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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Petitioner, v. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO, Respondent, JOHNNY MORALES, Real Party in Interest.	No. _____ Court of Appeal No. E061754 **Related Death Penalty Appeal Pending** No. S137307

PETITION FOR REVIEW

After **Published** Decision by the Court of Appeal, Fourth Appellate District, Division Two, Issuing Peremptory Writ of Mandate, Filed July 15, 2015

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.500(a)(1) of the California Rules of Court, Johnny Morales, defendant and appellant in the trial court proceedings and related capital appeal pending before this Court and real party in interest in the mandamus proceedings before the appellate court, respectfully petitions for review following the published opinion of the California Court of Appeal, Fourth Appellate District, Division Two, filed on July 15, 2015, issuing a peremptory writ of mandate to the San Bernardino County Superior Court to vacate its order to preserve evidence in this capital case. A copy of the opinion, originally issued in unpublished form, is attached to this petition as Appendix A. A copy of the court's order granting the People's request to publish the opinion is attached herein as Appendix B. (See also *People v. Superior Court (Morales)* (2015) ___ Cal.App.4th ___, 2015 DJDAR 8792.) A transcription of the audio recording of the oral argument before the appellate court, certified by the transcriber under penalty of perjury as true and correct, is attached as Appendix C. A separate motion to attach said transcript accompanies this petition. (Cal. Rules of Court, rule 8.504 (d)(4).)

Appellant seeks review under California Rules of Court, rule 8.500 (b)(1), to decide important, recurring, and unsettled questions of law and policy relating to capital appellate and postconviction practice and procedure.

ISSUES PRESENTED FOR REVIEW

Does current law create such a clear and present legal duty or rule that a trial court categorically acts outside its jurisdiction whenever it exercises its discretion in a capital case to grant a motion to preserve evidence, brought after it has imposed a death judgment but while appeal therefrom is pending? Assuming there is no such rule or duty preventing trial courts from so acting, should this Court affirmatively and explicitly recognize that current law empowers a trial court to issue such orders as a matter of both law and public policy?

REASONS FOR GRANTING REVIEW

This opinion is the first published decision addressing a trial court's jurisdiction to issue evidence preservation orders after it imposes judgment, but before the judgment's finality on appeal, since significant developments in the law and policies governing postconviction practice and procedure in capital cases over the last 17 years. In granting the People's petition for writ of mandamus to vacate such an order in this case, the appellate court simply ignored those developments in holding that this Court's decades-old decisions in *People v. Gonzalez* (1990) 51 Cal.3d 1179 and *People v. Johnson* (1992) 3 Cal.4th 1183, reflect a clear and current rule of law that categorically forbids trial courts from granting nonstatutory postjudgment motions – including but not limited to evidence preservation motions – regardless of whether finality of the judgment is stayed pending appeal and regardless of the purpose or effect of the motion. The question of whether trial courts have jurisdiction to issue evidence preservation orders after a death judgment is imposed and is pending on appeal, made in anticipation of the appointment of habeas corpus counsel who has the exclusive authority to obtain evidence relevant to habeas corpus

investigation through discovery under Penal Code section 1054.9 and other means, is an enormously important and recurring one. It exists during every capital appeal when the defendant has not yet been afforded his right to habeas corpus counsel. Under current practice in which habeas corpus counsel typically is *not* timely appointed in accord with this Court's policies, this means that the question arises during most death penalty appeals.

The Court's failure to grant review and recognize not only that there is no clear and present rule of law *depriving* trial courts of such jurisdiction (contrary to the appellate court's reasoning), but also that trial courts in fact *enjoy* such jurisdiction, will have potentially severe and devastating consequences to death-sentenced defendants. The state's failure to appoint capital habeas counsel in a timely manner together with the inability of capital appellate counsel to ensure the preservation of vital evidence until habeas counsel is appointed creates a very real and present danger that critical evidence will be lost or destroyed before their clients' habeas corpus rights are finally honored and thereby strike a devastating blow to those rights, the interests of justice, and the state's own independent interest in the reliability of its death judgments. According to the appellate court in this case, only this Court can provide a mechanism by which to avoid those consequences: as the presiding justice remarked at oral argument, appellate "counsel is asking *us* to create a rule here that *really should be addressed by the Supreme Court*, it really is a problem of their creation . . . I recognize that everyone wants us to create that rule here but it just strikes me that it's better created in front of the folks who created the problem. I always believe in someone cleaning up their own mess." (App. C, p. 7, italics added.)

STATEMENT OF THE CASE AND FACTS

On September 12, 2005, the Superior Court of San Bernardino County, the Honorable Ingrid Uhler Presiding, entered a judgment of death against Johnny Morales, real party in interest in the mandamus proceedings before the appellate court. Thereafter, the Office of the State Public Defender was appointed to represent Morales on his automatic appeal from that judgment before this Court, which is currently pending. (No. S137307.) Habeas corpus counsel has yet to be appointed. (See Gov't Code, §§ 68662, 68663, 15421; Supreme Court Policies Regarding Cases Arising from Judgments of Death, policy 3, std. 2-1.)

Pursuant to the duty this Court has imposed upon appellate counsel to preserve evidence of potential relevance to habeas corpus investigation until habeas counsel is appointed (Supreme Ct. Policies, policy 3, std. 1-1; *Marks v. Superior Court* (2002) 27 Cal.4th 176, 184), Morales's appellate counsel moved the trial court for an order to various local agencies to *preserve* (not produce) such evidence ("preservation motion"). (Real Party Morales's Opposition to People's petition for writ of mandate, Exhibits A, C ["Opposition"].)[1] Over the District Attorney's written and oral objections (Opposition, Exhibit B), the trial court granted the motion and signed the evidence preservation order on July 9, 2014. (Opposition, Exhibits E, pp. 112-116, & F; see also Opposition, Exhibit C).

On August 20, 2014, the Attorney General, on behalf of the People, filed in the Court of Appeal for the Fourth Appellate District, Division

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[1] The motion was brought during the postjudgment superior court proceedings to correct, complete and certify the record on appeal, which remain pending in that court. (Opposition, pp. 1-2; see also Supreme Court docket in Case No. S137307.)

Two, a petition for a writ of mandamus to vacate the trial court's preservation order. On September 4, 2014, the appellate court invited Morales, as real party in interest, to file a response to the petition. On October 21, 2014, Morales filed an opposition to the petition. (Opposition, p. 1.) Although petitioner-People did not reply to that opposition, on November 18, 2014, the appellate court issued an order to show cause why the petition should not be granted, permitting Morales to elect to stand on his opposition. On December 10, 2014, Morales notified the appellate court and petitioner in writing that he elected to stand on his opposition given the petitioner's failure to reply to it and address the points and authorities raised therein.

On March 4, 2015, the appellate court issued a tentative written opinion granting the petition on the ground that the trial court lacked subject matter jurisdiction to grant the preservation motion, but permitting Morales on request to present oral argument before adopting the opinion as final. On July 7, 2015, at Morales's request, the parties presented oral argument in which his appellate counsel pressed the appellate court to deny the petition based on authorities he cited in his pleadings but which were omitted from the appellate court's tentative opinion. (App. C, pp. 2-4.) On July 15, 2015, the appellate court adopted its tentative opinion in full, without modification, as its final, unpublished opinion. (App. A.) On July 31, 2015, the appellate court granted the People's request to publish its opinion. (App. B; see also *People v. Superior Court (Morales)* (2015) ___ Cal.App.4th ___, 2015 DJDAR 8792.)

THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT A TRIAL JUDGE IN A CAPITAL CASE HAS JURISDICTION TO GRANT A MOTION TO PRESERVE EVIDENCE POTENTIALLY RELEVANT TO HABEAS CORPUS INVESTIGATION IN ANTICIPATION OF THE APPOINTMENT OF HABEAS CORPUS COUNSEL WHO CAN CONDUCT THAT INVESTIGATION AND RELATED DISCOVERY PROCEEDINGS UNDER PENAL CODE SECTION 1054.9

A. Summary of The Appellate Court's Published Opinion Granting the People's Petition for Writ of Mandate

Because the appellate court's published opinion was issued on the People's petition for writ of mandamus, Code of Civil Procedure section 1085 governed; under that statute, the essential question for the appellate court to resolve was whether the trial court had a "clear, present . . . duty" (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340) – or put another way, whether there existed a "clear case to compel" the trial court (*Perrin v. Honeycutt* (1904) 144 Cal. 87, 90; accord, *300 DeHaro Street Investors v. Dept. of Housing and Community Development* (2008) 161 Cal.App.4th 1240, 1255) – to deny Morales's motion for a preservation order for lack of subject matter jurisdiction. The appellate court answered this question in the affirmative based primarily on this Court's decisions in *People v. Gonzalez* (1990) 51 Cal.3d 1179 ("*Gonzalez*") and *People v. Johnson* (1992) 3 Cal.4th 1183 ("*Johnson*").

In *Gonzalez*, this Court held that defendants had no right to, and trial courts lacked jurisdiction to grant, discovery after judgment is imposed and before the filing of a petition for writ of habeas corpus and a finding that it states a prima facie case for relief. (*Gonzalez, supra*, 51 Cal.3d at pp. 1260-1261; App. A, p. 7.) In *Johnson,* this Court followed *Gonzalez* to hold that because there is no right to postjudgment pre-petition discovery, there is

likewise no right, and trial courts have no jurisdiction to grant, "anticipatory postjudgment discovery" motions to *preserve* evidence in anticipation of (then) non-existent discovery. (*Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258.)

The appellate court here recognized that *Gonzalez* has been abrogated by the 2003 enactment of Penal Code section 1054.9, which grants capital (and LWOP) defendants the right to postjudgment pre-petition discovery, but reasoned it has been abrogated only "to the extent covered by the statute." (App. A, p. 8, see also *In re Steele* (2004) 32 Cal.4th 682, 691.) Otherwise, *Gonzalez*, as well as *Johnson* which followed it, remain intact: in the appellate court's view, both clearly stand for the proposition that trial courts have no jurisdiction to grant nonstatutory motions after they have imposed judgment because "there is simply no pending case or proceeding to which the motion can attach," regardless of whether appeal from the judgment is pending or the purpose and effect of the order granting the motion. (App. A, pp. 7-10.) Also according to the appellate court here, this Court recently "confirmed" that rule in *People v. Picklesimer* (2010) 48 Cal.4th 330, 337 ("*Picklesimer*"). (App. A, p. 8.)

In reaching this holding, the appellate court did not even cite – much less address – the authorities Morales cited in his pleadings and oral argument before that court and discussed in detail below, which eroded the precedential value of *Gonzalez* and *Johnson*; limited them to postjudgment discovery and "anticipatory discovery" motions brought under then-existing discovery law; support a trial court's subject matter jurisdiction to grant postjudgment motions while finality of the judgment is stayed pending appeal and which do not alter that judgment; and make clear that the rule reflected in *Picklesimer* has no bearing on such motions. For the reasons

explained below, the appellate court's published opinion is fundamentally flawed and reveals the need for this Court to grant review.

B. The Court of Appeal Granted the People's Petition for Writ of Mandamus in Violation of a Trial Court's Discretionary Right to Entertain Postjudgment Motions While Appeal is Pending, So Long as They Do Not Alter the Judgment Being Appealed From

The appellate court's reliance on *Picklesimer*, *supra*, to support its grant of mandamus reveals that it has conflated two distinct concepts: (1) a trial court's jurisdiction following a true "final" judgment – i.e., judgment has not only been imposed in the trial court but has also been rendered final on appeal and remittitur has issued; and (2) a trial court's jurisdiction after it has imposed judgment but while the finality of that judgment has been stayed pending appeal. (See *Henderson v. Drake* (1954) 54 Cal.2d 1, 4; Code Civ. Proc., §§ 577, 916.) *Picklesimer* involved the former and reflects the rule that a trial court is ordinarily without jurisdiction in that context because all of the trial court proceedings and the resulting judgment are final. (*Picklesimer*, *supra*, 48 Cal.4th at pp. 337-338; Opposition, pp. 24-31; App. C, p. 4.) However, very different rules govern a trial court's jurisdiction after it has imposed judgment but while appeal is pending therefrom. (Opposition, pp. 24-31; App. C, pp. 2-4.)

Code of Civil Procedure section 916 explicitly provides that the filing of a notice of appeal after imposition of judgment in the trial court constitutes only a *partial* divestment of the trial court's inherent jurisdiction during the pendency of appeal. It provides in relevant part: "the perfecting of an appeal *stays* proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, *but the trial court may*

proceed upon any other matter embraced in the action and not affected by the judgment or order." (Code Civ. Proc., § 916, italics added.)

As this Court explained in its post-*Gonzalez* and *Johnson* decision in *Townsel v. Superior Court* (1999) 20 Cal.4th 1084 ("*Townsel*"), under Code of Civil Procedure section 916, "our acquisition of appellate jurisdiction does not . . . divest the trial court of all power to act." (*Id.* at pp. 1089-1090.) Rather, trial courts retain jurisdiction to issue orders that do not alter the judgment being appealed from and that go to matters "'collateral or supplemental to the questions involved on the appeal' [citation] . . . 'connected with the criminal proceeding before [the trial court].' [Citation]." (*Id.*, at p. 1090.)

It is true that the *Gonzalez* and *Johnson* decisions involved motions – a discovery motion in *Gonzalez* and an "anticipatory discovery" motion to preserve evidence in *Johnson* – brought after judgment was imposed in the trial court but while appeal was still pending. However, this Court made clear in *Townsel*, *supra*, that those cases simply cannot be read for a proposition that is inconsistent with Code of Civil Procedure section 916. (Opposition, pp. 24-30; App. C, pp. 2-4.)

In *Townsel*, as in this case, during capital postjudgment record correction and certification proceedings before the trial court while appeal was pending, the trial court issued a nonstatutory (jury no-contact) order. (*Townsel* , *supra*, 20 Cal.4th at pp. 1086-1088.) In stark contrast to the People's position in these proceedings, the People there defended the trial court's jurisdiction to issue that order under Code of Civil Procedure section 916 because it was "connected" to the criminal proceedings resulting in the judgment being appealed from and did not alter that judgment. (*Id.* at pp. 1089-1090.) This Court agreed and in so doing

explicitly rejected the defendant's argument that its earlier decision in *Johnson*, *supra*, established that trial courts are without jurisdiction to grant nonstatutory motions after imposition of the judgment, notwithstanding section 916. (*Id.* at pp. 1089-1091.) The Court explicitly held that *Johnson* "did not purport to override section 916(a)" and explained that *Johnson*'s holding was limited to the absence of a right to "discovery" (under then-existing discovery law). (*Ibid.*) The same reasoning applies equally to *Gonzalez,* on which – as the appellate court here emphasized – *Johnson* was based. (App. A, pp. 7-8.)

Of course, in these mandamus proceedings, the People as petitioner bore the burden of establishing a *clear* and present rule of law compelling the trial court to deny the evidence preservation motion for lack of subject matter jurisdiction. (Code Civ. Proc. , § 1085; *Picklesimer, supra,* 48 Cal.4th at p. 340; *Perrin v. Honeycutt*, *supra*, 144 Cal. at p. 90; *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153-1155.) The appellate court implicitly found that the People had satisfied this burden by holding that *Johnson*, *Gonzalez*, and *Picklesimer* "forbid[] trial courts from ruling on . . . 'free-floating' motions" after they have imposed judgment because "there is simply no pending case or proceeding to which the motion can attach" – regardless of whether appeal from the judgment is pending and regardless of the purpose and effect of the order granting the motion. (App. A, pp. 8-10.) But that is precisely the reading of *Johnson* (and *Gonzalez*) and the proposition the *Townsel* Court expressly rejected as being inconsistent with Code of Civil Procedure section 916. (Opposition, pp. 24-30; App. C, pp. 2-4.) Remarkably, in citing *Johnson* and *Gonzalez* for that very proposition, the appellate court

simply ignored *Townsel* and section 916. (See App. A.)[2] Similarly, the appellate court simply ignored the critical distinction – discussed above and as Morales emphasized in his written and oral arguments below – between the jurisdictional rule reflected in *Picklesimer* and that in section 916 and *Townsel*. (Opposition, pp. 24-31; App. C, p. 4.)[3]

Certainly, in the face of Code of Civil Procedure section 916 and *Townsel*, it is far from "clear" under current law that trial courts have no jurisdiction to grant postjudgment motions, including evidence preservation motions, brought while appeal is pending and that do not alter the judgment being appealed from.[4] Indeed, given that the People successfully argued

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[2] Likewise, the People, as the burden bearing party on mandamus, did not acknowledge these authorities in its petition for writ of mandamus and elected to file no reply to Morales's reliance thereon in his opposition. (Opposition, pp. 20, 32, fn. 7.)

[3] Indeed, it was in large part *because* the appellate court's tentative opinion did not acknowledge these authorities that Morales requested oral argument in order to press the court to do so. Although appellate counsel again argued those authorities before the court orally, and two of the justices each asked a single question of the Deputy Attorney General about Code of Civil Procedure section 916 and this Court's *Townsel* decision, those authorities remain omitted from the court's published final opinion. (App. C, pp. 2-6.)

[4] Indeed, trial courts frequently grant evidence preservation motions in this procedural posture under current law, which demonstrates the absence of any clear and present rule depriving courts of subject matter jurisdiction to do so. (See, e.g., *People v. Robert Ward Frazier*, Contra Costa County Superior Court No. 041700-6, December 6, 2013 order granting postjudgment motion to preserve evidence made while automatic appeal pending in No. S148863; *People v. Robert James Acremant*, Tulare County Superior Court No. 31734, August 3, 2011order while automatic appeal pending in No. S0110804; *People v. Larry Kusuth Hazlett, Jr.*, Kern

(continued...)

that a trial court does have such jurisdiction in *Townsel*, it is axiomatic that the trial judge's exercise of that very jurisdiction to grant the evidence preservation motion in this case did not violate any *clear* rule of law to the contrary and therefore that the People did not and could not satisfy their burden in these proceedings. The appellate court's published opinion is thus inconsistent with this Court's precedents and the fundamental requirements for mandamus relief. This Court cannot allow it to stand.

Of course, in the absence of clear and present law on the question of whether trial courts have jurisdiction to grant evidence preservation motions in this procedural context, settling that important and recurring issue and announcing a clear rule provides further reason for this Court to grant review.

C. Trial Courts Have the Inherent Authority to Use Any Nonstatutory Means or Process They Deem Necessary to Ensure the Successful Exercise of Their Statutory Jurisdiction

The 2003 enactment of Penal Code section 1054.9, granting defendants sentenced to death (or LWOP) the right to postjudgment pre-petition discovery "as an aid in preparing the [habeas corpus] petition," abrogated the contrary holdings of *Gonzalez* and *Johnson*. (See *In re*

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[4](...continued)
County Superior Court No. BF100925A, June 22, 2004 and October 6, 2011 orders while automatic appeal pending in No. S126387); *People v. Carlos Marvin Argueta*, Los Angeles County Superior Court No. BA261252, November 7, 2014, order while automatic appeal pending in No. S150524); *People v. Louis Mitchell, Jr.*, San Bernardino County Superior Court No. FSB051580, June 22, 2012 order while automatic appeal pending in No. S147335.)
Copies of those orders and a motion for judicial notice thereof pursuant to Evidence Code sections 452(c) & (d) and 459, accompany this petition.

Steele, *supra*, 32 Cal.4th at pp. 691-692 [trial court is appropriate forum for enforcement of this right, even in capital cases where petition is filed in Supreme Court and not trial court].) While the enactment of this statute *alone* did not create jurisdiction in the trial court to grant evidence preservation motions, it did trigger application of other legal principles that did not apply at the time of the *Johnson* and *Gonzalez* decisions and which extend the trial court's jurisdiction to evidence preservation orders. (Opposition, pp. 25-33.)

Code of Civil Procedure section 187 provides in relevant part: "When jurisdiction is, . . . by any . . . statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." This statute is consistent with the long-standing rule that, in the absence of explicit legislation, "[a] court set up by the [California] Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation." (*Millholen v. Riley* (1930) 211 Cal. 29, 33-34; accord, e.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 735.)

The *Townsel* decision implicitly reflects these principles. There, the challenged postjudgment jury no-contact order was not explicitly authorized by a specific statute. (*Townsel*, *supra*, 20 Cal.4th at pp. 1090-1091.) However, there was a specific statute conferring postjudgment jurisdiction on the trial court to impose sanctions for "unreasonable" postjudgment juror contact. (*Id.* at p. 1091.) In addition to holding that the trial court had jurisdiction to issue the nonstatutory jury no-contact order under Code of

Civil Procedure section 916, this Court held that the order served and facilitated the court's ability to exercise its statutory jurisdiction over unreasonable juror contact and for that reason, as well, was an appropriate exercise of the court's jurisdiction. (*Ibid.*)

Applying the foregoing principles here, "jurisdiction is . . . conferred" on the trial court to litigate postjudgment pre-petition discovery by Penal Code section 1054.9 and this Court's construction thereof in *In re Steele*, *supra*, 32 Cal.4th at pp. 691-692, within the meaning of Code Civil Procedure, § 187. Hence, the trial court has the inherent authority to utilize "all the means necessary to carry [its jurisdiction under section 1054.9] into effect . . . . [*even*] *if the course of proceeding be not specifically pointed out by*" section 1054.9 or other statutes. (Code Civ. Proc., § 187, italics added.)

As the trial judge recognized in granting the preservation motion, she had jurisdiction, or the "authority now," to order discovery. (Opposition, p. 8; Opposition Exhibit D, p. 114.) But as more fully discussed in part D, *post*, like more than half of the men and women on death row in this state, Morales has been deprived of his ability to invoke the trial court's discovery jurisdiction "now" because he has not yet been afforded his right to the timely appointment of habeas counsel, who has the exclusive authority to conduct factual investigation and obtain relevant evidence through discovery (and other means) as an aid in the preparation of his habeas corpus petition.

As this Court has recognized, there is a current crisis in the Court's ability to secure habeas corpus counsel in capital cases, resulting in many if not most death row inmates waiting many years – some decades – for their rights to habeas corpus counsel, and their concomitant right to the tools

necessary to prepare their habeas petitions, to be honored. (*In re Morgan* (2010) 50 Cal.4th 932, 938-939; *In re Jimenez* (2010) 50 Cal.4th 951, 955, 958; Gov. Code, § 68662; Supreme Court Policies, policy 3, stds. 2-1, 1.1-1.) The Court has further recognized that its failure to fulfill its obligations in this regard can carry significant threats to the rights of men and women sentenced to death, including the loss or destruction of critical evidence before habeas corpus counsel is finally appointed and can obtain it. (*In re Jimenez*, *supra*, at pp. 955, 958.) Indeed, given the People's apparent view – as reflected by their opposition in the trial court and their petition in the appellate court – that neither it nor any of the other local agencies to whom the preservation order was directed has a duty to preserve *any* evidence until such time that the trial court actually orders its *production* through discovery (or other means) (Opposition, pp. 23-24, 30-32), chilling the trial court's ability to order preservation of evidence at least until such time as habeas corpus counsel is appointed and can initiate discovery could render Penal Code section 1054.9 and the court's jurisdiction under that statute meaningless.

As Morales argued below, this danger is a potential "obstruction[]" to the court's "successful operation" under Penal Code section 1054.9, which its inherent powers of self-preservation authorize it to remove. (*Millholen v. Riley*, *supra*, 211 Cal. 29, 33-34; accord, *People v. Superior Court (Laff)*, *supra*, 25 Cal.4th 703, 735.) An evidence preservation order is a "suitable" "means" or "process or mode" to protect the trial court's jurisdiction under Penal Code section 1054.9 and ensure it is given "effect," even though that "course of proceeding be not specifically pointed out by" that statute or another. (Code Civ. Proc. ,§ 187.) Like the nonstatutory postjudgment order in *Townsel* that served and facilitated the trial court's

jurisdiction under another statute on a related subject and thus constituted an appropriate exercise of jurisdiction, a nonstatutory preservation order serves and facilitates the trial court's jurisdiction under Penal Code section 1054.9 and thus amounts to an appropriate exercise of jurisdiction. (*Townsel, supra*, 20 Cal.4th at pp. 1090-1091; see Opposition, pp. 7-8, 30-34; App. C, pp. 2-4.) The trial judge effectively agreed, reasoning that "if ultimately the trial court has authority now for further discovery, that obviously if we didn't also have authority to preserve, that there may be nothing to discover." (Opposition, p. 8; Opposition, Exhibit D, p. 114.)

However, the appellate court simply ignored these principles in its published opinion. The court observed: "[W]e have no quarrel with Morales's description of the delays in the death penalty review process. However, the issue is not whether the procedure sought by Morales is *desirable*, but whether it is authorized by law." (App. A., p. 4, italics added.) In resolving that issue in the negative, however, the court did not cite or address the foregoing authorities under which Morales argued that the procedure is not merely "desirable," *but also* "authorized by law," as reflected therein. (See App. A.)

Likewise, the appellate court ignored that even in *Johnson*, this Court recognized that superior courts "may well have the inherent authority to issue an order for the preservation" of their own court records and documents maintained by their ministerial officers, after imposition of judgment. (*Johnson, supra*, 3 Cal.4th at p. 1258, citing Code Civ. Proc., § 128, subd. (a) [court has inherent authority to control acts of its "ministerial officers" in "furtherance of justice"]; Opposition, pp. 8-10, 33-34; see App. A.) The trial court's order here was directed in large part to San Bernardino County Superior Court records, other materials in the possession of the

court's ministerial officers, and records to which Morales would otherwise be entitled independent of discovery through the prosecution, based on a particularized showing of potential relevance to habeas corpus investigation. (Opposition, pp. 8-10, 33-34; Opposition Exhibits A, C, D, F.) Indeed, the permanent preservation of many of those records are already permitted or required by statute so long as they are identified. (Gov. Code, § 68152, subd. (c)(1)) [court records of "capital felony" proceedings "in which the defendant is sentenced to death" must be retained permanently, "including records of the cases of any codefendants and any related cases, regardless of disposition" when so identified].) Thus, the court's order was not only consistent with its jurisdiction under Code of Civil Procedure section 916, but also with the authority to preserve materials recognized by this Court in *Johnson* itself as well as by the Legislature. Certainly viewed in the context of the prerequisites for mandamus relief, the trial court's order in this regard did not constitute such a break with "clear" law as to justify granting the People's petition for extraordinary relief.

Yet the appellate court declined to address any of these authorities and principles in its published opinion. Instead, it effectively punted to this Court the question of a trial court's authority to order preservation of any material. (See App. A, p. 10.) As the acting presiding justice remarked at oral argument, "counsel is asking us to create a rule here that really should be addressed by the Supreme Court . . . ." (App. C, p. 6.) But under the very authorities the appellate court ignored, it was clear that Morales was *not* asking the court to "create a rule;" rather, he was asking the court to apply current law in recognizing a rule that already exists. At the very least, he was insisting that the court hold the People to their burden – as the petitioner seeking mandamus relief – of establishing a *clear* rule of law to

the contrary. This the court failed to do.

Given the importance of the essential question of a trial court's authority to issue postjudgment preservation orders in capital cases under the circumstances presented here, its recurring nature in at least half of all capital cases in the same procedural posture, the appellate court's failure to resolve the critical issues presented and its view that only this Court can recognize a trial court's authority to order evidence preservation, this Court should grant review in order to do so.

D. The Court Should Grant Review to Make Clear That Preservation Motions Play an Important Part in Effectuating the Policies and Procedures It Has Developed For Capital Postconviction Practice and Protecting the Interests of Justice Section 1054.9 Was Enacted to Serve

The appellate court's published opinion is inconsistent with significant changes in the law and this Court's policies and practice governing capital postconviction procedures that have occurred since the Court's 1992 *Johnson* and 1990 *Gonzalez* decisions. Beginning in 1998, state law and policy were changed and now provide for the appointment of separate counsel on appeal and habeas corpus, delineate their separate duties, and limit their authority to act accordingly. (Gov. Code, §§ 68663, 15421; Supreme Ct. Policies, policy 3, std. 2-1; *Marks v. Superior Court*, *supra*, 27 Cal.4th at pp. 184-187 ["the scope of authority . . . should reflect the purpose and attendant duties of the separate appointments"].) Also under the new rules, "appointment of habeas corpus counsel for a person under a sentence of death *shall be made simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter.*" (Supreme Ct. Policies, policy 3, std. 2-1, italics added; see also policy 3, std. 1-1.1.)

Against this background, in 2002 the Legislature enacted the bill that

added section 1054.9 to the Penal Code, effective January 1, 2003. That statute entitles capital (and LWOP) defendants to postjudgment pre-petition discovery "as an aid in preparing" the petition for writ of habeas corpus (*In re Steele*, *supra*, 32 Cal.4th at p. 691) and is intended to "serve the interests of justice" (Pen. Code, § 1054.9, Historical and Statutory Notes, quoting Governor's written message]). Because habeas corpus counsel has the exclusive authority to "prepare" and file habeas corpus petitions, the statute necessarily presupposes the appointment of habeas counsel and thereby limits the authority to seek discovery to such counsel. The Legislature presumably enacted this statute with the law and policies requiring the timely appointment of habeas corpus counsel in mind. (See *Viking Pools Inc., v. Maloney* (1989) 48 Cal.3d 602, 609 [Legislature presumed to be aware of existing law when it enacts statutes].)

Thus, if the system worked as it should and habeas corpus counsel were actually appointed in a timely manner consistent with this Court's policies, motions to *preserve* evidence would be unnecessary. The "interests of justice" Penal Code section 1054.9 is intended to serve would be served by habeas corpus counsel's ability to promptly conduct the necessary factual investigation and obtain relevant evidence through discovery (and other means) to support the claims to be raised in the habeas corpus petition. However, in 2008, the reality that the system does *not* work as it should came into sharp focus, due in large part to the "excessive delay" in the appointment of capital habeas corpus counsel. (Cal. Com. on the Fair Admin. of Justice, Final Rep. (2008) pp. 114-115, 121.)

In its 2010 decisions in *In re Morgan* and *In re Jimenez*, this Court recognized that the crisis-level delays in the appointment of habeas corpus counsel can have devastating consequences to capital defendants and result

in unfair prejudice to their rights through no fault of their own. In those cases, the Court held that as a matter of policy, preventing unfair disadvantage resulting from the failure to timely appoint habeas counsel justified creating an exception to the ordinary rules of habeas corpus practice and procedure. (*In re Morgan*, *supra*, 50 Cal.4th at pp. 937-942 [creating exception under limited, specified circumstances to allow filing of "shell" petitions that would otherwise violate state law, demand prompt summary dismissal, and prohibit supplemental or second petitions]; accord, *In re Jimenez*, *supra*, 50 Cal.4th at pp. 955-958.)

Since the 2010 *Morgan* and *Jimenez* decisions, the situation has grown only worse. "[A]s of June 2014, 352 inmates – nearly half of Death Row – were without habeas corpus counsel." (*Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1058.) Of those inmates, 159 have been awaiting appointment of habeas corpus counsel for more than ten years; 76 have final judgments on appeal and have already waited an average of 15.8 years for the appointment of habeas counsel. (*Ibid.*)

This Court has recognized that the delays in the appointment of habeas counsel create a danger that critical evidence may be lost or destroyed in the years or decades before such counsel is finally appointed and the People's position in these proceedings demonstrates that this danger is a real and present one. (*In re Jimenez*, *supra*, 50 Cal.4th at pp. 955, 958; Opposition, pp. 23-24, 30-32.) Again, the trial judge agreed that under these circumstances, if she did not have the authority to order evidence preservation "there may be nothing [left] to discover" by the time habeas counsel is finally appointed. (Opposition, p. 8; Opposition, Exhibit D, p. 114.) Hence, as a result of the delay in the appointment of habeas counsel in all death penalty cases, Penal Code section 1054.9 and the discovery

rights it provides to defendants can be rendered meaningless, the "interests of justice" that section 1054.9 is designed to serve will be subverted, and the defendant will be deprived of the tools and factual support necessary to present a meaningful habeas corpus petition challenging the lawfulness and reliability of his capital conviction and death sentence. As in *Morgan* and *Jimenez*, significant damage to a capital defendant's rights caused by the state's failure to timely appoint habeas corpus counsel cannot be tolerated. There must be a mechanism by which to prevent it.

This Court has taken one step in that direction by imposing a duty on appellate counsel to "'preserve evidence that comes to [her] attention . . . if that evidence appears relevant to a potential habeas corpus investigation" until habeas corpus counsel is appointed. (Supreme Ct. Policies, policy 3, std. 1-1; *Marks v. Superior Court*, *supra*, 27 Cal.4th at p. 184; Opposition, pp. 2, 4, 10, 30). But that step, clearly, is not enough, as evidenced by the appellate court's opinion in this case.

Significantly, the appellate court did hold that there is a *different* mechanism by which appellate counsel can obtain an order preserving evidence, but which appellate counsel here simply "elected" not to pursue. According to the appellate court: "We recognize that if Morales had chosen to proceed by filing a *barebones habeas corpus petition*, there would at least have been a proceeding to which his request could have attached, and the trial court could have reached the merits. [fn. omitted] However, counsel has carefully observed the boundaries of his role as counsel on *appeal* [italics in original] and *elected* not to file a collateral proceeding." (App. A, p. 9, additional italics added.) The appellate court's reasoning lacks an appreciation for capital postconviction procedure.

As this Court – being the court in which capital postconviction

proceedings are litigated – is well aware, the procedure contemplated by the appellate court is forbidden for many reasons. Unlike noncapital cases, in which there is no "right" to habeas corpus counsel at all, much less a right to separate habeas and appellate counsel, such rights exist in capital cases and capital appellate counsel are limited by the terms of their appointment and not authorized to file habeas corpus petitions on their clients' behalf. More importantly, as the Court in *Jimenez* expressly cautioned, there is simply no such thing as a *valid* "barebones" or "shell" petition outside of the limited exception created in that case and *Morgan*. (*In re Jimenez*, *supra*, 50 Cal.4th at p. 958; *In re Morgan*, *supra*, 50 Cal.4th at pp. 937-942; accord, *In re Reno* (2012) 55 Cal.4th 428, 458 & fn. 15.) Even if appellate counsel were to disregard the limits of the appointment (and, as in this case, Government Code section 15421, limiting the authority of the Office of the State Public Defender) and had the power to "elect" to file a "barebones" or shell petition as a method to ensure that evidence relevant to habeas corpus is not destroyed, the ordinary rules of habeas corpus procedure would apply. Under those rules, the petition would institute habeas corpus proceedings, prompt disposition of the petition would be required and result in a summary dismissal, and a supplemental petition by habeas corpus counsel (once he or she is appointed) would be forbidden. (*In re Jimenez*, *supra*, 50 Cal.4th at pp. 956-958; *In re Morgan*, *supra*, 50 Cal.4th at p. 940; see also *In re Reno*, *supra*, 55 Cal.4th at pp. 452-463.) In other words, if appellate counsel were to file a "barebones" petition to create jurisdiction for the trial court to order evidence preservation for habeas corpus proceedings – as the published appellate court opinion directs – it would actually result in the *forfeiture* of the very habeas corpus rights counsel seeks to protect.

For all of these reasons, review by this Court is necessary to settle

this issue and announce a clear rule that trial courts in capital cases have the power to entertain and rule upon postjudgment motions to preserve evidence which are filed by appellate counsel when habeas counsel has yet to be appointed.[5]

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[5] Should the Court decline to grant review, Morales moves to depublish the appellate court's opinion pursuant to rule 8.1125 of the California Rules of Court. A letter requesting depublication of the opinion will be filed with the Court under separate cover.

CONCLUSION

The use of preservation motions in the manner employed in this case is unique to capital postconviction litigation – a type of litigation that is directly within the purview of this Court. Because of this, it is appropriate that this Court be the one to provide guidance in how to implement the litigation it controls. The Court of Appeal has issued a published opinion depriving trial courts of the opportunity to act when they believe action is necessary to protect the rights that the Legislature and this Court have acknowledged as being a necessary part of the capital postconviction system. To not grant review and to let that opinion stand with no word from this Court on an issue of significant statutory and constitutional import is unthinkable. This Court should grant review and make clear that trial courts have the discretion to order the preservation of evidence in capital cases so that such convictions can be litigated fully and fairly on habeas corpus.

DATE: August 18, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

BARRY P. HELFT
Chief Deputy State Public Defender

C. DELAINE RENARD
Senior Deputy State Public Defender

Attorneys for Appellant/Real
Party in Interest

CERTIFICATE OF COUNSEL

Calif. Rules of Court, rule 8.504(d)(1)

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent defendant and appellant on his automatic appeal before this court, and real party in interest in the mandamus proceedings before the appellate court, Johnny Morales. I have conducted a word count of this petition using our office's computer software. On the basis of that computer-generated word count and pursuant to rule 8.504(d)(1), I certify that this petition is 6,832 words in length.

C. DELAINE RENARD
Attorney for Appellant/Real Party
in Interest Johnny Morales

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Court of Appeal
Fourth Appellate District
Division Two
ELECTRONICALLY FILED

1:10 pm, Jul 15, 2015

By: M. Urena

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

JOHNNY MORALES,

Real Party in Interest.

E061754

(Super.Ct.No. FVA015456)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Ingrid Adamson Uhler, Judge. Petition granted.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Holly D. Wilkens and Michael T. Murphy, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Michael J. Hersek, State Public Defender, and Cheryl Delaine Renard, Senior Deputy State Public Defender, for Real Party in Interest.

On request of real party in interest Johnny Morales, the trial court entered an order requiring multiple public agencies and departments to "preserve" 22 categories of documents and other materials[1] allegedly to pertain in some way to the criminal proceedings which resulted in a judgment of death against petitioner.

The People sought review by way of petition for writ of mandate from this court, arguing that the trial court had no jurisdiction to make such an order in the absence of any pending proceeding. We agree that the order is erroneous, and will grant the relief requested.

STATEMENT OF THE CASE

Morales's motion requested that "materials potentially relevant to his case be kept intact so that future litigation can center on the fairness of his conviction and death sentence, and not on tangential issues such as whether materials should have been destroyed or whether destroyed materials would have favored the prosecution or appellant [Morales]." It appears that Morales was sentenced in 2005 and his appeal is pending before the Supreme Court of California. Morales asserted, without contradiction, that although he has been appointed appellate counsel (who prepared the motion), he has not yet been appointed counsel to pursue any habeas corpus remedy.

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[1] A copy of real party in interest's order, consisting of seven pages, listing the 22 categories of documents he wishes to preserve is attached as Appendix A, *post*.

It was also asserted in the motion that "the duty falls to appellate counsel to preserve all materials arguably governed by [Penal Code] section 1054.9[2] so that the Legislature's intention to provide condemned people like appellant with postjudgment discovery can be given full force and effect."[3]

The People opposed the motion on the primary ground that the trial court lacked jurisdiction to grant the requested relief in the absence of some pending recognized proceeding. The People also argued that the request imposed an undue burden on the various agencies and departments specified.

After hearing argument, the trial court made the order set out above. The People sought a writ of mandate to vacate the order and this court issued an order to show cause.[4]

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[2] All subsequent statutory references are to the Penal Code unless otherwise specified.

[3] Penal Code section 1054.9 provides that "(a) Upon the prosecution of a postconviction 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 [trial] court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b). [¶] (b) For purposes of this section, 'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial."

[4] MORALES asserts that writ review is not necessary because the People have an adequate remedy at law by appeal. Our issuance of the order to show cause reflects our determination that the remedy at law is *not* adequate, and we decline to revisit the issue. (See *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1056.) We will discuss his other procedural objections below.

DISCUSSION

First, we have no quarrel with Morales's description of the delays in the death penalty review process. However, the issue is not whether the procedure sought by Morales is desirable, but whether it is authorized by law.

In addition to arguing that writ review is unnecessary (see fn. 4, *post*), Morales focuses on procedural challenges to the People's attempt to overset the ruling. He argues first that the People failed to "specifically [] allege, or allege sufficient facts to make even a prima facie showing, that it has a beneficial interest or substantial right that will be substantially damaged if writ relief is denied . . . ." The gist of this argument is that the public agencies and departments listed in the motion did not object and therefore the People may not do so.

There are two flaws in this argument. The first is that consent (and a fortiori inaction) cannot confer jurisdiction where none exists. (See *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473 [also involving postjudgment trial court proceedings while defendant's appeal was pending].) The second is that the People *are* an interested party as multiple categories *do* impose a duty on the People to preserve evidence. For example, item "c." describes "[a]ll prosecutorial and law enforcement reports, notes, tape recordings, . . ." while item "f." specifies "[a]ll writings or other records relating to the decision by the San Bernardino County District Attorney's Office to seek the death penalty, . . ." and "t." refers to "[a]ll criminal files relating to other suspects and/or witnesses related to this case including the following: [names] whether in the possession

or control of the San Bernardino County Superior Court, the San Bernardino County District Attorney's Office . . . ." Thus, the People, acting through the district attorney, were directly affected by the order and were entitled to appear and oppose it both in the trial court and before this court.[5] Furthermore, the order would inevitably oblige the affected departments and entities to conduct a search of records and devise some method of segregating any materials which might conceivably fall within the order.

Morales also complains that the People inadequately allege the justification for extraordinary relief as set out in Code of Civil Procedure, sections 1085 and 1086. To the extent that this reflects the position that the People are not a party "beneficial[ly] interest[ed]" and that they have an adequate remedy at law, we have explained our disagreement.[6] To the extent that Morales challenges the technical adequacy of the pleading with respect to alleging these elements, we are unpersuaded. First, any such objection to the pleading is properly raised by demurrer, not argument. (See *Gong v. City*

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[5] It may also be questioned whether the *mailed* notice of the motion was sufficient to subject the various agencies and departments to the court's authority. The usual way of acquiring personal jurisdiction is by personal service; in the somewhat analogous context of compelling the attendance of a witness or the production of evidence, a subpoena must be personally served. (Code Civ. Proc., § 1987.)

[6] Morales also sets up a straw man by reasoning that the People's opposition is based upon the notion that they (and the other agencies) have a " 'substantial right' to *destroy* the subject materials . . . before any discovery order can be made," and then argues that this "subverts" the purposes of section 1054.9 and is "incompatible with RPI's most basic fundamental rights to fairness and heightened reliability in the death judgment against him." We do not read the People's arguments as evincing any zeal to destroy any evidence, but merely as objecting in principle to the court's attempt to issue an unjustified order imposing not-insignificant burdens.

of Fremont (1967) 250 Cal.App.2d 568, 573.) Second, where the petition contains sufficient facts from which the omitted facts can be gleaned, we have discretion to consider it despite technical inadequacies. (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271-272.) The district attorney's apparent unfamiliarity with pleading formats does not require us to refuse relief where warranted.

Morales then argues that the petition must be denied because the People cannot plead and prove that the trial court had a clear duty to deny his motion for lack of jurisdiction. It is true that it is often said that mandate issues to compel a lower court or officer to perform a "clear duty" (Code Civ. Proc., § 1085; see *City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 925) and of course it cannot control the exercise of discretion. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 751.) But mandate *is* available to correct abuses of discretion (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780) and an error of law *is* an "abuse of discretion" correctable by mandate. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.) As we find a clear error of law, mandate will lie.

We now explain our reasoning on the merits. First, it must be noted that this is *not* a request for actual postconviction discovery under section 1054.9. It is quite true that although that statute refers to such discovery " '[u]pon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment,' " (*In re Steele* (2004) 32 Cal.4th 682, 690-691) this does not mean that an actual petition or motion must have been filed at the time discovery is sought. It is sufficient if such a request for

collateral relief is proposed or in preparation. However, since this is not a request under section 1054.9[7] the permissiveness of that statute does not govern this case.

Before the enactment of section 1054.9, the Supreme Court in *People v. Gonzalez* (1990) 51 Cal.3d 1179 (*Gonzalez*) dealt with an effort by a capital defendant, pending resolution of his appeal, to obtain official file information about a jailhouse informant who had testified against him at trial. In that case, the court held that "[t]he trial court lacked jurisdiction to order 'free-floating' postjudgment discovery when no criminal proceeding was then pending before it." (*Gonzalez*, at p. 1256.) Quoting from previous authority, it explained that " 'a discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach.' . . . [¶] [This] reasoning applies equally where, as here, an appeal remains undecided." (*Id.* at p. 1257.) Stressing the presumptions of validity applicable to a collateral attack on a criminal judgment, the court held that "[t]he state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment." (*Id.* at p. 1260.) Thus, discovery would only be available once the reviewing court (the Supreme Court) issued an order to show cause upon a finding that a habeas corpus petition stated a prima facie case for relief. (*Id.*

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[7] Such a request must show that the materials either *were* provided to the defendant at trial, or *should* have been provided pursuant either to a discovery order in the case or the prosecution's constitutional obligations. (See *In re Steele*, *supra*, at p. 697.) It must also show "that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful . . . ." (§ 1054.9, subd. (a).)

at pp. 1260-1261.) *Gonzalez* was then followed by *People v. Johnson* (1992) 3 Cal.4th 1183, 1258, and in *People v. Picklesimer* (2010) 48 Cal.4th 330, 337 (*Picklesimer*), the court again confirmed that a motion is not an independent remedy but implies the pendency of an ongoing action.[8]

The court in *In re Steele*, *supra*, 32 Cal.4th 682 recognized that section 1054.9 affected the rule of *Gonzalez* to the extent covered by the statute. But the court's comment was that section 1054.9 "modifies" and reflects a "modification" of the rule, not that *Gonzalez* retains no further validity. (*In re Steele, supra*, at p. 691.) The court stressed that, in the language of *Gonzalez*, even the new legislation "does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses." (*In re Steele, supra,* 32 Cal.4th at p. 695.) It also commented that section 1054.9 "imposes no preservation duties that do not otherwise exist." (*In re Steele, supra*, at p. 695.)

Morales argues that the order was authorized by *Wisely v. Superior Court* (1985) 175 Cal.App.3d 267, 270, in which the appellate court found it "fundamentally unfair" to deny discovery to a defendant *who had been granted a new trial*, while the People's appeal of that order was pending. The reasoning of *Wisely* clearly did not impress the Supreme Court in *Gonzalez*, which found it "inapposite," "whatever its merits,"

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[8] *Picklesimer, supra,* 48 Cal.4th 330 involved the efforts of a petitioner long ago convicted of voluntary oral copulation with a 16- or 17-year-old minor (§ 288a, subdivision (b)(1)) to remove the requirement of mandatory sex offender registration after the court found an equal protection violation in *People v. Hofsheier* (2006) 37 Cal.4th 1185. *Picklesimer* holds that relief must be sought by a petition for writ of mandate.

(*Gonzalez, supra*, 51 Cal.3d at p. 1257) because the new trial order at least provided an arguable basis for continuing jurisdiction.[9] Here, although Morales claims that the preservation order is essential to protect his right to pursue collateral relief by habeas corpus, there is simply no pending case or proceeding to which the motion can attach. Accordingly, the trial court had no subject matter jurisdiction.

We recognize that if Morales had chosen to proceed by filing a barebones habeas corpus petition, there would at least have been a proceeding to which his request could have attached, and the trial court could have reached the merits.[10] However, counsel has carefully observed the boundaries of his role as counsel on *appeal* and elected not to file a collateral proceeding. We also recognize that some of the materials which he seeks to have preserved and which are not subject to any statutory preservation obligation *may* be of value to him in presenting a claim for relief on habeas corpus. However, our decision is guided by two points: first, that this is not a legislatively authorized motion under

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[9] The standard rule, of course, is that an appeal deprives the court of jurisdiction going to the merits of the case—that is, anything that might interfere with the appellate court's effective resolution of the case. (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472.)

[10] We do not determine whether the issuance of a preservation order would be proper. The scope of the motion appears to have gone far beyond the limits of section 1054.9; it was not established that the materials sought could not be obtained from counsel *or* should have been turned over by the prosecution. Nor was any effort made to explain what information Morales ever hoped to find in more obscure categories which did not visibly fall within the ambit of materials to which he would have been entitled at trial. However, we need not, and do not, attempt to establish the level of "good cause," if any, which could support a preservation order—again, assuming that one could be made.

section 1054.9, and second, that Supreme Court precedent otherwise forbids trial courts from ruling on such a "free-floating" motion as was presented here. We are not at liberty to ignore *Gonzalez*, especially as the court in *Steele* noted the limited extent to which section 1054.9 altered *Gonzalez*'s rule.

Accordingly, we find that the trial court exceeded its jurisdiction in issuing the preservation order and we will issue the writ.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order for preservation of evidence, and to enter a new order denying real party in interest's motion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.

FILED
SAN BERNARDINO COUNTY
SUPERIOR COURT

JUL 09 2014

BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHNNY MORALES,

Defendant and Appellant.

Superior Ct. No. FVA 015456

(California Supreme Court No. S137307)

ORDER TO PRESERVE EVIDENCE PENDING AUTOMATIC APPEAL AND RELATED POST CONVICTION PROCEEDINGS

IT IS THE ORDER OF THIS COURT:

That the San Bernardino County District Attorney, the San Bernardino County Sheriff-Coroner, the Montclair Police Department, the Fontana Police Department, the Colton Police Department, the Corona Police Department, the San Bernardino Police Department (including the San Bernardino Police Department Crime Lab), the San Bernardino County Sheriff's Department, the San Bernardino County Sheriff's Scientific Investigations Division, the San Bernardino County Children and Family Services and the Children's Assessment Center, the San Bernardino County Probation Department, the San Bernardino County Superior Court, the San Bernardino County Jury Commissioner, the San Bernardino County Information Services Department, the San Bernardino County Jail, West Valley Detention Center, California Department of Corrections, the Attorney General of California, and their present and former employees, agents, and representatives, to preserve files, records, evidence and other related items listed herein pending resolution of this automatic appeal and all related postconviction litigation.

By this motion, appellant requests preservation of files, records, evidence and any other items pertaining to the prosecution of this case and relating to the investigation of the

APPENDIX A

death of Elia Lopez and the robbery of Carlos Gutierrez that occurred on June 9, 2001 in the city of Bloomington, as well as offenses alleged as other-crimes evidence and as aggravating factors during the guilt and penalty phases of appellant's trial, including, but not limited to, the following:

a. All records, documents, and exhibits, including the reporter's transcript notes of proceedings which pertain to appellant, Johnny Morales (AKA "Mario Morales" and "Jose Arrisa")(DOB: 1/20/78), and *People v. Johnny Morales* (Superior Court Case No. FVA 015456), including confidential Penal Code sections 987.9 and 987.2 records;

b. All items admitted into evidence, or offered into evidence but excluded or withdrawn in this case, whether at the trial or any pretrial proceeding, whether such items were physical; demonstrative, illustrative, written, tape recorded, videotaped, photographed, or of some other type; and whether in possession of the San Bernardino County Superior Court, the San Bernardino County Children and Family Services and the Children's Assessment Center, the San Bernardino County District Attorney's Office, or any other law enforcement agency, including, but not limited to the Fontana Police Department, the Montclair Police Department, the Ontario Police Department, the Corona Police Department, the Colton Police Department, the San Bernardino Police Department, and the San Bernardino County Sheriff's Department, ;

c. All prosecutorial and law enforcement reports, notes, tape recordings, or other memorializations of fruits of law enforcement investigation or witness interviews, all scientific and forensic reports or notes and underlying documentation (including, but not limited to, laboratory notebooks, bench notes, computer printouts, or other recordings of raw data, in whatever media), all photographs and negatives, and all other items that are in any way related to this capital case and that are in the possession of any of the city, county, or state governmental agencies or officials named above, or their agents or employees, including private individuals or institutions retained to render services in connection with this capital case;

d. All notes taken by each and every court reporter in this case, whether in

Superior or Municipal Court;

e. All custodial records relating to appellant Johnny Morales (AKA "Mario Morales" and "Jose Arrisa") (DOB: 1/20/78), including but not limited to; all jail records and/or the complete jail packet, which includes any "writings" (as defined in Gov. Code § 6252, subd. (g)), housing records, classification records, disciplinary records, jail visiting logs and records, records of any medical and/or psychiatric treatment or evaluation occurring during appellant's incarceration, and any audiotapes, videotapes, and any other records pertaining to appellant either during or prior to the pendency of this case that are in the possession or control of the San Bernardino County Sheriff's Department, the San Bernardino Police Department, the Fontana Police Department, the Corona Police Department and the Colton Police Department;

f. All writings or other records relating to the decision by the San Bernardino County District Attorney's Office to seek the death penalty in *People v. Johnny Morales* (Superior Court Case No. FVA 015456), including, but not limited to all policy manuals, regulations, guidelines, policy statements, internal memoranda and other writings which have been relied upon or promulgated by the San Bernardino County District Attorney's Office pertaining to the procedure by which a decision is made as to whether to charge special circumstances and/or seek the death penalty, and any and all documents, writings, records, memoranda, or notes relating to the decision to allege special circumstances and to seek the death penalty in this capital case;

g. All electronic data pertaining to *People v. Johnny Morales* (Superior Court Case No. FVA 015456) in the possession of or maintained by the San Bernardino County Information Services Department, including any email communications;

h. All records or documents maintained or controlled by the San Bernardino County Jury Commissioner pertaining to the selection of the venire or any other matter involving the case of *People v. Johnny Morales* (Superior Court Case No. FVA 015456). Any records, manuals, standard operating procedures, or other documents maintained or controlled by the San Bernardino County Jury Commissioner involving procedures and

practices regarding the selection of jury venires, including county-wide jury venires, which were in effect in the years 2002-2004;

i. All records maintained or controlled by the San Bernardino County Probation Department which pertain to appellant Johnny Morales(AKA "Mario Morales" and "Jose Arrisa")(DOB: 1/20/78) .

j.. All materials controlled or maintained by the San Bernardino County Sheriff-Coroner's Department (or any private contractor personnel) pertaining to the investigation and autopsy of the death of Elia Torres Lopez on or about June 9, 2001;

k.. All records, documents, exhibits, investigative reports, and jail records relating to prior investigations or prosecutions of appellant Johnny Morales, (AKA "Mario Morales" and "Jose Arrisa") (DOB 1/20/78), including but not limited to those pertaining to the following; San Bernardino County Case: *People v. Johnny Morales*, San Bernardino Court Case No: FVA011012; *People v. Johnny Morales*, Fontana Municipal Court Case No: MVA 021611; *People v. Johnny Morales*, Fontana Municipal Court Case No: MVA017382; whether in the possession or control of the San Bernardino County Superior Court, the San Bernardino County District Attorney's Office, or any other law enforcement agency, including, but not limited to the Fontana Police Department, the Montclair Police Department, the Ontario Police Department, the Corona Police Department, the Colton Police Department, the San Bernardino Police Department, and the San Bernardino County Sheriff's Department.

l. All criminal files relating to witnesses appearing in this case including the following people: Cesar Alban, Anthony Casas, Xiomara Escobar, Carlos Gutierrez, Michael Kania, Maria S. Lopez, Mayra Lopez, Margarita Martinez, Daniel J. Mendoza, Angel I. Morales, Marcela Ochoa-Martinez, Yolanda Riech, Alejandra Sanchez, Brianda Sanchez, Jennifer Sanchez, Joe Sanchez, Frank P. Sheridan, Josefina T. Tadeo, Brad Toms, Elda Velasquez and Kenneth Wolf.

m. All California Department of Corrections records regarding Johnny Morales (AKA "Mario Morales" and "Jose Arrisa")(DOB 1/20/78) including, but not limited to,

West Valley Detention Center records.

n. All notes taken by each and every court reporter, whether in Superior or Municipal court, during the proceedings of appellant's co-defendant, Xiomara Escobar (San Bernardino County Case No. FVA 015456), in which appellant was not present.

o. All records, manuals, standard operating procedures, policies or documents maintained or controlled by the San Bernardino County Indigent Defense Program pertaining to the selection of and qualifications for members of the county conflict panel between 2001 to 2004; and any other records or other documents maintained or controlled by the program involving the appointment and payment of counsel in the case of *People v. Johnny Morales* (Superior Court Case No. FVA 015456).

p. All records, manuals, standard operating procedures, policies or documents maintained or controlled by the San Bernardino County Indigent Defense Program, San Bernardino Superior Court and the Law Offices of Earl Carter pertaining to the procuring and awarding of contracts for the operation of the San Bernardino County Conflict Panel. selection of and qualifications for members of the county conflict panel between 2001 to 2004;

q. All records, manuals, standard operating procedures, policies or documents maintained or controlled by the San Bernardino County Superior Court pertaining to the appointment of counsel for indigent defendants from the county conflict panel between 2001 to 2004; and any other records or other documents maintained or controlled by the court involving the appointment and counsel in the case of *People v. Johnny Morales* (Superior Court Case No. FVA 015456).

r. All prosecutorial and law enforcement reports, notes, tape recordings, or other memorializations of fruits of law enforcement investigation or witness interviews, all photographs and negatives, and all other items that are in any way related to *People v. Wayne Rozenberg* (Superior Court Case No. FSB046236) and that are in the possession of any of the city, county, or state governmental agencies or officials named above, or their agents or employees, including private individuals or institutions retained to render services

in connection with this case;

s. All records, documents, exhibits, investigative reports, and jail records relating to prior investigations or prosecutions of Mario Izaguirre, including but not limited to those pertaining to the following; San Bernardino County Case: *People v. Mario Izaguirre*, San Bernardino Court Case No: FVA022952.

t. All criminal files relating to other suspects and/or witnesses related to this case including the following: Junior Ivan Escobar, Javier Ever Flores (DOB 9/7/79), Marlo Flores (DOB 7/28/78), Melvin Falla, Melvin Hernandez, Jorge Morales, Jossy Remberto Aleman-Cruz (DOB: 6/24/79) (AKA "Jossy Cruz-Aleman" or "Josy" or "Carlos Rodriquez"), Enrique Lujan (AKA "Kuique"or "Kiki"), Henry Lujan (AKA "Garra" or "Garras"), Noe Sevilla-Ochoa, Jorge Luis Sifuentes, Joe Vant and Rigoberto Zavala (AKA "Rico") whether in the possession or control of the San Bernardino County Superior Court, the San Bernardino County District Attorney's Office, or any other law enforcement agency, including, but not limited to the Fontana Police Department, the Montclair Police Department, the Ontario Police Department, the Corona Police Department, the Colton Police Department, the San Bernardino Police Department, and the San Bernardino County Sheriff's Department.

u. All files, reports, notes, tape recordings, other memorializations of fruits forensic interviews of Joe Sanchez, Jennifer Sanchez, Brianda Sanchez, Crystal Izaguirre and David Gutierrez by staff at the San Bernardino County Children's Assessment Center that were in any way related to law enforcement investigation or prosecution of either: (1) the death of Elia Torres Sanchez or (2) the home invasion robbery of Carlos Gutierrez on or about June 9, 2001 whether in the possession or control of the San Bernardino County Children's Assessment Center, the San Bernardino County Superior Court, the San Bernardino County District Attorney's Office, or any other law enforcement agency, including, but not limited to the Fontana Police Department, the San Bernardino Police Department, and the San Bernardino County Sheriff's Department.

v. All records, documents, exhibits, investigative reports, and jail records relating to prior investigations or prosecutions related or pertaining to the following;

Corona Police Department Case No: 01-4706, Ontario Police Department Case No: 01-05-1083, Fontana Police Department Case No: 01-5241, Fontana Police Department Case No: C97-9381, Fontana Police Department Case No: C98-08777, San Bernardino County Sheriff Department Case No: 030102609, whether in the possession or control of the San Bernardino County Superior Court, the San Bernardino County District Attorney's Office, or any other law enforcement agency, including, but not limited to the Fontana Police Department, the Ontario Police Department, the Corona Police Department, the San Bernardino Police Department, and the San Bernardino County Sheriff's Department.

Appellant requests that this order for preservation remain in effect until either: (1) thirty days after execution of the death sentence, or (2) non-preservation of such items or materials is approved by a court of competent jurisdiction after at least ninety (90) days written notice of any intention to destroy or allow destruction of such evidence has been given to appellant, his counsel, the San Bernardino County District Attorney, and the Attorney General of California.

Appellant further moves for disclosure by the agencies named in this motion as to whether any of the items or materials mentioned above are in the possession of any other governmental unit, entity, official, employee or former employee and/or whether any of such material has been destroyed.

SO ORDERED.

Dated: 1/9/2014

SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN BERNARDINO

INGRID A. UHLER
JUDGE OF THE SUPERIOR COURT

APPENDIX B

Filed 7/31/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ORDER

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; JOHNNY MORALES, Real Party in Interest.	E061754 (Super.Ct.No. FVA015456)

THE COURT

A request having been made to this court pursuant to California Rules of Court, rule 8.1120(a), for publication of a nonpublished opinion heretofore filed in the above matter on July 15, 2015, and it appearing that the opinion meets the standards for publication as specified in California Rules of Court, rule 8.1105(c),

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 8.1105(b).

KING J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.

APPENDIX C

People v. Superior Court (Morales)
Fourth District Court of Appeal - Division 2
Case No. E061754

Oral Argument Transcript
Argued July 7, 2015 in Riverside, CA

MCKINSTER, PJ. And good morning. If we could have appearances for the record and we'll ask all parties appearing today, if they would spell their last name so our clerk can make sure we have all the paperwork right.

MURPHY Good morning, your Honor, Mike Murphy, Deputy Attorney General on behalf of the People. Last name is spelt M-U-R-P-H-Y.

RENARD And Delaine Renard on behalf of the State Public Defender for Real Party Johnny Morales. R-E-N-A-R-D.

MCKINSTER, PJ. Alright. We'll have you take a seat, I expect you may not be there long. Mr. Murphy, this is a favorable ruling for you should it withstand oral argument today. You're free to address any part of it, you can reserve all your time to respond if that's what you'd like to do...any other comments on publication, or whatever you'd like to do, you're free to do that, it's your call.

MURPHY Thank you, your Honor. I'll probably be real brief and try to get used to sitting on this other side of the courtroom today. I'm in full agreement with the tentative opinion and so I'll just reserve my time.

MCKINSTER, PJ. Alright. And you, as the appellant, you do have the right to open and close, it doesn't change the order of argument. With that in mind, I was the great Carnac we knew you wouldn't be seated long.

RENARD We were taking bets on whether he would show up at all...

MCKINSTER, PJ. Well...something you might want to address, I'm just curious, if this is publishable if for no other reason it's a first step in review and it does tend to get the attention of other people you might want to talk to.

RENARD That's correct.

MCKINSTER, PJ. So with that in mind, go ahead counsel.

People v. Superior Court (Morales)
Fourth District Court of Appeal - Division 2
Case No. E061754

Oral Argument Transcript
Argued July 7, 2015 in Riverside, CA

RENARD

The People have challenged the trial court's preservation order in this capital case on jurisdictional grounds by way of petition for writ of mandamus. And pursuant to mandamus principles, the petitioner bears the burden of proving that the trial court had a clear and present duty, or as the court put it, there was a clear rule of law compelling the court to deny the motion at the time it was made in 2014. Now, in its tentative opinion the court cited four primary cases as reflecting the law that governed at the time of the ruling; the most significant of which are the Supreme Court's 1990 decision in *Gonzalez* and its 1992 decision in *Johnson.*

But much has changed since those decisions and neither reflect a clear rule of law that required the court to deny the preservation motion. In *Gonzalez*, of course, the Supreme Court held there is no right to post conviction discovery and in *Johnson* the court relied on *Gonzalez* to hold that there is no right to preservation in anticipation of discovery proceedings that did not exist at the time. Of course those holdings have been abrogated by the enactment of section 1054.9. Now it is true as the court's noted in its tentative opinion that both cases have a broad discussion regarding a trial court's post-judgment jurisdiction. But the Supreme Court in 1999, in *Townsel v. Superior Court*, made clear that none of its prior cases, including...,and it specifically cited *Johnson*, can stand for the proposition that the trial court loses *all* jurisdiction while an appeal is pending. And that's because section 916 says so.

Code of Civil Procedure section 916 provides that after the trial court has imposed judgment and a notice of appeal is filed, there is a *partial* divestment of jurisdiction. That is, a divestment of jurisdiction just over the judgment. The trial court *retains* jurisdiction to entertain motions, to grant orders that don't alter the judgment. The Supreme Court in *Townsel* upheld a post-judgment motion that was brought in exactly the same procedural posture as our motion in this case. It was a People's motion in that case, on the ground that court had jurisdiction and it didn't alter the judgment.

So, here the order does not alter the judgment. Furthermore, although 1054.9, we agree, does not itself confer jurisdiction on the court to issue preservation orders, it does trigger application of other principles that didn't apply at the time of the *Johnson* decision. And that is, by statute, by long standing California Supreme Court precedent. Once a statute confers jurisdiction on a court, the court has the inherent power, the inherent authority to use any means, any process it deems necessary, even if that means and process is not delineated by statute or specified by statute to ensure that its jurisdiction is protected or given effect.

Again, Townsel relied on these principles to uphold the post-judgment motion in that case and if we apply that logic here, as the trial judge herself did, because as she said "I have jurisdiction to grant discovery now, so it follows that I have to have jurisdiction to order preservation of evidence otherwise there will be nothing left to discover," given the current crisis in the timely appointment of habeas counsel in capital cases. The law has also changed in other significant respects since *Johnson*, at that time there were dual appointment system in capital cases for habeas and appellate counsel. We now have separate appointments. We have separate duties and appellate counsel has a duty to preserve evidence until habeas counsel's appointed since we have 8 to 10 to 13-year delays before habeas counsel's appointed that duty becomes even more critical. Now the court...

MCKINSTER, PJ. Seems like something the Supremes might be interested in...

RENARD Certainly, I believe so your Honor.

MCKINSTER, PJ. Yeah, because I tip my hat to you for staying within confines of what you are supposed to do as appellate counsel and haven't deviated from that. The obvious answer is if you file a habeas, you now have the proceeding and there's a statute that now allows you to attach a motion to it and that appears to be *THE* problem in this case.

RENARD — Well, I think you're right, and in your tentative opinion there was this suggestion that we could file a bear bones petition and thereby create a proceeding to which this motion could attach. And we just can't. We're not authorized to do that...

MCKINSTER, PJ. — And we're telling you we're not authorized to do what you want us to do without that habeas.

RENARD — But actually you are. Section 916 says so. *Townsel* says so. You have jurisdiction, well the trial judge had jurisdiction. This order did not alter the judgment, 916 couldn't be more clear. *Townsel* in 1999 specifically held *Johnson* just can't be read in any way that's inconsistent with section 916. The judgment, the order here just cannot be distinguished on any grounds from the order that was upheld in *Townsel.* The court did, and maybe this will help clear it up, this court cited *Pickelsimer* as reflecting the governing law, and that's easily disposed of because that involved an order following a true final judgment. When I say true final judgment I mean appeal's final, remittitur's issued and that case it had been final for years. And the court actually ordered the judgment to be altered in a way. So section 916 didn't apply. So in true final judgment cases it's true, the court loses all jurisdiction but that's not true when appeal is pending. The finality of judgment is stayed pending the finality of the appeal. Section 916 explicitly states that the court retains jurisdiction to issue orders that don't alter the judgment. That's exactly...the petitioner has never contended that this order altered the judgment nor does it, nor could they.

The court has also cited *In re Steele*, a line from *In re Steele* that states that 1054.9 does not effect the, I'm sorry, does not impose preservation duties that don't otherwise exist. We don't disagree with that. We don't contend that 1054.9 itself confers jurisdiction to issue preservation orders. *Steele* was not addressing this jurisdictional question and didn't even cite *Johnson* which is the only preservation case on the books, much less indicate that it continues to be good law. And more to the point, it did not create a clear and present rule of law that required the trial court to deny the preservation motion. And I think unless there are any other questions, I'll submit.

MCKINSTER, PJ. All?...Not presently.

RENARD Ok.

MCKINSTER, PJ. Mr. Murphy.

MURPHY Morning again, thank you. Your Honors, I think mostly what we've heard from Real Party in Interest in this case are some policy arguments that, whatever merits they have, can't change the fact that the lower court just didn't have jurisdiction in this case. This case is controlled by *Gonzalez* and *Johnson*, two California Supreme Court cases...

KING, J. What about *Townsel*?

MURPHY Well *Townsel* addressed a no-contact order for jurors and it did relate to a matter wholly unrelated to discovery or preservation orders, which were the topic in *Johnson* and *Gonzalez* and when you also have the new statute that was enacted addressing discovery, and you have the California Supreme Court in *Steele* indicating that this was a limited modification to their cases and certainly didn't impose any preservation orders which is precisely the issue we're dealing with here. I think those cases are more on point...more controlling and there was some language, and I think it was in the *Johnson* case, where the court kind of dismissed these other similar arguments about, "well we should be able to have orders like this" and they just weren't impressed with that. And I think it's going to take a California Supreme Court to change what I think is clear in *Gonzalez* and *Johnson* that there's just not jurisdiction for orders at this stage dealing with discovery. Whether it be discovery itself or preservation outside of the confines of the new statute 1054.

CODRINGTON, J. She also said section 916 along with *Townsel* conveyed jurisdiction.

MURPHY — Right. And that was one of the statutes that was addressed, and I can't remember at the moment if it was in *Gonzalez* or *Johnson* that they were again unimpressed that that generalized statute would confer jurisdiction for a situation dealing with these kinds of specific non-statutory motions for discovery. And when you encompass or combine that with *In re Steele* and their discussing the discovery statute and limiting that to how they interpreted it in that case, I don't think it's appropriate to expand beyond that. I mean this, this was a very broad and encompassing order not only in the nature of it being preservation but obviously the scope of it too. And I think there needs to be statutory authority or further direction from the Supreme Court to really, what appears to the People to be, directly contrary to the holdings in *Gonzalez* and *Johnson*.

MCKINSTER, PJ. — To the extent that counsel is asking us to create a rule here that really should be addressed by the Supreme Court, it really is a problem of their creation...

MURPHY — Right.

MCKINSTER, PJ. — And it just seems to me that if we're going to have an 18-year gap or longer in appointing habeas counsel and, again I tip the hat to defendant's counsel of trying to ensure that materials were available, although that's a two-edge sword. This is such a broad order, in some cases it would be difficult for all the agencies to even determine what it is they are asking to be preserved let alone if they failed to do that 18 years hence there's now a Burmese tiger trap that one could fall into that you didn't to preserve this and therefore, for that reason alone the death penalty should be reversed. Having said all that, it's their problem of their creation, what is your position on publication of this case?

MURPHY — Yeah. I think you should because, well that's the short answer, I think you should.

MCKINSTER, PJ. — Yeah. And I'm just going to go quickly to defense counsel. What is your position on that?

RENARD — I would move for publication.

MCKINSTER, PJ. Ok. That does get the attention of the folks. I recognize that everyone wants us to create that rule here but it just strikes me that it's better created in front of the folks who created the problem. I always believe in someone cleaning up their own mess.

Anything further Mr. Murphy?

MURPHY No, that's all your Honors. Thank you very much.

MCKINSTER, PJ. Alright. Thank you very kindly, the matter will stand submitted.

[recording concluded] **Duration: 12:58**

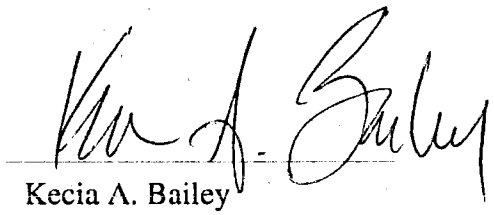
DECLARATION

Case Name: People v. Superior Court (Morales)

Case Number: E061754

I declare under penalty of perjury that the foregoing pages numbered 1 through 7 comprise a full, true and correct transcription, to the best of my ability, of the audio recording of the proceedings held in the above-entitled matter on Tuesday, July 7, 2015.

Dated: July 16, 2015



Kecia A. Bailey
Senior Legal Analyst
Office of the State Public Defender

DECLARATION OF SERVICE

Re: THE PEOPLE v. SUPERIOR COURT (MORALES) No._____
Court of Appeal No. E061754
Related Death Penalty Appeal
Pending No. S137307)

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

PETITION FOR REVIEW

on each of the following, by placing same in an envelope addressed respectively as follows:

FELICITY SENOSKI
Deputy Attorney General
Office of the Attorney General
110 W. A Street, Suite 110
San Diego, CA 92101

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San Bernardino County Superior Court
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CLERK OF THE COURT
Fourth District Court of Appeal
Division Two
3389 12th Street
Riverside, CA 92501

Each said envelope was then, on August 19, 2015, deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on this 19th day of August 2015, at Oakland, California.

Kecia Bailey