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

REAL PARTY IN INTEREST/APPELLANT'S OPENING BRIEF ON THE MERITS

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

MICHAEL J. HERSEK
State Public Defender
BARRY P. HELFT
Chief Deputy State Public Defender

C. DELAINE RENARD, State Bar No. 169893
Senior Deputy State Public Defender
1111 Broadway, Ste. 1000
Oakland, CA 94607
renard@ospd.ca.gov
510-267-3300

Attorneys for Real Party in Interest/Appellant
Johnny Morales

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

ISSUES PRESENTED ON REVIEW

This Court granted review to decide whether:

(1) "[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;" and whether

(2) "[C]urrent law create[s] 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."

STATEMENT OF THE CASE AND FACTS

A. Imposition of the Death Judgment in the Trial Court and this Court's Acquisition of Appellate Jurisdiction

On September 12, 2005, the Superior Court of San Bernardino County, the Honorable Ingrid Uhler Presiding, entered a judgment of death against appellant and real party in interest, Johnny Morales. On August 27, 2009, 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 in No. S137307. (See Gov. Code, § 15421.)

B. Appellate Counsel's Motion in the Trial Court for an Order to Preserve Evidence, Brought in Anticipation of Morales's Right to Habeas Corpus Counsel and this Court's Appointment of Such Counsel and That Counsel's Exclusive Authority to Conduct Factual Investigation and Seek Discovery

Morales's right to the appointment of capital habeas corpus counsel has yet to be honored. (See Gov. Code, §§ 68662, 68663; Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, std. 2-1.) Hence, on April 10, 2014, and 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 in Court of Appeal No. E061754

["Opposition"], Exhibits A, C & D.)[1] The motion was brought in anticipation of this Court's appointment of habeas corpus counsel, who has the exclusive authority to conduct factual investigation and seek discovery under Penal Code section 1054.9 to aid in his or her preparation of a petition for writ of habeas corpus on Morales's behalf. (*Ibid.*)[2]

On April 29, 2014, the District Attorney filed a written opposition to the motion on the grounds, inter alia, that the trial court lacked subject matter jurisdiction to grant the motion after it had imposed judgment and this Court acquired appellate jurisdiction over the judgment. (Opposition, Exhibit B.) Morales filed a written reply disputing the District Attorney's challenges. (Opposition, Exhibit C.)

On July 9, 2014, after considering the written pleadings and hearing oral arguments, the trial judge ruled, inter alia, that she had the authority to entertain the motion and granted it in toto. She signed the evidence preservation order on the same date. (Opposition, Exhibit E, pp. 112-116, & F.)[3]

---

[1] According to this Court's docket, on August 19, 2016, the Court of Appeal record of the mandamus proceeding was imported to this Court. Because there is no formal Clerk's Transcript to which to cite, Morales shall herafter refer to the orders and pleadings in the appellate record by date and name.

[2] Appellate counsel brought the motion before the trial court contemporaneously with record correction proceedings then pending before the court.

[3] The terms "evidence preservation" motion and order are used throughout this brief to refer to a motion for an order to preserve (not produce) materials that are in the possession of the prosecution team and other local entities that appear relevant to potential habeas corpus

(continued...)

C. The People's Petition in the Court of Appeal for a Writ of Mandamus to the Trial Court to Vacate its Evidence Preservation Order for Lack of Subject Matter Jurisdiction and the Appellate Court's Published Opinion that the Writ Should Issue

On August 20, 2014, the Attorney General, on behalf of the People, filed a petition in the Court of Appeal for the Fourth Appellate District, Division Two, for a writ of mandamus to the trial court to vacate its evidence preservation order on the ground, inter alia, that it lacked subject matter jurisdiction to issue the order after judgment was imposed and while appeal was pending. (8/20/14 Petition for Writ of Mandamus in No. E061754.) On September 4, 2014, the Court of Appeal ordered Morales to file a response to the petition, without which it was inclined to issue a peremptory writ, and gave the People an opportunity to reply to Morales's response. (9/4/14 order in No. E061754.) On October 21, 2014, Morales filed an opposition to the petition. (Opposition, p. 1.) The People elected to file no reply. On November 18, 2014, the appellate court issued an order to show cause why the petition should not be granted which permitted Morales to elect to stand on his already-filed opposition and afforded the People another opportunity to reply to Morales's response. (11/18/14 order in No. E061754.) On December 10, 2014, Morales gave notice that he elected to stand on his opposition given the petitioner's failure to reply and address the points and authorities raised therein. (12/10/14 notice by letter in No. E061754.) The People again declined to file a reply to Morales's opposition.

---

[3](...continued)
investigation, brought in anticipation of the appointment of habeas corpus counsel and his or her exclusive authority to initiate factual investigation and discovery under Penal Code section 1054.9.

On March 4, 2015, the appellate court issued a tentative written opinion adopting the People's jurisdictional argument and granting the People's petition on the ground that the trial court lacked subject matter jurisdiction to issue the preservation order. (3/4/15 Tentative Opinion in No. E061754.) As set forth in more detail in the arguments below, the appellate court concluded that this Court's decisions categorically "forbid[] trial courts from ruling on . . . [nonstatutory] '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. (See Appendix A, pp. 7-10, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, *People v. Johnson* (1992) 3 Cal.4th 1183, and *People v. Picklesimer* (2010) 48 Cal.4th 330.)[4]

On July 7, 2015, the parties presented oral argument and Morales's appellate counsel pressed the appellate court to deny the petition based on authorities he cited in his pleadings but which were omitted from the court's tentative opinion. (Appendix C, pp. 2-4.) Nevertheless, on July 15, 2015, the appellate court adopted its tentative opinion in full, without modification, as its final opinion that the writ must issue. (App. A.) Although the final opinion was originally issued in unpublished form, on July 31, 2015, the appellate court granted the People's request to publish it. (Appendix B; see also *People v. Superior Court (Morales)* (2015) ___ Cal.App.4th ___, 2015 *Daily Journal* D.A.R. 8792.)

---

[4] Exhibit A is the appellate court's final opinion. However, as explained in Morales's petition for review and undisputed by the People in their answer filed in this Court, the appellate court's final opinion adopted the tentative opinion in full and without modification.

D. Morales's Petition for Review and Motion for Judicial Notice in this Court

On August 19, 2015, Morales filed a petition for review in this Court asking it to: (1) make clear that, after they have imposed judgment and while appeal therefrom is pending, trial judges in capital cases retain subject matter jurisdiction to grant motions 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; and (2) determine whether the law that existed at the time of the trial court's 2014 evidence preservation order in this case created such a clear and present legal duty or rule mandating trial courts to *deny* such motions for lack of subject matter jurisdiction that an order granting such a motion warranted extraordinary relief on mandamus. (Morales's Petition for Review, pp. 2, 6.) On the same date, Morales filed a request for judicial notice of preservation orders issued by other trial courts in other cases, after they imposed judgment but while the appeals therefrom were pending, from 2011 through 2014.[5]

---

[5] Specifically, Morales moved for judicial notice of the following illustrative, but by no means exclusive, court orders: *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, 2011 order while automatic appeal pending in No. S0110804; *People v. Larry Kusuth Hazlett, Jr.*, Kern 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

(continued...)

On August 27, 2015, this Court requested an answer from the People to the petition for review. On September 8, 2015, the People filed an answer to the petition, arguing only that this Court should not grant review. On September 11, 2015, Morales filed a reply to the People's answer.

On September 30, 2015, this Court granted Morales's petition for review, as well as his motion for judicial notice.

//

//

---

[5](...continued)
automatic appeal pending in No. S147335.

ARGUMENT

I. HILE A JUDGMENT IS PENDING ON APPEAL, TRIAL JUDGES IN CAPITAL CASES RETAIN JURISDICTION TO GRANT MOTIONS 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. Introduction

Twenty five years ago, this Court held in *People v. Gonzalez* (1990) 51 Cal.3d 1179 ("*Gonzalez*") that defendants had no right to, and trial courts lacked jurisdiction to grant, discovery after the trial court imposes judgment and before the filing of a petition for writ of habeas corpus and a finding that it states a prima facie case for relief. (*Id.* at pp. 1257-1261.) Two years later, in *People v. Johnson* (1992) 3 Cal.4th 1183 ("*Johnson*"), the Court followed *Gonzalez* and held that because there is no right to postjudgment pre-petition discovery, there is likewise no right to, and trial courts have no jurisdiction to grant, "anticipatory postjudgment discovery" motions to preserve evidence in anticipation of (then) non-existent discovery. (*Id.* at pp. 1257-1258.)

This Court has explicitly held that *Gonzalez*'s holding has been abrogated by the 2002 enactment of Penal Code section 1054.9, which grants capital (and LWOP) defendants the right to, and trial courts jurisdiction over, postjudgment pre-petition discovery "as an aid in preparing" a petition for writ of habeas corpus. (*In re Steele* (2004) 32 Cal.4th 682, 691-692; App. A, p. 8.) The People and the appellate court in this case recognized as much, but reasoned that *Gonzalez* has been

abrogated only "to the extent covered by the statute." (App. A, p. 8.) Otherwise, the appellate court concluded, *Gonzalez* and *Johnson* remain intact. In the court's view, both clearly stand for the broad and categorical proposition that trial courts have no jurisdiction to grant any nonstatutory motions – including but not limited to evidence preservation 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.) That this broad and categorical rule remains the law today is, according to the appellate court, demonstrated by this Court's "confirm[ation]" of that purported rule in *People v. Picklesimer* (2010) 48 Cal.4th 330, 337 ("*Picklesimer*"). (App. A, p. 8.) Based on this analysis, the appellate court granted the People's petition for writ of mandamus to the trial court to vacate its evidence preservation motion for want of subject matter jurisdiction. (App. A, pp. 7-10.)

As demonstrated below, this Court's decision in *Picklesimer* simply does not stand for the proposition the appellate court attributed to it. Furthermore, this Court's *Gonzalez* and *Johnson* decisions regarding a trial court's postjudgment jurisdiction to entertain and grant motions relating to discovery in capital cases, as well as the broader implications of their jurisdictional analyses as applied postjudgment and while appeal therefrom is pending, have effectively been rendered dead letter, or limited to their particular time and place in the legal landscape. That landscape has changed dramatically in light of subsequent decisions and developments in the law and policy governing capital postconviction practice and procedure. In the current legal landscape, after a trial court has imposed a death judgment and while the finality of that judgment remains pending on appeal

before this Court, trial courts retain jurisdiction to grant motions 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.

B. After They Have Imposed Judgment and While Appeal Therefrom Is Pending, Trial Courts Retain Subject Matter Jurisdiction to Grant Evidence Preservation Motions

1. During the Pendency of Appeal from a Judgment, Code of Civil Procedure Section 916 Provides that Trial Courts Retain Subject Matter Jurisdiction To Proceed on Collateral Matters that Do Not Affect or Alter the Judgment Being Appealed

The appellate court's analysis and reliance on *Picklesimer* to support its grant of mandamus 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 (or after the time for filing appeal has passed) 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 Code Civ. Proc., §§ 22, 577, 916, & 1049; Pen. Code, § 1260.) The rule reflected in cases like *Picklesimer* applies in the former situation and provides that a trial court is ordinarily without subject matter jurisdiction to entertain or grant motions in that context because both the trial court proceedings and the resulting judgment are final for all purposes and hence there is nothing pending in the trial court to which a motion can attach. (*Picklesimer*, *supra*, 48 Cal.4th at pp. 337-338, and authorities cited therein; accord, e.g., *People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251.) But very different rules

apply while the judgment and its finality are pending on appeal.[6]

As this Court recognized in its post-*Gonzalez* and *Johnson* decision in *Townsel v. Superior Court* (1999) 20 Cal.4th 1084 ("*Townsel*"), Code of Civil Procedure section 916 governs a trial court's jurisdiction after it has imposed judgment and while appeal therefrom is pending. Section 916 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, subd. (a), italics added.)

Under Code of Civil Procedure section 916, when an appeal is taken from the judgment imposed by the trial court, it results in only a partial divestment of the trial court's inherent jurisdiction during pendency of the appeal. (*Townsel, supra*, 20 Cal.4th at pp. 1089-1090; accord, e.g., *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189, and authorities cited therein ["*Varian*"].) The appellate court acquires exclusive appellate jurisdiction over the judgment and the trial court has no authority to interfere with such appellate jurisdiction. In order "to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided," section 916, subdivision (a), "stays all further trial court proceedings 'upon the matters embraced' in or 'affected' by the appeal" (*Varian, supra*, at p.

---

[6] To be sure, the term "final judgment" has various meanings depending upon the purpose for which "finality" is relevant. (See 7 Witkin, Cal. Proc. 5th (2008) Judgm. § 7, p. 551 [collecting cases].) For jurisdictional purposes and ease of reference, Morales will use the term "true final judgment" throughout this brief to refer to a judgment that has been rendered final following appeal and issuance of the remittitur.

189) and divests the trial court of subject matter jurisdiction over the judgment being appealed and bars it from taking action which affects or alters the judgment (*id.* at pp. 196-198; *Townsel, supra*, at p. 1089).

Importantly, however, the appellate court's "acquisition of appellate jurisdiction does not . . . divest the trial court of all power to act." (*Townsel, supra*, 20 Cal.4th at pp. 1089-1090; accord, *Varian, supra*, 35 Cal.4th at pp. 189, 191.) Rather, by the plain terms of Code of Civil Procedure section 916, trial courts retain jurisdiction over "'other matter[s] embraced in the action and *not* affected by the judgment.'" (*Townsel, supra*, at p. 1090, italics added.) Thus, an appeal taken from the judgment imposed in the trial court "does not stay proceedings on 'ancillary or collateral matters which do not affect the judgment or order on appeal . . . .' [Citation.]" (*Varian, supra*, at p. 191.) If a postjudment motion, proceeding, or order does not "interfere with [the appellate court's] appellate jurisdiction" by affecting the appeal or altering the judgment on appeal, it falls within the trial court's jurisdiction to proceed on the matter. (*Townsel, supra*, at p. 1090; accord, *Varian, supra*, at p. 191.) Or as this Court has otherwise explained, "'whether a matter is "embraced" in or "affected" by a judgment or order within the meaning of section 916 depends on whether postjudgment or postorder proceedings on the matter would have any effect on the "effectiveness" of the appeal.' [Citations.]" (*Varian, supra*, at p. 189.) "'If so, the proceedings are stayed'" and the trial court has no jurisdiction to act; "'if not, the proceedings are permitted'" and the trial court has jurisdiction to act. (*Ibid.*; see also *Id.* at pp. 191, 196-198.) For instance, in *Townsel* – and as discussed in detail in Part 3, *post* – this Court held that the trial judge retained jurisdiction under section 916 to issue a nonstatutory jury no-contact order after it had imposed a death

judgment and while automatic appeal therefrom was pending because it did not affect of alter the judgment being appealed or otherwise interfere with this Court's appellate jurisdiction. (*Townsel*, *supra*, at pp. 1089-1091.)

2. The Holdings and Jurisdictional Analyses of *Gonzalez* and *Johnson*

The *Gonzalez* and *Johnson* decisions involved motions – a discovery motion in *Gonzalez* and an "anticipatory postjudgment discovery motion" to preserve evidence in *Johnson* – brought after judgment was imposed in the trial court and while appeal was still pending. (*Gonzalez*, *supra*, 51 Cal.3d at p. 1257; *Johnson*, *supra*, 3 Cal.4th at pp. 1256-1258.) As explained in Part 3, *post*, both their jurisdictional analyses and holdings have been superceded by the enactment of Penal Code section 1054.9, jurisdictional principles triggered by the enactment of that statute, and this Court's subsequent decisions analyzing the appropriate application of Code of Civil Procedure section 916, both in civil and criminal cases.

Gonzalez's primary holding was that there was no postjudgment right to the affirmative production of evidence through discovery prior to the filing of a habeas corpus petition and a finding that it stated a prima facie case for relief. (*Gonzalez*, *supra*, 51 Cal.3d at pp. 1258-1261.) In reaching that holding, the *Gonzalez* majority also reasoned that a trial court had no subject matter jurisdiction to entertain or grant a discovery motion after it imposed judgment, regardless of whether or not appeal from that judgment was pending. It based its subject matter jurisdictional analysis entirely on the general rule, reflected in *Picklesimer* and discussed above, that applies to all nonstatutory motions brought after a "true" final judgment – i.e., after judgment has been rendered final on appeal and remittitur has issued: under those circumstances, since all proceedings are "final in the

trial court," "there is nothing pending" to which any motion can attach and the trial court has no jurisdiction to grant a motion relating to those final proceedings. (*Gonzalez, supra*, at p. 1257, citing *People v. Ainsworth, supra*, 217 Cal.App.3d 247, 251 [applying rule to discovery motion brought after "true" final judgment].)

While the *Gonzalez* majority acknowledged that the motion there was not brought after a "true" final judgment but rather while appeal was still pending, it perfunctorily concluded that the distinction was one without a difference because the same principles applied in both procedural postures. (*Gonzalez, supra*, 51 Cal.3d at p. 1257.) In so reasoning, the majority ignored Code of Civil Procedure section 916 apart from inserting it into a string cite to inapposite authorities, all of which applied to jurisdiction *after* remittitur had issued. (*Ibid.*, citing Pen. Code, §§ 1193, 1265, Code Civ. Proc., § 916, subd. (a), and *People v. Rittger* (1961) 55 Cal.2d 849, 852.)

Gonzalez's broad jurisdictional analysis is inconsistent with the plain terms of Code of Civil Procedure section 916 and this Court's subsequent application thereof in cases like *Townsel* and *Varian,* as discussed in Part 1, *ante.* In contrast to the finality of the trial court proceedings following a "true" final judgment, the proceedings are not "final in the trial court" for jurisdictional purposes by the trial court's mere imposition of judgment or the taking of an appeal. (*Gonzalez, supra*, 51 Cal.3d at p. 1257.) As discussed above, the appeal merely "stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby . . . ." (Code Civ. Proc., § 916, subd. (a).) But the proceedings are *not* stayed – much less "final in the trial court" (*Gonzalez, supra*, 51 Cal.3d at p.1257) – over "'ancillary or collateral

matters which do not affect the judgment or order on appeal . . . .' [Citation]" (*Varian, supra*, 35 Cal.4th at p. 191). Hence, the trial court retains subject matter jurisdiction to "proceed upon" such matters as "any other matter embraced in the action and not affected by the judgment or order." (Code Civ. Proc., § 916, subd. (a); accord, *Townsel, supra*, 20 Cal.4th at pp. 1089-1091; *Varian, supra*, at pp. 196-198.) Thus, under Code of Civil Procedure section 916, the real *jurisdictional* question for the *Gonzalez* majority to resolve was whether the discovery motion involved a matter collateral to the judgment on appeal or whether it would have affected or altered the judgment on appeal or otherwise interfered with the appellate court's jurisdiction – a question the majority overlooked and thus failed to resolve. (See *Gonzalez, supra*, 51 Cal.3d at pp. 1284-1285, dis. opn. of Broussard, J., joined by Mosk, J. [criticizing majority's reliance on inapposite rule reflected in *Ainsworth* and failure to apply governing rule of section 916].)

As explained in Part 3, *post*, to the extent that *Gonzalez*'s general jurisdictional analysis is inconsistent with Code of Civil Procedure section 916, it has been implicitly overruled by this Court's subsequent decisions, particularly in *Townsel.* (See also *Varian, supra*, 35 Cal.4th at pp. 189-191, 196-198 [explaining application of section 916].) Furthermore, *Gonzalez*'s specific holdings regarding the absence of a right to postjudgment discovery and a trial court's postjudgment subject matter jurisdiction to order discovery have been explicitly superceded by the Legislature's subsequent enactment of Penal Code section 1054.9.

Turning to the *Johnson* decision issued two years later, the *Johnson* Court relied entirely on *Gonzalez* to hold that trial courts had no jurisdiction to grant motions to preserve evidence brought in anticipation of

postjudgment pre-petition discovery for two reasons. (*Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258.) First, following *Gonzalez*'s analysis that the trial court proceedings are final after imposition of judgment and hence there is nothing pending to which a motion can attach, the *Johnson* Court rejected the notion – never raised here – that discovery or "anticipatory" discovery motions can attach to pending record correction proceedings. (*Ibid.*, citing *Gonzalez, supra*, 51 Cal.3d at pp. 1256-1258 and *People v. Ainsworth, supra*, 217 Cal.App.3d at pp. 250-255.)

Second, also following *Gonzalez*, *Johnson* held that there was no right, or jurisdiction to grant, a motion to preserve evidence brought in anticipation of postjudgment, pre-petition discovery *because* there simply was no right to such discovery under *Gonzalez*. (*Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258.) In other words, the evidence preservation motion in that case was properly denied because it was brought in anticipation of an asserted right and procedure that simply did not exist under the law then reflected in *Gonzalez*. (*Ibid.*, distinguishing *Wisely v. Superior Court* (1985) 175 Cal.App.3d 267, 268-270 [trial court had jurisdiction to order pretrial discovery in anticipation of new trial and its attendant discovery rights notwithstanding that new trial order was still pending on appeal].) As set forth below, like the *Gonzalez* decision on which *Johnson* was based, *Johnson* has been rendered dead letter by the subsequent decisions of this Court and the subsequent enactment of Penal Code section 1054.9.

//

//

3. The Holdings and Jurisdictional Analyses of *Gonzalez* and *Johnson* Have Been Superceded By the Subsequent Decisions of this Court and the Legislature's Subsequent Enactment of Penal Code Section 1054.9

Gonzalez's holding that a trial court has no jurisdiction over, and a defendant has no right to, postjudgment discovery in a capital case before a habeas corpus petition is filed and a judicial finding is made that it states a prima facie case for relief has been abrogated by the 2002 enactment of Penal Code section 1054.9. (*In re Steele*, *supra*, 32 Cal.4th at pp. 691-692.) To the extent that *Johnson* rested on *Gonzalez*'s holdings in this regard, it too has been superceded by that statute. As to the broader implications of those decisions' analyses on the question of a trial court's postjudgment jurisdiction during the pendency of appeal in general, this Court has already expressly limited them in *Townsel*. Indeed, the *Townsel* Court's analysis and application of Code of Civil Procedure section 916, as well as the Court's analysis of that statute in *Varian*, have impliedly overruled them.

In *Townsel*, during capital postjudgment record correction and certification proceedings in the trial court and while automatic appeal was pending in this Court, 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 as the petitioner on mandamus before the appellate court in this case, the People there defended the trial court's subject matter jurisdiction to issue the order under Code of Civil Procedure section 916 because it did not affect or alter the judgment and thus did not interfere with this Court's exclusive appellate jurisdiction. (*Id.* at pp. 1089-1090.) This Court agreed. (*Ibid.*)

In so doing, this Court explicitly rejected the defendant's argument

that *Johnson* established that trial courts are without jurisdiction to grant nonstatutory motions after imposition of the judgment even during pendency of appeal, notwithstanding Code of Civil Procedure section 916. (*Townsel*, *supra*, 20 Cal.4th at pp. 1089-1091.) As the Court put it, "*Johnson* . . . merely held the process of record correction is not a 'criminal proceeding' sufficient to support orders relating to *discovery*. [Citation.] In resolving the discovery issue in *Johnson*, we did not purport to override section 916(a)'s language that, despite a pending appeal, a trial court could 'proceed upon any matter embraced in the action and not affected by the judgment or order.'" (*Id.* at p. 1090, italics in original.) This holding is consistent with the fundamental separation of powers doctrine that courts do not have the power to override, abrogate, or rewrite a statute enacted by the Legislature other than on constitutional grounds. (See, e.g., *People v. Leal* (2004) 33 Cal.4th 999, 1008, and authorities cited therein; *Connecticut Indem. Co. v. Superior Court* (2000) 24 Cal.4th 807, 814.)

Thus, the *Townsel* Court explicitly limited the precedential value of *Johnson*'s jurisdictional analysis and, by necessary implication, the *Gonzalez* analysis on which it was based. *Johnson*, as well as *Gonzalez*, simply cannot be read for a proposition inconsistent with, or which "purport[s] to override section 916(a)." (*Townsel*, 20 Cal.4th at p. 1090.) The reasoning of the appellate court and the People in this case that *Gonzalez*, *Johnson*, and *Picklesimer* categorically "forbid[] trial courts from ruling on . . . [nonstatutory] '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. 7-10) – is flatly inconsistent with section

916 and precisely what *Townsel* expressly forbade.

Indeed, *Townsel*'s analysis and holding, along with the Court's extensive analysis of Code of Civil Procedure section 916 in *Varian*, *supra*, 35 Cal.4th at pp. 189-191, 196-198, are utterly irreconcilable with the general jurisdictional analyses of *Gonzalez* and *Johnson*, as discussed in the preceding sections. This Court has never applied the jurisdictional analysis reflected in *Gonzalez* and *Johnson* to a case still pending on appeal, as those decisions did, either before or after those decisions. This Court's post-*Gonzalez* and *Johnson* decisions addressing a trial court's subject matter jurisdiction after imposition of judgment and while appeal is pending have clearly recognized that the trial court proceedings are *not* "final" in this context, that only part of the proceedings are stayed, and that the trial court is *not* divested of all jurisdiction to act, contrary to the reasoning of *Gonzalez* and *Johnson.* The trial court's subject matter jurisdiction in this context is governed by Code of Civil Procedure section 916 and turns on the impact of a motion or order on the judgment being appealed and the appellate court's jurisdiction, also contrary to *Gonzalez* and *Johnson.* (*Townsel*, *supra*, 20 Cal.4th at pp. 1089-1091; *Varian, supra*, at pp. 189-191, 196-198.) Hence, it necessarily follows that the broad jurisdictional analyses of both *Gonzalez* and *Johnson* have been impliedly overruled and are dead letter for all purposes.

At best, they must be limited to their particular time and place: postjudgment motions relating to "discovery" under the *then-existing* discovery law reflected in *Gonzalez*. (See *Townsel*, *supra*, 20 Cal.4th at p. 1090.) Because Penal Code section 1054.9 abrogated the discovery law reflected in *Gonzalez*, and now confers on trial courts jurisdiction to grant, and on capital defendants the right to, postjudgment discovery as an aid in

preparing their habeas corpus petitions, even what limited value they may have retained after *Townsel* in the discovery context has been nullified.

Pursuant to the foregoing authorities and under current law, Code of Civil Procedure section 916, subdivision (a), governs the question of whether trial courts in capital cases retain jurisdiction to grant postjudgment motions, brought while appeal from the judgment remains pending, to preserve evidence in anticipation of the appointment of habeas corpus counsel and his or her initiation of factual investigation and postjudgment discovery. (See *Townsel*, *supra*, 20 Cal.4th at pp. 1089-1091; accord, *Varian*, *supra*, 35 Cal.4th at pp. 189-191, 196-198.) Under that statute, the only jurisdictional question becomes whether the motion is collateral to, and does not seek to alter or affect, the judgment being appealed. (*Townsel*, *supra*, at pp. 1089-1091; accord, *Varian*, *supra*, at pp. 189-191, 196-198.) Although the People in this case had ample motive and opportunity to do so, they have never disputed that an evidence preservation motion, like that brought here, satisfies these requirements.[7]

Indeed, the point is indisputable. Just as the trial court in *Townsel*

---

[7] As set forth in Morales's opposition to the People's petition for writ of mandamus, their petition never cited or addressed Morales's reliance in the trial court on Code of Civil Procedure section 916 and *Townsel*. (Opposition, pp. 20, 32, fn. 7.) Morales's opposition also relied heavily on those authorities. (Opposition, pp. 24-30.) Although the appellate court gave the People the opportunity to reply to Morales's opposition and his written notice electing to stand on his opposition to show cause why the People's petition should not be granted, the People elected not to reply and thus not to address or dispute the application of section 916 and *Townsel*. Finally, even at oral argument, Morales's appellate counsel emphasized the People's failure to dispute that if the jurisdictional question were governed by section 916, the motion and order here clearly fell within the trial court's jurisdiction under that statute and *Townsel*. (App. C, p. 4.)

retained subject matter jurisdiction under Code of Civil Procedure section 916 to issue the postjudgment, nonstatutory juror no-contact order while appeal from the judgment remained pending because it did not affect or seek to alter the judgment being appealed, for the same reasons so too do trial courts retain jurisdiction under that statute to issue evidence preservation orders brought in the same procedural posture.

For these reasons alone, this Court must recognize that under current law, trial courts in capital cases retain subject matter jurisdiction to entertain and grant postjudgment evidence preservation motions while appeal from the judgment is pending pursuant to Code of Civil Procedure section 916, subdivision (a). If there remains any doubt over the matter, it is surely resolved by additional laws and policy considerations.

C. Trial Courts Have the Inherent Authority to Order Evidence Preservation as a Means or Process They Deem Necessary to Ensure The Successful Exercise of Their Statutory Jurisdiction to Order Discovery Once Habeas Corpus Counsel is Appointed

Under Penal Code section 1054.9, the trial court has postjudgment jurisdiction over discovery, even in capital cases in which the habeas corpus petition is filed in this Court. (*In re Steele*, *supra*, 32 Cal.4th at pp. 691-692.) While the enactment of section 1054.9 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 that extend the trial court's jurisdiction to evidence preservation orders.

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 reflects the long-recognized, inherent powers of courts to effectuate and protect the jurisdiction conferred upon them.

When jurisdiction is conferred upon the courts by law, whether constitution or statute, they "have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function . . . ." (*People v. Engram* (2010) 50 Cal.4th 1131, 1146 [discussing jurisdiction conferred by California Constitution]; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267; *Millholen v. Riley* (1930) 211 Cal. 29, 33-34.) In the absence of a specific statute, these powers entitle courts to "'adopt any suitable method of practice, both in ordinary actions and special proceedings," for a defendant to invoke, or the court to successfully exercise, its jurisdiction. (*Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813; accord, e.g., *People v. Jordan* (1884) 65 Cal. 644, 645-646.) This power "'arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.' [Citation.]" (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-176.) Under these principles, absent 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*, *supra*, 211 Cal. 29, 33-34; accord, e.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 735.)

The *Townsel* decision is consistent with these principles. There, the

challenged postjudgment jury no-contact order was not explicitly authorized by a specific statute at the time. (*Townsel, supra*, 20 Cal.4th at pp. 1090-1091.) However, Code of Civil Procedure section 206 conferred postjudgment jurisdiction on the trial court to impose sanctions for "unreasonable" juror contact. (*Id.* at p. 1091.) In addition to holding that the trial court had jurisdiction to issue the order under Code of Civil Procedure section 916, this Court held that the no-contact order served and facilitated the court's ability to exercise its jurisdiction under section 206 and for that reason, as well, "both sections 916(a) and 206 establish that [the court] possessed jurisdiction to enter the no-contact order." (*Ibid.*)

Applying the foregoing principles here, "jurisdiction is . . . conferred" on the trial court over postjudgment discovery by Penal Code section 1054.9 within the meaning of Code of Civil Procedure section 187. Therefore, 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 statute. (Code Civ. Proc., § 187.) Hence, if the trial court deems it necessary to order evidence preservation to ensure that discoverable evidence is not lost or destroyed and thereby protect the successful exercise of its statutory jurisdiction to order discovery once habeas corpus counsel is finally appointed and can seek it, the court has the inherent authority to do so. That is just what the trial court in this case ruled.

As the trial judge recognized, she had jurisdiction, or the "authority now," to order discovery. (Opposition, Exhibit D, p. 113.) However, 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 right 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, 68663; Supreme Ct. 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; see also *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897-898, citing and quoting from legislative history of Penal Code section 1054.9 [legislature recognizing "all too often" occurrence that materials will be lost after trial and before habeas corpus counsel can secure them to aid in preparation of petition].) Certainly, that danger is illustrated by this case.

Based on the People's opposition to Morales's evidence preservation motion in the trial court and their mandamus petition in the appellate court, their view is that neither they nor any of the other local agencies to whom the preservation order was directed have 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.) Even assuming that all prosecuting agencies had some hypothetical policy to preserve all discoverable material until such time that postjudgment discovery is sought, without the authority of the court to order preservation of all potentially relevant material until such time that the matter of discovery can actually be litigated, the question of what is and is not discoverable and thus what must and must not be preserved is left to the prosecutors alone in the interim. As a result, discoverable evidence may be lost or destroyed before habeas corpus counsel is appointed and can seek discovery. Such a result acts to prevent the complete and successful exercise of the trial court's discovery jurisdiction. For example, in this case the People have an erroneously limited view of discoverable materials under Penal Code section 1054.9, failing to recognize, inter alia, that postjudgment discovery includes materials in the possession of "'investigating agencies,'" *including* "'any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties'" (*In re Steele, supra*, 32 Cal.4th at pp. 696-697, citing Pen. Code, §§ 1054.1 and 1054.5), as well as the clear relevance of much of the material in this case even at this early stage, despite Morales's particularized showing of their relevance to habeas corpus issues already apparent from the face of the appellate record alone. (Opposition, pp. 37-39; Opposition, Exhibit C, pp. 52-67.) Thus, in the view of the People here, they have no duty to preserve – and hence are free to destroy – materials that would be subject to the discovery provisions of section 1054.9. 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 factual investigation and discovery, could render meaningless

Penal Code section 1054.9 and the court's jurisdiction under that statute.

This danger is a potential "obstruction[]" to the court's "successful operation" as well as the defendant's rights under Penal Code section 1054.9, which the court's inherent powers of "self-preservation" authorize it to remove. (*Millholen v. Riley*, *supra*, 211 Cal. at pp. 33-34; accord, e.g., *People v. Superior Court (Laff)*, *supra*, 25 Cal.4th at p. 735; *James H. v. Superior Court*, *supra*, 77 Cal.App.3d at pp. 175-176.) An evidence preservation order is a suitable or necessary "means" 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" statute. (Code Civ. Proc., § 187.) Just as the trial court's nonstatutory postjudgment no-contact order served and facilitated its postjudgment jurisdiction under Code of Civil Procedure section 206 and thus was a proper exercise of the court's jurisdiction in *Townsel*, so too does a trial court's nonstatutory evidence preservation order serve and facilitate its postjudgment jurisdiction under Penal Code section 1054.9 and thus is a proper exercise of its jurisdiction. (*Townsel*, *supra*, 20 Cal.4th at pp. 1090-1091.)

The trial judge's ruling in this case reflects these principles. Following Morales's written arguments describing the delays in the appointment of habeas corpus counsel and the concomitant danger that discoverable evidence will be lost or destroyed before such counsel is finally appointed and can seek discovery, the court reasoned 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, Exhibit D, p. 113.) Based in part on the judge's reasoning that her authority to order preservation of evidence

potentially relevant to habeas corpus investigation followed from and was necessary to ensure the full and effective exercise of her jurisdiction and the protection of Morales's rights under Penal Code section 1054.9, the trial court granted the motion. (Opposition, Exhibit D, pp. 112-114.) As demonstrated, the trial judge's ruling finds ample support in the law.

Finally, it is true – as the appellate court in this case pointed out (App. A, p. 9) – that in construing the scope of discovery under Penal Code section 1054.9 in *In re Steele*, *supra*, this Court observed that the statute "imposes no preservation duties that do not otherwise exist." (32 Cal.4th at p. 695.) Morales has no quarrel with this point; he agrees that the statute alone imposes no *independent* preservation duties on the part of evidence custodians that do not otherwise exist. Indeed, this is one of the reasons why a trial court's ability to *order* custodians to preserve evidence is necessary in the first place. The fact that the statute alone does not create any new, independent evidence preservation duties in no way undermines the fundamental principle that the trial court retains subject matter jurisdiction to *order* preservation. The *Steele* Court did not address that issue at all; nor did the Court even cite *Johnson*, much less hint that its holding – that a trial court lacks postjudgment jurisdiction to order evidence preservation in anticipation of postjudgment discovery – remains intact.

Pursuant to the foregoing principles, a trial court has the inherent power to act when it deems that act necessary to protect the authority of the court and the rights of a capital defendant that have been created by the Legislature and this Court. This power includes the authority to order the preservation of evidence following the imposition of a death judgment as a matter of law as well as a matter of policy, as set forth below.

D. Preservation Motions Play a Critical Role in Ensuring that Capital Defendants are Not Unfairly Prejudiced by The State's Failure to Timely Appoint Habeas Corpus Counsel, Effectuating the Policies and Procedures This Court Has Developed For Capital Postconviction Practice, and Protecting the Interests of Justice Penal Code Section 1054.9 Was Enacted to Serve

Significant changes in the law and policy governing capital postconviction practice and procedure have occurred since the Court's 1992 *Johnson* and 1990 *Gonzalez* decisions. These changes warrant recognition of a trial court's inherent authority to grant postjudgment evidence preservation motions brought by appellate counsel in capital cases before habeas corpus counsel is appointed.

Prior to 1998, all death penalty appointments were dual, i.e., were for both the direct appeal and habeas corpus/executive clemency proceedings. (See *Marks v. Superior Court*, *supra*, 27 Cal.4th at p. 183.) Beginning in 1998, however, state law and policy were changed and now provide for the appointment of separate counsel on appeal and habeas corpus in capital cases. (Gov. Code, §§ 68662, 68663; Supreme Ct. Policies, policy 3, std. 2-1.) 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 [timely petition to be filed either within 180 days after due date for filing appellant's reply brief on appeal or within 36 months after appointment of habeas counsel, whichever is later].) This right "to appointed habeas corpus counsel 'promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a

reasonably adequate opportunity to present us their habeas corpus claims.' (*In re Barnett* (2003) 31 Cal.4th 466, 475.)" (*In re Morgan, supra*, 50 Cal.4th at p. 937; see also *Christeson v. Roper* (2015) ___ U.S. ___, 135 S.Ct. 891, 893 (per curiam) [by providing indigent capital defendants with similar right to qualified habeas corpus counsel, Congress recognizes that "'habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty'"].)

The Legislature and the Court have also delineated separate duties for appellate and habeas corpus counsel and in so doing have limited the scope of their authority to act in accordance with their defined duties. (Gov. Code, §§ 68662, 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"].) This scheme confers on habeas corpus counsel the exclusive authority to conduct factual investigation into, prepare, and file the habeas corpus petition.

The purpose of the rule requiring the appointment of capital habeas corpus counsel "simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter" (Supreme Ct. Policies, policy 3, std. 2-1) is to ensure that this system actually works. As this Court has explained, "[i]deally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death," so as to "enable habeas corpus counsel to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal" and "ensure the filing of a habeas corpus petition soon after completion of the briefing on the appeal" as contemplated by Policy 3, Standard 1-1.1. (*In re Morgan, supra*, 50

Cal.4th at p. 937.)

Against this background, in 2002 the Legislature enacted the bill that added section 1054.9 to the Penal Code. This 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.) 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 habeas counsel.

The Legislature enacted Penal Code section 1054.9 in order to prevent the injustice that results when habeas corpus counsel is unable to obtain evidence to which she would otherwise have access but does not through no fault of her or the defendant. The legislative history materials to the statute acknowledged the "all too often" occurrence that "a defendant's files are lost or destroyed after trial," resulting in habeas counsel's inability (under *Gonzalez*) to otherwise obtain the materials necessary to file a habeas corpus petition that states a prima facie case for relief. (*Barnett v. Superior Court*, *supra*, 50 Cal.4th at pp. 897-898, citing and quoting from legislative history of Penal Code section 1054.9.) Crippling habeas corpus counsel's ability to prepare a petition due to the loss of or inability to obtain such evidence "through no fault of" her or the defendant leads to "'clear'" "'injustice.'" (*Ibid.*) In order to avoid that result, the Legislature enacted Penal Code section 1054.9 in "the interests of justice." (Pen. Code, § 1054.9, Historical and Statutory Notes; see also *Barnett v. Superior Court*, *supra*, at pp. 897-898, citing legislative history materials.) 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 "shortly after an indigent defendant's judgment of death" (*In re Morgan, supra*, 50 Cal.4th at p. 937) or "simultaneously with appointment of appellate counsel" (Supreme Ct. Policies, policy 3, std. 2-1), motions to *preserve* evidence would be unnecessary. The "interests of justice" Penal Code section 1054.9 were designed to serve would be served by habeas counsel's prompt ability to conduct necessary factual investigation and obtain relevant evidence through discovery (and other means) to support the claims to be raised on habeas corpus petition. However, six years after the Legislature enacted section 1054.9, 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 Report (2008) pp. 114-115, 121, cited by *In re Morgan*, supra, 50 Cal.4th at p. 939.)

In its 2010 decisions in *Morgan* and *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 appoint habeas counsel in a timely manner 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 to existing rules under limited, specified circumstances, to allow filing of "placeholder" petitions that would otherwise result in

prompt and 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, reversed on other grounds in *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538.) 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.*)

As set forth in Part C, *ante*, 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 positions in the proceedings below demonstrate 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, 37-39; Opposition, Exhibit C, pp. 52-67.) Such evidence is not limited to discoverable materials, but also includes other materials relevant to habeas corpus issues that would otherwise be available to habeas corpus counsel if he or she were appointed "shortly after an indigent defendant's judgment of death" (*In re Morgan*, *supra*, 50 Cal.4th at p. 937), such as court records, other materials in the possession of the court's ministerial officers, or materials to which the defendant would otherwise be entitled independent of formal discovery. (See, e.g., Pen. Code, §§ 13300, subd. (b)(11), 13101; Health & Saf. Code, § 123110.) In capital cases, the Legislature has already provided for the permanent preservation of the court records of "capital felony" proceedings "in which the defendant is sentenced to death,"

as well as the "records of the cases of any codefendants and any related cases, regardless of disposition," so long as those related records or cases are so identified on the record. (Gov. Code, § 68152, subd. (c)(1).) When they are not so identified, however, other statutory provisions come into play which provide, inter alia, that court reporters may destroy their notes ten years after the notes have been taken. (Gov. Code, § 69955, subd. (e).) Even when existing statutes already require preservation of records, it is all too common for their negligent loss or destruction to occur. (See, e.g., *People v. Galland* (2008) 45 Cal.4th 354, 369 [custodians negligently destroyed records in violation of Government Code section 68152]; *People v. Hailey* (2004) 34 Cal.4th 283, 305 [juror questionnaires]; *People v. Seaton* (2001) 26 Cal.4th 598, 698 [court's file containing pleadings and other records]; *People v. Osband* (1996) 13 Cal.4th 622, 661 [many trial exhibits].)[8] The likelihood that important evidence will be purposely or negligently lost or destroyed increases with every year that capital defendants wait for their right to habeas corpus counsel to be honored.

Thus, the same concerns that prompted the enactment of Penal Code section 1054.9 continue to exist given the *reality* of current capital postconviction practice and procedure. When habeas corpus counsel appointed years or decades after a death judgment is unable to obtain evidence due to its loss or destruction in the years before her appointment, but to which she would otherwise have had access had she been appointed in a timely manner, "'the injustice is clear.'" (*Barnett v. Superior Court*,

---

[8] Indeed, as Morales argued in the trial court below, such evidence has already been lost in this case, including the preliminary hearing exhibits and two significant pleadings the People filed during trial. (Opposition, Exhibit C, p. 56.)

supra, 50 Cal.4th at pp. 897-898, quoting from legislative history materials.)

As the Legislature recognized in enacting Penal Code section 1054.9, such injustice must be avoided. As the Court recognized in *Morgan* and *Jimenez*, unfair prejudice to the defendant's habeas corpus rights resulting from the failure or inability to appoint habeas corpus counsel in a timely manner must likewise be prevented. Therefore, there must be a mechanism by which to ensure that important evidence will not be lost to habeas corpus counsel due to the failure to timely appoint her and not to any fault of her or the defendant.

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.) But that step, clearly, is not enough, as evidenced by the appellate court's opinion in this case.

As demonstrated, there *is* a mechanism by which to prevent unfair prejudice to the rights of capital defendants due to the loss or destruction of evidence resulting from the failure to timely appoint habeas corpus counsel: appellate counsel's ability to invoke the trial court's postjudgment jurisdiction to entertain and grant evidence preservation motions while appeal from the judgment remains pending and before habeas corpus counsel is appointed. This Court need only recognize the lawfulness of that procedure in the interests of justice.

II. EVEN IF THIS COURT HOLDS THAT TRIAL COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION TO ISSUE EVIDENCE PRESERVATION ORDERS AFTER THEY HAVE IMPOSED JUDGMENT AND WHILE APPEAL THEREFROM IS PENDING, THE LAW PRIOR TO ITS DECISION IN THIS CASE AND AFTER ITS 1999 *TOWNSEL* DECISION AND THE 2003 EFFECTIVE DATE OF PENAL CODE SECTION 1054.9, WAS UNSETTLED AND THUS DID NOT IMPOSE ON TRIAL COURTS A CLEAR, SPECIFIC, PRESENT LEGAL DUTY TO DENY SUCH MOTIONS

As discussed in Argument I-A, *ante*, mandamus law governed the appellate court's consideration of the People's petition for writ of mandamus in this case and its holding that mandamus should issue to the trial court to vacate its evidence preservation order for lack of subject matter jurisdiction. Under Code of Civil Procedure section 1085, traditional mandamus will only lie to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station.[9] The petitioner on mandamus bears the burden of pleading and proving the claims for relief on mandamus. (See, e.g., *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153-1155.)

Among other elements, the petitioner must show that he or she has a "clear, present, and beneficial right" to performance of a "clear, present . . . ministerial duty on behalf of the respondent" sought to be compelled through mandamus. (*Picklesimer, supra*, 48 Cal.4th at p. 340, and

---

[9] Code of Civil Procedure section 1085 provides in relevant part: "(a) A writ of mandate may be issued by any court to any inferior tribunal. . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

authorities cited therein, ellipses in original.) With respect to respondent's duty, "[a] ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act." (*Ibid.*) The legal duty to act must be "specific," "clear," and "present" at the time the act sought to be compelled through mandamus was refused. (*Ibid*; Code Civ. Proc., § 1085; *Jacobs v. Board of Supervisors of City and County of San Francisco* (1893) 100 Cal. 121, 129 [the act to be commanded must be "definite, certain and fixed" at the time the respondent refused to so act]; accord, *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 456; *Lundgren v. Deukmejian* (1988) 45 Cal.3d 777, 731-732 ["present" duty is "measured as of the time the proceeding is filed"].) In the absence of a specific statute clearly creating such a duty, "there must be a clear case to 'compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station'" for mandamus to issue. (*Perrin v. Honeycutt* (1904) 144 Cal. 87, 90; accord, e.g., *300 DeHaro Street Investors v. Dept. of Housing and Community Development* (2008) 161 Cal.App.4th 1240, 1255; *Wenzler v. Municipal Court* (1965) 235 Cal.App.2d 128, 132-133.)

Under these principles, the People who petitioned for mandamus relief in this case bore the burden of demonstrating that a "clear case" created a "specific," "clear" and "present" legal rule mandating the trial court to deny postjudgment evidence preservation motions for lack of subject matter jurisdiction, even while appeal was pending, at the time of its 2014 order granting the motion and the People's responsive petition for writ of mandamus. Of course, if this Court agrees that a trial court has subject matter jurisdiction to entertain and grant postjudgment evidence

preservation motions while appeal from the judgment remains pending pursuant to the legal authorities set forth in Argument I, *ante*, it necessarily follows that the appellate court's order granting the People's petition for writ of mandamus must be reversed. But even, assuming arguendo, that this Court declines to hold that a trial court has such jurisdiction, the same result is required.

As discussed in Argument I-A, *ante*, the appellate court implicitly found that the People had satisfied their burden by broadly holding that *Johnson*, *Gonzalez*, and *Picklesimer* categorically "forbid[] trial courts from ruling on" on any and all 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 and regardless of the purpose and effect of the order granting the motion. (App. A, pp. 7-10.) Without question, the law in 2014 did *not* clearly establish the rule so stated.

To the contrary, the law clearly established just the opposite. (Code Civ. Proc., § 916, subd. (a); *Townsel*, *supra*, 20 Cal.4th at pp. 1089-1091.) Indeed, in *Townsel*, the People successfully argued that after judgment is imposed but while appeal is still pending, trial courts retain jurisdiction under Code of Civil Procedure section 916, subdivision (a), to grant motions that are connected to the trial court proceedings and involve matters collateral to the judgment being appealed. (*Townsel*, *supra*, at p. 1089.) It is axiomatic, then, that the People in this case could not and did not satisfy their burden of establishing that the trial court's exercise of that very jurisdiction to grant Morales's evidence preservation motion violated any *clear, specific* legal duty to the contrary.

The appellate court's holding that the trial court clearly had no

subject matter jurisdiction to grant the evidence preservation motion was not limited to such motions in particular but rather purported to apply to that motion a non-existent rule that – in its view – applies to any and all nonstatutory motions brought after imposition of the judgment. (See App. A, pp. 7-10.) As to the specific question of whether trial courts had a clear, specific, and present legal duty to deny postjudgment evidence preservation motions in particular for lack of subject matter jurisdiction at the time of the court's 2014 ruling and the People's initiation of the mandamus proceedings in this case, this Court decides that issue de novo, as one of pure law that does not involve any disputed facts. (*Branciforte Heights, LLC v. City Of Santa Cruz* (2006) 138 Cal.App. 4th 914, 933, and authorities cited therein.) As to this question, it is true that the 1992 *Johnson* decision was "clear" in holding that trial courts do not have postjudgment jurisdiction to entertain and grant evidence preservation motions brought in anticipation of postjudgment pre-petition discovery based on the *Gonzalez* analysis and in holding that courts *at that time* had no jurisdiction to grant, and defendants enjoyed no right to, such discovery. (*Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258.) However, the legal proposition reflected in *Johnson* was no longer "clear" in 2014, or indeed at any time after this Court's 1999 *Townsel* decision and the Legislature's enactment of Penal Code section 1054.9, for the reasons discussed in Argument I, *ante*. Even if the authorities cited in Argument I, *ante,* did not clearly establish the trial court's authority to *grant* the evidence preservation motion in this case, at the very least they conflicted with and cast considerable doubt on the continued vitality of *Johnson,* and the clarity of any "rule" requiring trial courts to *deny* such motions for lack of subject matter jurisdiction in 2014.

Furthermore, *Johnson*'s jurisdictional holding was qualified even at the time it was made. In contrast to its holding that a trial court lacked subject matter jurisdiction to order preservation of potentially *discoverable* evidence under *Gonzalez*, *Johnson* recognized that superior courts "*may well have* the inherent authority to issue an order for the preservation" of records maintained by their ministerial officers after imposition of judgment. (*Johnson, supra*, 3 Cal.4th at p. 1258, italics added, citing Code Civ. Proc., § 128, subd. (a) [court has inherent authority to control acts of its "ministerial officers" in "furtherance of justice"]; see also Opposition, pp. 8-10, 33-34.) The San Bernardino County Superior Court's evidence preservation order in this case was directed in substantial part to San Bernardino County Superior Court records in this and related cases and other materials in the possession of that court's ministerial officers, based on a particularized showing of their potential relevance to habeas corpus investigation. (Opposition, pp. 8-10, 33-34; Opposition, Exhibits A, C, D, F.) Hence, even at the time of *Johnson* decision, it did not impose a "clear" or "specific" duty on the part of trial courts to deny motions to preserve materials in the custody of the superior court where the case was tried, or its ministerial officers, for lack of subject matter jurisdiction.[10]

The absence of any "specific," "clear" and "present" legal rule mandating trial courts to deny postjudgment evidence preservation motions

---

[10] As the burden bearing party on mandamus who relied solely on *Johnson* and *Gonzalez* in arguing the trial court's lack of subject matter jurisdiction in 2014, the People simply ignored the overriding or at the very least conflicting legal principles set forth in Argument I, *ante*, and the *Johnson* decision's own limitations on its jurisdictional holding. (Opposition, pp. 20, 32-34, fn. 7; App. C.) The appellate court's opinion followed suit. (See App. A.)

for want of subject matter jurisdiction is further demonstrated by this Court's judicially noticed facts that trial courts across the state have granted such motions during pendency of appeal since the enactment of Penal Code section 1054.9. (See fn. 5, *ante*.) Whether this Court ultimately determines that those courts were right or wrong, it is impossible to reconcile their rulings with a "specific," "clear" and "present" legal "duty" on trial courts to deny all such motions for lack or subject matter jurisdiction.

Given the foregoing, the necessary prerequisite for mandamus relief in this case was not and could not be satisfied. There simply was no "specific," "clear" and "present" rule of law that compelled the trial court to deny the evidence preservation motion here for lack of subject matter jurisdiction at the time of its 2014 ruling and the initiation of mandamus proceedings in the appellate court.

In other words, even if this Court were to decide that trial courts do not have subject matter jurisdiction to issue postjudgment evidence preservation orders during the pendency of appeal under current law and announce a clear rule which creates a clear duty on the part of trial courts to deny preservation motions on that ground in the future, that holding would necessarily entail resolving the *uncertainty* resulting from the conflict between Gonzalez and Johnson on the one hand and the subsequent authorities discussed in Argument I, *ante*, on the other. "As a general rule, by its very nature, a writ of mandamus cannot . . . create or impose new" duties. "Mandamus may be used only for the purpose of enforcing the exercise . . . or the performance of such duties *as already exist without the mandate*." (55 C.J.S. Mandamus, § 78 (2015), fns. omitted, italics added; accord, *Supervisors v. United States* (1873) 85 U.S. 71, 77 [under traditional mandamus principles, "the office of a writ of mandamus is not to

create duties, but to compel the discharge of those already existing"]; see also 55 C.J.S. Mandamus, *supra*, § 74 ["If for any reason the duty to perform the act is doubtful" at the time it is refused and the mandamus petition is filed, "the obligation is not regarded as imperative" and mandamus will not issue].) Hence, reversal of the appellate court's mandamus order to the trial court to vacate its evidence preservation order in this case would still be required.

//

//

CONCLUSION

The *Gonzales* and *Johnson* decisions were promulgated in a legal galaxy that existed long ago and far away. Since those cases were decided this Court has clarified the scope of a trial court's jurisdiction when an appeal is pending and the trial court is considering an issue that does not go to the merits of the judgment; the Legislature has significantly altered the law by providing for pre-petition discovery in capital and LWOP cases; and the law and policy have radically changed regarding appellate and postconviction litigation in capital cases. All of these factors render irrelevant the *Gonzales* and *Johnson* decisions and mandate a finding that in the current legal landscape trial courts have jurisdiction to consider and grant evidence preservation motions. This Court should now clearly declare that to be the law.

DATE: December 24, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

BARRY P. HELFT
Chief Deputy State Public Defender

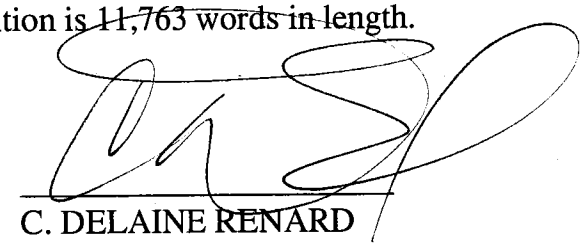
C. DELAINE RENARD
Senior Deputy State Public Defender

Attorneys for Real Party in Interest/Appellant

CERTIFICATE OF COUNSEL

Calif. Rules of Court, rule 8.520(c)(1)

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent defendant and appellant on his automatic appeal from his death sentence before this Court, and real party in interest in the mandamus proceedings before the appellate court below and on review thereof before this Court, Johnny Morales. I have conducted a word count of this brief on the merits using our office's computer software. On the basis of that computer-generated word count and pursuant to rule 8.520(c)(1), I certify that this petition is 11,763 words in length.



C. DELAINE RENARD
Senior Deputy State Public Defender
Attorney for Real Party in Interest/
Appellant 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.

---

[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]

---

[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*

---

[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.*

---

[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,"

---

[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

---

[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: 7/9/2014

SUPERIOR COURT OF CALIFORNIA COUNTY OF

INGRID A. UHLER
JUDGE OF THE SUPERIOR COURT

APPENDIX B

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.

cc: See attached list

MAILING LIST FOR CASE: E061754
The People v. The Superior Court; Johnny Morales

Superior Court Clerk
San Bernardino County
247 West Third Street
San Bernardino, CA 92415

Michael Thomas Murphy
Office of the Attorney General
P. O. Box 85266
San Diego, CA 92186-5266

Cheryl Delaine Renard
Office of the State Public Defender
1111 Broadway Suite 1000
Oakland, CA 94607

Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101-2396

District Attorney
County of San Bernardino
Appellate Services Unit
412 Hospitality Lane, 1st Flr.
San Bernardino, CA 92415-0042

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.

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. 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**

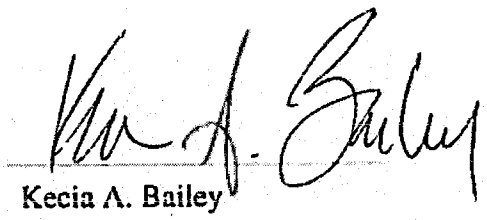
DECLARATION

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. 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:

REAL PARTY IN INTEREST/APPELLANT'S OPENING BRIEF ON THE MERITS

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
600 W. Broadway, Suite 1800
San Diego, CA 92186-5266

JOHNNY MORALES, V-94083
CSP-SQ
5-EB-101
San Quentin, CA 94974

MICHAEL T. MURPHY
Deputy Attorney General
Office of the Attorney General
600 W. Broadway, Suite 1800
San Diego, CA 92186-5266

CLERK OF THE COURT
San Bernardino County Superior Court
247 West Third Street
San Bernardino, CA 92415

MICHAEL DOWD
Supervising Deputy District Attorney
San Bernardino County District Attorney
900 E. Gilbert Street
San Bernardino, CA 92415

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

Each said envelope was then, on December 28, 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 28th day of December 2015, at Oakland, California.

Kecia Bailey