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 REPLY 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

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ARGUMENT

I. WHILE A JUDGMENT IS PENDING ON APPEAL, TRIAL JUDGES IN CAPITAL CASES HAVE 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

The briefing in this case presents two distinct approaches for the Court to choose between. The first approach involves an interpretation of existing law and precedents, as well as legislative intent and policy declarations of this Court, that supports the view that we want a criminal justice system in this state that provides the same opportunity for all capital defendants to litigate the soundness of their convictions and sentences regardless of the vagaries of the appointment process and the serendipity of when they may receive habeas corpus counsel. The second approach takes a cribbed view of this Court's precedents as well as legislative intent, while giving short shrift to the policies of the Court that were developed with the idea of ensuring an equitable and just capital review scheme. Morales urges this Court to adopt the first approach as the second approach belittles us all.

B. Trial Courts Have Subject Matter Jurisdiction to Issue Preservation Orders Pursuant to the Dictates of Code of Civil Procedure Section 916, Subdivision (a)

The essence of the Attorney General's argument, raised for the first time before this Court, is that evidence preservation motions are not the type of matters contemplated by Code of Civil Procedure section 916, subdivision (a), which bestows jurisdiction on a trial court over "any other

matter embraced in the action and not affected by the judgment" on appeal. (Answer Brief on the Merits ("Answer") 11-16; compare Opening Brief on the Merits ("BOM") 20 & fn. 7 ["[a]lthough 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 the[] requirements" of section 916(a) for purposes of the court's ongoing jurisdiction].)

The Attorney General now contends that the fundamental basis of the decisions in *People v. Gonzalez* (1990) 51 Cal.3d 1179 ("*Gonzalez*") and *People v. Johnson* (1992) 3 Cal.4th 1183 ("*Johnson*") was that motions relating to postjudgment discovery, in contrast to other kinds of postjudgment motions, are not matters "embraced in the action" under Code of Civil Procedure section 916, subdivision (a). (Answer 14-16.) While admitting that Penal Code section 1054.9 superceded *Gonzalez* to the extent that the statute specifically confers jurisdiction on trial courts to conduct postjudgment discovery proceedings, the Attorney General asserts that "the key to the decision in both *Gonzalez* and *Johnson*" (Answer 16), or the "dispositive issue" in both cases (Answer 19), was that matters relating to postjudgment discovery are not "embraced in the action" within the meaning of section 916(a) (Answer 14-21). This fundamental basis of both decisions thus still "control[s]" and demands that trial courts still have no jurisdiction to proceed on evidence preservation motions under section 916(a). (Answer 5-6, 14-21.) The Attorney General is wrong.

1. Because They Do Not Affect the Judgment Being Appealed and are Connected to the Underlying Criminal Proceedings, the Trial Court has Jurisdiction over Evidence Preservation Motions Under Code of Civil Procedure Section 916, Subdivision (a)

The Attorney General seemingly accepts the proposition that an evidence preservation motion is not a matter that is "embraced in" or "affected by" by the judgment pending appeal within the meaning of the automatic stay provision of Code of Civil Procedure section 916, subdivision (a). Instead, the Attorney General parses the permissive language of the statute, i.e., "but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment," to contend that, although they do not affect the judgment, evidence preservation motions do not involve matters "embraced in the action." (Answer 13-16.) In doing so, however, the Attorney General does not attempt to give meaning to the term "embraced in the action," but simply asserts that preservation motions do not fall within this category. (Answer 13-16.)

Basically, the Attorney General seems to believe that this Court's decision in *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564 provides all the support needed for the proposition that a preservation order does not involve a "matter embraced in the action." (Answer 14-16.) This constitutes a significant misreading of the import of *Pearson*.

The issue being resolved in *Pearson* was whether the enactment of Penal Code section 1054.9 constituted an amendment to Proposition 115. (*People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 567.) This is important to note because everything in the opinion was in aid of resolving that narrow issue and not some broader issue relating to a trial court's subject matter jurisdiction. Consequently, when this Court characterized a

habeas corpus proceeding as a "separate matter from the criminal case itself" and postjudgment discovery under Penal Code section 1054.9 as – by its own terms – "part of the prosecution of the habeas corpus matter, not part of the underlying criminal case," those characterizations had a meaning in *Pearson* that they do not have here. (*Pearson*, *supra*, at p. 572; see Answer 14-15.) As the Attorney General otherwise emphasizes, "context is important . . . ." (Answer 25). Yet, the Attorney General decontexualizes these observations and attempts to give them a meaning that does not fit the issue presented by this case.

The Attorney General uses the above observations as support for the conclusion that postjudgment discovery under Penal Code section 1054.9 is not a "matter embraced in the" criminal action within the meaning of Code of Civil Procedure section 916, subdivision (a), from which it necessarily follows that a motion to preserve evidence is also not a matter embraced in the underlying criminal action. (Answer 14-15.) The problem with this approach is that the differing contexts between *Pearson* and this case render the quotations relied upon by the Attorney General of little use in supporting her position.

Preliminarily, the Attorney General erroneously equates a motion to *preserve* evidence with a motion for *discovery* under Penal Code section 1054.9. While they are certainly related, they are distinct. A motion to *preserve* evidence is just that – a motion for an order to custodians to maintain preservation of the existing status quo of evidence relating to the criminal proceedings and resulting death judgment, and which appears to be relevant to potential challenges to that judgment, in order to ensure its availability to habeas corpus counsel when he or she is finally appointed. A postjudgment discovery motion is one for an order to custodians to *produce*

or otherwise give habeas corpus counsel reasonable access to discoverable materials. A motion to preserve evidence is brought by capital appellate counsel *before* "the prosecution" of the habeas corpus matter, which commences upon the appointment of habeas corpus counsel and his or her preparation of the petition, and as a matter of necessity precisely *because* "the prosecution" of the habeas corpus matter has not yet commenced through no fault of the capital defendant. (See BOM 9-34.)

The terms of Penal Code section 1054.9 itself grant posttrial discovery rights only to material to which the same defendant would have been entitled at the time of trial. (*People v. Superior Court (Pearson), supra,* 48 Cal.4th at p. 569.) Thus, the substance of the preservation motion addresses only material relating to the underlying criminal case, regardless of the fact that the material may be later produced at a habeas proceeding. As the Court itself pointedly stated in *Pearson*: "The substance, not the form, is what matters." (*Id.* at p. 573.) A fair reading of the content of *Pearson* actually supports Morales's assertion that a preservation motion encompasses a "matter embraced in the action" for purposes of Code of Civil Procedure section 916, subdivision (a).

Morales's position is also supported by this Court's holding in *Townsel v. Superior Court* (1999) 20 Cal.4th 1084 ("*Townsel*"). At issue there was the trial court's postjudgment jurisdiction under Code of Civil Procedure section 916, subdivision (a), to issue a nonstatutory order prohibiting the defendant/petitioner's counsel from contacting the jurors discharged in the underlying capital criminal action (a "no-contact order"). (*Townsel, supra,* 20 Cal.4th at pp. 1088-1091; see also BOM 10-12, 17-21.) The duration of that order was not limited to the lifetime of the underlying criminal "action," which would be completed upon issuance of the appellate

remittitur, but rather continued indefinitely. (*Id.* at pp. 1088, 1090.)

As the Court explained the dispute in that case:

> Petitioner and the Attorney General differ on whether the order falls within the exception for "other matter[s] embraced in the action and not affected by the judgment," as that phrase is used in section 916(a). As we explain, the Attorney General has the better argument. . . .
>
> The Attorney General argues that, despite the exclusive nature of our appellate jurisdiction, the trial court can enter any order that is "collateral or supplemental to the questions involved on the appeal [citation]," as long as it is "*connected* with the criminal proceeding before the trial court." To the extent he is arguing the trial court had jurisdiction to enter an order regarding 'other matter[s] embraced in the action and not affected by the judgment,' as that phrase is used in section 916(a), we agree. Assuming the no-contact order is otherwise supportable, we fail to see how that order could interfere with this court's appellate jurisdiction.

(*Townsel*, *supra*, 20 Cal.4th at p. 1090; *Id.* at pp. 1089-1090 [under section 916(a), the trial court retains jurisdiction over "'incidental aspects of the cause'" so long as they do not affect the judgment or order being appealed]; see also BOM 10-12, 17-21.) Because the order did not alter or affect the judgment being appealed and the matter of the order was "connected" to the underlying criminal action, even though also separate and independent from it to the extent that the order was not limited to the lifetime of its pendency, this Court held that the trial court had jurisdiction to issue it under Code of Civil Procedure section 916, subdivision (a). (*Townsel*, *supra*, at pp. 1089-1090.)

The Court subsequently expanded the jurisdictional meaning of the language in Code of Civil Procedure section 916, subdivision (a), in *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 ("*Varian*"). (See

BOM 11-15, 20.) As the Court in *Varian* emphasized, the meaning of that statute turns on its principal purpose of protecting the appellate court's jurisdiction by preserving the status quo until the appeal is decided and preventing the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. (*Varian*, *supra*, at p. 189; accord, *Townsel*, *supra*, 20 Cal.4th at p. 1089.) To accomplish this purpose, section 916, subdivision (a), stays all further trial court proceedings, and thereby divests the trial court of subject matter jurisdiction to proceed further "'upon the matters embraced' in or 'affected' by the appeal." (*Varian*, *supra,* at p. 189; accord, *Townsel*, *supra*, at p. 1089.)

With this purpose in mind, the *Varian* Court described the critical jurisdictional test under the statute: "'Whether a matter is 'embraced' in or 'affected' by a judgment or order [pending appeal] 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.' [Citation.] "'If so, the proceedings are stayed'" and the trial court is divested of jurisdiction over them; "'*if not, the proceedings are permitted*' (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938)" and therefore the trial court has jurisdiction to act. (*Varian*, *supra*, 35 Cal.4th at pp. 189, 196-198.) Under this test, the automatic stay provision of Code of Civil Procedure section 916, subdivision (a), does not apply, and the trial court retains jurisdiction to proceed on and determine, inter alia, any "'ancillary or collateral matters which do not affect the judgment or order on appeal' . . . . (*Betz*, *supra*, 16 Cal.App.4th at p. 938.)" (*Varian*, *supra*, 35 Cal.4th at p. 191.) Thus, consistent with *Townsel*, the trial court's subject matter jurisdiction to proceed on "any . . . matter embraced in the action and not

affected by the judgment or order" turns primarily on the fact that the matter does not affect the judgment on appeal and includes any collateral matters that are "connected" or "incidental" to the underlying action.[1]

Applying these principles here, the Attorney General does not claim that an evidence preservation motion is a matter embraced in or affected by a judgment or order or that postjudgment proceedings on the matter would have an effect on the appeal. (*Varian*, *supra*, 35 Cal.4th at p. 189.) Hence, as *Varian* succinctly put it, "the proceedings are permitted'" for jurisdictional purposes. (*Ibid.*) Moreover, evidence preservation motions are "connected" to the underlying criminal action and death judgment insofar as they seek to preserve the status quo of evidence relating to the criminal proceedings and resulting death judgment. (See Morales's Opposition to People's Petition for Mandate ["Opposition"], Exhibits A & C [evidence preservation motion directed to evidence apparent from face of record of trial proceedings].)

Though a separate cause of action, the habeas corpus proceedings, of which postjudgment discovery is a part, are still related to the underlying criminal proceedings and judgment. The postjudgment discovery provisions of Penal Code section 1054.9 are an aid in preparing for a collateral attack on the validity of the underlying criminal judgment and are

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[1] The Attorney General fleetingly contends that *Varian* is inapposite because it did not specifically address or define the term "embraced in the action." (Answer, 19.) The Attorney General is incorrect. *Varian* addressed the meaning of the statutory language read as a whole and its discussion of the trial court's jurisdiction to proceed under Code of Civil Procedure section 916, subdivision (a), necessarily encompassed "any other matter embraced in the action and not affected by the judgment or order" being appealed.

directed to matters to which the defendant was or would have been entitled to at trial. (See *In re Steele* (2004) 32 Cal.4th 682, 696-697, citing Pen. Code, §§ 1054.1 and 1054.5.) Indeed, given its relationship to the underlying criminal proceedings and judgment, this Court has held that the trial court is the appropriate forum in which to litigate postjudgment discovery under Penal Code section 1054.9 in both capital and noncapital cases, even when the petition itself will be filed in this Court. (*In re Steele*, *supra*, at pp. 691-692.) Against this background, the fact that evidence preservation motions are intended to serve and protect the purpose of future postjudgment discovery proceedings under Penal Code section 1054.9 and ensure the availability of critical evidence to capital habeas corpus counsel once he or she is finally appointed, does not divorce those motions entirely from the underlying criminal action. To the contrary, under the *Townsel* Court's further jurisdictional analysis, the purpose of evidence preservation motions only reinforces the trial court's jurisdiction to proceed upon them.

Although the no-contact order in *Townsel* was not authorized by a specific statute at the time, this Court emphasized that it could consider another statute–Code of Civil Procedure section 206–when engaging in its jurisdictional analysis regarding the validity of the no-contact order. That statute addressed the issue of reasonable and unreasonable juror contact after the verdict in a criminal case. (*Townsel*, *supra*, 20 Cal.4th at pp. 1091, 1095-1096; see also BOM 22-23.) At the time, section 206 provided that before discharging jurors in a criminal case, the trial judge was to inform them that they had an absolute right to decide whether or not to discuss their deliberations or verdict with anyone. (Code Civ. Proc., § 206, subd. (a), see Stats. 1988, ch. 1245, § 2, p. 4145.) It further provided that after the jurors were discharged, any unreasonable and unwanted juror contact was to be

reported to the trial judge and considered a violation of a lawful court order and subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure. (*Id.*, subds. (c) & (d); *Townsel, supra*, 20 Cal.4th at pp. 1091, 1095-1096.) An action against counsel for the imposition of reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure is a separate or collateral matter to the underlying criminal proceedings. (See, e.g., *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 975-976, and authorities cited therein.)

Nevertheless, the *Townsel* Court held that Code of Civil Procedure section 206 "presupposes that the trial court will retain jurisdiction to resolve issues concerning an attorney's postverdict contact with jurors. . . . [and] to act to protect jurors from harassment or other unwanted contact despite the court's having already received the verdict and discharged the jury." (*Townsel, supra*, 20 Cal.4th at p. 1091.) Although there was no evidence that any of the *Townsel* jurors had expressed a desire not to be contacted, and no indication that the defendant/petitioner's counsel had made, attempted, or intended any unreasonable or unwanted juror contact, the Court held that it was within the power of the trial court "to act[] as a *gatekeeper to ensure* that any juror contact by petitioner's counsel (or a representative of petitioner), now almost a decade after the jury verdict in a capital case, is both consensual and reasonable" as contemplated by Code of Civil Procedure section 206 and the inherent authority of the court to protect jurors reflected therein. (*Id.* at p. 1087, italics added; *Id.* at pp. 1095-1096.) Therefore, the Court concluded, "*both* sections 916(a) and 206 establish that [the trial court] possessed jurisdiction to enter the no-contact order." (*Id.* at p. 1091, italics added.)

Here, much like Code of Civil Procedure section 206, Penal Code

section 1054.9 addresses the trial court's jurisdiction over a related though separate matter from the underlying criminal proceedings – postjudgment discovery. Just as the explicit jurisdictional provisions of section 206 were conditioned upon a future act – unreasonable juror contact – the explicit jurisdictional provisions of Penal Code section 1054.9 are conditioned upon future acts – the appointment of habeas corpus counsel and her invocation of its discovery provisions. If Code of Civil Procedure section 206 "presuppose[d] that the trial court will retain jurisdiction to resolve" *all* matters relating to an attorney's postverdict contact with jurors in order "to act[] as a gatekeeper to ensure" that the purpose of the statute would be served by preventing even the possibility of any unreasonable or unwanted contact, the same must be said about Penal Code section 1054.9. Like Code of Civil Procedure section 206, section 1054.9 necessarily "presupposes that the trial court will retain jurisdiction" over all matters pertaining to potentially discoverable evidence in order to "act as a *gatekeeper* to ensure" that its purpose will be served by preventing the possibility that discoverable evidence will be lost or destroyed.[2] (*Townsel*, *supra*, 20 Cal.4th at p. 1087, italics added; *Id.* at pp. 1095-1096.) Hence, the jurisdictional analysis of *Townsel* applies with full force to support the trial court's jurisdiction to proceed upon and grant evidence preservation motions after it has pronounced judgment, during the pendency of appeal, and before the appointment of habeas corpus counsel, under Code of Civil

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[2] Indeed, this is how the superior court judge viewed her role as reflected by her statement 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. 114.)

Procedure section 916, subdivision (a).

2. Neither *Gonzalez* Nor *Johnson* Held That Matters Relating to PostJudgment Discovery are Not "Embraced in the Action" Within the Meaning of Code of Civil Procedure Section 916, subdivision (a)

The Attorney General contends that "the *Gonzalez* court properly concluded that the trial court lacked jurisdiction to act on a motion seeking habeas discovery" because habeas discovery – unlike other motions that are permitted after pronouncement of judgement under Code of Civil Procedure section 916, subdivision (a) – "is not a matter 'embraced in' the underlying criminal action." (Answer 15.) Likewise, *Johnson* properly followed *Gonzalez* in holding that "because the defendant's [evidence preservation motion] related to postjudgment discovery – a matter not embraced in the action – and because the motion did not relate to the record correction proceedings pending in the trial court," the trial court had no jurisdiction to grant the motion under section 916, subdivision (a). (Answer 15.) It is *that* principle from *Gonzalez* and *Johnson*, the Attorney General now contends, that remains intact notwithstanding the enactment of Penal Code section 1054.9, and hence still controls the Court's resolution of the issue today. (Answer 15-16.) The Attorney General is wrong.

As the Attorney General correctly observed below (People's Petition for Writ of Mandate, pp. 7, 12), *Gonzalez*'s jurisdictional analysis was based on the premise that trial courts are without jurisdiction to grant postjudgment discovery after pronouncement of judgment because, "'*as with any other motion*, 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.*'" (*Gonzalez, supra*, 51 Cal.3d at p.

1257, italics added, quoting from *People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251 [applying rule to discovery motion brought after "true" final judgment following issuance of the appellate remittitur].) Despite the fact that appeal was still pending from the judgment and therefore not yet final, the *Gonzalez* Court reasoned that this principle still applied: after the trial court's pronouncement of judgment, "no criminal proceeding was then pending before it" to which any motion, including but not limited to a discovery motion, could attach. (*Id.* at p. 1256; see also Petition for Writ of Mandate, pp. 7, 12; Appendix A to BOM pp. 7-10.)

Apart from its bare citation to Code of Civil Procedure section 916, subdivision (a), buried in a string cite to inapposite authorities regarding the trial court's divestment of all jurisdiction *after* issuance of the appellate remittitur, the *Gonzalez* Court did not discuss or address Code of Civil Procedure section 916, subdivision (a), at all. Indeed, the dissenting justices criticized the majority's decision for precisely that reason. (*Gonzalez, supra*, 51 Cal.3d at pp. 1284-1285, dis. opn. of Broussard, J., joined by Mosk, J.) Certainly, the *Gonzalez* Court did not parse the language of the statute to hold that postjudgment discovery is not a "matter embraced in the action." It is axiomatic that cases are not authority for propositions not considered therein. (See, e.g., *People v. Brown* (2012) 54 Cal.4th 314, 330.) Hence, the Attorney General's contention that *Gonzalez* controls resolution of an issue it never considered is without merit.

Nor did *Johnson* hold that trial courts have no jurisdiction under Code of Civil Procedure section 916 to issue evidence preservation orders because they are not "embraced in the" criminal "action" that was still pending before the trial court. (Answer 15.) To the contrary, and as the appellate court here held, *Johnson* relied entirely on *Gonzalez*'s

jurisdictional analysis that *all* of the proceedings on the action are final after judgment is pronounced and hence there is nothing pending to which *any* motion can attach. (*Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258, citing *Gonzalez, supra*, 51 Cal.3d at pp. 1256-1258 and *People v. Ainsworth, supra*, 217 Cal.App.3d at pp. 250-255; App. A, pp. 7-10; see also BOM 16-19.) As this Court later emphasized in *Townsel*, *Johnson*'s jurisdictional analysis under section 916 amounted to no more and no less than that "*Johnson* . . . merely held the process of *record correction* is not a 'criminal proceeding' sufficient to support orders relating to discovery." (*Townsel*, *supra*, 20 Cal.4th at p. 1090, italics added; BOM 18.) Otherwise, *Johnson*'s holding with respect to evidence preservation motions in particular also rested entirely on *Gonzalez*: because *Gonzalez* established that there was no right or jurisdiction to grant postjudgment, prepetition discovery, there was necessarily no right or jurisdiction to grant what the Court considered to be "anticipatory postjudgment discovery." (*Johnson*, *supra*, 20 Cal.4th at p. 1257-1258.)

The subsequent enactment of Penal Code section 1054.9 superceded *Gonzalez* on that basis and now establishes that – unlike the law on which the *Johnson* decision rested – there is a right to and jurisdiction to grant postjudgment, prepetition discovery. Consequently, the essential basis for *Johnson*'s holding that there is no right or jurisdiction to grant an evidence preservation motion in anticipation of postjudgment discovery because there was no such discovery at the time, has likewise been superceded by that statute.

In short, the *Gonzalez* and *Johnson* decisions are dead letter. Under current law and Code of Civil Procedure section 916, subdivision (a), trial courts have jurisdiction to proceed on evidence preservation motions after

pronouncement of the judgment and during the pendency of appeal therefrom because they do not affect the judgment being appealed and are otherwise connected to the underlying criminal proceedings resulting in the judgment. (BOM 10-21.)

C. Trial Courts Have the Inherent Authority to Order Evidence Preservation to Ensure The Successful Exercise of Their Statutory Jurisdiction to Order Discovery Once Habeas Corpus Counsel is Appointed

A trial court's authority to grant evidence preservation motions is also supported by Code of Civil Procedure section 187, which is "declaratory of the common law" governing the inherent powers of the courts. (*Traffic Truck Sales Co. v. Justice Court* (1923) 192 Cal. 377, 382, disapproved on other grounds in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 303; see BOM 21-27.) 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." (See also BOM 21-27, citing, inter alia, *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267, *Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813, *Millholen v. Riley* (1930) 211 Cal. 29, 33-34, and *People v. Jordan* (1884) 65 Cal. 644, 645-646.) The only limitation on this inherent authority occurs when the procedural mechanism is otherwise prohibited by a specific statute, Judicial Council Rule, or the expressed will of the Legislature. (See, e.g., *Smith v. Smith* (1954) 125 Cal.App.2d 154, 166-167 [authority exists unless there exists "prohibitive legislation"]; *Tide Water*

Assoc. Oil Co. v. Superior Court (1955) 43 Cal.2d 415, 825-826; *People v. Lujan* (2013) 211 Cal.App.4th 1499, 1506-1508; cf. Gov. Code, § 68070 [authority of courts to make rules for their own government that are not inconsistent with specific statute, Judicial Council rules, or constitution].)

Applying that principle here, Penal Code section 1054.9 – enacted after this Court's *Gonzalez* and *Johnson* decisions – now confers jurisdiction on the trial court to grant postjudgment discovery once capital habeas corpus counsel is finally appointed and can invoke it. (See BOM 23-24, 28-30 [citing and discussing state law and policies governing capital habeas corpus counsel's appointment and duties].) Hence, it is permissible for the court to adopt any suitable procedure, not otherwise prohibited by law, to ensure the defendant's meaningful ability to invoke and achieve the court's successful exercise of its discovery jurisdiction. (See, e.g., *Union Collection Company v. Superior Court* (1906) 149 Cal. 790, 792-793 [section 187 "operates to enable the court to exercise a jurisdiction otherwise created"].) Given the excessive delays of years and even decades before capital habeas corpus counsel is appointed under current capital habeas corpus practice and procedure, and the increasing likelihood that critical evidence will be lost in the interim (*In re Jimenez* (2010) 50 Cal.4th 951, 955, 958), the evidence preservation process is a suitable one that is consistent with the will of the Legislature to ensure the availability of discoverable evidence to habeas corpus counsel and confer jurisdiction on the trial court to grant it, just as the trial court in this case ruled. (BOM 21-27, 32-33; Opposition, Exhibit D, p. 113.) The Attorney General disagrees. (Answer 22-24.)

According to the Attorney General, trial courts have no authority to order evidence preservation as a procedural mechanism to ensure the

successful exercise of their postjudgment discovery jurisdiction under Penal Code section 1054.9 because the statute does not specifically speak to that procedure. (Answer 23.) Of course, that is precisely the circumstance to which Code of Civil Procedure section 187 is directed; it permits the courts to fill in gaps in legislation with procedural mechanisms necessary to carry their jurisdiction into effect. (Code Civ. Proc., § 187 [court may adopt any suitable process to protect or effectuate its statutory jurisdiction when "the course of the proceeding be not specifically pointed out by this Code or the statute . . ."]; see, e.g., *Traffic Truck Sales Co. v. Justice Court*, *supra*, 192 Cal. at p. 382 ["when the law as written provides none, it is permissible to adopt any suitable procedure which will achieve the desired result"].)

According to the Attorney General, however, the Legislature's silence on the subject of evidence preservation in Penal Code section 1054.9 reflects a deliberate "choice" to prohibit the procedure. (Answer 26.) By the Attorney General's reasoning, section 1054.9 defines the scope of, and the procedures by which to obtain, *discovery* and courts do not have the authority to alter or expand the scope of the *discovery* mechanism in section 1054.9. (Answer 23.) From this premise, the Attorney General leaps to the conclusion that section 1054.9 prohibits the evidence *preservation* mechanism and that the Legislature has expressed its will that no preservation duties may be imposed upon prosecution and law enforcement authorities by court order. (*Ibid.*) The Attorney General is mistaken on several counts.

First, as discussed in Part B, *ante*, the Attorney General's argument again mistakenly equates an order to custodians to *preserve* evidence with an order to custodians to *produce* evidence through discovery. To be sure, the scope of actual *discovery* is limited by Penal Code section 1054.9, but

an evidence preservation order is *not* a discovery order. A motion to *preserve* evidence is just that – a request to *preserve* the status quo of the evidence in the possession of custodians. It does not purport to be an order to produce evidence, nor does it purport to be an anticipatory order that certain evidence will be subject to production through discovery. What is or is not discoverable can only be determined after capital habeas corpus counsel is appointed and can invoke the court's postjudgment discovery jurisdiction. (See BOM 23-27, 29-34.) And that is precisely the issue the preservation order is designed to address.

Because the matter of discovery cannot be litigated and decided until capital habeas corpus counsel is appointed, and because it now takes years or decades to secure such appointment, a preservation motion is necessary in order to ensure that evidence will not be lost or destroyed and leave nothing left to discover by the time habeas corpus counsel is finally appointed and can invoke the court's discovery jurisdiction. In other words, the evidence preservation mechanism is a suitable means by which the court has the power to ensure that Penal Code section 1054.9 is not merely an empty promise. In this regard, a court's power to fashion procedures under Code of Civil Procedure section 187 "'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; see also *Millholen v. Riley*, *supra*, 211 Cal. 29, 33-34 [courts have inherent power of self-preservation to protect jurisdiction conferred upon them and remove obstacles to their successful operation]; *Townsel*, *supra*, 20 Cal.4th at pp. 1091, 1095-1096 [statute conferring jurisdiction over court to punish unreasonable postverdict juror contact after it has occurred presupposed

trial court's authority to issue jury no-contact order to prevent the possibility of unwanted or unreasonable contact that would otherwise undermine goal of statute].)

Furthermore, the critical need for evidence preservation motions was not even on the Legislature's radar in 2002 when it enacted the bill that became Penal Code section 1054.9. As set forth in the opening brief on the merits, but ignored by the Attorney General, the Legislature presumably enacted the statute with existing rules and policies in mind that habeas corpus counsel would be appointed "simultaneously with appointment of appellate counsel" (Supreme Ct. Policies, policy 3, std. 2-1) or "shortly after an indigent defendant's judgment of death" (*In re Morgan* (2010) 50 Cal.4th 932, 937). (See *Viking Pools Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 [Legislature presumed to be aware of existing law when it enacts statutes]; see BOM 28-34.) In other words, the legislation presupposed habeas corpus 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 a habeas corpus petition based on the premise that habeas counsel actually would be appointed in a timely manner and have access to evidence necessary to aid her in preparing the petition. It was only six years later that it became clear that this is simply not the reality due to "excessive delay[s]" in the appointment of habeas corpus counsel – delays that continue unabated today. (Cal. Com. on the Fair Admin. of Justice, Final Report (2008) pp. 114-115, 121; *In re Morgan, supra*, 50 Cal.4th at p. 939; *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.) Hence, the Legislature's failure to provide for evidence preservation as a procedural mechanism to ensure the protection

of a capital defendant's postjudgment discovery rights and the court's postjudgment discovery jurisdiction is meaningless. This is precisely the kind of legislative gap that a court has the inherent power to fill when necessary to perform its functions. (Cf. *In re Steele*, *supra*, 32 Cal.4th at pp. 691-692 [filling in legislative gap in Penal Code section 1054.9 to hold that postjudgment discovery should be litigated in the trial court that conducted the underlying criminal proceedings and imposed the death judgment, regardless of where the habeas corpus petition will be filed].)

The Attorney General nevertheless seems to contend that the Legislature has expressed its will that prosecution and law enforcement agencies cannot be forced to preserve evidence postconviction. (Answer 23.) The Attorney General cites no authority for this proposition other than this Court's decisions in *Johnson*, *supra*, 3 Cal.4th at pp. 1257-1258 and *In re Steele*, *supra*, 32 Cal.4th at p. 696. (*Ibid.*) Neither supports the Attorney's General's contention. The *Johnson* decision has been thoroughly discussed in Part B-2, *ante*, and Morales's opening brief on the merits (BOM 13-21); it says nothing about any *legislative intent* to prohibit evidence preservation even under the law in existence at the time and certainly does not address the issue of legislative intent under current law. As to *In re Steele*, the Court addressed the scope of *discovery* under Penal Code section 1054.9 and in so doing simply observed that the statute itself did not create any new preservation duties on the part of prosecution and law enforcement agencies that did not otherwise exist. (*In re Steele*, *supra*, 32 Cal.4th at p. 695.) But that simply does not equate to an expression of legislative will to *prohibit* the trial court from *ordering* them to preserve evidence when necessary to protect its jurisdiction and safeguard the purpose of section 1054.9.

Far from thwarting the will of the Legislature, evidence preservation is a critical mechanism to carry it out. By providing for the right to habeas corpus counsel in capital cases in the first place, the Legislature has expressed its will to "'promote[] the state's interest in the fair and efficient administration of justice and, at the same time, protect[] 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'"].) And by providing for postjudgment discovery under Penal Code section 1054.9, the Legislature expressed its will to prevent the "injustice" that the *Gonzalez* decision posed by ensuring habeas corpus counsel's access to evidence necessary to aid in the preparation of the habeas corpus petition. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897-898, citing and quoting from legislative history of Penal Code section 1054.9; see also BOM 30-34.)

In short, Penal Code section 1054.9 is simply silent on the subject of evidence preservation and the Attorney General points to no specific statute, rule of court, or expression of legislative intent that prohibits the evidence preservation procedure. Absent such a prohibition, trial courts are authorized to utilize the procedure in order to prevent the loss or destruction of discoverable evidence during the years of delay before the appointment of habeas corpus counsel and thereby protect the jurisdiction and rights conferred by Penal Code section 1054.9.

D. The Attorney General's Responses to the Compelling Policy Reasons for this Court to Recognize the Validity of the Evidence Preservation Procedure Are Irrelevant and Contrary to Legislative Goals and this Court's Policies Governing Capital Postconviction Practice

Finally, as set forth in Morales's opening brief, the evidence preservation procedure employed in this case serves legislative goals, as well as the Court's current capital postconviction policies, by attempting to prevent defendants from being unfairly prejudiced by the systematic failure to appoint capital habeas corpus counsel in a timely manner. (BOM 28-34.) The Attorney General's responses to Morales's policy arguments are off-base. (Answer 24-27.)

According to the Attorney General, this Court "dismissed a similar argument as unpersuasive when it was raised in *Johnson* and it remains unpersuasive today." (Answer 25.) The argument is "unpersuasive," the Attorney General contends, because habeas corpus proceedings seek to undermine a presumptively fair and valid judgment, do not provide the same pretrial rights that exist when the presumption of innocence applies, and therefore "'[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.'" (Answer 25-26, quoting from *Gonzalez*, *supra*, 51 Cal.3d at p. 1260.) The Attorney General's contention makes no sense.

First, the Attorney General does not actually describe or discuss the "similar argument" made in *Johnson* or the reason this Court found it to be "unpersuasive." (See Answer 25.) In fact, an examination of *Johnson* reveals that the only mention of any policy argument there was as follows:

> Defendant also suggests that the trial court was required to issue the requested [evidence preservation order] in order to preserve his right to meaningful state and federal habeas

> review of his conviction and sentence. He cites no specific authority for this point, and we do not find it persuasive.

(*Johnson*, *supra*, 3 Cal.4th at p. 1258.) This brief passage from *Johnson* bears no relationship to the issue presented in this case in light of the law, policies, and reality of capital postconviction practice as they exist *today*, nearly 25 years later. That is, the issue here is whether there are policy reasons to recognize the validity of a procedural mechanism by which to ensure that Penal Code section 1054.9 does not become an empty promise as a result of the Court's inability to provide capital defendants with the right necessary to secure it – the timely appointment of habeas corpus counsel. (BOM 28-34.) *Johnson*, decided years before this law and reality came to fruition, simply has no bearing on this question.

Equally irrelevant is the Attorney General's emphasis on habeas corpus as a collateral attack on the judgment. (Answer 25-26.) In fact, the Attorney General's discussion in this regard is taken almost verbatim from the *Gonzalez* Court's response to a different argument. There, the defendant argued, inter alia, that prohibiting postjudgment, prepetition discovery until after a defendant filed a habeas corpus petition and a judicial determination was made that it stated a prima facie case for relief, unfairly created "a 'Catch-22' by requiring him to state the specific facts supporting his claim before he may invoke any right to postjudgment discovery." (*Gonzalez*, *supra*, 51 Cal.3d at p. 1259.) The *Gonzalez* Court rejected *that* argument for the very reasons the Attorney General paraphrases here: because habeas corpus proceedings seek to undermine a presumptively fair and valid judgment and thus do not provide the same pretrial rights that exist when the presumption of innocence applies, "[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.)

The issue here does not involve policy reasons for recognizing a right to prepetition *discovery*. The Legislature has already resolved that issue by enacting Penal Code section 1054.9. And in so doing, the Legislature rejected the very rationale of *Gonzalez* on which the Attorney General relies here:

> "'Currently, as expressed in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 275 Cal.Rptr. 729, 800 P.2d 1159, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, *the injustice is clear. The existing remedy, as discussed in Gonzalez, is woefully inadequate in cases where a defendant's file, through no fault of their own, no longer exists. The purpose of this bill is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled.*'"

(*Barnett v. Superior Court, supra*, 50 Cal.4th at p. 898, quoting from legislative history materials to Penal Code section 1054.9, italics added.)

In short, the Attorney General's response, based on *Johnson* and *Gonzalez,* is irrelevant to the policy concerns raised in this case. Her reliance on the rationale the Legislature condemned as inviting an unjust result only bolsters Morales's argument. Absent the timely appointment of habeas corpus counsel, a trial court in a capital case must have the postjudgment authority to issue evidence preservation orders to act as a gatekeeper to ensure access to the promise of Penal Code section 1054.9, serve the interests of justice that statute is intended to serve, and avoid the

manifest injustice that would result if critical evidence to which the defendant would otherwise have had access is lost or destroyed as a result of the delay in honoring his right to appointed habeas corpus counsel. (BOM 28-34.)

Equally without merit is the Attorney General's contention that evidence preservation is unnecessary because: (1) prosecution and law enforcement agencies are self-motivated to "indefinitely" preserve evidence in the event that a convicted defendant obtains a retrial on appeal or habeas corpus; and (2) Government Code section 68152 already requires superior courts to retain records in capital cases, including the cases of codefendants and related cases. (Answer 26.) Throughout these proceedings, the People have insisted that prosecution and law enforcement agencies have no obligation to preserve *any* evidence after conviction and courts have no authority to create such duties. (Answer 23-26; see also BOM 24-25, 32; Opposition, pp. 23-24, 30-32, 37-39; Opposition, Exhibit C, pp. 52-67; Petition for Writ of Mandate, pp. 7-12.) Its position here that courts should nevertheless trust that those agencies will preserve evidence absent an order is as disingenuous as it is unpersuasive. Suffice it to say here that history does not bear it out. (See, e.g., *Andrews v. Davis* (9th Cir. 2015) 798 F.3d 750, 794-795 [state's destruction of critical evidence postconviction left defendant with no remedy]; *People v. Memro* (1995) 11 Cal.4th 786, 831 [police department destroyed police personnel files that were subject of trial level *Pitchess* motion after trial, pursuant to standard destruction policy].) And even assuming a self-interest on the part of prosecution and law enforcement agencies to preserve evidence after a death judgment has been imposed, it would be to preserve evidence that inculpates the defendant and supports the death judgment, not to preserve evidence that might exculpate

or undermine the judgment. As to Government Code section 68152, subdivision (c)(1), the Attorney General ignores that it only applies to the "records of the cases of any codefendants and any related cases, regardless of disposition," *if they are so identified on the record.* (See BOM 33.) When they are not so identified, however (as in this case), 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); BOM 33.) Further, even when existing statutes already require preservation of records, it is all too common for their negligent loss or destruction to occur. (BOM 33, citing case examples.)

In any event, this Court has already recognized that the delays in the appointment of habeas corpus counsel create a risk that critical evidence will be lost or destroyed before he or she is finally appointed. (*In re Jimenez, supra,* 50 Cal.4th at pp. 955, 958.) Hence, the Court has already implicitly rejected the premise of the Attorney General's contention that there is no need for evidence preservation orders.

The Attorney General ignores that the Court has further recognized that the rights of men and women who have been sentenced to death cannot be made to suffer as a result of the Court's inability to secure their right to habeas corpus counsel in a timely manner. In this context, the Court has held that it is appropriate to fashion procedural rules to prevent such injustice from occurring. (*In re Jimenez, supra*, 50 Cal.4th at pp. 955-958; *In re Morgan, supra*, 50 Cal.4th at pp. 937-942.) The same concerns apply here and warrant this Court's recognition of the evidence preservation procedure to safeguard a capital defendant's rights from unfair prejudice when he – like most men and women on death row – remains without habeas counsel while he is appealing from the judgment. (BOM 28-34.)

Finally, for the same reasons addressed in Part C, *ante*, the Attorney General argues that this Court has no authority to recognize the evidence preservation procedure as a means of preventing unfair prejudice to the rights of death-sentenced defendants from the failure to timely appoint habeas corpus counsel. This is so, the Attorney General contends, because the Legislature "chose not to impose any additional preservation duties," which amounts to a legislative prohibition against a trial court's authority to issue evidence preservation orders that this Court has no power to nullify. (Answer 27.) For all of the reasons set forth in Part C, *ante*, the Attorney General is incorrect.

As this Court has long recognized in a wide variety of contexts, "'[c]ourts are not powerless to formulate rules of procedure when justice demands it.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 528, 522.) The Court has the power to recognize a trial court's authority to issue postjudgment evidence preservation orders in capital cases when habeas corpus counsel has not been appointed and it should exercise that power for all of the reasons set forth in the opening brief and above. (BOM 8-34.)

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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

In his opening brief on the merits, Morales argued that regardless of whether or not this Court agrees that a trial court has jurisdiction to issue evidence preservation orders, the appellate court's order granting the People's petition for writ of mandamus to vacate the trial court's evidence preservation order in this case must be reversed. This is so because at the time of the trial court's 2014 order, there was no "clear case" or statute that created a "specific," "clear" and "present" legal rule mandating it to deny such postjudgment motions for lack of subject matter jurisdiction, as required for mandamus relief under Code of Civil Procedure section 1085. (BOM 35-41, and authorities cited therein.) The Attorney General disagrees, arguing that mandamus lies to correct any error of law, regardless of whether that error violated a duty that was "clear" and "present" at the time it was made. (Answer 27-28.)

In its answer, the Attorney General fails to discuss any of the theories or arguments set forth by Morales in his opening brief. Instead, the Attorney General basically takes the position that the trial court was wrong and so mandamus is an appropriate remedy. This was fully addressed by Morales in his opening brief and no further reply is necessary here.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Morales's opening brief on the merits, as a matter of law, policy, and in the interests of justice, this Court must recognize a trial court's postjudgment authority to grant evidence preservation motions in capital cases while appeal is pending and the defendant is still awaiting the appointment of habeas corpus counsel. The appellate court's order granting the People's petition for writ of mandamus to the trial court to vacate its evidence preservation order in this case for lack of subject matter jurisdiction must be reversed.

Date: March 3, 2016

Respectfully submitted,

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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 brief is 8,356 words in length.

C. DELAINE RENARD
Senior Deputy State Public Defender
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Appellant Johnny Morales

DECLARATION OF SERVICE

Re: THE PEOPLE v. SUPERIOR COURT (MORALES) No. S228642
Court of Appeal No. E061754
Related Death Penalty Appeal Pending No. S137307)

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

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

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

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Each said envelope was then, on March 3, 2016, 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 3rd day of March 2016, at Oakland, California.

Kecia Bailey