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Superior Court of California
County of Los Angeles

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10 PEOPLE OF THE STATE OF CALIFORNIA,

Case No. BA382700

11 Plaintiff,

**PEOPLE'S RESPONSE TO
DEFENDANT'S MOTION TO
LIMIT CONCLUSIONS OF
FIREARMS EXAMINERS**

12 v.

13 LONNIE FRANKLIN, JR.

Date: To Be Determined

14 Defendant.

Time: 8:30 am

15 Court: February 5, 2016

16
17 **TO THE HONORABLE KATHLEEN A. KENNEDY, JUDGE OF THE ABOVE**
18 **ENTITLED COURT, DEFENDANT LONNIE FRANKLIN, JR., AND HIS ATTORNEYS**
19 **OF RECORD:**

20 On January 8, 2016, the People received "Defendant's Motion to Limit Conclusions of
21 Firearms Examiner and Response to Motion in Limine to Exclude Testimony of Defense
22 Witness Bruce Krell Pursuant to Evidence Code Sections 720, 801, and 352," (hereafter
23 "Defense's Motion"). As the People previously advised this Court, the document filed by the
24 defense includes two separate and distinct pleadings.

25 This response will address the defense's meritless request for affirmative relief. In short,
26 this Court must deny the defense's request for a hearing pursuant to *People v. Kelly* (1976) 17
27 Cal.3d 24; *Frye v. United States* (D.C.Cir 1923) 293 F. 1013; and *Daubert v. Merrell Dow*
28 *Pharmaceuticals Inc.* (1993) 509 U.S. 579. The California Supreme Court previously and

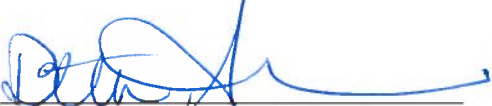
1 conclusively settled the defense's contentions in *People v. Cowan* (2010) 50 Cal.4th 401, holding
2 that *Kelly* is not proper grounds for challenging firearms comparison and toolmark identification
3 evidence. As the case law is well settled in this area, the People request that this Court deny the
4 defense motion on the pleadings submitted in this matter without a hearing.

5 The People submit the following Points and Authorities in Response to the defense's
6 aforementioned motion. This Response will be based upon the attached Points and Authorities,
7 the files and pleadings in the above-captioned matter, the Grand Jury hearing transcript for the
8 proceedings conducted between March 12, 2011 and March 23, 2011, and any further evidence
9 or argument the Court may properly receive at the hearing on this matter.

10 Dated this 3rd Day of February, 2016

Respectfully submitted,

11 JACKIE LACEY
12 District Attorney of Los Angeles County

13 By 
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16 Major Crimes Division

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I.**

4 **STATEMENT OF FACTS**

5
6 For a complete Statement of Facts, see the People’s Notice of Motion and Motion in
7 Limine to Exclude Testimony of Defense Witness Bruce Krell Pursuant to Evidence Code
8 Sections 720, 801, and 352 (hereafter “the People’s Motion to Exclude Bruce Krell”) filed on
9 November 9, 2015.

10 **II.**

11 **THE *DAUBERT* RULE DOES NOT APPLY IN CALIFORNIA**

12 The defense’s request that this Court exclude the conclusions of the People’s firearms
13 and toolmark examiners based upon *Daubert v. Merrill Dow Pharmaceuticals* and *Frye v.*
14 *United States*, is without merit. The defense’s entire argument is irrelevant in California and it is
15 readily apparent that the defense has merely copied and pasted an argument from a different
16 jurisdiction and presented it as their own. As addressed by the California Supreme Court several
17 times, **the federal standard for determining admissibility of scientific evidence as**
18 **articulated in *Daubert* does not apply in California.**¹ (*People v. Leahy* (1994) 8 Cal.4th 587;
19 *People v. Venegas* (1998) 18 Cal.4th 47; *People v. Ayala* (2000) 24 Cal.4th 243.)

20 In 1994, one year after *Daubert*, the California Supreme Court decided *People v. Leahy*,
21 holding that the *Kelly* formulation survived *Daubert* and is still the law in California. (*People v.*
22 *Leahy, supra*, 8 Cal.4th 587.) The California Supreme Court unequivocally stated that, “we
23 conclude that the *Kelly/Frye* formulation (or more accurately, the *Kelly* formulation) should
24 remain a prerequisite to the admission of expert testimony regarding **new** scientific methodology
25 in this state.” (*People v. Leahy, supra*, 8 Cal.4th at p. 591 [emphasis added].)

26
27 ¹ In *Daubert v. Merrill Dow Pharmaceuticals* (1993) 509 U.S. 579, the United States Supreme Court specifically
28 addressed an issue of statutory interpretation unique to Federal Rule of Evidence § 702. Thus the decision in
Daubert is not binding on state courts because it does not address an issue which is constitutionally mandated or
implicitly required by either the Due Process Clause or the Right to a Fair Trial.

1 Two years later, in *People v. Venegas*, the California Supreme Court again applied the
2 *Kelly* test to determine the admissibility of RFLP DNA analysis, essentially reaffirming their
3 prior holding that it is the *Kelly* test, and not the *Daubert* test which is controlling in California.
4 (*People v. Venegas* (1998) 18 Cal.4th 47.) Specifically, in Footnote 30 of the *Venegas* opinion,
5 the California Supreme Court addressed *Daubert* and reiterated that it was the *Kelly* test which
6 applied in California. (*People v. Venegas, supra*, 18 Cal.4th 47, fn. 30.) Once again, in 2000,
7 the California Supreme Court decided *People v. Ayala* and again held that the *Kelly* test is to be
8 applied when determining the admissibility of “new scientific” evidence. (*People v. Ayala,*
9 *supra*, 24 Cal.4th at p. 281.)

10 The California Supreme Court has addressed this issue a number of times and has
11 consistently held that the *Kelly* test is to be applied when challenging scientific evidence,
12 unambiguously holding that ***Daubert* does not apply**. As such, the defense’s contention that the
13 scientific principles applied by the People’s experts do not meet the *Daubert* standard, while
14 incorrect, do not need to be decided by this Court, as the defense has clearly applied the wrong
15 standard. Furthermore, when the defense states that “conflict has started now to engulf the state
16 courts, causing many judicial officers to consider what was once unquestioned science to now be
17 one that is subject to serious question,” they does so **without a single citation** supporting their
18 claim, and certainly without a citation to a California case. (Defense Motion at p. 4, lines 11-12.)
19 As such, this Court must deny the defense’s motion as it amounts to an unsupported and
20 frivolous challenge of established law.

21 22 III.

23 THE KELLY/FRYE TEST DOES NOT APPLY 24 TO FIREARMS AND TOOLMARK COMPARISON EVIDENCE

25 While the defense has failed to apply the correct standard in their motion, even if they
26 had applied the correct test, the motion would still utterly fail because **the *Kelly* test does not**
27 **apply to firearms and toolmark comparison evidence**. (*People v. Cowan* (2010) 50 Cal.4th
28 401, 469-471.) California courts do not consider comparative analysis and observation evidence

1 as the type of scientific evidence subject to *Kelly*. Courts distinguish between evidence produced
2 by a new “‘scientific’ mechanism, instrument or procedure,” and comparison or explanation
3 testimony. In very basic terms, firearms and toolmark identification involves an analyst
4 comparing microscopic markings on a projectile to those of a separate projectile. Since this
5 testimony involves comparison, and not a new scientific mechanism, it is not subject to
6 *Kelly/Frye* analysis. (*People v. Cowan, supra*, 50 Cal.4th at p. 469-471.) This is well
7 established law in California.

8 This Court is bound by the controlling precedent of decisions in courts of superior
9 jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d
10 450.) As such, this Court must adhere to the holding of the California Supreme Court that the
11 *Kelly* analysis does not apply to firearms identification and toolmark comparison examinations.
12 (*People v. Cowan, supra*, 50 Cal.4th at p. 469-471.)

13 *People v. Cowan*, is instructive. (*People v. Cowan, supra*, 50 Cal.4th at p. 469-471.) In
14 *People v. Cowan*, the California Supreme Court analyzed the application of the *Kelly* test to the
15 testimony of the prosecution’s firearms and toolmark examiner and unequivocally held that *Kelly*
16 did not apply. (*Id.*) Specifically, the Court quoted their earlier decision in *Leahy* and held that:

17 *Kelly* applies only to ‘that limited class of expert testimony which
18 is based, in whole or in part, on a technique, process, or theory
19 which is *new* to science and, even more so, to the law.’ (*People v.*
20 *Leahy, supra*, 8 Cal. 4th at p. 605, quoting *People v. Stoll* (1989)
49 Cal.3d 1136, 1156.)

21 (*People v. Cowan, supra*, 50 Cal.4th at p. 470.) The Court specifically addressed firearms
22 comparison and toolmark identification:

23 Moreover, neither technique is ‘so foreign to everyday experience
24 as to be unusually difficult for laypersons to evaluate.’ (*People v.*
25 *Venegas, supra*, 18 Cal.4th at p. 81 [contrasting DNA evidence,
26 which requires validation under *Kelly*, with “fingerprint, shoe
27 track, bite mark, or **ballistic comparisons**, which jurors essentially
28 can see for themselves.”].) As we have explained, the *Kelly* rule
‘is intended to prevent lay jurors from being unduly influenced by
procedures which seem scientific and infallible, but which are not.’
(*People v. Webb* (1993) 6 Cal.4th 494, 524; see also *People v.*

1 *Leahy, supra*, 8 Cal.4th at p. 606.)

2 (*People v. Cowan, supra*, 50 Cal.4th at p. 470 [emphasis added].)

3 Finally, in *Cowan*, the California Supreme Court quoted their earlier decision in *People v.*
4 *Webb*, and held that, “we concluded, ‘[w]here, as here, a procedure isolates physical evidence
5 whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the
6 reliability of the process in producing that result is equally apparent and need not be debated
7 under’ the *Kelly* rule.” (*People v. Cowan, supra*, 50 Cal.4th at p. 470; quoting; *People v. Webb,*
8 *supra*, 6 Cal.4th at p. 524.) California state courts adherence to the above axiom is not only true
9 for firearms and toolmark identification evidence, but also a litany of other forensic science
10 disciplines:

- 11 1. *People v. MacDonald* (1984) 37 Cal.3d 351, 372-373 [identification expert];
- 12 2. *People v. Mendibles* (1985) 199 Cal. App.3d 1277, 1292-1293 [use of a scope to
13 examine microscopic trauma, even if not visible to the naked eye];
- 14 3. *People v. Stoll* (1989) 49 Cal.3d 1136 [expert opinion on sexual deviancy, based
15 upon standardized psychological tests]
- 16 4. *People v. Cegers* (1992) 7 Cal.App.4th 988 [diagnosis of sleep disorder];
- 17 5. *People v. Pride* (1992) 3 Cal.4th 195, 238-239 [comparison of hair samples]; and
- 18 6. *People v. Webb* (1993) 6 Cal.4th 494 [comparison of laser enhanced fingerprint].

19 Thus, applying *Kelly* to determine the admissibility of firearms and toolmark
20 examination evidence in this case would directly conflict with a multitude of decisions by the
21 California Supreme Court. It is the People’s position, that this Court’s inquiry must begin and
22 end with the California Supreme Court’s holding in *People v. Cowan* and that the defense’s
23 motion **must** be denied. The defense motion fails legally and has no basis in California
24 jurisprudence.

25 IV.

26 THE NATIONAL RESEARCH COUNCIL REPORTS 27 MUST BE STRICKEN AS IMPERMISSIBLE HEARSAY

28 Assuming this Court were to consider the merits of the defense’s motion, the defense has
failed to provide any support for his stated positions, but instead relies upon hearsay and

1 supporting documentation taken completely out of context. In their motion, the defense
2 primarily relies on two (2) reports published by the National Research Council (hereafter
3 “NRC”). The first report, titled *Ballistic Imaging*, was published by the NRC Committee to
4 Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database in
5 2008 (this publication is hereafter referred to as the “2008 report”). The second report, titled
6 *Strengthening Forensic Science in the United States: A Path Forward*, was published by the
7 NRC Committee on Identifying the Needs of the Forensic Sciences Community in 2009 (this
8 publication is hereafter referred to as the “2009 report”). While the People will address the merits
9 of these reports below, this Court must strike both reports as impermissible hearsay and, as such,
10 these reports should not be considered. (*Evidence Code* § 1200.)

11 There is no hearsay exception which would permit the opinions contained in NRC reports
12 to be considered by this Court without the defense first laying a sufficient foundation via an
13 expert witness who is qualified to testify in the subject area. (*Evidence Code* §§ 1300 and 1341
14 [allowing “books of science... when offered to prove facts of general notoriety and interest”].)
15 Absent any such witnesses to testify regarding the validity of these reports, or even provide
16 insight as to the qualifications of its authors or committee members, the Court is only left with
17 unsubstantiated articles whose questionable commentary on “the uniqueness and reproducibility
18 of firearms-related toolmarks” lacks any empirical evidence. The defense’s attempt to present
19 these reports without laying any foundation deprives the People of the ability to conduct
20 meaningful cross-examination of any potential defense witness specifically relating the validity
21 of any findings contained in the these reports, or of the application of those findings to criminal
22 investigations.

23 As will be discussed below, it is doubtful that the defense would ever be able to produce
24 a qualified expert, active firearms examiner, or member of the relevant scientific community,
25 who would testify that the NRC reports currently call into question the validity of microscopic
26 firearm-related toolmark comparison. Without the conclusions contained in these reports, the
27 defense’s claims regarding the scientific methods used in yielding the toolmark results in the
28 present case has been impugned, must fail. Accordingly, this Court must strike the 2008 and

1 2009 reports from consideration, and summarily deny the defense's motion for a *Kelly* hearing.

2
3 V.

4 **ASSUMING THE NRC REPORTS ARE CONSIDERED BY THE COURT,**
5 **THE DEFENSE'S RELIANCE UPON THEM IS MISPLACED**
6 **AND DOES NOT TRIGGER THE REQUIREMENT FOR A *KELLY* HEARING**

7 Although the defense directs this Court to consider two (2) reports published by the NRC,
8 neither of these reports are germane to the issues addressed in the defense motion. First, neither
9 of the reports were authored by members of the relevant scientific community. Although the
10 defense would have this Court look at the impressive credentials of other members of the
11 National Research Council, these credentials do not apply to the authors of the cited reports, nor
12 more importantly, do the authors possess the requisite experience to be considered part of the
13 relevant scientific community. Furthermore, the defense has not only taken these reports
14 completely out of context, but they have actually ignored those portions of the reports which are
15 contrary to their position. While the People maintain that this Court should not consider these
16 reports, the People are compelled to address the defense's mischaracterizations. Each report is
17 discussed separately below.

18
19 **A. The 2008 Report**

20 The 2008 report, titled *Ballistic Imaging*, focuses on ballistic imaging technology in the
21 context of a **national database** and does **not** support the defense's position that the science of
22 microscopic toolmark identification has been impugned. In their motion, the defense correctly
23 concedes multiple times that, "firearms identification was not the primary focus of the
24 investigation...." (Defense's Motion at p. 7, line 14, through p. 8, line 1, and fn. 3.) However,
25 immediately following this concession, the defense then asks this Court to apply this non-topical
26 report to that very subject. The defense also completely ignores sections of the report which do
27 not support their position. Applying *Ballistic Imaging* in order to call into question the validity
28 of comprehensive firearm and toolmark examinations is akin to comparing apples to oranges.

1 “Ballistic imaging,” as discussed in the 2008 report, is the digital imaging of cartridge
2 cases and bullets that are subsequently entered into a database containing other digital images of
3 fired cartridges cases from crime scenes. (See *Training Guide for Integrated Ballistics*
4 *Identification System*, Forensic Technology WAI, Inc., 2009.) In the ballistic imaging process,
5 however, only a few limited characteristics are considered. By way of example, when a center
6 fire cartridge case is entered into a ballistic imaging database, only three characteristics are
7 considered: the breech face signatures, firing pin impressions and, if entered, extractor marks.
8 These marks are compared against other specimens in the database to use as a screening tool to
9 aid law enforcement in potentially linking ballistics evidence from multiple sources. (See
10 *Ballistic Imaging: Committee to Assess the Feasibility, Accuracy, and Technical Capability of a*
11 *National Ballistics Database*, John E. Rolph & Eugene S. Meieran, 6-C, 176 (2008).)

12 Obviously, as a screening tool, results from ballistics imaging must then be verified by a
13 qualified firearms examiner through a process known as microscopic ballistics comparison. This
14 is the forensic examination of a fired bullet or fired cartridge case to a suspected firearm, or to
15 other fired bullets and/or fired cartridge cases. Unlike the few characteristics considered in
16 ballistic imaging, microscopic ballistics comparison is not limited to considering a few
17 characteristics, such as the breech face signature and firing pin impression, but also includes a
18 significant number of other characteristics as well. Using the example of a center-fire cartridge
19 case, a qualified forensic examiner would consider the same breech face signatures, firing pin
20 impressions and, extractor marks, but would also consider firing pin drag marks, ejector marks,
21 and magazine lip marks. (See *Firearms Identification*, Vol. I, J. Howard Matthews (1962).)

22 In the present case, as early as April 1987 multiple firearms examiners from both the Los
23 Angeles Police Department and Los Angeles County Sheriff’s Department crime laboratories
24 examined bullets recovered during the autopsies of several victims and concluded that these
25 bullets were fired from the same firearm. This opinion has been expanded to include other
26 coroner bullets, since recovered from additional victims. Furthermore, after the defendant’s
27 arrest, an analysis showed that several of the bullets had been fired by firearms recovered at the
28 defendant home. In this case, however, every single case involved comparing projectiles to one

1 another by qualified forensic examiners conducting a comprehensive microscopic comparison.
2 Notably, the People’s experts are not relying upon ballistic imaging, nor, despite the defense’s
3 repeated and erroneous assertions, have they compared any cartridge cases in this case.
4 (Defense’s Motion at p. 5, lines 19-25.) In arriving at their conclusions, the People’s experts
5 examined the entire projectiles in their totality, not just isolated marks. Thus, the fact that the
6 2008 report comments on the feasibility of “ballistic imaging” in the context of national
7 databases is irrelevant to the comprehensive microscopic firearms examinations conducted in
8 this case. Thus, again, the defense is talking about apples in a case involving oranges.

9
10 **1. The Committee that Generated the 2008 Report Does Not**
11 **Fall Within the Meaning of “Relevant Scientific**
Community” as Contemplated by *People v. Kelly*

12 The 2008 report was not published by members within the relevant scientific
13 community. This fact is critical because the *Kelly* Court recognized the importance of “new
14 technique[s]” gaining “general acceptance... in the relevant scientific community” as a primary
15 consideration in the admissibility of a “novel method of proof.” (*People v. Kelly, supra*, 17
16 Cal.3d at p. 30 [emphasis added].)

17 In the preface of the 2008 report, the authors specifically state that “[w]hen the
18 committee [to assess the feasibility, accuracy, and technical capability of a national ballistics
19 database] was being formed, it was **decided not to include an active firearms examiner.**”
20 (*Ballistic Imaging, supra*, Preface, at p. xii [emphasis added].) In their motion, the defense
21 stated that the National Research Council is comprised of a number of individuals possessing
22 very impressive credentials including Nobel Prizes. However, this information is of no value to
23 this Court. None of those “Nobel Prize winners” authored this report. Furthermore, the first
24 page of the 2008 report includes a disclaimer that the views and opinions expressed within the
25 2008 report are solely “those of the author(s) and do not necessarily reflect the views of the
26 organizations or agencies that provided support for the project.” (*Ballistic Imaging, supra.*)
27 Thus, the very report itself cautions against the “piggy-backing” of credentials that the defense is
28 asking this Court to consider.

1 The Chair of the 2008 report, John E. Rolph, is a statistician by trade and thus not a
2 member of the relevant scientific community. The Vice-Chair, Eugene S. Meieran, is a
3 metallurgist, and again, not a member of the relevant scientific community. The defense cannot
4 offer even one firearms examiner (or anyone else within the forensic firearms examination and
5 toolmark identification community) to support their ridiculous position that microscopic ballistic
6 comparison is not generally accepted within the relevant scientific community. As such, the
7 defense's reliance on a non-topical report, which fails to cite the opinions of the relevant
8 scientific community, is of no value to this Court.

9
10 **2. The Defense's Attempt to Impugn the Science of**
11 **Microscopic Toolmark Identification and Comparison is**
12 **Taken Out of Context.**

13 Not only has the defense cited to a non-topical report, they have also taken a solitary,
14 unsubstantiated comment in the 350-page report completely out of context, distorted the stated
15 mission of the committee that authored the report, and ignored sections of the report that are
16 contrary to their assertions.

17 As stated above, the committee which authored the 2008 report was empaneled to
18 examine the viability of ballistic imaging in national databases, not the forensic firearms and
19 toolmark discipline as a whole. Where the defense quotes comments in the 2008 report
20 concerning conclusions drawn in firearms identification, which are unrelated to ballistic imaging,
21 they are unable to provide any empirical data for these assertions because they are non-existent
22 in the 2008 report. Furthermore, when the defense directed this Court to a passage in the 2008
23 report on page 81, they took that passage out of context. In fact the defense omitted the
24 introductory sentence to the cited paragraph which states, "A third point is important in reading
25 this report – **stopping short of commenting on whether firearms toolmark evidence should**
26 **be admissible:...**" This introduction makes clear that the conclusion which followed should not
27 be given any weight during admissibility court proceedings.

28 The defense's position that the 2008 report detrimentally impacts the admissibility of the
People's firearm and toolmark identification evidence in the present case could not be more

1 emphatically denied in the very report itself: 1) “[W]e do not in any way offer a determination of
2 whether ballistics evidence should or should not be admissible in court proceedings” (*Ballistic*
3 *Imaging, supra*, 1-A.2, at p. 20).); and 2) “[I]t is not the function of this committee to assess the
4 general validity of firearms identification and toolmark examination nor their admissibility in
5 court proceedings.” (*Ballistic Imaging, supra*, 3-E, at p. 81.)

6 The authors of the 2008 report anticipated that their report would be used improperly
7 when acknowledging that while, “some readers may attempt to infer from [the Committee’s
8 review] a stance by this committee, for or against the validity of firearms identification
9 generally,” the committee made clear its conclusion that “it is possible to speak meaningfully
10 about ballistic image database performance without first fully accepting or concluding the
11 fundamental uniqueness of toolmarks.” (See *Ballistic Imaging*, 1-A.2, p. 19.)

12 The defense’s attempt to exploit a single comment in the 2008 report is most effectively
13 defeated by the report itself. At page 18, under the heading, “1-A.2 Limitations: What the
14 Committee Study Does *Not* Do,” the authors stated,

15
16 First, and most significantly, *this study is neither a verdict on the*
17 *uniqueness of firearms-related toolmarks generally nor an*
18 *assessment of the validity of firearms identification as a discipline.*
19 Our charge is to focus on ‘the uniqueness of ballistics images’ –
20 that is, on the uniqueness and reproducibility of the markings
(toolmarks) left on cartridge cases and bullets as they are recorded
or measured by various technologies (e.g., photography or surface
metrology).

21
22 The uniqueness of firearms-related toolmarks generally is a much
23 broader question – and a very important one – but it is not one that
24 our committee was consulted to address. At a minimum, assessing
25 the general validity and uniqueness of toolmark evidence would
26 require a much wider range of gun and ammunition selections and
27 firing conditions than was supported in our experimentation
28 through NIST (see Chapter 9). It would also require precise
quantification of the myriad sources of variability inherent in the
firing of a gun (see Chapter 2). In short, it would be a major
undertaking, requiring a sustained program of research over many
years, and it is impossible to definitively answer the question of the

1 uniqueness of ballistic toolmarks as a by-product of a more
2 targeted study of the uniqueness of ballistic images.

3 (*Ballistic Imaging*, at p. 18 [emphasis in original].)

4 In reality, the defense directed this Court to a single comment in the 2008 report in their
5 attempt to impugn microscopic firearms and toolmark comparison and identification and the
6 admissibility of such evidence in court proceedings. By doing this the defense conveniently
7 ignored the numerous instances in the 2008 report that not only fail to support their position, but
8 which clearly contradicts their assertions.

9
10 **3. The 2008 Report Supports the Results**
11 **Yielded in the Present Case via Microscopic**
12 **Toolmark Comparison and Identification.**

13 The 2008 report actually reflects the present state of forensic firearms comparison and
14 toolmark identification: “in the Committee’s view, ‘statements on toolmark matches (including
15 legal testimony) should be supported by the work that was done in the laboratory, by the notes
16 and documentation made by examiners, and by proficiency testing or established error rates for
17 individual examiners in the field and in that particular laboratory....’” (*Ballistic Imaging, supra*,
18 3-E, at p. 82-85.)

19 The People intend to call several criminalists to testify concerning their firearms and
20 toolmark identification examinations. All of these experts are qualified examiners who routinely
21 perform toolmark examinations using a comparison microscope. They have each taken and
22 passed yearly proficiency tests, and are in current compliance. Additionally, both the Los
23 Angeles Police Department and Los Angeles County Sheriff’s Department laboratories are
24 accredited by the American Society of Crime Lab Directors Laboratory Accreditation Board
25 (ASCLD-LAB) and the International Standards Organization (ISO). Both crime labs undergo re-
26 accreditation every five (5) years pursuant to an independent inspection, as well as an internal
27 inspection every year. All of the People’s experts utilize accepted and authorized methods and
28 procedures conforming to the quality assurance procedures of their respective laboratories.
These methods and procedures are guided by the Association of Firearms and Toolmark

1 Examiners (AFTE) and are generally followed by the relevant scientific community. All of the
2 People's experts can support their test results with lab notes and documentation. Therefore, all
3 of the criminalists in this case are qualified to render expert opinions and testify in this case
4 according to the results of their microscopic toolmark examinations.

5 As such, the People request that this Court disregard the impermissible hearsay contained
6 within the 2008 report. However, assuming this Court were to consider the 2008 report in its
7 totality (not just isolated single passages taken out of context), the Court would conclude that this
8 report is irrelevant and does not support the defense's position. As such, the defense's motion
9 must be denied as they have failed to show any disagreement among the relevant scientific
10 community.

11 **B. The 2009 Report**

12 The defense relies heavily on the 2009 report, published by the National Research
13 Council, Committee on Identifying the Needs of the Forensic Sciences Community. As their
14 name would suggest, the committee that authored the 2009 report conducted a basic and
15 perfunctory review of all of the forensic sciences and in no way called into question the scientific
16 validity of firearms examination and toolmark identification. Perhaps most telling, while the
17 2009 report is approximately 350 pages long, only approximately four (4) pages of the report
18 discuss firearms and toolmark evidence directly. As the acting Director of the Bureau of
19 Alcohol, Tobacco, Firearms and Explosives (ATF) remarked in his testimony before Congress
20 on May 13, 2009, the 2009 report "does not, and was never intended to, comprehensively assess
21 the forensic sciences themselves."

22 This Court should not consider the opinions expressed in the 2009 report for the same
23 reasons as stated above in the discussion of the 2008 report. Specifically, the 2009 report was
24 not published by members of the relevant scientific community. Once again, the defense distorts
25 the qualifications of the authors of the 2009 report, as well as their stated mission. Consistent
26 with the 2008 report, the 2009 report also failed to identify any new evidence which would
27 undermine the core premises upon which firearm and toolmark analysis is based.
28

1 **1. The 2009 Report Was Not Published by the “Relevant**
2 **Scientific Community” as Contemplated by *People v. Kelly***

3 The 2009 report was not published by members within the relevant scientific
4 community. The thrust of the defense’s motion is that the 2009 report speaks for the scientific
5 community as a whole. The defense concedes in their motion that the 2009 report represents the
6 opinions of the purported all-inclusive scientific community, which they refer to as the “general
7 scientific community.” However, pursuant to *Kelly*, this Court must only consider the consensus
8 within the more limited relevant scientific community. (*People v. Kelly, supra*, 17 Cal.3d at p.
9 30 [emphasis added].)

10 The relevant scientific community is the “firearms examination community,” which has
11 been interpreted to include firearms examiners, as well as members of the Association of
12 Firearms and Toolmark Examiners (AFTE). (*Commonwealth v. Meaks* (2006) 2006 WL
13 2819423.) Just as they failed in 2008, the National Research Council did not include *any*
14 firearms examiners in the committee which published the 2009 report. (*Strengthening Forensic*
15 *Science: A Path Forward*, (2009), Appendix A, Biographical Information of Committee and
16 Staff, at A-1 through A-12.) The NRC Committee did not include *any* individuals who have
17 conducted validation studies or published scientific, peer-reviewed articles in the field of
18 Firearms and Toolmark Identification. (*Id.*) Although the committee did hear from two (2)
19 experts within the firearms community,² both presentations to the committee merely **reaffirmed**
20 **the general acceptance of pattern matching methodology**, which is traditionally used in
21 firearms and toolmark identification. Thus, the Court’s reliance on this report would be
22 misplaced as the committee that published the report, yet again, failed to represent the opinions
23 of the relevant scientific community.

24 ///

25 ///

26 ///

27 _____
28 ² ATF Firearms Examiner Gregory Klees, Chairman-Elect of the FBI’s Scientific Working Group for Firearms and
Toolmark Examiners (SWGUN) and retired Firearms Examiner Peter Striupaitis, who previously worked at the
Illinois State Police.

1 **2. The 2009 Report Represented a Cursory Review of All of the**
2 **Forensic Sciences and Reaffirmed the Reliability of Firearm**
3 **and Toolmark Identification**

4 Contrary to the defense’s claims, rather than a “comprehensive” analysis of the firearms
5 and toolmark identification, the 2009 report consists of a perfunctory, overly-generalized review.
6 (Defense’s Motion at p. 27, line 9.) The defense misrepresents the 2009 report as a treatise of
7 sorts, which examines the discipline of firearms and toolmark identification as a whole. This
8 characterization of the 2009 report, simply is not correct and not supported by the report itself.
9 Of the nearly 350 pages encompassing the 2009 report, a mere six (6) pages are devoted to the
10 field of firearms and toolmark identification. (*Strengthening Forensic Science: A Path Forward*
11 (2009), at pp. 150-155.)

12 The conclusions contained in the six (6) page firearm and toolmark identification section
13 of the 2009 report were not supported by *any* scientific literature. This section of the 2009 report
14 refers to a total of five (5) peer-reviewed journal articles and only a single validation study,
15 despite the hundreds of studies which have been published in peer-reviewed journals. Still,
16 despite the negative tone of the 2009 report, none of the cited scientific journals undermines the
17 traditional pattern matching methodology utilized in firearms and toolmark identification. In
18 fact, the single validation study, published by Dr. James E. Hamby, is a continuation of a prior
19 validation study and demonstrates that the pattern matching methodology is practiced by
20 qualified firearms examiners around the world and with equally reliable findings: **zero false**
21 **identifications**³. (J.E. Hamby, D.J. Brundage, and J.W. Thorpe. 2009. *The identification of*
22 *bullet fired from 10 consecutively rifled 9mm Ruger pistol barrels: A research project involving*
23 *468 participants from 19 countries.*) Furthermore, to the extent the scientific materials address
24 pattern matching, they merely reaffirm the methodology’s general acceptance within the relevant
25 scientific community:

26 During the past eighty years, a significant volume of research –

27 ³ Other recent studies have also found zero false identifications, including, Brundage (1998), Bunch & Murphy
28 (2003), De France (2003), Smith (2005), and Orench (2005). The only published test that contained a mis-
identification error(s) involved marks produced by tools other than firearms. Thompson & Wyant (2003) found a
very small, 0.78% error rate.

1 some of which is cited in this paper – has involved the evaluation
2 of test-fired projectiles and cartridge casings. This research has
3 included test firing the same firearm numerous times to evaluate
4 the changes in the fired components or test firing consecutively
5 rifled firearms to determine if projectiles could be associated with
6 the correct barrel. In every research project, involving the
7 examination of consecutively manufactured tools – including
8 bullets from consecutively rifled barrels – the results have
9 established that examiners have the ability to identify fired
10 components to the firearm as well as to identify other tools.

11 (J.E. Hamby, et al., *supra*.)

12 The 2009 report’s citation to the earlier 2008 report, *Ballistic Imaging*, exemplifies the
13 superficial nature of the toolmark section of the report. The 2009 report cites to the 2008 report
14 in an attempt to reinforce the claim that “the validity of the fundamental assumptions of
15 uniqueness and reproducibility of firearms-related toolmarks has not yet been fully
16 demonstrated.” (*Ballistic Imaging*, 3-E, at p. 81.) However, glaringly absent from the 2009
17 report is any mention of the fact that Dr. John E. Rolph explicitly rejected application of the
18 quoted language to the evaluation of the field of firearms and toolmark identification. As
19 discussed above, Dr. Rolph made clear that the above-quoted language, was not made in the
20 context of assessing the admissibility of firearms-related evidence and that the entire 2008 report
21 was “neither a verdict on the uniqueness of firearm-related toolmarks generally nor an
22 assessment of the validity of firearms identification as a discipline.” (*Ballistic Imaging*, 1-A.2, at
23 p. 18.) Since that statement was not supported in the 2008 report, merely reiterating the
24 statement in the 2009 report does not make it true.

25 Consequently, the defense’s assertion that “firearms examiners have not demonstrated
26 that they can reliably identify a particular firearm, nor what would be required to reliably identify
27 if a particular firearm discharged a particular bullet,” is untrue. Similarly, the defense statement
28 that the “AFTE theory has not been validated” is equally false. It appears from the defense’s
motion that they simply disregarded the numerous validation studies which have been conducted
in the field of firearms and toolmark identification. When the defense states that “...without
sufficient tests having been conducted to determine the validity...” and “[i]nstead of listening to

1 the greater scientific community and conducting validation tests...” **he has wholly ignored all**
2 **of the validation tests which have been conducted, including the validation study published**
3 **in the 2009 report which he cites so heavily.** (Defense’s Motion at p. 4, lines 1-3.) The 2009
4 report’s failure to address the results of validation studies in the field of firearms and toolmark
5 identification is nothing short of perplexing, and demonstrates the superficial nature of the that
6 report.

7 The defense is correct that scientists “...conduct validation testing to establish whether or
8 not [their] methodology reliably and consistently produces the purported results.” (Defense’s
9 Motion at p. 17, lines 15-16.) However, the defense completely omits the fact that validation
10 studies have repeatedly demonstrated that qualified firearms examiners can identify toolmarks to
11 a particular firearm under worst-case scenarios with near-perfect precision. (See J.E. Hamby,
12 *supra*.) In fact, validation studies are regularly conducted with consecutively manufactured
13 firearms because the possibility of a false-positive conclusion that two bullets came from the
14 same firearm is highest with bullets that were fired from two different but consecutively
15 manufactured firearms. Even given the fact that validation tests are conducted under this worst-
16 case scenario, it is significant that the defense cannot point to a single validation study casting
17 doubt over the validity of pattern matching.

18 If anything, the 2009 report reveals that a committee composed of a diverse group of
19 scientists, academicians, and lawyers (none of whom are member of the relevant firearms
20 community) are in favor of greater research so that all forensic disciplines continue to strive for a
21 level of proficiency and validation more comparable to forensic DNA. However, given that
22 validation studies over the past century have repeatedly demonstrated that firearms examiners
23 have the ability to match cartridge cases and bullets to consecutively manufactured barrels with a
24 zero error rate, a perceived need for additional research by the NRC has no bearing on the
25 general acceptance of firearms and toolmark evidence within the relevant scientific community.

26 Once again, the defense has distorted the significance to be attributed to the 2009 report.
27 They have completely failed to present the opinions of the relevant scientific community, and
28 further failed to dispute the science of microscopic firearms and toolmark examination. Since

1 the science of firearm and toolmark identification is sufficiently supported by validation studies,
2 once again, the defense has not and cannot meet their burden. As such, this Court must deny the
3 defense's motion.

4
5 **C. The Science of Firearms and Toolmark Identification is Well**
6 **Documented and Supported by Peer-Reviewed and Validated**
7 **Studies.**

8 The scientific validation of firearms and toolmark identification is well documented in
9 the relevant scientific community. One ATF examiner, Ronald G. Nichols, conducted a
10 comprehensive review of the relevant scientific literature in the field of firearms and toolmark
11 identification and authored two (2) foundational articles in this area. In the first article, Nichols
12 reviewed a total of thirty-four (34) scientific articles. (See Nichols, R.G., *Firearms and*
13 *Toolmark Identification Criteria: A review of the Literature*, Journal of Forensic Sciences, 1997:
14 42(d): 446-74.) In the second article, Nichols reviewed a total of twenty-two (22) scientific
15 articles. (See Nichols, R.G., *Firearms and Toolmark Identification Criteria: A Review of the*
16 *Literature, Part II*, Journal of Forensic Sciences, 2003 Mar: 48(2): 318-27.) Nichols was also
17 called as an expert witness during a *Daubert* hearing in *United States v. Diaz*, where he testified
18 that after his comprehensive review of the scientific literature in the field of firearms and
19 toolmark identification, **he was not aware of a single peer-reviewed article that stood for the**
20 **proposition that firearms and toolmark identification are unreliable forensic disciplines.**
21 (*United States v. Diaz* (N.D. Cal.) 2007 WL 485967, *26.)

22 That fact that this breadth of research was not mentioned in the 2009 report is not
23 surprising because, by its own admission, the committee that published the 2009 report
24 essentially discounted this extensive research supporting the scientific underpinnings of the
25 identification of firearm and toolmark evidence. Specifically, the 2009 report states:

26 The committee decided early in its work that it would not be
27 feasible to develop a detailed evaluation of each discipline in terms
28 of its scientific underpinning, level of development, and ability to

1 provide evidence to address the major types of questions raised in
2 criminal prosecutions and civil litigation.

3 (*Strengthening Forensic Science: A Path Forward, supra*, at p. 7.) Thus, not only has the
4 defense failed to undermine the foundations of this forensic discipline, but he also relies on a
5 report which, by its own admission, ignored the scientific literature in this field.

6 Although it is the defense’s burden to show that firearms and toolmark evidence amounts
7 to a “novel method of proof,” they cannot meet this burden because a great volume of scientific
8 literature exists supporting this science and the “general acceptance” it has enjoyed for more than
9 a half century, as well as recent studies⁴ which are consistently advancing the science.

10 **VI.**

11 **THE DEFENSE’S RELIANCE ON *UNITED STATES V. GREEN***
12 **AND *UNITED STATES V. GLYNN* IS MISPLACED**

13 The defense relies on the decisions of Federal Courts in *United States v. Green* (D. Mass.
14 2005) 405 F.Supp.2d 104 and *United States v. Glynn* (S.D.N.Y. 2008) 578 F.Supp.2d 567, to
15 claim the courts are increasingly questioning the testimony and form of testimony to be admitted
16 without a hearing. First, neither of these opinions is binding on this Court’s determination. Both
17 of these cases were decided in Federal courts applying the *Daubert* test. As documented above,
18 California is not a *Daubert* jurisdiction and neither of these cases addresses the applicable *Kelly*
19 standard. Second, the value of these cases to the defense cause is questionable. While the *Green*
20

21 _____
22 ⁴ For instance, Dr. James E. Hamby, et al., published a validation study involving 10 consecutively rifled pistol
23 barrels. (J.E. Hamby, et. al., *supra*.) The study was a continuation of one originally designed by David Brundage,
24 primarily limited to examiners from nationally accredited laboratories in the United States. Since that time, the
25 original study was expanded to include examiners from around the world. To accomplish this expansion, 240 test
26 sets of ammunition were produced and distributed to forensic scientists and researchers around the world. A thesis,
27 which involved a total of 201 participants – including the original 67 reported on by Brundage – was published by
28 Dr. Hamby in 2001. In 2015, this paper was expanded upon even further to report the final conclusions of research
conducted over the intervening 15 year period. (*The Identification of Bullets Fired From 10 Consecutively Rifled
9MM RUGER Pistol Barrels – A research project involving 619 participants from 23 Countries Using Optical
Comparison Microscopy and ‘Ballistics’ Imaging Instrumentation with an Analysis of Possible Error Rate Using
Bayesian Statistics.* (Journal of Forensic Sciences (In Press) 2015).) Recently, 20 additional test sets were
developed using a 4th type of 9mm Luger ammunition as well as polymer ‘clone’ sets. These sets – both actual
bullets and clone sets – have been distributed for use in forensic laboratories worldwide. Currently, this research
project has a total of 653 participants from 61 countries. This is but one example of the ever-expanding and
constant validation undertaken within this forensic science discipline.

1 court did not specifically address the issue of general acceptance, the court noted that there
2 appears to be “widespread acceptance in the courts of ballistics testing and toolmark analysis.”
3 (*United States v. Green, supra*, 405 F.Supp.2d at p. 122.) Much like the court in *Green*, the
4 *Glynn* court determined that the methodology of ballistics examination “has garnered sufficient
5 empirical support as to warrant its admissibility.” (*United States v. Glynn, supra*, 578 F.Supp.2d
6 at p. 574.)

7 In addition to these federal opinions, **many** other federal courts have also determined that
8 a hearing on the admissibility of firearms and toolmark evidence is unnecessary. (*United States*
9 *v. Alatorre* (9th Cir. 2000) 222 F.3d 1098; *United States v. Crisp* (4th Cir. 2003) 324 F.3d 261;
10 *United States v. Nichols* (10th Cir. 1999) 169 F.3d 1255.) Based on the foregoing, neither of
11 these cases address the critical issues before this Court. Furthermore, even if this Court were to
12 consider these Federal cases as persuasive, there still exists ample authority to establish the
13 general acceptance underlying the science of firearms and toolmark identification.

14 VII.

15 **THE DEFENSE HAS TAKEN AN ISOLATED INCIDENT** 16 **AT THE DETROIT POLICE DEPARTMENT CRIME LAB** 17 **COMPLETELY OUT OF CONTEXT**

18 As has been repeatedly demonstrated in the defense’s motion, they, once again, have
19 completely distorted an isolated incident, involving administration at the Detroit Police
20 Department crime lab. The defense uses this example by taking an isolated incident out of
21 context and erroneously presenting this as proof that the science of firearms and toolmark
22 identification is flawed. This characterization has no grounding in reality. In their motion, the
23 defense cites that “the Detroit Police Department’s firearms examination unit was shut down
24 after auditors found at least 19 instances of serious firearms identification errors in random
25 review of 200 cases.” The defense presented this information within the context of their
26 argument that firearm and toolmark evidence cannot be matched to a “reasonable degree of
27 certainty.” However, contrary to the defense’s argument, the Detroit Police Department was shut
28

1 down precisely because they were not following well-accepted protocol and standards.

2 An audit of the laboratory found “the laboratory’s firearms unit was in compliance with
3 just 42 percent of ‘essential standards,’ which are criteria that fundamentally affect the outcome
4 of work there.” (Nick Bunkly, *Detroit Crime Lab is Closed After Audit Finds Serious Errors in*
5 *Many Cases* (New York Times, Sept. 25, 2008).) “The auditors said that officers at the
6 laboratory often cut corners and that in many instances ‘an assumption was made to the entirety
7 of all items based on the analysis of only a few.’ Technical review of the work were ‘almost
8 nonexistent,’ they wrote. Factors that contributed to the problems, they said, were a heavy
9 workload, a lack of training and ‘the deplorable conditions at the facility.’” (*Id.*)

10 The defense attempts to present this single instance of examiners failing to follow well
11 established AFTE standards as proof that the entire science of firearms and toolmark
12 examination is seriously flawed. Such a leap is completely unsupported by this story. This
13 example does not support an indictment of the forensic discipline of firearms and toolmark
14 identification. In reality, the larger scientific community of firearms and toolmark examiners
15 caused this substandard conduct to be identified and remedied by their very institution of
16 standards and audits.

17 Furthermore, if the defense assertion was true that no qualified examiner could determine
18 a match, how would an outside audit determine that the Detroit lab had erred? This
19 administrative error, while possible in any human discipline, has no bearing on the science of
20 firearms and toolmark identification. The defense’s attempt to use this to their benefit is, quite
21 frankly, deplorable.

22 VIII.

23 THE DEFENSE’S UNSUBSTANTIATED ARGUMENTS 24 DO NOT IMPLICATE *KELLY*

25 Throughout the defense’s motion they puts forth numerous unsubstantiated claims. For
26 instance, in the defense motion they begin with the assertion that the “methods utilized by the
27 firearm expert(s) for the prosecution to render their opinion are not commonly accepted in the
28

1 scientific community” and “the equipment utilized by the firearm expert(s) for the prosecution
2 are outdated and subject to erroneous findings.” (Defense’s Motion at p. 6, lines 13-17.) This
3 assertion is not only ridiculous, but entirely unsubstantiated. In fact, the defense never revisits
4 this argument in the body of their motion and they do not provide any empirical evidence nor
5 scientific support. The defense has repeatedly made such lofty claims and then wholly failed to
6 deliver as promised. Thus, until such time as the defense can provide some supporting evidence,
7 the People will not address their baseless claims.

8 The remainder of the defense’s arguments are built upon the faulty premise that the 2009
9 report speaks for the relevant scientific community. In essence, the defense recycles all of their
10 earlier arguments with the imprimatur of the 2009 report. Since *Daubert* does not apply in
11 California, and the 2009 report does not speak for the relevant scientific community, the
12 defense’s arguments continue to lack merit.

13
14 **A. “Show-Up” Comparisons and Contextual Information are Entirely
Irrelevant to This Case.**

15 The defense’s assertion that errors occurred in this case because “comparisons are
16 conducted in a ‘show-up’ fashion, where the bullet or cartridge case collected from the scene is
17 compared side-by-side against the test fire(s) from the suspect firearm and no other firearm,” and
18 “[f]irearm examiners are often given contextual information about the case and the evidence
19 before they perform their examinations” completely lacks merit. (Defense’s Motion at p. 16,
20 lines 8-15.) In reality, the defendant thwarted justice for nearly two (2) decades. As discussed
21 above, during that time LAPD firearms examiners compared hundreds, if not thousands, of
22 bullets to determine if they could be matched to a common origin with **no** contextual
23 information. Consistently, the respective analysts determined that the vast majority of bullets
24 they compared did not match, with the exception of those relevant to the charged victims.
25 Again, the criminalists were not given any contextual information. In reality, the forensic
26 evidence provided the contextual information which ultimately assisted investigators in
27 determining that the victims were killed by a common serial killer, the defendant.
28

1 Furthermore, the firearms and toolmark evidence in this case does not exist in a vacuum.
2 Although firearms and toolmark evidence was initially the best evidence the LAPD had to
3 connect the defendant to this series of crimes, the science of DNA ultimately progressed and,
4 independent of the firearms and toolmark evidence, the defendant was linked to multiple victims.
5 Thus, while the defense may claim a theoretical issue that the firearm and toolmark evidence in
6 this case was presented in a “show-up” fashion or based on “contextual information” they does
7 so, once again, without any support in reality.

8
9 **B. The Defense’s Call for an “Error Rate” Lacks Support**

10 The defense also engages the 2009 report once again, in their call for a “determination of
11 error rates.” (Defense’s Motion at p. 17, line 13.) Again, the 2009 report does not reflect the
12 opinions of the relevant scientific community, which does not require such a calculation.
13 Although many of the recommendations of the 2009 report may serve the lofty goal of
14 strengthening all of the forensic disciplines within the United States, real life application of these
15 objectives to actual forensic casework can be fraught with unanticipated complications. For
16 example, the idea of calculating an error rate sounds reasonable at first glance, but application to
17 the field of forensic DNA analysis (the gold standard according to the 2009 report) proved
18 impractical.

19 In *Roberts v. United States* (D.C. 2007) 916 A.2d 922, the appellant argued that the
20 FBI’s refusal to incorporate a laboratory error rate into their statistical calculations caused
21 scientists significant in number and expertise to regard the FBI’s analysis as unreliable and
22 misleading. (*Roberts v. United States, supra*, 916 A.2d at p. 929.) The Court of Appeals
23 rejected the argument because: 1) there was no allegation of error in that particular case; 2) error
24 rates are inherently suspect because laboratories typically take measures to prevent reoccurring
25 errors once a problem is discovered; 3) the best protection an innocent suspect has from a false
26 match is an independent test; and 4) nothing prevented Robert’s from presenting independent
27 testimony about the incidence of laboratory errors. (*Id.*, at p. 929-931.) All of these reasons
28 apply with equal force to the use of error rates in the field of firearms examination and toolmark

1 identification.

2
3 **C. There is No Support For Defense’s Arbitrary Position**
4 **that the Opinions of the People’s Experts Should be Limited**

5 In their motion the defense calls for certain opinions of the People’s experts to be
6 arbitrarily limited to “class characteristics.” This request is made with absolutely no relevant
7 support. It is significant that no California court has ever deemed inadmissible the type of
8 firearms identification evidence that the defense challenges in their motion. (See *People v.*
9 *Buckowski* (1951) 37 Cal.2d 629 [ballistic expert’s testimony that the markings were identical
10 with those found on the fatal bullet and that the bullet had been fired by the gun found in the
11 defendant’s residence]; *People v. Trujillo* (1948) 32 Cal.2d 105 [the ballistic expert testified that
12 the bullet could have come from a certain gun because it had five lands and five grooves and the
13 rifling of the bullet showed that it had been fired from a gun having such characteristics]; *People*
14 *v. Moore* (1935) 3 Cal.2d 700, 702 [“The ballistic expert of the city’s police department testified
15 that in his opinion the metal slugs found in the building near the scene of the shooting had been
16 fired from the gun which the defendant had in his possession when he was arrested”]; *People v.*
17 *Lawrence* (1985) 172 Cal.App.3d 1069 [ballistics tests indicated that the four bullets that the
18 police recovered from the crime scene had been fired from a gun belonging to defendant’s
19 sister].) The defense’s request that the opinions of the People’s experts be limited to “class
20 characteristics” is not supported by the non-topical federal case cited by the defense, which cites
21 the incorrect *Daubert* standard, nor by any California cases. This request is wholly without
22 support and must be denied outright.

23
24 **IX.**

25 **CONCLUSION**

26 This Court must deny the defense’s motion because it is settled law in California that a
27 *Kelly* hearing is not proper when considering firearms and toolmark identification evidence.
28 (*People v. Cowan, supra*, 50 Cal.4th at p. 470.) Furthermore, even if this Court were to consider

1 the merits of the defense’s motion, the simple fact remains that the scientific opinion regarding
2 firearms examination and toolmark identification has not materially changed since it was first
3 accepted by the scientific community.

4 Toolmark identification evidence, a general forensic methodology of which firearms
5 identification is a subset, has been admitted in California for over a half of a century (*People v.*
6 *Godlewski* (1943) 22 Cal.2d 677, 685 [comparing parts of a safe to a chisel]), and has become
7 universally accepted. (*State v. Hacket* (1949) 215 S.C. 434 [indicating that “[i]t is now common
8 knowledge that by means of the science of ballistics, it may often be determined that a bullet was
9 fired from a certain pistol”].) As reported in 4 Faigman et al., *Modern Scientific Evidence, The*
10 *Law and Science of Expert Testimony* (Thompson Reuters/West 2010) (*Faigman*), section 35:1,
11 pages 613-614, “**expert evidence on toolmarks and firearms identification is universally**
12 **admissible...**” (Fn. Omitted. [emphasis added].) As well, “[e]xpert testimony identifying a
13 particular weapon as the one source of both a questioned (crime scene) bullet and known bullets
14 (test firings) is **admissible in every American jurisdiction.**” (*Id.*, § 35:3, p. 619 [emphasis
15 added].)

16 A recent unpublished decision concluded, after a full evidentiary hearing, that the very
17 theory of firearm identification used in the San Francisco Police Department Crime Lab was
18 “reliable under *Daubert*. While there is some subjectivity involved, it is the **subjective**
19 **judgment of trained professionals with a keen practiced eye for discerning the extent of**
20 **matching patterns.** The methods used are reliable.” (*United States v. Diaz, supra*, 2007 WL
21 485967, *1 [emphasis added].) The *Diaz* court further held that the “theory of firearms
22 identification based on traditional pattern matching appears to have **broad acceptance in the**
23 **forensic community. There has been no critique sufficient to undermine the traditional**
24 **examination method as it is performed by competent, trained examiners.**” (*Id.* at *11
25 [emphasis added].)

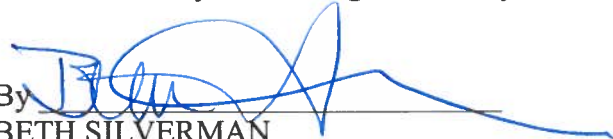
26 The defense’s motion is woefully inadequate. First, the defense has failed to meet the
27 bare minimum requirement of citing the law which is applicable to this jurisdiction. Their entire
28 motion is flawed in that they attempt to make their point using the non-applicable *Daubert*

1 standard. This very basic failure to apply the appropriate standard, i.e. the *Kelly* test, is
2 absolutely fatal to their claims. Furthermore, the Supreme Court of California is very clear that
3 neither *Daubert*, nor *Kelly*, applies to firearms and toolmark examinations in California. In
4 totality, based on long standing precedent in California jurisprudence that *Kelly*, rather than
5 *Daubert*, controls the admissibility of scientific evidence, and as firearms comparison and
6 toolmark identification is not subject to *Kelly*, a hearing on the issue is not warranted and the
7 defense motion must be denied.

8
9 Dated this 3rd Day of February, 2016

Respectfully submitted,

10
11 JACKIE LACEY
12 District Attorney of Los Angeles County

13 By 
14 BETH SILVERMAN
15 Deputy District Attorney
16 Major Crimes Division

17 MARGUERITE RIZZO
18 Deputy District Attorney
19 Forensic Science Section

20 PAUL PRZELOMIEC
21 Deputy District Attorney
22 Major Crimes Division
23
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Proof of Service

I, Deputy District Attorney Paul Przelomiec, declare:

I personally served the **PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO LIMIT CONCLUSIONS OF FIREARMS EXAMINERS**, by email to each of the following:

Seymour Amster at attyamster@yahoo.com

Dale Atherton at daleratherton@gmail.com

Kristen Gozawa at kristen_gozawa@yahoo.com

I declare under penalty of perjury pursuant to the laws of California that the above is true and correct and that I, Deputy District Attorney Paul Przelomiec, executed this proof of service in Los Angeles, California on February 3, 2016.

Paul Przelomiec
Deputy District Attorney
Major Crimes Division