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. S228642 Court of Appeal No. E061754 **Related Death Penalty Appeal Pending** No. S137307

REPLY TO ANSWER TO 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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THE STATE'S CONTENTION THAT REVIEW SHOULD BE DENIED BECAUSE THE APPELLATE COURT'S DECISION IS CONSISTENT WITH TWO DECADES-OLD DECISIONS OF THIS COURT DOES NOT ADDRESS THE ESSENTIAL QUESTION PRESENTED OF WHETHER THOSE DECISIONS HAVE BEEN NULLIFIED BY SUBSEQUENT DEVELOPMENTS IN LAW AND POLICY

In his petition for review ("PFR"), Morales asked the Court to resolve whether a trial court has subject matter jurisdiction under current law and policy to grant postjudgment evidence preservation motions in capital cases while appeal from the judgment is pending. Necessarily subsumed within that question is whether this Court's decades-old decisions in *People v. Gonzalez* (1990) 51 Cal.3d 1179 ("*Gonzalez*") and *People v. Johnson* (1992) 3 Cal.4th 1183 ("*Johnson*") have effectively been negated in that regard in light of subsequent developments in law and policy. (PFR 2-18.)

In its Court-ordered answer to Morales's petition, the State contends that this Court should deny review because it already decided the question of a trial court's postjudgment subject matter jurisdiction in *Gonzalez* and *Johnson*. (Answer 1-4.) This is no answer at all to the actual questions presented for review.

Furthermore, the State contends "the arguments advanced by Morales seek a change in the law and, therefore, is properly addressed to the Legislature, not the Courts." (Answer 2.) Yet, the only authority the State cites in support of a trial court's *lack* of subject matter jurisdiction to grant postjudgment preservation motions during the pendency of appeal are the decades-old decisions of this Court in *Gonzalez* and *Johnson*. (Answer 2-4.) A fortiori, this Court has the power to decide whether its own

precedents remain good law.

Additionally, the Legislature *has* already spoken to the questions presented, albeit indirectly. Significantly, respondent does not dispute that, during the pendency of appeal, postjudgment evidence preservation motions are "connected" to the criminal proceedings that resulted in the judgment appealed from and do not alter that judgment. (PFR 8-12, citing *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089-1090 ("*Townsel*") and Code Civ. Proc., § 916, subd. (a).) Therefore, Code of Civil Procedure section 916, subdivision (a) applies, under which the trial court retains jurisdiction to entertain and grant evidence preservation motions in this procedural context. (PFR 8-12; *Townsel, supra*, at pp. 1089-1090.)

Although the State was the burden-bearing party in the mandamus proceedings before the appellate court and Morales repeatedly relied on Code of Civil Procedure section 916 in his moving papers in the trial court and his written and oral arguments before the appellate court, it is only for the first time in its answer to Morales's petition for review that the State even acknowledges that statute. (See PFR 8-10 & fns. 2-3.) But its only answer to the application of that statute is that "this Court in *Johnson* expressly rejected the notion that Code of Civil Procedure section 916 conferred jurisdiction to issue postconviction orders relating to discovery." (Answer 4.) But to the extent that *Johnson* relied on then-existing discovery law, it has been superceded by the enactment of Penal Code section 1054.9. Otherwise, this Court made it crystal clear in its subsequent *Townsel* decision that *Johnson* simply cannot be read for the proposition that the *appellate court* attributed to it: a trial court loses all jurisdiction to act following imposition of the judgment, regardless of whether appeal therefrom is pending. (PFR 7-10, citing *Townsel, supra*, 20 Cal.4th at pp.

1089-1090.) This is so because such a reading is flatly inconsistent with Code of Civil Procedure section 916, subdivision (a). (*Ibid.*)

Respondent points out that the *Townsel* Court did not disapprove of *Johnson* to the extent that it held that record correction proceeding are not proceedings to which motions relating to discovery can attach. (Answer 3-4.) But that holding has no bearing here because Morales never made any such argument. His argument is and was a plain and straightforward one: just as the nonstatutory postjudgment jury no-contact order in *Townsel* fell within the trial court's jurisdiction under Code of Civil Procedure section 916 because it was connected to the criminal proceedings resulting in the judgment still pending on appeal and did not alter that judgment, so too does a nonstatutory evidence preservation order fall within the court's jurisdiction under Code of Civil Procedure section 916, subdivision (a), for the same reasons. (PFR 7-12.) There is no logical or reasonable basis for distinguishing the motions for purposes of section 916, subdivision (a), nor does respondent offer one. It bears repeating here: respondent does not dispute, and hence implicitly concedes, that an evidence preservation motion is connected to the criminal proceedings that resulted in the judgment pending on appeal and does not seek to alter that judgment and hence it necessarily follows that the trial court retains subject matter jurisdiction to grant such motions under Code of Civil Procedure section 916, subdivision (a).

Likewise the Legislature has spoken to this issue of jurisdiction by its enactment of Penal Code section 1054.9, read together Code of Civil Procedure section 187, as set forth in Morales's petition and his written and oral arguments below. (PFR 12-17.) Again, for the first time in its answer to Morales's petition, respondent finally acknowledges Code of Civil

Procedure section 187, but its only answer to the application of that statute is that "this Court in *Gonzalez* rejected the notion that Code of Civil Procedure section 187 provided jurisdiction to issue postconviction discovery orders because, "'[b]y its terms, . . . section 187 operates only where some other provision of law confers judicial authority *in the first instance*.' (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1257, italics in original.)" (Answer 4.) Respondent makes Morales's point for him.

At the time of the *Gonzalez* decision, no other law or statute conferred jurisdiction on the trial court "in the first instance" to grant postjudgment, pre-petition discovery and hence Code of Civil Procedure section 187 was inapplicable. In contrast, under *current*, post-*Gonzalez* law, Penal Code section 1054.9 *does* confer jurisdiction on the trial court to grant postjudgment, pre-petition discovery "in the first instance." (PFR 12-17.) Hence, the enactment of that statute triggers application of Code of Civil Procedure section 187, under which 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.) The trial judge recognized as much in granting Morales's evidence preservation motion in this case, reasoning that since she "has authority now for further discovery" under Penal Code section 1054.9, "obviously if we didn't also have authority to preserve, that there may be nothing to discover" given the ever-increasing delays in the appointment of habeas corpus counsel, who has the exclusive authority to seek discovery itself, during which critical evidence may be lost or destroyed. (PFR 15, citing, inter alia, *In re Jimenez* (2010) 50 Cal.4th 951,

955, 958.) Put another way, as set forth in Morales's petition but ignored by respondent, the recognized threat that critical evidence may be lost or destroyed before habeas corpus counsel is finally appointed and can obtain discovery is a potential "obstruction" to the trial court's jurisdiction and "successful operation" as a postjudgment *discovery* court under Penal Code section 1054.9, which the trial court has the inherent authority to remove. (*Millholen v. Riley* (1930) 211 Cal. 29, 33-34; accord, e.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 735; see also *Townsel, supra*, 20 Cal.4th at pp. 1089-1091 [in addition to its jurisdiction under Code of Civil Procedure section 916, trial court had jurisdiction to issue nonstatutory postjudgment order because it served and facilitated the jurisdiction conferred upon it by other laws to act in a related area].)

As to the sound policy reasons in the death penalty context for recognizing a trial court's jurisdiction to issue postjudgment evidence preservation orders while appeal is pending and the defendant is awaiting the appointment of habeas corpus counsel (PFR 17-23), respondent again contends that only the Legislature can act in this area (Answer 4-5). Not so. Respondent ignores that this Court has already declared a judicial rule creating an exception to existing habeas corpus rules in order to avoid unfair prejudice to capital defendants' future habeas corpus rights resulting from the state's failure to appoint habeas corpus counsel in a timely manner. (PFR 17-23, citing *In re Morgan* (2010) 50 Cal.4th 932, 938-939; *In re Jimenez, supra*, 50 Cal.4th at pp. 955-958.) The same policy considerations support the recognition of a trial court's postjudgment subject matter jurisdiction to grant evidence preservation motions in capital cases while defendants await the appointment of habeas corpus counsel, particularly because it is already supported by existing statutory law. The Court need

only apply that statutory law to effectuate both legislative and judicial policies in favor of protecting the rights of capital defendants against unfair prejudice resulting from the state's actions (or inaction).

Finally, respondent's answer is significant for what it omits. Respondent does not address or dispute that three aspects of the appellate court's published decision are patently erroneous and contrary to clearly established law. First, the appellate court's holding is not limited to postjudgment evidence preservation motions but rather broadly holds that trial courts are without jurisdiction to grant *any* nonstatutory postjudgment motion, even if finality of the judgment is stayed pending appeal and even if the order granting the motion does not alter that judgment, on the theory that "there is simply no pending case or proceeding to which the motion can attach." (PFR, Appendix A, pp. 7-10.) This part of the opinion is flatly contrary to the plain meaning of Code of Civil Procedure section 916 and this Court's precedents applying it, such as *Townsel.* (PFR 7-12.) Second, respondent does not dispute that the jurisdictional rule reflected in *People v. Picklesimer* (2010) 48 Cal.4th 330, 337 – which was central to the appellate court's published decision in this case – had absolutely no bearing on the question presented here of a trial court's postjudgment jurisdiction *while appeal from that judgment is pending.* (PFR 7-8, 11; PFR, Appendix A, pp. 7-10.) Third, respondent does not dispute that the appellate court's direction to appellate counsel that they can create jurisdiction in the trial court to grant postjudgment evidence preservation motions by filing "barebones" habeas corpus petitions, and thereby create proceedings to which the motions can "attach," flies in the face of well-settled habeas corpus law and policy and would result in the forfeiture of the very habeas corpus rights appellate counsel seeks to preserve and protect. (PFR 20-22;

PFR, Appendix A, p. 9.) The Court should treat respondent's silence as a tacit concession that the appellate court's published decision was seriously flawed in all of these respects, which only supports Morales's petition for review.

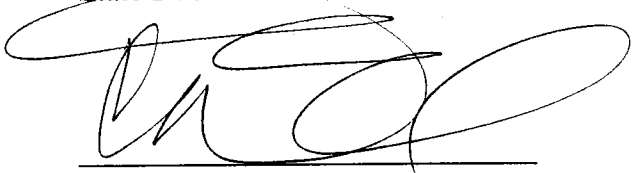
CONCLUSION

In sum, the State has proffered no logical or reasoned basis for this Court to deny Morales's petition for review. For all of the foregoing reasons, as well as those set forth in Morales's petition for review, this Court should grant review to resolve the important and recurring question of a trial court's jurisdiction under *current* law to grant postjudgment evidence preservation motions in capital cases, made while appeal is pending and before the appointment of habeas corpus counsel.

DATE: September 11, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



C. DELAINE RENARD
Senior Deputy State Public Defender

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 reply 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 reply is 1,866 words in length.

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

DECLARATION OF SERVICE

Re: THE PEOPLE v. SUPERIOR COURT (MORALES) No. S228642
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:

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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Each said envelope was then, on September 11, 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 11th day of September 2015, at Oakland, California.

Kecia Bailey