Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner, No. S171117

v.

SUPERIOR COURT, CONTRA COSTA COUNTY,

Respondent,

MICHAEL NEVAIL PEARSON,

Real Party in Interest.

After Decision by the Court of Appeal
First Appellate District, Division Five, No. A120430
Contra Costa County Superior Court No. 5-951701-2
The Honorable Leslie G. Landau, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

PENAL CODE SECTION 1054.9 AMENDED THE CRIMINAL DISCOVERY STATUTE

1. Regardless of the Definition Given to "Criminal Cases," Section 1054.9 Amended the Criminal Discovery Statute By Extending Its Reach to Postconviction Proceedings

Defendant Pearson contends the Criminal Discovery Statute was never intended to govern criminal proceedings beyond trial. Even if that were true – and it most emphatically is not – he has made no effort to

address the fact that by extending the Criminal Discovery Statute's provisions to reach postconviction proceedings, section 1054.9 amended it.

"The enacting body is deemed to be aware of existing laws and judicial constructions in effect at time legislation is enacted [and] [t]his principle applies to legislation enacted by initiative." (*People v. Weidert* (1985) 39 Cal.3d 836, 844.) The voters knew, in 1990, that an act is amendatory ""[i]f its aim is . . . to reach situations which were not covered by the original statute." (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1201; *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 777.) Accordingly, when they mandated that "[t]he statutory provisions contained in [Proposition 115] may not be amended by the Legislature except by [a supermajority vote]" (Prop. 115, § 30), they intended to require that "[t]he statutory provisions contained in [Proposition 115] may not be [made "to reach situations which were not covered by the original statute"] . . . except by [a supermajority vote]." (Prop. 115, § 30; cf. *Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d at p. 1201; *Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 777.)

Section 1054.9's codification within the Criminal Discovery Statute caused its provisions to reach situations not covered by the original statute. "Where a new section affects the application of the original statute . . . , the new section is an amendment to the statute." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) As originally written, section 1054.5(b) did not require defendants seeking postconviction discovery to make an initial, informal request for disclosure. Section 1054.9 extended section 1054.5(b)'s reach, so that now it requires defendants seeking postconviction discovery to make an initial, informal request for disclosure. As originally written, section 1054.5(b) did not authorize trial courts to sanction prosecutors for noncompliance with postconviction discovery orders. Section 1054.9 extended section 1054.5(b)'s reach, so that now trial courts enforcing postconviction discovery orders must comply with section 1054.5(b)'s enforcement procedures. And finally, Section 1054.9 amended the Criminal Discovery Statute by extending the reach of section 1054.1's mandated disclosures to postconviction proceedings.

The electorate, however, prohibited a deficient number of legislators from tinkering, in any way, with the Criminal Discovery Statute. The voters prohibitted a 53% legislative majority from extending any of its provisions "to reach situations which were not covered by the original statute." (Cf.

Franchise Tax Bd. v. Cory, supra, 80 Cal.App.3d at p. 777.) By extending the Criminal Discovery Statute's informal request and enforcement procedures (Pen. Code, § 1054.5, subd. (b)), as well as some of its mandated disclosures (Pen. Code, § 1054.1), to reach situations not covered by the original statute, the Legislature amended it.

An act can be amendatory "even though in its wording it does not purport to amend the language of the prior act." (*Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 777; *Mobilepark West Homeowners Assn. v. Escondido* (1995) 35 Cal.App.4th 32, 40.) Employing the Criminal Discovery Statute as the foundation for a parallel discovery scheme, governing habeas proceedings and motions to vacate judgment, impermissibly burdens future electoral attempts to amend it. (Cf. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541, fn. 8 [discussing how legislation that "limit[s] the authority and responsibility of the legislative body to periodically review and amend the general plan" is amendatory].) By extending the Criminal Discovery Statute's reach, and by impeding future amendatory endeavors, section 1054.9 effectuated impermissible amendments. Regardless of the definition given to "criminal cases," section 1054.9 amended the Criminal Discovery Statute by extending its reach to postconviction proceedings.

2. The Voters Endowed "Criminal Cases" With Its Well-Established Meaning

Defendant Pearson contends the Criminal Discovery Statute was never intended to govern criminal proceedings beyond trial. He accuses the People of attempting to rewrite its provisions, to encompass subjects never mentioned or even contemplated. He claims its "discovery provisions [are] not intended to prohibit discovery in . . . post-trial criminal proceedings, such as probation hearings, nor in motions to vacate judgment."

Defendant Pearson is mistaken. For more than 150 years, criminal cases have encompassed postconviction proceedings such as motions for new trial, sentencing hearings,[1] probation hearings, appeals, and motions to vacate judgment. (Cf. *People v. Hedgecock* (1990) 51 Cal.3d 395, 415; *People v. Serrato* (1973) 9 Cal.3d 753, 760; *People v. Evans* (2008) 44 Cal.4th 590, 599; *People v. Allen* (1986) 42 Cal.3d 1222, 1292; *People v.*

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[1] "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." (*Mitchell v. United States* (1999) 526 U.S. 314, 327 [119 S.Ct. 1307, 1314; 143 L.Ed.2d 424] [Fifth Amendment's right against self-incrimination applies to any "criminal case," and "criminal case" includes sentencing].)

Tanner (1979) 24 Cal.3d 514, 531, fn 5; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 912; *In re Armstrong* (1981) 126 Cal.App.3d 565, 569; *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 123, 124; *In re Benoit* (1973) 10 Cal.3d 72, 77; *People v. Williams* (1861) 18 Cal. 187, 194; Cal. Const., former art. VI, § 4½; Cal. Rules of Court, Rule No. 8.368; *Ingram v. Justice Court for Lake Valley Judicial Dist. of El Dorado County* (1968) 69 Cal.2d 832, 843; *People v. Shipman* (1965) 62 Cal.2d 226, 231; *People v. Paiva* (1948) 31 Cal.2d 503, 510.)

Accordingly, "criminal cases," as used within the Criminal Discovery Statute, enjoys its well-established meaning. (Cf. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23 [judicially construed terms in an initiative are presumed to enjoy the precise and technical meaning endowed, earlier, by the courts]; *People v. Wheeler* (1992) 4 Cal.4th 284, 302 ["the voters intended legal terms to have their legal compass"].) Proposition 115's voters employed criminal cases elsewhere within their initiative, in a manner indisputably encompassing postconviction criminal proceedings. (Prop. 115, § 3; Cal. Const., art. I, § 24,) They intended for criminal cases – as they used that phrase within Proposition 115, Section 3 – to encompass postconviction criminal proceedings. If they had intended to impart a different meaning to it within the Criminal Discovery Statute, they

would have said so. (Cf. *People v. Acosta* (2002) 29 Cal.4th 105, 114 ["[a]s a matter of statutory construction, 'a word or phrase repeated in a statute should be given the same meaning throughout'"].) Criminal cases encompass more than just trials; otherwise, the voters would not have differentiated between trials (Pen. Code, § 1054, subd. (a)), proceedings (Pen. Code, § 1054, subd. (d)), and criminal cases. (Pen. Code, § 1054, subd. (e).) Thus in 1990, a criminal case meant – as it does today – all criminal proceedings related to the accused's prosecution, including those criminal proceedings which occur after trial.

This Court agrees. "In *criminal proceedings* . . . all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115." (*In re Littlefield* (1993) 5 Cal.4th 122, 129, italics added; accord, *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106; *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 161; *Jones v. Superior Court, supra,* 115 Cal.App.4th at p. 56.) This Court is not the only court to equate criminal cases with criminal proceedings. "[T]he parties to a *criminal proceeding* may not employ discovery procedures other than those authorized by [the Criminal Discovery Statute]." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1312-1313, italics added.)

Defendant Pearson complains it is "[im]plausible that the proponents of Proposition 115 had any concern with 'prohibiting' discovery in pre-petition habeas . . . cases." He accuses the People of interpreting the statute in a manner whereby "Proposition 115's proponents implicitly . . . intended to bar all courts, and anything less than a two-thirds majority of the Legislature, from authorizing discovery in habeas proceedings before a petiton is filed . . ." Defendant Pearson misstates the People's position. The fact that the Criminal Discovery Statute, as originally enacted, does not govern habeas proceedings (*In re Scott* (2003) 29 Cal.4th 783, 813) in no way alters its prohibition of compulsory disclosures within the myriad of postconviction criminal proceedings that occur within criminal cases.

The Criminal Discovery Statute governs reciprocal discovery geared toward trial, while at the same time prohibiting compulsory disclosures elsewhere in criminal proceedings. This prohibition extends to all postconviction proceedings in all criminal cases. Although the voters intended for reciprocal disclosures to occur before trial (Pen. Code, §§ 1054.1, 1054.3, 1054.7), they repeatedly took pains to ensure that additional

compulsory disclosures would not occur, within criminal cases, after trial. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a).)[2]

3. The Legislature's Ability to Authorize Pre-Suit Discovery Does Not Permit It to Exceed the Voters' Limits On Its Amendatory Powers

Defendant Pearson assumes that since the Legislature can authorize litigants to file discovery motions before formally initiating a lawsuit, he did not move for discovery within his underlying criminal case. But unless he sought discovery within a pending habeas proceeding, or within some other

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2 So interpreted, three of the Criminal Discovery Statute's statements of purpose refer both to pretrial and postconviction criminal proceedings. "[N]o discovery shall occur in *criminal cases* except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Pen. Code, § 1054, subd. (e), italics added.) "No order requiring discovery shall be made in *criminal cases* except as provided in [the Criminal Discovery Statute]." (Pen. Code, § 1054.5, subd. (a), italics added.) "[The Criminal Discovery Statute] shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys [in *criminal cases*]." (*Ibid.*) The Criminal Discovery Statute must "be interpreted to give effect to *all* of [its] purposes." (Pen. Code, § 1054, italics added.)

type of special proceeding, then by definition, his section 1054.9 motion attached to his underlying criminal case. Defendant Pearson has yet to file a habeas petition, so he has no conceivable case before this Court, other than his underlying criminal case, or some other type of special proceeding that he initiated by filing his section 1054.9 motion. And, as we will explain further below, he did not initiate some other type of special proceeding by moving for postconviction discovery.

Judicial remedies are divided into two classes: actions and special proceedings. (Code Civ. Proc., § 21.) "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22.) "Actions are of two kinds: [¶] 1. Civil; and [¶] 2. Criminal." (Code Civ. Proc., § 24.) "Every other remedy is a special proceeding." (Code Civ. Proc., § 23.)

"'Special proceedings are creatures of statute and the court's jurisdiction in such proceedings is limited by statutory authority. [*Citation*]." (*Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1387.) "The term 'special proceeding' applies only to a proceeding that is distinct from, and not a mere

part of, any underlying litigation. [*Citation*].” (*People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 725.)[3] “The term ‘has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. [Citations.]’” (*Ibid.*) But, “the pendency of a related criminal action may warrant classifying a special proceeding as a part of the criminal action.” (*Id.*, at p. 723.)

Defendant Pearson asserts the Legislature can authorize litigants to file discovery motions before formally initiating a lawsuit. (*Orr v. City of Stockton* (2007) 150 Cal.App.4th 622, 631.) He maintains “the Legislature

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[3] A discovery motion accompanying a nonstatutory motion to vacate judgment is hardly distinct from its underlying litigation. Rather, the pendency of the related criminal action warrants classifying such a discovery motion as part of the criminal action. (Cf. *People v. Shipman, supra,* 62 Cal.2d at p. 231.)

A motion to vacate judgment “is ‘properly regarded ‘as a part of the proceedings in the case to which it refers’ rather than as ‘a new adversary suit.’” (*Bravo v. Cabell* (1974) 11 Cal.3d 834, 839; *People v. Paiva, supra,* 31 Cal.2d at p. 509.) Absent statutory language creating a special proceeding, proceedings which initiate no new controversy, but relate only to their criminal actions, and which are “made necessary by events in the criminal action[s],” should be considered as a part of the criminal actions to which they refer. (Cf. *Bravo v. Cabell*, *supra*, 11 Cal.3d at pp. 838, 840.)

could . . . enact section 1054.9 pursuant to its power to authorize potential litigants to seek discovery in advance of initiating a lawsuit." Defendant Pearson misses the point. Although the Legislature can authorize potential litigants to seek discovery in advance of initiating a lawsuit, it cannot exceed the voters' limits on its amendatory powers in doing so. Any legislative authorization of pre-suit discovery, if accompanied by the Criminal Discovery Statute's amendment, requires a supermajority vote. (Prop. 115, § 30.)

Without a two-thirds vote, the Legislature cannot authorize criminal defendants to compel pre-suit discovery within their underlying criminal cases. The Criminal Discovery Statute's exclusivity provisions (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a)), and the constitutional limitation on the Legislature's power to amend Proposition 115 (Cal. Const., art. II, § 10, subd. (c); Prop. 115, § 30) prohibit any elusion of Propositioin 115's terms. A 53% legislative majority cannot permit criminal defendants to compel postconviction discovery in criminal proceedings. Permitting them to force prosecutors to provide discovery, in support of nonstatutory motions to vacate judgment, effectively amended the Criminal Discovery Statute, even

if accomplished under the rubric of a special proceeding.[4] A 53% legislative majority cannot enact a statute which contravenes Proposition 115's basic command: criminal defendants shall not obtain discovery, to assist them in their criminal cases, except as provided by the Criminal Discovery Statute as originally written.

4. The Defendant's Discovery Motion Did Not Initiate a Habeas Proceeding or Some Other Type of Special Proceeding, But Rather, It Attached to His Underlying Criminal Case

a) Without an Order to Show Cause, Defendant Pearson Never Invoked the Trial Court's "Independent Habeas Corpus Jurisdiction"

Just as "the filing of a petition to preserve evidence cannot be equated with the filing (commencement) of a suit" (*Orr v. City of Stockton, supra,* 150 Cal.App.4th at p. 632), filing a section 1054.9 motion cannot be equated

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4 The law respects form less than substance. (Civ. Code, § 3528; *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 890 [carefully articulated statutory scheme would amount to little, if parties could circumvent it by means having effects indistinguishable from those prohibited by statute].)

with initiating habeas proceedings. A petition to preserve evidence indicates that a suit may be forthcoming but has not yet been commenced. (*Orr v. City of Stockton, supra,* 150 Cal.App.4th at p. 634.) Likewise, Defendant Pearson's 1054.9 motion, brought before he has filed any habeas petition whatsoever, does no more than indicate that a habeas proceeding may be forthcoming but has not yet been commenced.

Defendant Pearson declares that motions seeking pre-suit discovery under section 1054.9, when no action has yet commenced, are directed to the court's underlying jurisdiction to entertain the case once the requesting individual becomes "a party to any action.'" (Cf. *Orr v. City of Stockton, supra,* 150 Cal.App.4th at p. 631, discussing Code Civ. Proc., §§ 2035.010, subd. (a), 2035.030, subd. (a).) He maintains that "a motion filed under section 1054.9 need not and does not 'attach' to any other case," and that "[t]he motion is predicated on a court's independent habeas corpus jurisdiction."

Unfortunately for Defendant Pearson, there is no such thing as "a court's independent habeas corpus jurisdiction." "[J]urisdiction is conferred by constitutional or statutory law. [Citations.]" (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 503.) "A court cannot, by presuming to act, invest itself with jurisdiction." (*Mannix v. Superior Court* (1933) 133 Cal.App.

740, 743.) "The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act." (*In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532, 536; accord, *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 108; *Harrington v. Superior Court* (1924) 194 Cal. 185, 188 [jurisdiction in any proceeding is conferred by constitution or by statute].) Defendant Pearson, who has never filed a habeas petition, has no pending habeas case before this Court, nor before the trial court. No OSC has ever issued in his favor. Therefore the case before this Court derives from his underlying criminal case, or from some other type of special proceeding that he initiated by filing his section 1054.9 motion.

It is impossible to reconcile Defendant Pearson's assertion that he predicated his discovery motion upon some type of "independent habeas corpus jurisdiction." Perhaps he relies upon Code of Civil Procedure section 187, "which grants every court all means necessary to carry its jurisdiction into effect. By its terms, however, section 187 operates only where some other provision of law confers judicial authority *in the first instance.* ([Citations].) Such is not the case here." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257-1258, italics in the original; see also *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 224 [mere presentation of officer's

affidavit to trial court and issuance of appearance order did not create a criminal proceeding through which the trial court could exercise jurisdiction over petitioner to appear at lineup].)

Defendant Pearson proclaims that even before habeas proceedings have been formally initiated, the trial court has underlying habeas corpus jurisdiction. But while our state charter "grants original subject matter jurisdiction over habeas corpus proceedings concurrently to the superior court, the Court of Appeal, and this [C]ourt" (*In re Carpenter* (1995) 9 Cal.4th 634, 645; Cal. Const., art. VI, § 10), before habeas proceedings had commenced, the lack of a pending habeas case prevented the trial court from exerting habeas jurisdiction. Habeas proceedings do not commence upon a potential petitioner's mere contemplation or preparation of a petition, nor even upon the petition's filing. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1258; *Curl v. Superior Court* (2006) 140 Cal.App.4th 310, 320; *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1242.)

"When exercising jurisdiction in habeas corpus matters, courts must abide by the procedures set forth in Penal Code sections 1473 through 1508." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1010.) The judiciary's "power and authority . . . to ensure orderly discovery" in habeas proceedings derives from Penal Code section 1484. (*In re Lawley* (2008) 42 Cal.4th

1231, 1249; *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241-1242.) Section 1484 endows courts exercising habeas jurisdiction with the "power and authority . . . to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." But section 1484 does not vest habeas courts with discovery jurisdiction until after an OSC issues; by its express terms, it does not vest habeas courts with this power until after "the return of the writ." (Pen. Code, § 1484.)

Defendant Pearson could not bring his postconviction discovery motion within a proceeding not yet commenced. He misplaces his reliance on *In re Carpenter, supra,* 9 Cal.4th 634, when he asserts "independent habeas corpus jurisdiction" permitted the trial court to assert habeas jurisdiction over his section 1054.9 motion. In *In re Carpenter, supra,* 9 Cal.4th 634, the *Carpenter* petitioner filed a petition for writ of habeas corpus in the superior court challenging his murder judgment, shortly after its rendition, and the superior issued an order to show cause. (*Id.*, at p. 642.) The Attorney General argued that the superior court lacked jurisdiction over the habeas proceeding, because his automatic appeal from that same judgment was still pending in this Court. (*Id.*, at p. 645.) Only after the OSC had issued did this Court rule that nothing in our state constitution

denied the superior court jurisdiction over the habeas proceeding, even when the challenged judgment of death was pending on automatic appeal before this Court. (*Id.*, at p. 646.) Thus nothing in the *Carpenter* decision supports Defendant Pearson's assertion that the trial court could exercise habeas jurisdiction, before the actual initiation of habeas proceedings. "No prior decision has confronted this precise issue, and it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *Trope v. Katz* (1995) 11 Cal.4th 274, 284 [an opinion's language must be construed with reference to the facts presented; decisions are only authority for the points actually involved and actually decided].)

Defendant Pearson's habeas proceedings will not commence unless and until this Court issues an OSC. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) "The issuance of either the writ of habeas corpus or the order to show cause creates a 'cause' . . ." (*People v. Romero, supra*, 8 Cal.4th at p. 740; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.) "The writ of habeas corpus . . . triggers adversarial proceedings and requires the respondent to file a return." (*Durdines v. Superior Court* (1999) 76 Cal.App.4th 247, 250, fn. 6, citing Pen. Code, §§ 1477, 1480.) When the trial court below issued its postconviction discovery order, its power to carry its habeas jurisdiction into effect, under Code of Civil Procedure section 187, simply did not exist.

The fact a habeas proceeding will commence, if and when an OSC eventually issues, does not confer jurisdiction before the habeas proceeding commences. (Cf. *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1257-1258; *Goodwin v. Superior Court, supra,* 90 Cal.App.4th at p. 224.)

Defendant Davis places inordinate emphasis on the fact that Code of Civil Procedure section 2035.010 et seq. provides a mechanism to discover information prior to the filing of an action.[5] It "allows the petitioner to preserve evidence *in anticipation* of a suit being commenced." (*Orr v. City of Stockton, supra,* 150 Cal.App.4th at p. 631, italics in original.) It "does not constitute a 'suit' because it is not an adversarial proceeding to enforce a right or redress an injury." (*Id.,* at p. 630.)

Defendant Davis fails to appreciate that a petition to preserve evidence commences a special proceeding. Code of Civil Procedure section 2035.010(a)'s reference to "[o]ne who expects to be a party" effectively

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5 Section 2035.010 permits "[o]ne who expects to be a party . . . to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, [to] obtain discovery . . . for the purpose of perpetuating . . . testimony . . . or of preserving evidence for use in the event an action is subsequently filed." (Code Civ. Proc., §§ 2035.010, subd. (a).)

gives rise to a special proceeding, not to an action. Penal Code section 1054.9, however, makes repeated reference to "the defendant." It permits criminal defendants to seek postconviction discovery within their criminal cases. It revests jurisdiction in the trial court, and permits those seeking its statutorily enumerated disclosures to attach their postconviction discovery motions to their underlying criminal cases.

Section 1054.9's proponents repeatedly employed "the defendant" when referencing those whom they attempted to endow with postconviction discovery rights. (Pen. Code, § 1054.9, subds. (a), (c), (d).) Their exclusive statutory references to "the defendant" – not to "the plaintiff," to "the petitioner," to "the person convicted," or to "one who expects to be a habeas petitioner" – enabled postconviction discovery within the confines of defendants' underlying criminal cases, not within a special proceeding. "The party prosecuted in a criminal action is designated [within the Penal Code] as the defendant." (Pen. Code, § 685.) On the other hand, "[t]he party prosecuting a special proceeding of a criminal nature is designated in [the Penal] Code as the complainant, and the adverse party as the defendant." (Pen. Code, § 1562.)

By employing “the defendant,” section 1054.9’s proponents attached postconviction discovery proceedings directly to their underlying criminal cases. They never intended to create a special proceeding. If they had wanted to do so, they would have codified section 1054.9 within the statutory provisions governing special proceedings (Pen. Code, Part 2, Title 12 (Pen. Code, §§ 1473-1564))[6] or miscellaneous proceedings. (Pen. Code, Part 2, Title 10 (Pen. Code, §§ 1268-1424).)

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[6] “When no criminal action has been filed, . . . a motion for the return of seized property is deemed to be a special proceeding, even though it may be considered part of a criminal action if such an action is pending.” (*People v. Superior Court* (*Laff*), *supra*, 25 Cal.4th at p. 724.) Penal Code section 1539 distinguishes between motions for return of property, made “by a defendant” (Pen. Code, §1539, subds. (a)(i), (a)(ii)), and motions for return of property, made “by a person who is not a defendant in a criminal action at the time the hearing is held.” (Pen. Code, §1539, subd.(a)(iii).)

The Legislature’s statutory precision, in differentiating between criminal defendants and those who are not criminal defendants, demonstrates that section 1054.9 motions do not initiate special proceedings. Rather, they comprise part of their underlying criminal actions. A 1054.9 motion is not a separate and independent special proceeding, but rather, a proceeding which is “an ancillary or component part of” the underlying criminal action in which it is litigated. (Cf. *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1276.)

Section 1054.9's proponents codified it within the Criminal Discovery Statute, they repeatedly employed "defendant" instead of "petitioner," and they permitted defendants, prosecuting nonstatutory motions to vacate judgment, to move for postconviction discovery within their underlying criminal cases. Those who voted for section 1054.9, and who deliberately codified it within the Penal Code, Part 2, rightfully assumed that it would "apply to all criminal actions and [to all criminal] proceedings in all courts" (Pen. Code, § 690); they never intended to authorize special proceedings.

b) This Court Lacks Original Jurisdiction in Special Proceedings

The superior court has original jurisdiction in all special proceedings that are not habeas corpus proceedings. "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings . . . [¶] Superior courts have original jurisdiction in all other causes." (Cal. Const., art. VI, § 10.) (Habeas corpus proceedings are not viewed as part of the criminal process itself. (*In re Barnett* (2003) 31 Cal.4th 466, 478, fn. 10.) A habeas proceeding "is a special proceeding and not entirely analogous to either category [civil or criminal]." (*In re Scott* (2003) 29 Cal.4th 783, 815, fn. 6.))

Since this Court lacks original jurisdiction in special proceedings, other than in habeas, a section 1054.9 movant could not file his motion directly with this Court if it initiated an ordinary special proceeding. This Court, however, interprets section 1054.9 so that "either the trial or the reviewing court has jurisdiction over the motion." (*In re Steele, supra*, 32 Cal.4th at p. 691.) The fact that "the reviewing court has jurisdiction over the motion" (*Id.,* at p. 691) provides further proof that section 1054.9 motions do not initiate special proceedings.

Penal Code section 1506,[7] which grants a limited right to appeal final habeas orders, vests neither the trial court nor the reviewing court with jurisdiction over section 1054.9 motions. This Court's concurrent, original jurisdiction in section 1054.9 proceedings derives from the fact that section 1054.9 motions attach to their underlying criminal cases. This Court's "exclusive death penalty jurisdiction . . . appl[ies] only to *criminal cases* in which a judgment of death has been rendered" (*Thompson v. Department of*

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[7] "An appeal may be taken . . . by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought . . . ; and . . . where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. . . ." (Pen. Code, § 1506.)

Corrections (2001) 25 Cal.4th 117, 124, italics in original; Cal. Const., art. VI, § 11.) Any case that "is not a criminal case . . . does not fall within this [C]ourt's exclusive [appellate] jurisdiction." (*Thompson v. Department of Corrections, supra,* 25 Cal.4th 117, 124.)

If Defendant Pearson had initiated an ordinary special proceeding by moving for discovery under section 1054.9 motion, then the trial court's ruling would be appealable as a final order. (*In re Matthew C.* (1993) 6 Cal.4th 386, 395; *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 705.) But a party challenging an adverse section 1054.9 ruling must seek writ review (*In re Steele, supra*, 32 Cal.4th at pp. 688, 692), which is the established remedy, for the People, when we suffer an adverse discovery ruling in a criminal case. (Pen. Code, § 1512, subd. (a).)[8] If moving for postconviction discovery under section 1054.9 initiated a special proceeding, writ review would be unavailable. The availability of direct appeal would provide the aggrieved party with an adequate remedy at law. (Cf. *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913 ["an appeal is normally presumed to

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[8] The People can "seek review of an order granting a defendant's motion for . . . discovery by a petition for a writ of mandate." (Pen. Code, § 1512, subd. (a).)

be an adequate remedy at law, thus barring immediate review by extraordinary writ"]; *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 218 [writ review unavailable where the party seeking the writ has an adequate means, such as direct appeal, by which to attain relief].) Thus the established remedy for an adverse section 1054.9 ruling is inconsistent with any notion the Legislature created a special proceeding.

c) The Defendant's Discovery Motion Attached to His Underlying Criminal Case

Defendant Pearson had to bring his motion within the framework of a pending proceeding before the trial court. "A motion is an application to the court for an order." (*People v. Williams* (1999) 20 Cal.4th 119, 129; Code Civ. Proc., § 1003 ["Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion"]) "[M]otions must be made in the court in which the action is pending." (Code Civ. Proc., § 1004.) A motion therefore implies the "pendency of [a] suit[ ] between the parties." (*People v. Burks* (1961) 189 Cal.App.2d 313, 317; see also *People v. Sparks* (1952) 112 Cal.App.2d 120, 121 ["a motion relates to some question collateral to

the main object of the action and is connected with, and dependent on, the principal remedy"].) Without Penal Code section 1054.9, there would be "no statutory authority for a trial court to entertain a postjudgment motion that is unrelated to any proceeding then pending before the court." (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76-77; *People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251.)

Section 1054.9's proponents sought to "modif[y] [the earlier] rule" of *People v. Gonzalez, supra,* 51 Cal.3d 1179, where "after the judgment had become final, nothing was pending in the trial court to which a discovery motion may attach, and . . . the defendant had to state a prima facie case for relief before he may receive discovery." (*In re Steele, supra,* 32 Cal.4th at p. 691.) "But the only way this modification of the *Gonzalez* rule makes sense is to permit defendants to seek discovery before they file the petition, i.e., before they must state a prima facie case." (*Ibid.*) The Legislature wanted criminal defendants to be able to seek postconviction discovery before having "to state a prima facie case for [habeas] relief." (Cf. *In re Steele, supra,* 32 Cal.4th at p. 691.) "[D]iscovery will not lie in habeas corpus with respect to issues upon which the petition fails to state a prima facie case for relief" (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1261), and the *Gonzalez* trial court "exceeded its jurisdiction by ordering postconviction discovery in

the absence of any proceeding pending before that court." (*Ibid.*) This caused section 1054.9's backers to attempt to enable movants to render their underlying criminal cases pending for postconviction discovery purposes, so they could attach their postconviction discovery motions to their underlying criminal cases.

A criminal action is the proceeding wherein the accused is brought to trial and punishment. (Pen. Code, § 683.) "Imprisonment pending execution of a death sentence is a part of the punishment for the crime." (*People v. Rittger* (1961) 55 Cal.2d 849, 852.) Until his execution, Defendant Pearson's underlying criminal case will be pending somewhere. Postjudgment jurisdiction in capital cases lies either with this Court, or with the trial court upon remand to issue a death warrant. (Pen. Code, § 1193, subd. (a).) Section 1054.9 revests jurisdiction in the trial court, thereby allowing those seeking postconviction discovery to attach their section 1054.9 motions to their underlying criminal cases. But since no discovery shall occur in criminal cases except as provided by the Criminal Discovery Statute, as originally written (Pen. Code, § 1054, subd. (e)), since no order requiring discovery shall be made in criminal cases except as provided in the Criminal Discovery Statute, as originally written (Pen. Code, § 1054.5, subd. (a)), and since the Criminal Discovery Statute, as originally written, shall be

the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys in criminal cases (*ibid*), the trial court abused its discretion by ordering the People, in Defendant Pearson's underlying criminal case, to provide postconviction discovery.

CONCLUSION

Section 1054.9's codification within the Criminal Discovery Statute extended its reach to postconviction proceedings. Defendants seeking postconviction discovery must make an initial, informal request for disclosure (Pen. Code, § 1054.5, subd. (b)); trial courts enforcing postconviction discovery orders must comply with section 1054.5(b)'s enforcement procedures; and section 1054.1's mandated disclosures extend to postconviction proceedings. None of these amendments depend upon the definition of "criminal cases."

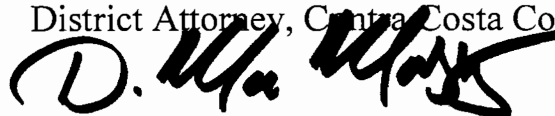
Nevertheless, for more than 150 years, "criminal cases" has enjoyed a well-established meaning; the term encompasses all criminal proceedings, including postconviction criminal proceedings such as motions to vacate judgment. The Criminal Discovery Statute governs reciprocal discovery geared toward trial, while at the same time prohibiting compulsory

disclosures elsewhere in criminal proceedings. The voters repeatedly took pains to ensure that additional compulsory disclosures would not occur, within criminal cases, after trial. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a).) In addition to extending section 1054.5(b)'s and section 1054.1's reach, a 53% legislative majority amended the Criminal Discovery Statute by authorizing postconviction discovery orders, under section 1054.9, to issue within their underlying criminal cases.

If the Legislature wishes to address postconviction discovery in capital cases and in LWOP cases, it can do so by enacting a valid bill. But until then, section 1054.9 remains an act in excess of the Legislature's amendatory powers. Accordingly, the People respectfully ask this Court to reverse the Court of Appeal, and to direct it to grant our petition for writ of mandate.

Respectfully submitted,

ROBERT J. KOCHLY
District Attorney, Contra Costa County



DOUG MacMASTER
Deputy District Attorney
State Bar No. 130122

Attorneys for Petitioner

RULE 8.360(b) CERTIFICATION

I, Doug MacMaster, certify that the number of words in this reply brief totals 5406 words.

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

DATED: November 13, 2009

Doug MacMaster
Deputy District Attorney
State Bar No. 130122

Attorney for Petitioner

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CERTIFICATE OF SERVICE BY MAIL
(C.C.P. 1012, 1013, 1013a, 2015.5 and EC 641)

Docket No. **5-951701-2**

Re: **PEOPLE v. MICHAEL NEVAIL PEARSON**

I certify that my address is: **Office of the District Attorney**
Contra Costa County
P.O. BOX 640
Martinez, CA 94553

and I am a citizen of the United States, over 18 years of age, a resident of the County of Contra Costa, and not a party to the within action;

I served a true copy of the attached **PETITIONER'S REPLY BRIEF ON THE MERITS**

By placing said copy in an envelope address as follows:

THE SUPREME COURT OF THE STATE OF CALIFORNIA
ATTENTION: CLERK OF THE COURT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102

THE CALIFORNIA STATE COURT OF APPEAL
FIRST APPELLATE DIVISION COURT CLERK
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102

DAVID LANE & KEVIN MICHAEL BRINGUEL
HABEUS CORPUS RESOURCE CENTER
303 SECOND STREET, SUITE 400 SOUTH
SAN FRANCISCO, CA 94107

which is a place having delivery service by U.S. Mail, which envelope was then sealed and postage fully prepaid thereon, and thereafter was, on this day, deposited in the United States Mail at Martinez , California, Contra Costa County, California 94805 ;

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

Dated: **November 16, 2009**

MAREN PADILLA
SENIOR CLERK, HOMICIDE UNIT
Telephone (925) 957-8603 Fax (925) 957-2240
Signed at Martinez , Contra Costa County, California.

DA-20.3 (10/04)

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CLERK OF COURT
CONTRA COSTA SUPERIOR COURT
P.O. BOX 911
MARTINEZ, CA 94553

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OFFICE OF THE ATTORNEY GENERAL
1300 I STREET, PO BOX 944255
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CRIMINAL JUSTICE LEGAL FOUNDATION
2131 L STREET
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25 COUNTY CENTER DRIVE
OROVILLE, CA 95965

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DA-20.3 (10/04)

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CLERK OF THE COURT
SUPERIOR COURT OF BUTTE COUNTY
1 COURT STREET
OROVILLE, CA 95965

W. SCOTT THORPE
CALIFORNIA DISTRICT ATTORNEY ASSOCIATION
921 ELEVENTH STREET. THIRD FLOOR
SACRAMENTO, CA 95814

LINDA FREY ROBERTSON
CALIFORNIA APPELLATE PROJECT
101 SECOND STREET, SUITE 600
SAN FRANCISCO, CA 94105

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DA-20.3 (10/04)