 2018 before the trial court. Petitioner alleges that Exhibit 50 to his habeas petition is the transcript of the hearing on February 1, 2018 before the trial court. Petitioner alleges that Exhibit 19 to his habeas petition is the transcript of the hearing on February 14, 2018 before the trial court. Petitioner admits that Exhibit 68 to the habeas petition, Declaration of Robert M. Sanger, was not in the possession of the Los Angeles County Superior Court at the time the trial court ruled on the motion. Petitioner admits that Exhibit 25 to the habeas petition, Declaration of Lance Martini, was not in the possession of the Los Angeles County Superior Court

at the time the trial court ruled on the motion. Petitioner alleges that the reason that the information in Exhibts 25 and 68 was not presented to the trial court was that Real Party had not yet disclosed the information which was the subject of those declarations in discovery. In particular, Petitioner alleges that Petitioner did not have the underlying ballistics documents at the time the motion was made because Real Party had not yet provided it in discovery. Petitioner alleges that after the Petition for Writ of Mandate was filed in the Court of Appeal, Real Party disclosed additional reports in discovery which had previously been concealed. Petitioner alleges that those reports were disclosed in time to file with the Amended Petition for Writ of Habeas Corpus filed on June 8, 2018, but not in time to be included in the motion at issue here. Petitioner admits that the judge who heard the underlying trial was the Honorable Tomson Ong and not the Honorable Laura Laesecke.

6. Petitioner admits that he may bring a writ following the denial of his motion for discovery by the trial court.

7. Petitioner denies that the trial court's ruling was not contrary to law, an abuse of discretion, or made in excess of the court's jurisdiction. Petitioner denies that the trial court both understood and followed the requirements of section 1054.9, subdivision (c). Petitioner denies 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). Petitioner denies that the trial court acted within the confines of the applicable statute. Petitioner denies that he failed to follow the basic requirements established by the state Legislature in enacting the law.

8. Petitioner admits that no other writ has been filed by Petitioner relating to this matter. Petitioner denies that this is not his sole remedy. Petitioner alleges that he has no other plain, speedy, or adequate remedy in the ordinary course of law, other than the relief sought in the petition. Real Party proposes a novel, but not necessarily

established, alternative remedy, to wit, a renewed motion in the trial court. Petitioner admits that no published decision holds that a motion for post-conviction discovery under section 1054.9 can only be brought once and that the Court has specifically left open the question of whether a successive, supported discovery motion can be brought pursuant to section 1054.9. Although Real Party indicates the Court has not ruled out such a possible remedy (Return, p. 22), Real Party provides no authority to show that the Court has approved of such a procedure. (Return, p. 22.) Petitioner alleges that, while this Court could remand this case to the trial court for further proceedings, Petitioner's counsel would be remiss in our duties if we were to abandon this writ proceeding in favor of proceeding with a renewed motion in the trial court at this time given the lack of authority establishing that procedure as an available remedy.

9. Petitioner denies that the trial court followed a basic gate-keeping function that is intended to allow trial courts to weed out baseless discovery requests in post-conviction

proceedings. Petitioner denies that trial courts are already flooded with post-conviction litigation in capital cases and needless or unsupported discovery requests only delay proceedings. Petitioner denies that he has not met the minimum hurdle for physical testing.

10. Petitioner denies that the enactment of section 1473 does not modify how a motion under section 1054.9 must be evaluated. Petitioner denies that his argument that section 1473 "provides for relief upon a showing that the prosecution's expert's opinion at trial has been undermined by later scientific research or technological advances" is purely academic. Petitioner denies that he failed to show good cause in the trial court to believe that the examination of the evidence is reasonably necessary to his effort to obtain relief.

11. Petitioner denies that the trial court record provided in support of the writ establishes that discussions of technological advances and scientific research in the field of ballistics were not presented to the trial court. Petitioner alleges that Petitioner's argument that examination of the

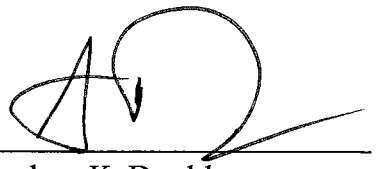
physical evidence is necessary based on technical advances and scientific research in the field of ballistics was discussed in the trial court on February 1, 2018. (RT 31-33.) Petitioner admits that the supporting documentation referred to in the writ petition was not presented to the trial court.

12. Petitioner denies that this Court should deny the relief requested.

DATED: August 28, 2018

Respectfully submitted,

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

By: 

Stephen K. Dunkle
Attorneys for Petitioner,
William Satele

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE SUPERIOR COURT ABUSED ITS DISCRETION BY APPLYING PENAL CODE SECTION 1054.9, SUBDIVISION (C), TO A MOTION FOR ACCESS TO TRIAL EVIDENCE THAT IS IN THE POSSESSION OF THE SUPERIOR COURT

The order to show cause issued by this Court on July 11, 2018 orders Real Party to show cause why the relief requested should not be granted on the ground that the superior court abused its discretion by applying Penal Code section 1054.9, subdivision (c) to a motion for access to trial evidence that is in the possession of the superior court. (Order to Show Cause.) The Return filed by Real Party does not squarely address the issue as framed by the Court in the Order to Show Cause[1]. It appears to Petitioner that the Court is focused on the question of whether or

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1

The arguments raised by Real Party address the claims made in the Petition for Review which was denied by this Court's order on July 11, 2018. Those arguments are addressed in the Petition for Writ of Mandate, Petition for Reivew, and Reply to Answer to Petition for Review, which are incorporated by reference as set forth above.

not Penal Code section 1054.9, subdivision (c), which is a discovery statute, applies to limit counsel and experts employed by counsel from accessing trial evidence which is in the possession of the trial court.

In the present case, the trial court's denial of Petitioner's motion included a denial of Petitioner's request 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. (RT 26-40.) Petitioner respectfully submits that the trial court abused its discretion by applying Penal Code section 1054.9(c) to limit access to trial evidence that is in the possession of the superior court.

Penal Code section 1054.9 is a statute which, by its own terms, governs post-conviction access to "discovery materials." (Penal Code section 1054.9, subdivision (a).) Penal Code section 1054.9, subdivision (b) states that "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." In describing the statute, this

Court has stated that Penal Code section 1054.9 "creates a mechanism by which, as noted, a capital or LWOP prisoner prosecuting a habeas corpus petition can seek discovery of 'materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at [the] time of trial.' (*Id.* subd. (b).)." (*People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 528.) The statute itself and this Court's opinions discussing the statute make no reference to the statute covering trial exhibits in the possession of the court.

Penal Code section 1054.9, subdivision (c) applies when the discovery materials at issue are "physical evidence." Penal Code section 1054.9, subdivision (c) states that:

> 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. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing

> are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes.

(Penal Code section 1054.9, subdivision (c).)

Thus, access to discovery materials as defined in Penal Code section 1054.9, subdivision (b) which are also physical evidence pursuant to Penal Code section 1054.9, subdivision (c), first a motion or petition "satisfying the conditions in subdivision (a)" and then 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." However, where the physical evidence at issue is not subject to Penal Code section 1054.9(a) because it is not "in the possession of the prosecution and law enforcement authorities," the entire statute, including subdivision (c), is not applicable.

In this case, the physical evidence admitted as exhibits at trial does not qualify as "discovery materials" because it is not "in the possession of the prosecution and law enforcement authorities." (Penal Code section 1054.9, subdivision (b).) The trial exhibits are maintained by the superior court pursuant to Penal Code section 1417. Penal Code section 1417 states, "[a]ll

exhibits which have been introduced or filed in any criminal action or proceeding shall be retained by the clerk of the court who shall establish a procedure to account for the exhibits properly, subject to Sections 1417.2 and 1417.3 until final determination of the action or proceedings and the exhibits shall thereafter be distributed or disposed of as provided in this chapter." (Penal Code section 1417.) Penal Code section 1417.1 requires the superior court to maintain possession of exhibits until as follows:

> (1) In cases where the death penalty is imposed, 30 days after the date of execution of sentence.
> (2) In cases where the death penalty is imposed and the defendant dies while awaiting execution, one year after the date of the defendant's death.

(Penal Code section 1417.1(d).)

Therefore, trial exhibits remain in the possession of the trial court and are not in the possession of the prosecution and law enforcement authorities.

The only published authority Petitioner was able to locate making reference to a trial exhibit as physical evidence covered by Penal Code section 1054.9, subdivision (c) is the Court of Appeal's opinion in *Rubio v. Superior Court* (2016) 244

Cal.App.4th 459. In *Rubio v. Superior Court*, *supra*, 244 Cal.App.4th 559, the Court of Appeal stated, "[a]lthough section 1054.9 does not expressly define 'physical evidence,' a commonsense reading suggests the Legislature intended 'physical evidence' to refer to items such as biological material, weapons, original trial exhibits, and the like. (*Rubio v. Superior Court*, *supra*, 244 Cal.App.4th at 472.) However, the *Rubio* case dealt with the issue of what is covered by the cost provision contained in Penal Code section 1054.9, subdivision (d) and did not involve an issue of access to physical evidence. The *Rubio* opinion contains no analysis of how physical evidence in the possession of the trial court could constitute "discovery materials" pursuant to subdivision (b) of Penal Code section 1054.9. As this Court has stated, "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566.")

In the present case, a prosecution ballistics expert testified at trial 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 undermined by later scientific research or technological advances, Petitioner needs to have the opportunity to have his own expert examine the ballistics evidence. The trial court's ruling disallowing a defense expert access to physical evidence admitted as trial exhibits was erroneous because Penal Code section 1054.9, subdivision (c) is limited by its own terms to physical evidence which qualifies as discovery materials in the possession of the prosecution.

CONCLUSION

For the reasons stated above and the reasons stated in the Petition, Petitioner respectfully requests that relief should be granted on the ground that the trial court abused its discretion by applying Penal Code section 1054.9, subdivision (c) to a motion for access to trial evidence that is in the possession of the superior court.

DATED: August 28, 2018

Respectfully submitted,

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

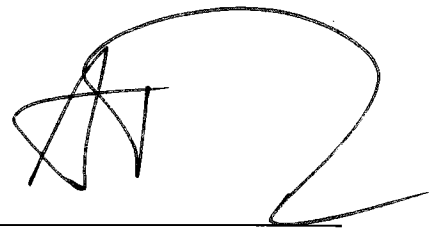
By: _____
Stephen K. Dunkle
Attorneys for Petitioner,
William Satele

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 3,330 words, including footnotes.

Dated: August 28, 2018



Stephen K. Dunkle

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 August 28, 2018 I served the foregoing document entitled: **TRAVERSE TO REAL PARTY'S RETURN** on the interested parties in this action by depositing a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

__X__ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

__X__ **BY ELECTRONIC TRANSMISSION** -I caused the above-referenced document(s) to be transmitted via electronic transmission to the interested parties at the email addresses referenced in the attached service list.

__X__ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed August 28, 2018 at Santa Barbara, California.

Jake Swanson

SERVICE LIST

Phyllis C. Asayama
Scott D. Collins
Los Angeles District Attorney's Office
Appellate Division
320 W. Temple Street, Suite 540
Los Angeles, CA 90012
(By Electronic Transmission and U.S. Mail)

Linda Baek
Los Angeles District Attorney's Office
210 W. Temple Street
Los Angeles, CA 90012
(By Electronic Transmission and U.S. Mail)

John Aquilina
5055 Canyon Crest Dr., # 221
Riverside, CA 92507
(By U.S. Mail)

Los Angeles Superior Court
Governor George Deukmejian Courthouse
275 Magnolia Ave.
Long Beach, CA 90802
(By U.S. Mail)

Office of the Attorney General
300 S. Spring Street, #1700
Los Angeles, CA 90013
(By U.S. Mail)