S 167148

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

STEVEN D. CATLIN, Petitioner,	)	No.
v.	)	Court of Appeal, Fifth Dist. No. F053705
SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF KERN, Respondent,	)	Kern County Superior Court No. 30594
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)	[Related to California Supreme Court Capital Habeas Case No. S090636 and to Case No. S157232 (grant and transfer to Court of Appeal)]

PETITION FOR REVIEW

Petition for Review After a Decision

by the Court of Appeal, Fifth District

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN D. CATLIN, Petitioner; v. SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF KERN, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	))))))))))))))	No. Court of Appeal, Fifth Dist. No. F053705 Kern County Superior Court No. 30594 [Related to California Supreme Court Capital Habeas Case No. S090636 and to Case No. S157232 (grant and transfer to Court of Appeal)]

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN DAVID CATLIN.
Petitioner

NO. _____

v.

SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF KERN
Respondent,

(Fifth District Court of Appeal, F053705)

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party In Interest
_____/

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Steven Catlin petitions this Court for review following the discharge of the alternative writ and denial of his petition for writ of mandate from the Kern County Superior Court's denial, as untimely, of his motion for post-conviction discovery pursuant to Penal Code section 1054.9[1] in the published opinion by the Court of Appeal, Fifth Appellate District, filed August 22, 2008. In the course of denying Mr. Catlin's petition, the Court

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1 All statutory references are to the Penal Code unless otherwise indicated.

of Appeal further erred by denying his motion for the court to take judicial notice of items from the legislative history of section 1054.9 and other relevant documents. (See slip opn., p. 7, n. 5.) As a result, the Court of Appeal's interpretation of section 1054.9 is at odds with the plain language of the statute and the legislative intent of the statute. (See slip opn., dissenting opn. of Dawson, J., p. 2.)

Review should be granted in this matter because the Court of Appeal's ruling is at odds with the language and legislative history of Penal Code section 1054.9. Furthermore, it permits trial courts to usurp the function of this Court by denying statutorily authorized discovery based upon vague timeliness requirements, precluding habeas petitioners from obtaining discovery needed to develop and present claims in habeas corpus petitions and to demonstrate the timeliness of those claims to this Court.

ISSUES PRESENTED FOR REVIEW

Did the Court of Appeal err by (1) finding that dicta in *In re Steele,* (2004) 32 Cal.4th 682, imposed a timeliness requirement for filing a post-conviction discovery motion upon a statute that contained no timeliness requirement and further err by (2) wrongly applying that requirement to Mr. Catlin?

WHY REVIEW SHOULD BE GRANTED

(CAL. RULES OF COURT, RULE 8.500.)

Review of the issue should be ordered because this Court's guidance is necessary to secure uniformity of decision and the settlement of important questions of law. (Cal. Rules of Court, rule 8.500, subd. (b).) Resolution is also necessary because this issue, arising from a misinterpretation of section 1054.9 and this Court's opinion in *In re Steele*, *supra*, 32 Cal.4th 682 (hereinafter *Steele*), is likely to recur. This Court should grant review because of the practical effect of the issue presented -- whether a petitioner receives the discovery to which he is entitled likely will impact whether he prevails on his habeas corpus claims that his convictions and death sentence are unconstitutional, and in turn, whether he is executed (see, e.g., *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error

with painstaking care is never more exacting than it is in a capital case"]) -- and because these questions are of first impression and general importance to the bench and bar.

STATEMENT OF THE CASE AND FACTS

Petitioner Steven D. Catlin is an inmate of San Quentin State Prison, confined under a sentence of death which was imposed in Kern County on July 6, 1990.

On August 9, 2000, Mr. Catlin, by and through his then-appointed counsel Jeffrey Schwartz, filed a petition for a writ of habeas corpus in the California Supreme Court (Case No. S090636). That petition was pending at the time of the Superior Court's denial of petitioner's motion for post-conviction discovery (but was subsequently denied on September 25, 2007).

On September 26, 2001, Mr. Catlin's automatic direct appeal from a judgment of death was affirmed by this Court (Case No. S016718; *People v. Catlin* (2001) 26 Cal.4th 81, 26 Cal. 4th 1060c.)

On July 22, 2005, Mr. Catlin's then habeas counsel, Jeffrey Schwartz, moved to withdraw because he had accepted employment with the Humboldt County District Attorney's Office; this Court granted the motion to withdraw on August 10, 2005. On May 5, 2006, J. Wilder Lee,

who had previous worked on Mr. Catlin's habeas petition as an unappointed, supervised attorney, was appointed counsel of record for Mr. Catlin for all state post-conviction proceedings.

In July, 2007, Mr. Catlin sought informal discovery from the Attorney General, who had prosecuted the case at the trial level, but the Attorney General refused to cooperate with his request. Thereafter, Mr. Catlin filed a motion for post-conviction discovery in the Kern County Superior Court on August 3, 2007. (Exh. A of pet. for writ of mandate filed in the Court of Appeal.) That motion requested sixteen distinct categories of discovery materials. The People, represented by the California Attorney General, filed an opposition to the motion on August 20, 2007 based, in part, on grounds that Mr. Catlin's motion was untimely.[2] (Exh. B of pet. for writ of mandate.) Petitioner filed a reply on August 27, 2007. (Exh. C of pet. for writ of mandate.) A hearing on the motion was held on August 27, 2007. At that time, Mr. Catlin's petition for writ of habeas corpus was pending before the California Supreme Court, Case Number S090636 (although it was subsequently denied on September 25, 2007.) At the hearing, the Superior Court denied petitioner's motion as untimely. (8/27/07

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The People were represented at petitioner's trial by the California Attorney General after the Kern County District Attorney was recused.

RT 38 [Exhibit D of the petition for writ of mandate].) Petitioner obtained no discovery materials at all either through the informal discovery process or the filing of his motion.

Petitioner filed a petition for writ of mandate[3] in the Court of Appeal, Fifth District, on September 14, 2007. (Fifth District Court of Appeal Case Number F053705.) The petition for writ of mandate was summarily denied on October 5, 2007. On October 16, 2007, Mr. Catlin filed a petition for review in the California Supreme Court (Case No. S157232). On November 28, 2007, this Court granted the petition for review and transferred the matter back to the Court of Appeal with directions to vacate the order denying his petition for mandate and to issue an alternative writ directing the superior court to grant the motion or show cause why it should not be granted. The Court of Appeal issued an alternative writ on February 28, 2008. After respondent filed a return on March 27, 2008, petitioner filed a reply and a motion for judicial notice on April 18, 2008. The Court of Appeal issued its opinion on August 22, 2008 with a dissenting opinion by Justice Dawson. Mr. Catlin filed a petition for rehearing on September 4, 2008. That petition was denied without any

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A petition for a writ of mandate is the proper remedy to challenge a trial court's post-conviction discovery order. (*In re Steele, supra,* 32 Cal.4th at p. 692, n. 2.)

substantive changes to the opinion[4] on September 8, 2008; Justice Dawson "would [have] grant[ed] the petition."

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4 The Court of Appeal, in the order denying the petition for rehearing, did correct the date on which this Court granted Mr. Catlin's prior petition for review.

ARGUMENT

I. Did the California Supreme Court Intend to Impose a Time Deadline for Filing a Discovery Motion When it Used the Phrase "Reasonable Time" in *In re Steele* (2004) 32 Cal.4th 682, 692, n. 2, in Light of the Fact That Section 1054.9 Contains No Statutory Deadline for Filing a Discovery Motion?

Section 1054.9 allows persons subject to a sentence of death to file a motion for post-conviction discovery to assist in seeking a writ of habeas corpus. It provides that,

> [u]pon prosecution of a postconviction writ of habeas corpus ... in a case in which a sentence of death ... has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall ... order that the defendant be provided reasonable access to ... materials in possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at the time of trial.

(Sec. 1054.9, subds. (a) & (b).)

The statute provides no time limits for making the discovery motion.

In *In re Steele*, the California Supreme Court stated in a footnote that:

> Section 1054.9 provides no time limits for making the discovery motion or complying with any discovery order. We believe the statute implies that the motion, any petition challenging the trial court's ruling, and compliance with a discovery order must all be done within a reasonable time period. We will consider any unreasonable delay in seeking discovery under this section in determining whether the underlying habeas corpus petition is timely.

> (See generally *In re Robbins* (1998) 18 Cal.4th 770; *In re Clark* (1993) 5 Cal.4th 750.) We would consider a petition for writ of mandate challenging the trial court's order filed within 20 days after that order to be filed within a reasonable time for these purposes. Moreover, as we are directing in this case, any discovery ordered pursuant to section 1054.9 should be provided within a reasonable time, which might vary depending on the nature of the order. We will also consider the date of compliance with the order in considering the timeliness of any petition for writ of habeas corpus that might be filed in light of the discovery.

(*In re Steele, supra*, 32 Cal.4th at p. 692, n. 2.)

Even though this footnote acknowledges the legislature set no time limit for bringing a post-conviction discovery motion, the Superior Court and the Fifth District Court of Appeal read this footnote as requiring the superior court to determine whether any post-conviction discovery motion has been brought within a "reasonable time." (Slip opn., pp. 3, 6-7, 9, 11.) The Court of Appeal declined to define a "reasonable time" period and erroneously suggests, without deciding, a multitude of dates upon which any time period might have started running. (Slip opn., pp. 8, 9-11.)

As Justice Dawson notes in her dissent, footnote 2 of *Steele*

> can be read in at least three ways. First, it can be read to say that "any unreasonable delay in seeking discovery" will be considered when (and only when) the timeliness of "the underlying habeas corpus petition" is considered. (*Steele*, at pp. 692-693, fn. 2.) Second, it can be read to say that "any petition challenging the trial court's ruling" on a section 1054.9 motion, as well as "compliance with a discovery order must all be done within a reasonable time period" after the filing of a section 1054.9 motion. (*Steele*, at pp. 692-693, fn. 2, italics added.) Third, it can be read as does the

> majority. ¶ Given this ambiguity in footnote 2, I must disagree with the conclusion that its language allows us to ignore the plain words used and not used by the Legislature in enacting section 1054.9. The section simply provides no time limit for making a motion.

(Slip opn., dissenting opn. of Dawson, J., p. 1.)

The majority did not consider whether the language of this *Steele* footnote contains any ambiguity much less how to resolve it. Nor does the majority cite any authority for its position that the phrase "reasonable time" means nothing more than the strict measurement of weeks or days from a fixed starting point that, itself, is undefined by the court.

By ignoring the concerns of Justice Dawson and other arguments raised by Mr. Catlin below, the Court of Appeal reached a conclusion not supported by this Court's precedents and one that, as Justice Dawson presciently notes, will add to the problems of unnecessary delays and undue public expenditures. (See slip opn., dissenting opn. of Dawson, J., p. 2.) Moreover, the majority opinion, rather than provide a clear answer regarding the interpretation of the phrase a "reasonable time," merely adds a new level of confusion that does not serve the legislative intent of section 1054.9.

A. The Majority Opinion Fails to Address the Central Issue Raised By Mr. Catlin: What Did the California Supreme Court Mean by the Phrase "Reasonable Time"

As Justice Dawson notes in her dissent, the meaning of the phrase "reasonable time" as used in footnote 2 of *Steele* is ambiguous and open to several differing interpretations. (Slip opn., dissenting opn. of Dawson, J., p. 1.) The majority ignores the fact that the language of footnote 2 does not clearly set any time limit for filing a post-conviction discovery motion and, even if it could be so interpreted, the footnote is ambiguous as to whether that limit should be interpreted as it is in the Court of Appeal's opinion and ambiguous as to both who makes the determination of timeliness and when that determination is made.

The Court of Appeal majority rejects both the plain language of the statute, which contains no time limit, and the language of footnote 2 that explicitly says "any unreasonable delay in seeking discovery" will be considered by the California Supreme Court "in determining whether the underlying habeas corpus petition is timely." (*In re Steele, supra*, 32 Cal.4th at p. 692, n. 2; see slip opn., p. 7.) The Court of Appeal's interpretation is contrary to *Steele* (1) as to when the determination of timeliness is made (e.g., at the time the motion is filed as opposed to at the time the habeas petition is filed), (2) as to you makes the determination (the trial court

instead of this Court), and (3) as to the standard used to determine timeliness. In rejecting the idea that the Supreme Court will consider any unreasonable delay at the time a petition for habeas corpus is filed, the Court of Appeal majority basically renders this sentence in *Steele* meaningless.

The Court of Appeal majority does not attempt to explain how this sentence has meaning if it is the superior court who determines whether a post-conviction discovery motion has been filed within a reasonable time. If the superior court makes the determination of timeliness, the Supreme Court cannot "consider any unreasonable delay in seeking discovery ... in determining whether the underlying habeas corpus petition is timely." (*Steele*, 32 Cal.4th p. 692, n. 2.) Such action would be foreclosed.

This Court explicitly acknowledged that section 1054.9, as enacted, contained no time limitations on when a motion for post-conviction discovery can be filed. (See *Steele*, 32 Cal. 4th at p. 692, n. 2 ["Section 1054.9 provides no time limits for making the discovery motion..."].) By stating that unreasonable delay in filing the motion will be considered in determining the timeliness of the underlying petition for writ of habeas corpus, this Court reconciled the lack of time limits in the statute with its own policies that a habeas petition must be filed without substantial delay.

(See *In re Robbins* (1998) 18 Cal.4th 770, 780-781; *In re Clark* (1993) 5 Cal.4th 750; Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3, stds. 1-1.1 & 1-1.2.) The proper reading of footnote 2 would be that, even though the statute contains no time limits, that lack of a time restriction to file a post-conviction discovery motion does not affect the need to file the habeas petition without substantial delay.

In reaching its conclusion, the Court of Appeal neglected to consider language in *Steele* that shows the Supreme Court contemplated the filing of a post-conviction discovery motion after filing a state habeas petition, during the federal habeas proceedings, and after an execution date has been set. *Steele* directs petitioners to file a discovery motion in this Court, rather than the trial court,

> when the federal courts have denied relief on habeas corpus (or the time for the petitioner to seek federal habeas corpus relief has passed), and the superior court has set a specific execution date. At this late stage of the proceedings, to expedite our consideration of any final challenges to the judgment, a petitioner may, and usually should, file any discovery motion in this court in the first instance.

(*Steele*, 32 Cal.4th at p. 692, n. 1.)

This Court clearly contemplated that motions would be filed up to the date of execution. Thus, in considering the *Steele* opinion as a whole, the Court of Appeal's conclusion is at odds with the *Steele* opinion on when a post-conviction motion may be filed.

Because the language used by the Supreme Court in footnote 2 of *Steele* is ambiguous, Mr. Catlin should be given the benefit of any doubt in interpreting the meaning of a "reasonable time." Moreover, one cannot "ignore the plain words used and not used by the Legislature in enacting section 1054.9" in deciding whether a post-conviction discovery motion must be filed within a "reasonable time." (Slip opn., dissenting opn. of Dawson, J., p. 1.)

Settled rules of statutory construction require that in criminal cases any ambiguity should be resolved in favor of the defendant. (*People v. Belmontes* (1983) 34 Cal.3d 335, 345.) While the time requirements of footnote 2 are a judicially-created rule of procedure rather than a legislatively-enacted statute, the same maxim should apply by analogy. Thus, any ambiguity in the language of section 1054.9 must be decided in Mr. Catlin's favor. As Justice Dawson's dissent explains, there are multiple reasonable readings of the language of footnote 2. (Slip opn., dissenting opn. of Dawson, J., p. 1.) Petitioner cannot be faulted for interpreting the statute differently from the majority below.

Given the structure of the overall habeas scheme, this Court is in a better position to evaluate any alleged delay at the time that the habeas petition is filed than is the trial court at the time that the post-conviction

discovery motion is filed. Unlike the trial court, this Court can evaluate the results of any post-conviction discovery at the time of the petition. For example materials turned over by the prosecution during post-conviction discovery may well be characterized at that time by the prosecutor as irrelevant but, with further investigation, this discovery material could be shown to be exculpatory evidence that the prosecution had an independent duty to disclose under *Brady v. Maryland* (1963) 373 U.S. 83. If, for instance, the prosecutor were given only the name of a potential witness by law enforcement, he might not know that the witness had provided exculpatory evidence to the police. Post-conviction discovery would give the petitioner a chance to identify and interview that exculpatory witness and to present it in the habeas petition. In the subsequent habeas petition, the petitioner could well be able to convince this Court that any delay in filing the habeas petition was attributable to the prosecution's failure to disclose *Brady* evidence and, therefore, justifiable. Without such discovery, the condemned petitioner might well be executed without ever having that claim considered by a court.

B. By Refusing to Consider the Plain Language and Legislative History of Section 1054.9, the Court of Appeal Reaches the Wrong Interpretation of Footnote 2

When the plain language and legislative history of section 1054.9 are considered, the Court of Appeal's interpretation of footnote 2 is clearly erroneous. While the majority refused to consider the legislative history and other relevant documents in interpreting section 1054.9 in light of the *Steele* footnote (slip opn., p. 7, n. 5), such documents are highly relevant. (See slip opn., dissenting opn. of Dawson, J., p. 1-2.) The Court of Appeal's refusal is especially troubling in light of the fact that, as Justice Dawson demonstrates, the language of footnote 2 and the legislative history of section 1054.9 can be straightforwardly reconciled by interpreting footnote 2 to mean that any unreasonable delay in filing a post-conviction discovery motion will be considered only when determining the timeliness of the underlying habeas petition. (See slip opn., dissenting opn. of Dawson, J., p. 1.) As Justice Dawson demonstrates, the majority is imposing by judicial fiat the exact concept of timeliness that was rejected by the Legislature when drafting the statute. (See slip opn., dissenting opn. of Dawson, J., p. 1.) The majority fails to explain why it adopted a reading of footnote 2 that is at odds with the plain language and the legislative intent of section 1054.9 when the statute's language and legislative history can

easily be reconciled with the language of the *Steele* opinion.

Furthermore, the plain language of section 1054.9, subdivision (a), provides that the court "shall" order discovery be provided upon (1) the prosecution of a habeas petition and (2) on a showing that good faith efforts were made to obtain the materials sought from trial counsel. The Legislature's use of the word "shall" is ordinarily construed as mandatory under well-settled principles of statutory construction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) Once the two statutory preconditions for ordering discovery are met, the Legislature did not intend to give the court discretion on whether such discovery was granted. The Court of Appeal ignored the statute's use of the word "shall," in reaching its holding that the trial court has discretion to deny discovery based upon some concept of timeliness that looks to the substantive requests in the motion. (See slip opn., pp. 9-10.) In this respect, the Court of Appeal's opinion is directly at odds with the statutory language chosen by the Legislature.

C. Even if the Supreme Court Intended that the Superior Court Determine Whether a Post-conviction Discovery Motion Was Filed Within a Reasonable Time, There is No Support for the Court of Appeal's Contention that Such a Standard Should Be Measured in Days or Months From a Fixed Starting Point

Without explaining when the "reasonableness" clock starts running, the Court of Appeal held that, at some point, "any lengthy delay must be explained in a manner that will permit the trial court to conclude the delay was reasonable." (Slip opn., p. 8.) The Court of Appeal refused to provide a definition of "reasonable delay" "other than to suggest that if the practitioner is concerned about the delay, the trial court also will be concerned." (Slip opn., p. 8.)

Neither the Court of Appeal nor Real Party in Interest in its briefing cited any authority for interpreting "reasonable time" to mean a fixed period of time measured from some certain starting point. Indeed, the practitioner who looked to other instances where this Court and the Courts of Appeal have used the phrase "reasonable time" would come to a different definition than that proffered by the majority below.

In *People v. Windham,* (1977) 19 Cal.3d 121, 128, fn. 5 (stating when a *Faretta*[5] motion can be brought), this Court defined "reasonable

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5 *Faretta v. California* (1975) 422 U.S. 806.

time" as any time before a motion causes unjustifiable delay or obstructs the orderly administration of justice. (*People v. Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) Such a definition is entirely consistent with the language used in *Steele*. The Court of Appeal does not acknowledge or attempt to distinguish *Windham*'s definition of "reasonable time." Even though footnote 2 could logically and correctly be interpreted using the *Windham* Court's definition of reasonable time, the Court of Appeal refused to address this argument.

Not only is the language in *Steele* entirely consistent with the language in *Windham* interpreting the phrase "reasonable time," but this Court has used a similar construction in interpreting the timeliness of trial court discovery motions. In *Hill v. Superior Court of Los Angeles County* (1974) 10 Cal.3d 812, 821, the Court, in discussing the timeliness of a discovery motion, stated that "[s]uch a motion ordinarily should be made at a time when it would not have [the] effect" of delaying the trial were the motion granted. The *Hill* court looked at the prejudicial effect on the proceedings when assessing timeliness. (*Ibid.*) One appellate judge has opined that the standard of timeliness for a discovery motion as expressed in *Hill* requires that, "[i]n considering the question of timeliness trial courts must consider not only absolute time, i.e., the months or days since the

prosecution was commenced, but, what may be more important, time as it relates to the present stage of the proceedings." (*City of Alhambra v. Superior Court (Rodriguez)* (1988) 205 Cal.App.3d 1118, 1139, dissenting opn. of Danielson, J.)

In other contexts, courts have interpreted a "reasonable time" to be any time before which one party is prejudiced by any delay. In *California State Auto. Assn. Inter-Ins. Bureau v. Cohen* (1975) 44 Cal.App.3d 387, the appellate court was tasked with interpreting the phrase "a reasonable time" as it applied to the time in which arbitration must be demanded when the arbitration agreement itself specified no time limits. (*Id.* at pp. 392-393.) The court interpreted "a reasonable time" as being "the period of time before one party improperly causes prejudice to the other ..." (*Id.* at p. 393.)

Under this definition, petitioner's motion was timely. Neither Respondent nor Real Party in Interest alleged that they were prejudiced in any way by the timing of petitioner's motion. The statute by its terms only requires Real Party in Interest to turn over materials in its possession; it imposes no other duty. The trial court alleged no inconvenience from the timing of the motion. The Court of Appeal pointed to no disruption of the court process or prejudice to the government that changes with the timing of the motion. Whenever the motion is brought, the only relief possible is for

the trial court to order the prosecution to turn over what it already has. Indeed, as Real Party in Interest argued in its briefing, Mr. Catlin is the one who suffers any prejudice arising from the timing of the motion.

Petitioner notes that neither the Court of Appeal nor Real Party in Interest provided any authority for its interpretation of "reasonable time." A petitioner looking to this Court's own opinions for guidance to meaning of "reasonable time" in *Steele* would find no precedent for the Court of Appeal's position. Although the Court of Appeal claims to "follow the Supreme Court's lead" (slip opn., p. 7, n. 5), it certainly does not do so in interpreting how this Court has used the phrase "reasonable time."

D. Assuming, Arguendo, that the Court of Appeal Adopted the Correct Interpretation of Footnote 2, the Court of Appeal Erred in Applying the Definition to Mr. Catlin's Case

As shown above in Arguments I. A, B, and C, and in Justice Dawson's dissent, the language of footnote 2 was subject to multiple logical interpretations. Mr. Catlin should not be disadvantaged for failing to guess which interpretation the Court of Appeal would chose.

Here, as shown above, the definition of "a reasonable time" as used in *Steele* could reasonably and logically be interpreted in a manner that led to the conclusion that petitioner's motion was timely. Yet, the Court of Appeal adopted a definition of timeliness under which petitioner's motion would be barred as untimely. It was unfair to apply to petitioner this novel definition of timeliness that first arose and was defined in the context of this writ proceeding. (See *People v. Welch* (1993) 5 Cal.4th 228, 238 [unfair to apply to appellant a rule that arose within context of her own appeal].) Therefore, regardless of the Court of Appeal's definition of timeliness, petitioner should have been afforded relief and the trial court ordered to address the merits of his motion.

E. The Court of Appeal's Interpretation of Footnote 2 is at Odds With the Purpose of Section 1054.9, the Principles Expressed in *Steele*, and Other Court of Appeal Opinions

Putting aside the fact that the majority ignored the compelling arguments of both Justice Dawson and Mr. Catlin, the Court of Appeal reaches conclusions about section 1054.9 that are at odds with the language of the statute, prior case law precedent, and the legislative intent of the statute.

1. The Court of Appeal Places a Burden of Proof on Petitioner to Justify the Items Requested

In denying Mr. Catlin's petition on grounds that his motion was not timely, the Court of Appeal places an affirmative duty upon the petitioner to prove that any delay was reasonable. (See slip opn., p. 8.) In evaluating whether Mr. Catlin met this newly-defined burden, the Court of Appeal goes beyond the timeliness issue considered by the superior court to the merits of Mr. Catlin's substantive requests. (See slip opn., pp. 9-10.) Although the Court of Appeal mischaracterizes Mr. Catlin's request (see Argument I.B., *infra*)[6], it looked at whether Mr. Catlin had justified the

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The Court of Appeal mischaracterized Mr. Catlin's discovery request by stating he only wanted "access to the district attorney's entire file" (slip opn., p. 9), At the time that the trial court denied the motion for post-conviction discovery, Mr. Catlin had submitted a proposed order that listed 16 specific discovery requests.

items requested. (Slip opn., p. 10 ["no suggestion ... information was missing from Catlin's trial counsel's files ... that trial counsel had not been provided with discovery to which Catlin was entitled ... that anything had occurred ...necessitating the filing of the section 1054.9 motion."]) The Court of Appeal places a burden of proof on a petitioner to prove that he needs the items requested as part of his proof justifying why "a delay was reasonable." (Slip opn., p. 8.) Such a burden of proof on the petitioner is not found in the statute.

Making this burden a condition of timeliness is a backdoor method of imposing that which has been rejected at the front door. In *Curl v. Superior Court (People)* (2006) 140 Cal.App.4th 310, 319, the Court held that "[a] defendant seeking section 1054.9 post-conviction discovery is not seeking to prove anything and has no 'burden of proof.'" The *Curl* court noted that "[i]It is axiomatic that one cannot prove what was not turned over if one does not know what was not turned over." (*Id.* at p. 324.) In contrast, the majority below expected Mr. Catlin to identify what documents

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(Pet., Exh. A [Proposed Order pp. 1-10].) Mr. Catlin had also provided Real Party in Interest with a 90-page-long list of documents that were believed to have been provided during pretrial discovery, all of which Mr. Catlin was willing to exclude from his discovery request. (Pet., Exh D [Reporter's Transcript of August 27, 2007, pp. 35-36].) The opinion does not accurately reflect that Mr. Catlin's discovery request was not merely a broad, blanket one. (See Pet. for Rehearing, filed Sept. 4, 2008.)

had not been turned over to trial counsel. (Slip opn., p. 10 ["There was no suggestion that new information was developed suggesting that trial counsel had not been provided with discovery to which Catlin was entitled"].) In the guise of "justifying" the timeliness of a motion, the Court of Appeal requires a petitioner to demonstrate the necessity of his requests. Given that the Court of Appeal does not define a "reasonable time" by which the motion must be filed (see Argument I.B.2, *infra*) and requires the petitioner to demonstrate that any delay was reasonable, a petitioner will have little choice but to justify the need for requested items (i.e., meet an unspecified burden of proof) in order to justify the timeliness of his request.

Since the Court of Appeal holds that each individual request must be justified as timely, a habeas petitioner will almost be forced to file and litigate a "mini-habeas" petition detailing and justifying each individual request to insure that post-conviction discovery is not denied as untimely. Because it is unclear from the Court of Appeal's opinion what "facts or circumstances" will lead to a conclusion that "a delay was reasonable" (Slip opn., p. 8), a petitioner will have to provide evidence justifying any delay and explaining why each individual request is necessary. As Justice Dawson notes, "engrafting of a timeliness requirement on section 1054.9 discovery motions, ... simply will not serve the end of avoiding

unnecessary delays and public expenditures; instead, it will add to the problem." (Slip opn., dissenting opn. of Dawson, J., p. 2.)

2. The Court of Appeal Does Not Even Identify the Point From Which Timeliness is Measured

The Court of Appeal concludes that "any lengthy delay must be explained in a manner that will permit the trial court to conclude the delay was reasonable." (Slip opn., p. 8.) The Court of Appeal, however, fails to identify the point from which any delay is measured, or, in other words, when the timeliness clock starts.

By not identifying the point from which any delay is measured, the Court of Appeal fails to give any useful guidance to practitioners. The Court of Appeal notes as significant that "[s]eventeen years passed between Mr. Catlin's conviction and his section 1054.9 motion." (Slip opn., p. 9.) It also found that "the filing of the original petition for writ of habeas corpus in 2000 is also significant ..." (Slip opn., p. 10.) The majority concluded that Mr. Catlin "waited ... seven years to file his section 1054.9 motion" from the date that his petition for writ of habeas corpus was filed.[7] (Slip

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[7] The Court of Appeal fails to cite any authority that allowed a post-conviction discovery motion to be filed prior to the issuance of an order to show cause until the effective date of section 1054.9 on January 1, 2003.

opn., p. 9.)

In rejecting Mr. Catlin's argument that his motion was timely, the Court of Appeal stated that "appointment of new counsel 16 years after Catlin was convicted simply is not ... a satisfactory reason to permit the filing of a section 1054.9 motion after a lengthy delay." (Slip opn., p. 11.) The Court of Appeal posits as possible starting points for measuring delay, the date of conviction, the date on which a habeas petition was filed, or the date on which section 1054.9 became effective. Thus, the opinion provides little guidance for future petitioners.[8]

Given the emphasis by the Court of Appeal on the date of conviction, the next litigant seeking to explain any delay in filing a post-conviction discovery motion will most likely include argument and evidence justifying why the motion was not filed closer to the date of conviction. In the absence of any guidance from the Court of Appeal – "we cannot list the facts or circumstances that would require a court to conclude

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Measuring "reasonable time" from any of the dates proffered by the Court of Appeal will necessarily mean that post-conviction discovery motions cannot be filed in a timely manner by the numerous death row inmates who have not been appointed habeas counsel years after conviction and, in some cases, despite the fact that their direct appeals have already been decided. The Court of Appeal's position could result in the wholesale denial of post-conviction discovery motions for those as-yet-unrepresented condemned prisoners subjecting them to loss of a statutory right before they were ever in a position to assert it; such a result would clearly violate the due process principles of *Hicks v. Oklahoma* (1980) 447 U.S. 343.

that a delay was reasonable" (slip opn., p. 8) – a practitioner filing a post-conviction discovery motion might need a declaration from trial counsel explaining any post-conviction delay in the trial court, such as time spent working on a motion for new trial, a declaration from counsel on direct appeal explaining why no motion was filed before the appointment of habeas counsel, and a declaration from habeas counsel explaining why the motion was not filed immediately after his appointment. Such a petitioner might even seek a declaration from the Supreme Court's Automatic Appeals Monitor explaining any delay in appointing habeas counsel. Given that some Death Row inmates are not appointed habeas counsel until after their direct appeal has been decided, a court utilizing the Court of Appeal's logic could find that a "reasonable time" had long past even before habeas counsel was appointed.

Moreover, the Court of Appeal is confused about whether post-conviction discovery was available before the enactment of section 1054.9. The majority thinks that, prior to the passage of section 1054.9, Mr. Catlin could have made "a motion to determine if anything was missing from Catlin's trial counsel's files" at the time his habeas petition was filed but did not do so "perhaps because of the burdensome procedures that would have been necessary ..." (Slip opn., p. 10.) Had the majority attentively

read *Steele*, they would have known that

> In *People v. Gonzalez* (1990) 51 Cal.3d 1179, [this Court] held that a person seeking habeas corpus relief from a judgment of death is not entitled to court-ordered discovery unless and until this court has issued an order to show cause and thus has determined that the petition has stated a prima facie case for relief. (*Id.* at pp. 1255–1261.)

(*Steele, supra*, 32 Cal.4th at p. 690.)

Thus the Court of Appeal may well be unaware that it faults Mr. Catlin for not asking for that to which he was legally not entitled at the time.

The majority compounds this error by falsely speculating that habeas counsel would necessarily comb through the voluminous record and trial counsel files to determine whether materials were missing (slip opn., p. 10) at a time when there was no chance of obtaining such materials through discovery. The Court of Appeal cannot explain how Mr. Catlin's habeas counsel could accomplish such a task when his trial counsel failed even to keep a discovery log. (See Pet., Exh. A [Declaration of counsel in Support of Motion for Discovery].) Once trial counsel had turned over what was represented as his entire file, habeas counsel had no one from whom additional discovery could be requested. Thus, prior to the enactment of section 1054.9, compiling a discovery "wish list" served no purpose prior to the issuance of an order to show cause. The Court of Appeal lacks a basic grasp of the capital case habeas scheme.

The majority ignores an obvious starting point for measuring timeliness in this case, March 23, 2004, the date of the *Steele* opinion which, according to the Court of Appeal, first raised the possibility of a time limit. Mr. Catlin cannot be blamed for failing to intuit a time limit that is not contained in the statute.

Moreover, even if a timeliness limit were known or promulgated with the publication of *Steele*, there was no mechanism in place to pay already-appointed counsel for work done on post-conviction discovery motions until November, 2004. Mr. Catlin, like most habeas petitioners, had expended the resources allocated by the Court (and then some) in preparing his habeas petition. Habeas counsel could not be expected to work for free when filing a post-conviction discovery motion. Even if the there was a time limitation, "[p]rivate appointed counsel ... is under no obligation to fund ... an investigation [into potential habeas claims] out-of-pocket." (*In re Gallego* (1998) 18 Cal.4th 825, 833.) Not until November, 2004, did the California Supreme Court make clear that appointed counsel in death penalty cases would be compensated for litigating post-conviction discovery motions. (Letter of November 23, 2004 from Frederick K. Olhrich, Court Administrator and Clerk of the Supreme Court, which was Exhibit E to Petitioner's Motion Requesting Judicial Notice denied by the Court of

Appeal.)

Although the Court of Appeal based its denial of Mr. Catlin's petition in part on grounds that he "ha[d] been represented by counsel since before his trial" (Slip opn., p. 11), the majority failed to acknowledge that private, appointed counsel was under no obligation to fund litigation out-of-pocket. Measuring delay from the point at which compensation was provided, there was an eight month period between Mr. Olhrich's letter authorizing compensation and former counsel's motion to withdraw and a nine month period between former counsel's withdrawal and appointment of new counsel. (See Reply, pp. 12-13.)

While the Court of Appeal presents Mr. Catlin's representation by counsel as a smooth continuum, in reality, his representation since the *Steele* opinion included long periods of uncertainty about whether counsel would be compensated for a post-conviction discovery motion and who counsel would be. The Court of Appeal ignored these important facts and circumstances and, as a result, reached the wrong conclusion.

3. The Court of Appeal Errs by Contending that a Time Limitation Prevents "Numerous" Post-conviction Discovery Motions

The Court of Appeal rejected the argument that the language of footnote 2 in *Steele* means that any unreasonable delay in bringing a post-conviction discovery motion is evaluated by this Court at the time the habeas petition is filed. The majority found that this interpretation results in "mischief" because "a defendant could file numerous section 1054.9 motions over a period of years and the trial court would be without power to deny the motions on the grounds that he or she had waited too long." (Slip opn., p. 7.) Neither Real Party in Interest in its briefing nor the Court of Appeal at oral argument raised any concern that numerous motions would be filed. This doomsday scenario exists only within the Court of Appeal's fertile imagination.

The practical considerations of habeas litigation disprove the majority's argument. The presumptive deadlines for filing a petition for writ of habeas corpus lay to rest the Court of Appeal's imagined fears of "numerous" motions over a number of years. A petition for a writ of habeas corpus is presumed to be filed without substantial delay if it is filed within 180 days after the filing of the appellant's reply brief on the direct appeal, or within 36 months after appointment of habeas corpus counsel, whichever

is later. (Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3, stds. 1-1.1 & 1-1.2.) Habeas counsel has little time to file successive post-conviction discovery motions and great incentive to deal with any post-conviction discovery issues in an efficient manner.[9] Any effective post-conviction discovery motion would have to be filed in the window between the time that habeas counsel had digested the transcripts and the contents of trial counsel's files and the time at which counsel would be unable to complete any investigation based on materials provided through post-conviction discovery.

Furthermore, given the high barriers that must be overcome before a second or successive petition for habeas corpus will be considered (see *In re Clark, supra,* 5 Cal.4th at p. 797), a post-conviction discovery motion submitted after the habeas petition has been filed would normally do little good. The Court of Appeal failed to realize that Mr. Catlin was in a unique position because, for him, the right to bring a post-conviction discovery motion arose only after his petition for writ of habeas corpus had been filed. The number of litigants in Mr. Catlin's position will quickly approach zero as the effective date of section 1054.9 recedes into the past.

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The Court of Appeal appears ignorant of the reality that habeas counsel could not expect compensation from the Supreme Court for "numerous" post-conviction discovery motions.

Moreover, it is sheer folly for the Court of Appeal to believe that a petitioner would file numerous motions based upon the same evidence with any rational expectation of a different result. It would be irrational, once the trial court had ruled, to file the same motion in the same court even if the second motion was filed within a reasonable time. Discovery, even if granted, is limited to items possessed by the prosecution at the time of trial (sec. 1054.9, subd. (b), so there is no on-going duty on the part of the prosecution to provide discovery nor the possibility that discoverable materials will be created in the future.

A petitioner's remedy for the denial of post-conviction discovery is a petition for writ of mandate. (*In re Steele, supra*, 32 Cal.4th at p. 692, n. 2.) The Court of Appeal cites no authority for its position that time limitations are necessary to prevent numerous motions, and Mr. Catlin is aware of no area of the law where practitioners file numerous motions based upon the facts. Moreover, such imagined "mischief" is prevented by other legal concepts that, unlike time limitations, are specifically designed to prevent multiple motions litigating the same issue. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 252-253; *People v. DeLouize* (2004) 32 Cal.4th 1223, 1232 [trial court cannot reconsider final orders].) Therefore, a defendant could not file "numerous" post-conviction discovery motions

with any rational expectation of a new or different result.

4. The Court of Appeal Implies that Any Delay Would Have to Be Explained for Each Separate Item Requested in the Post-Conviction Discovery Motion

At the same time that the majority decries the specter of "numerous" post-conviction discovery motions, it devises a scheme that could result in numerous such motions being filed. The majority's opinion contemplates that the superior court will look to the substance of the individual requests for discovery materials in determining whether any delay in making that request is reasonable. (See slip opn., p. 10.) If the delay in bringing each individual request must be explained, rather than any delay in bringing a single comprehensive motion, then a petitioner would have a great incentive to bring a motion for each individual claim as soon as the grounds for making such a request is known. For the petitioner who seeks to cover all bases in his quest for relief, the result would be a succession of motions seeking to fulfill individual discovery requests. Such an approach would be the only way a petitioner could insure that each request was made "within a reasonable time." Ironically, the Court of Appeal's fear of "numerous" motions could be realized because of the very policy that Court itself adopted.

5. The Court of Appeal Fails to Understand How Materials Obtained through Post-conviction Discovery Could Be Useful to a Petitioner

The Court of Appeal finds "the obvious potential for mischief" in interpreting footnote 2 of *Steele* to mean that a post-conviction discovery motion is timely if the information obtained may be useful to the petitioner. (Slip opn., p. 8.) The majority erroneously concludes that "[i]f the only time limit on the filing of a section 1054.9 motion is that it must be filed before the defendant is executed, then the reasonable time requirement becomes meaningless." (Slip opn., p. 8.) This conclusion is based on the Court of Appeal's narrow focus on the moment of filing of a post-conviction discovery motion without regard to the overall habeas scheme of which such a motion is a part. The Court of Appeal exposes its ignorance of the policies and precedents which govern California capital habeas petitions. Thus, the Court of Appeal's conclusion fails to acknowledge that a post-conviction discovery motion is only a means to obtain material useful in a petition for habeas corpus. Counsel, therefore, has every incentive to obtain post-conviction discovery before the date upon which a habeas petition is presumptively timely.

There is no doubt that, when a habeas petition is filed past the presumptive deadlines, any substantial delay must be justified. (*In re Clark*,

supra, 5 Cal.4th at p. 782; *In re Robbins*, *supra*, 18 Cal.4th at p. 780-781.) Even if the superior court is not making a determination of a "reasonable time," this Court most certainly is. Missing the presumptive deadline for habeas petitions presents a grave danger to capital defendants. Any "reasonable time" requirement is not "meaningless" if it has to be explained in the petition for habeas corpus. The Court of Appeal's analysis lacks an appreciation of the role that a post-conviction discovery motion plays in the overall habeas scheme.[10] This lack of appreciation has led to an opinion that fails to address the issue that was before the court in a manner consistent with the statue itself, the *Steele* opinion, and, ultimately, the overall capital case habeas scheme. This Court must take corrective action.

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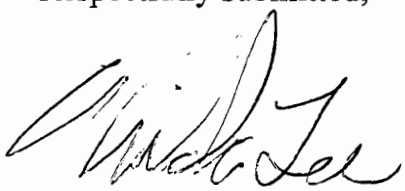
Mr. Catlin suspects that the "obvious potential for mischief" that worries the majority is the possibility that the filing of a last-minute post-conviction discovery motion will be good cause to delay a scheduled execution. Such concern is mere speculation. There is simply no reason to believe that a last-minute motion will convince this Court to postpone an execution.

CONCLUSION

For the foregoing reasons, and in the interest of justice, petitioner respectfully requests that the petition for review be granted.

Dated: September 26, 2008

Respectfully submitted,

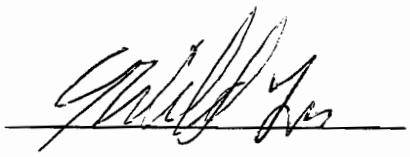


J. Wilder Lee
Attorney for Petitioner
Steven D. Catlin

Certification of Word Count

I hereby certify that the number of words in this Petition for Review is 8060 according to the word count function of the computer program used to prepare the document.

Dated: Sept. 26, 2008



J. Wilder Lee
Attorney for Petitioner

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STEVEN DAVID CATLIN, Petitioner, v. SUPERIOR COURT OF KERN COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	F053705 (Super Ct. No. 30594) **OPINION**

ORIGINAL PROCEEDING; petition for writ of mandate. Clarence Westra, Jr., Judge.

J. Wilder Lee, under appointment by the Supreme Court, for Petitioner.

No appearance for Respondent.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, George Hendrickson and Stephen G. Herndon, Deputy Attorneys General, for Real Party in Interest.

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SEE DISSENTING OPINION

Steven David Catlin is awaiting execution for the 1984 murder of his mother, Martha Catlin, and is serving life sentences for the murders of two of his ex-wives, Joyce and Glenna Catlin.[1] He has filed a petition for a writ of mandate seeking an order directing the trial court to grant his motion for postconviction discovery pursuant to the provisions of Penal Code section 1054.9.[2] The trial court denied Catlin's section 1054.9 motion, finding it was not filed within a reasonable time period.

Catlin argues the trial court erred because the statute does not require a section 1054.9 motion be filed within a "reasonable" time period. We agree with Catlin that section 1054.9 does not impose any such requirement, but conclude that *In re Steele* (2004) 32 Cal.4th 682 (*Steele*) requires a motion filed pursuant to the statute be filed within a reasonable time period. Accordingly, we will deny Catlin's petition.

PROCEDURAL SUMMARY

Catlin was convicted of the three crimes in two separate trials. He was convicted of murdering Glenna in Monterey County Superior Court in 1986. He was sentenced to life in prison without the possibility of parole. The judgment was affirmed on appeal in an unpublished opinion. (*People v. Catlin* (June 13, 1988, H002078) [nonpub. opn.].) Catlin was convicted of murdering Joyce and Martha in 1990 in Kern County Superior Court. He was sentenced to life in prison for the murder of Joyce[3] and sentenced to death for the murder of Martha. The judgment was affirmed on direct appeal. (*People v. Catlin* (2001) 26 Cal.4th 81.) Catlin is confined at San Quentin State Prison pending execution of the death sentence.

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[1]We will refer to the victims by their first names, not out of disrespect but to avoid any confusion to the reader.

[2]All further statutory references are to the Penal Code unless otherwise stated.

[3]Catlin was not eligible for the death penalty because the murder occurred after the death penalty was found unconstitutional and before the revised death penalty statute was enacted.

On August 9, 2000, Catlin filed a petition for writ of habeas corpus in the Supreme Court. On September 25, 2007, the Supreme Court denied Catlin's petition for writ of habeas corpus.

On August 3, 2007, seven years after filing his petition for writ of habeas corpus, but before the petition was denied, Catlin filed a motion for postconviction discovery pursuant to section 1054.9. Section 1054.9 permits a defendant who has been sentenced to death, or to life in prison without the possibility of parole, to obtain discovery "[u]pon the prosecution of a postconviction writ of habeas corpus." (*Id.*, subd. (a).) The trial court denied the motion.

On September 14, 2007, Catlin filed a petition for writ of mandate in this court seeking an order directing the trial court to grant his motion. On October 5, 2007, we denied Catlin's petition for writ of mandate, after his petition for writ of habeas corpus had been denied by the Supreme Court. On October 16, 2007, Catlin filed a petition in the Supreme Court seeking review of our order. On February 19, 2008, Catlin's petition for review was granted, and the matter was transferred to this court with directions to vacate our order denying his petition for writ of mandate and to issue an alternative writ directing Kern County Superior Court to grant the motion or show cause why it should not be granted. We did so.

DISCUSSION

I. A Section 1054.9 Motion Must Be Filed Within a Reasonable Time Period

As stated *ante*, section 1054.9 permits a defendant sentenced to death or life in prison without the possibility of parole to obtain postconviction discovery if he or she is prosecuting a postconviction petition for writ of habeas corpus. The permitted discovery is limited to material in the possession of the prosecution or law enforcement to which he or she would have been entitled at the time of trial. Discovery is permitted only if the

defendant seeking discovery shows "that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful ...." (*Id.*, subd. (a).)[4]

The parties agree that *Steele, supra,* 32 Cal.4th 682 must guide us in the resolution of this case. *Steele* is the only Supreme Court opinion to address section 1054.9. The Supreme Court issued an order to show cause in *Steele* "to resolve important procedural and substantive issues regarding" section 1054.9. (*Steele,* at p. 688.)

The Supreme Court began its analysis by addressing procedural issues related to section 1054.9. The court noted that section 1054.9 "says little about the procedure a defendant should follow in seeking the discovery materials, such as the time and place for making the motion." (*Steele, supra,* 32 Cal.4th at pp. 690-691.) It began by deciding that the phrase "'[u]pon the prosecution of postconviction writ of habeas corpus'" means that

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[4]Section 1054.9 states in full:

"(a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).

"(b) For purposes of this section, 'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

"(c) In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes.

"(d) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant."

a defendant is entitled "to seek discovery if he or she is preparing to file the petition as well as after the petition has been filed." (*Id.* at p. 691.) It concluded that a motion pursuant to section 1054.9 should, except in unusual circumstances, be filed in the court where the matter was tried, but that either party could challenge the trial court's ruling by filing a petition for writ of mandate in the court of appeal. (*Steele,* at pp. 691-692.)

In the portion of the opinion addressing the substantive issues related to section 1054.9, the Supreme Court recognized the statute provides for only limited discovery. (*Steele, supra,* 32 Cal.4th at p. 695.) The Supreme Court interpreted "section 1054.9 to require the trial court ... to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them." (*Id.* at p. 697.)

The trial court here, when ruling on Catlin's motion for discovery, did not address the substantive issues raised by the motion. Instead, it concluded that Catlin's motion, filed 17 years after he had been convicted, and seven years after he had filed his petition for writ of habeas corpus with the Supreme Court, was not filed within a reasonable time. The basis for the trial court's ruling can be found in the second footnote in *Steele*, which reads:

> "Section 1054.9 provides no time limits for making the discovery motion or complying with any discovery order. We believe the statute implies that the

> motion, any petition challenging the trial court's ruling, and compliance with a discovery order must all be done within a reasonable time period. We will consider any unreasonable delay in seeking discovery under this section in determining whether the underlying habeas corpus petition is timely. [Citations.] We would consider a petition for writ of mandate challenging the trial court's order filed within 20 days after that order to be filed within a reasonable time for these purposes. Moreover, as we are directing in this case, any discovery ordered pursuant to section 1054.9 should be provided within a reasonable time, which might vary depending on the nature of the order. We will also consider the date of compliance with the order in considering the timeliness of any petition for writ of habeas corpus that might be filed in light of the discovery." (*Steele, supra,* 32 Cal.4th at pp. 692-693, fn. 2.)

Catlin contends that this footnote is obiter dictum, and thus is not binding precedent. He urges us to follow the language of the statute, which requires only that a section 1054.9 motion be filed during the prosecution of a postconviction writ of habeas corpus, which *Steele* defined to include the time during which the defendant is preparing to file the writ as well as during the time the writ is pending. (*Steele, supra,* 32 Cal.4th at p. 691.)

While footnote 2 may not have been related directly to the issue before the Supreme Court, we choose not to ignore it. The Supreme Court made it clear in *Steele* that it was considering procedural and substantive issues regarding a new statute. "When the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic, its dictum should be followed." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) The time within which a defendant must make a section 1054.9 motion is a procedural issue and was considered by the Supreme Court. Whether footnote 2 is binding on this court may be arguable, but it is clear evidence of the Supreme Court's interpretation of the time requirements for bringing a section 1054.9 motion. Since the Supreme Court was conducting a thorough review of the procedural and substantive issues presented by section 1054.9, we conclude we should follow

footnote 2 and hold that a section 1054.9 motion must be brought within a reasonable time period.[5]

Catlin makes two additional arguments to support his contention that the trial court erred in denying his motion. First, he argues that the third sentence of footnote 2 requires that the timeliness of a section 1054.9 motion should be determined only when the Supreme Court is ruling on the defendant's petition for a writ of habeas corpus. After stating that a section 1054.9 motion must be filed within a reasonable time period, footnote 2 states, "We will consider any unreasonable delay in seeking discovery under this section in determining whether the underlying habeas corpus petition is timely." (*Steele, supra,* 32 Cal.4th at p. 692, fn. 2.) Catlin interprets this sentence to mean that the motion must be granted by the trial court, and any issue related to whether the motion was filed within a reasonable time period can be litigated only in the Supreme Court when addressing the timeliness of the habeas corpus petition.

This interpretation would result in mischief.

When reading the third sentence of footnote 2 in context, it is clear that the Supreme Court was not suggesting the timeliness of a section 1054.9 motion could be challenged only by arguing the underlying habeas corpus petition was untimely. Otherwise, a defendant could file numerous section 1054.9 motions over a period of years and the trial court would be without power to deny the motions on the grounds that he or she had waited too long. Instead, we conclude this sentence explains that the timeliness of the motion is one factor the Supreme Court will consider when deciding if the underlying habeas corpus petition is timely; it does not limit the trial court's ability to decide if the section 1054.9 motion was filed within a reasonable time. It cannot be interpreted as suggested by Catlin.

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[5]Since we follow the Supreme Court's lead, we deny Catlin's request that we take judicial notice of various items from the legislative history of section 1054.9.

Catlin's second argument is that a motion is timely if the information obtained may be useful to the petitioner. Stated differently, Catlin argues a section 1054.9 motion is timely at any time before the petitioner is executed, since another petition for writ of habeas corpus may be filed at any time before execution and information discovered as a result of the motion may be useful to the petitioner.

Again, the obvious potential for mischief this interpretation would create demands the suggestion be rejected. If the only time limit on the filing of a section 1054.9 motion is that it must be filed before the defendant is executed, then the reasonable time requirement becomes meaningless. Any delay becomes reasonable since the materials obtained, if they exist, may assist the petitioner in avoiding execution.

We agree with Catlin to a certain extent because a section 1054.9 motion may be filed at any time before execution as long as a petition for writ of habeas corpus is being contemplated or is pending. Where we disagree with Catlin, however, is that any lengthy delay must be explained in a manner that will permit the trial court to conclude the delay was reasonable. Although practitioners undoubtedly would welcome a bright line definition of a reasonable delay, we cannot provide one other than to suggest that if the practitioner is concerned about the delay, the trial court also will be concerned.

Similarly, we cannot list the facts or circumstances that would require a court to conclude that a delay was reasonable. We can envision circumstances that would lead to the conclusion that a long delay in making a motion was reasonable. New techniques for evaluating evidence will be developed in the future. Discovery may be necessary to permit the petitioner to analyze the evidence from his case using these new techniques. Witnesses may come forward after a lengthy delay that may cast suspicion on the prosecution's evidence or witnesses. What the circumstances will be are impossible to predict. What we can state with certainty, however, is that if there is a lengthy delay in making a section 1054.9 motion, the circumstances justifying the delay must be included

in the motion, along with an explanation that will permit the trial court to conclude the delay was reasonable.

II. The Trial Court Did Not Abuse Its Discretion

Having concluded that a section 1054.9 motion must be filed within a reasonable time period, we turn to the question of whether the trial court abused its discretion in concluding the motion in this case was not timely. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.) We conclude that it did not.

As stated above, Catlin was convicted and sentenced for the murders of Joyce and Martha in 1990. His opening brief on his direct appeal was filed in 1998, and the Supreme Court affirmed his conviction in 2001. Catlin filed his petition for writ of habeas corpus on August 9, 2000. Catlin waited another seven years to file his section 1054.9 discovery motion on August 3, 2007. Seventeen years passed between Catlin's conviction and his section 1054.9 motion.

Catlin's only attempt to explain this substantial delay was that his current writ attorney was appointed on May 5, 2006, and counsel was required to conduct an investigation and raise all potentially meritorious claims for relief. Counsel believed that the prosecution and law enforcement agencies had evidence in their possession that would assist in presenting a supplemental writ petition. In addition, counsel pointed out that section 1054.9 did not become effective until January 1, 2003. Therefore, he could not have filed the motion before that date.

Catlin's section 1054.9 motion requested access to the district attorney's entire file. The reason for this request was that Catlin's current counsel could not determine what Catlin's trial counsel had received from the district attorney. Counsel had attempted to determine what information had been provided in discovery, but trial counsel did not number the discovery received from the district attorney or create an index or catalog of the discovery. Despite current counsel's best attempts, he could not determine the extent of discovery provided to trial counsel. Therefore, current counsel sought access to the

district attorney's entire file to make sure that everything to which Catlin had been entitled was provided by the prosecution.

The breadth of counsel's discovery request is important only to point out the lack of any explanation for the delay in filing the section 1054.9 motion. There is no suggestion that information was missing from Catlin's trial counsel's files, only that current counsel was unsure whether he had everything provided to trial counsel. There was no suggestion that new information was developed suggesting that trial counsel had not been provided with discovery to which Catlin was entitled. There was no suggestion that examination or testing of evidence would be beneficial to Catlin in any manner. There was no suggestion that anything had occurred after the petition for writ of habeas corpus was filed necessitating the filing of the section 1054.9 motion.

The filing of the original petition for writ of habeas corpus in 2000 also is significant because, had there been important material missing from Catlin's trial counsel's files, Catlin would have been aware of the missing materials at that time since current counsel has not provided any information to suggest otherwise. Moreover, Catlin and his counsel must have known at the time the petition for writ of habeas corpus was filed that trial counsel did not number, index, or catalog the discovery received before and during trial. Clearly, by the time the original petition for writ of habeas corpus was filed, Catlin and counsel were aware of the difficulty in determining what discovery was provided to Catlin by the district attorney. Even if it were determined that it would not have been worthwhile to make a motion to determine if anything was missing from Catlin's trial counsel's files at that time, perhaps because of the burdensome procedures that would have been necessary, there is no reason a motion could not have been made when section 1054.9 became effective on January 1, 2003.

The only attempt to explain the delay provided by Catlin was that current counsel was not his primary counsel for writ purposes until May 2006. Current counsel explained

that he did not make the section 1054.9 motion until August 2007 because he was becoming familiar with the file.

This argument is not persuasive. Catlin has been represented by counsel since before his trial. The appointment of new counsel 16 years after Catlin was convicted simply is not, in and of itself, a satisfactory reason to permit the filing of a section 1054.9 motion after a lengthy delay. If new counsel had uncovered new facts or developed new theories, then the change in counsel might become significant. As pointed out above, however, there is nothing in this case that would suggest the change in counsel was significant for any reason other than the change itself.

The facts and circumstances of this case establish that the trial court did not abuse its discretion in determining that the section 1054.9 motion was not filed within a reasonable time period.

DISPOSITION

The alternative writ is discharged, and Catlin's petition for writ of mandate is denied.

CORNELL, Acting P.J.

I CONCUR:

KANE, J.

DAWSON, J.

I dissent from the conclusion that footnote 2 of the opinion in *In re Steele* (2004) 32 Cal.4th 682, 692 (*Steele*) engrafts a timeliness requirement onto Penal Code section 1054.9.[1] The footnote can be read in at least three ways. First, it can be read to say that "any unreasonable delay in seeking discovery" will be considered when (and only when) the timeliness of "the underlying habeas corpus petition" is considered. (*Steele*, at pp. 692-693, fn. 2.) Second, it can be read to say that "any petition challenging the trial court's ruling" on a section 1054.9 motion, as well as "compliance with a discovery order must all be done within a reasonable time *period*" after the filing of a section 1054.9 motion. (*Steele*, at pp. 692-693, fn. 2, italics added.) Third, it can be read as does the majority.

Given this ambiguity in footnote 2, I must disagree with the conclusion that its language allows us to ignore the plain words used and not used by the Legislature in enacting section 1054.9. The section simply provides no time limit for making a motion.

Neither is the language of *Steele*'s footnote 2 sufficiently clear, in my view, to allow us to ignore a legislative history that indicates the California Attorney General's Office, counsel for respondent here, opposed the enactment of section 1054.9 for precisely the reason that it contained no time limits on the making of the motions for which it provides. (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002, p. 4.) Thus, we know that the Legislature passed section 1054.9 without, and intended to pass it without, any timeliness requirement. I would take judicial notice of this legislative history, as requested by appellant. (*People v. Taylor* (2007) 157 Cal.App.4th 433, 437-438.)

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[1]Further statutory references are to the Penal Code.

The legislative history of section 1054.9 also indicates that one of its purposes was to simplify and thus reduce the cost of the discovery process conducted in connection with habeas corpus petitions, particularly in capital cases. A staff report prepared for an April 23, 2002, hearing before the Senate Committee on Public Safety states that, according to the sponsor of the proposed legislation:

> "The problem that occurs all too often is this: a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to [obtain discovery]." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 23, 2002, p. 4.)

The engrafting of a timeliness requirement on section 1054.9 discovery motions, where timeliness is already an issue that will be addressed and decided in connection with a decision on the petition for habeas corpus, simply will not serve the end of avoiding unnecessary delays and public expenditures; instead, it will add to the problem.

Perhaps, as the majority predicts, there will be ways of abusing the discovery rights granted by section 1054.9, just as there may be ways of abusing the habeas corpus writ. But it is not up to this court to legislate from the bench in order to solve such potential problems, particularly in contravention of the legislature's evident decision not to use a timeliness requirement as a method of solution.

I would grant the petition.

Dawson

DAWSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STEVEN DAVID CATLIN, Petitioner, v. SUPERIOR COURT OF KERN COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	F053705 (Super Ct. No. 30594) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 22, 2008, be modified as follows:

1. On page 3, the third full paragraph beginning "On September 14, 2007" is deleted and the following paragraph inserted in its place:

> On September 14, 2007, Catlin filed a petition for writ of mandate in this court seeking an order directing the trial court to grant his motion. On October 5, 2007, we denied Catlin's petition for writ of mandate, after his petition for writ of habeas corpus had been denied by the Supreme Court. On October 16, 2007, Catlin filed a petition in the Supreme Court seeking review of our order. On November 28, 2007, Catlin's petition for review was granted, and the matter was transferred to this court with directions to vacate our order denying his petition for writ of mandate and to issue an

alternative writ directing Kern County Superior Court to grant the motion or show cause why it should not be granted. We did so.

Except for the modification set forth, the opinion previously filed remains unchanged. There is no change in judgment.

Appellant's petition for rehearing is denied.

Dawson, J. would grant the petition.

CORNELL, Acting P.J.

I CONCUR:

KANE, J.

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 360 Ritch Street, Suite 201, San Francisco, CA 94107. On the date shown below, I served the within **Petition for Review** to the following parties hereinafter named by:

Placing a true copy thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

Hon. Clarence Westra
Kern County Superior Court
1415 Truxtun Avenue
Bakersfield, CA 93301

Stephen G. Herndon
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Clerk, Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California, 93721

I declare under penalty of perjury the foregoing is true and correct. Executed this ___ day of _____, _____ at Berkeley, California.

_____
J. Wilder Lee