

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN D. CATLIN,)	No. 167148
Petitioner,)	
)	Court of Appeal, Fifth
v.)	Dist. No. F053705
)	
SUPERIOR COURT,)	Kern County Superior
STATE OF CALIFORNIA,)	Court No. 30594
COUNTY OF KERN,)	
Respondent,)	
)	
PEOPLE OF THE STATE OF)	
CALIFORNIA,)	
<u>Real Party in Interest.</u>)	

SUPREME COURT
FILED

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PETITIONER'S OPENING BRIEF ON THE MERITS Deputy

After the Denial of a Petition for Writ of Mandate

by the Court of Appeal, Fifth District

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN DAVID CATLIN.

Petitioner

NO. S167148

v.

SUPERIOR COURT, STATE OF
CALIFORNIA, COUNTY OF KERN

(Fifth District Court of Appeal,
F053705)

Respondent,

PEOPLE OF THE STATE OF
CALIFORNIA,
Real Party In Interest

PETITIONER'S OPENING BRIEF

Questions Presented

On November 19, 2008, this Court granted Mr. Catlin's petition for review on the questions of whether the Court of Appeal erred 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?

Summary of Argument

The answer to these questions is yes. The statute itself includes no time limitations on filing a motion, and its legislative history indicates that such a limit was considered by the legislature but ultimately rejected. This Court, in interpreting the statute, stated that any unreasonable delay in filing a post-conviction discovery motion will be considered in deciding the timeliness of the underlying habeas corpus petition. (*In re Steele* (2004) 32 Cal.4th 682, 692, n. 2.) The statute and this Court's interpretation of it both demonstrate that the trial court does not determine whether a post-conviction discovery motion has been filed within a reasonable time period. Rather timeliness considerations, if any, are reserved for this Court.

If this Court were to find that the trial court should make a determination of whether a post-conviction discovery motion has been filed within a reasonable time period, then such a rule cannot be applied in Mr. Catlin's case based on fundamental principles of due process and notice.

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. (See *People v. Catlin* (2001) 26 Cal.4th 81, 26 Cal. 4th 1060c [affirming conviction on direct appeal].)

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 subsequently denied on September 25, 2007, after the trial court's denial of petitioner's motion for post-conviction discovery.

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.¹ (Exh. B of pet. for writ of mandate.) At a hearing on August 27, 2007, the trial court denied petitioner's motion as untimely. (8/27/07 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 subsequently filed a petition for writ of mandate² in the Court of Appeal, Fifth District (Case Number F053705) that was summarily denied on October 5, 2007. A petition for review to the California Supreme Court (Case No. S157232) was granted on November 28, 2007, and the matter was transferred back to the Court of Appeal with directions to (1) vacate the order denying his petition for mandate and (2) issue an alternative writ directing the superior court to grant the motion or show

1

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

2

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.)

cause why it should not be granted.

After issuing an alternative writ, the Court of Appeal ultimately denied Mr. Catlin's petition in its published opinion on August 22, 2008 which included a dissenting opinion by Justice Dawson. A petition for rehearing was denied without any substantive changes to the opinion³ on September 8, 2008; Justice Dawson "would [have] grant[ed] the petition." This Court granted a petition for review on November 19, 2008.

³

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, subs. (a) & (b).)

In *In re Steele*, this 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 that the legislature set no time limit for bringing a post-conviction discovery motion, the Superior Court and the Fifth District Court of Appeal, finding no ambiguity, read this footnote as requiring the trial court to determine whether any post-conviction discovery motion has been brought within a “reasonable time.” (Slip opn., pp. 3, 6-7, 9, 11.) This interpretation, rather than settling the matter, simply leads to further, unanswered questions of how long is a reasonable time period and from which point in time is that reasonable time period measured? Neither the trial court nor the appellate court had answers to these questions.

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.)

Justice Dawson has the better argument here. She, as does Footnote 2 in *Steele*, places the role of the post-conviction discovery motion within the larger context of the habeas proceeding. Within that context, the scheme advanced by Justice Dawson, that this Court – not the trial court – considers any unreasonable delay in filing a post-conviction discovery motion within the context of the timeliness of the underlying habeas corpus petition, is the preferred reading of Footnote 2. Such a reading is consistent both with the legislative history of section 1054.9 and the language of footnote two of *Steele*.

A. The Plain Language and Legislative History of Section 1054.9 Indicate that the Legislature Intended No Time Limitations for Filing a Post-conviction Discovery Motion

As this Court noted in *Steele*, “[s]ection 1054.9 provides no time limits for making the discovery motion ...” (*In re Steele, supra*, 32 Cal.4th at p. 692, n. 2.) In interpreting a statute, “the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted ...” (Code of Civ. Pro. sec. 1858; see also *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1022.) Application of the rules of statutory construction leads to the conclusion that the Legislature did not intend to impose a time limitation as to when a post-conviction discovery motion could be filed.

1. The Plain Language of Section 1054.9 Contains No Time Limit for Filing a Post-conviction Discovery Motion

The primary goal of statutory construction is to ascertain the intent of the Legislature so that the purposes of the law can be effectuated. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Toward that end, the court first examines the words of the statute, applying their usual, ordinary, and common sense meaning based upon the language the Legislature used and the evident purpose for which the statute was adopted. (*In re Rojas* (1979)

23 Cal.3d 152, 155.)

The plain language of section 1054.9, subdivision (a), provides that the court “shall” order discovery 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.) Therefore, there are only two preconditions for seeking post-conviction discovery. The Legislature did not include filing a post-conviction discovery motion within a certain time limit as precondition for the court granting discovery. To insert such a time requirement that was omitted by the Legislature is inconsonant with the rules of statutory construction. The better reading of the language of section 1054.9 is that the Legislature did not intend to give the trial court discretion to decide whether to grant or deny discovery based upon the time when the motion was filed.

**2. The Legislative History of Section 1054.9
Demonstrates that the Legislature Considered and
Rejected a Time Limit for Filing Post-conviction
Discovery Motions**

This specific issue – time restrictions – was raised in the Legislature while this statute was being debated. The Report from the Assembly Committee on Public Safety notes the Attorney General's opposition to the legislation, in part, because there was no time restriction for filing a discovery motion. The report states, in relevant part, as follows:

The Attorney General contends that with no time limitations on when a motion for discovery could be made, it would impose an unreasonable burden on law enforcement and prosecutors' offices to maintain files and all types of evidence long after defendants had been discharged from custody.

(Assem. Comm. on Public Safety, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002, p. 4.⁴)

The Attorney General subsequently removed its opposition to Bill 1391 when it was amended so that post-conviction discovery was only available in death and life-without-parole cases. (Sen. Floor Analyses of Bill 1391 (2001-2002 Reg. Sess.) as amended August 26, 2002, p. 4 [“Note:

4

See also Assem. Comm. on Appropriations, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002, p. 2 [“The Attorney General, the California District Attorneys Association and the California Judges Association contend that eliminating time limits on when a motion for discovery may be made imposes an unreasonable burden on law enforcement to maintain files and all types of evidence long after defendants have been discharged.”].)

The Attorney General removed opposition with the amendments of August 26, 2002.”].) A canon of statutory construction is that “a court ‘should not grant through litigation what could not be achieved through legislation.’” (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal. App. 4th 224, 230, citation omitted.) To engraft a time limitation for making a discovery motion on to section 1054.9 would upset the balance that the Legislature struck, which not only took the Attorney General’s concerns into consideration but also appears to have resolved those concerns to the Attorney General’s satisfaction.

As Justice Dawson notes in her dissent,

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.

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

"If there is no ambiguity in the language of the statute, then the legislature is presumed to have meant what it said." (*Villa De Las Palmas Homeowners Ass'n v. Terifaj* (2004) 33 Cal.4th 73, 82 [citations omitted].)

The Legislature was well-aware of the Attorney General’s objection to the

lack of a timing restriction in Section 1054.9, as the Attorney General objected to the language of the statute during the legislative process. Here, the Legislature rejected the objection raised by the Attorney General as demonstrated by the fact that Section 1054.9 does not contain a time restriction.⁵ This Court recognized in *Gikas v. Zolin* (1993) 6 Cal.4th 841, 862, that courts "should be slow to put back that which the legislature has rejected." Adding a time limitation for filing a post-conviction discovery motion would be inserting into the statute that which the Legislature specifically considered and rejected.

5

Bill 1391 was enacted, at least in part, in response to the Rampart scandal at the Los Angeles Police Department. (See Sen. Comm. on Public Safety, Analysis of Sen. Bill 1391 (2001-2002 Reg. Sess.) as amended April 10, 2002, p. 6; for a description of the Rampart scandal, see, generally, *People v. Germany* (2005) 133 Cal.App.4th 784, 792 ["certain Los Angeles Police Department officers had engaged in misconduct, including planting evidence, filing false police reports, committing perjury, and creating nonexistent confessions."].) While the post-conviction discovery aspects of the bill do not directly address the implications of the Rampart scandal, it provides a context in which misconduct by law enforcement was not provable until many years later. Thus, a decision by the Legislature to eschew arbitrary time limits in all provisions of the bill is logical.

B. Footnote 2 of *Steele*, When Read in a Manner Consistent with the Statutory Language and History of Section 1054.9 Does Not Impose a Time Limitation on Filing a Post-conviction Discovery Motion

It is in the light of this legislative history and the overall context of the habeas corpus scheme that the *Steele* Court's language in Footnote 2 regarding "a reasonable time period" must be read. (*Steele*, 32 Cal.4th at p. 692, fn. 2.) Read in its entirety, Footnote 2 is consonant with the language and legislative history of section 1054.9. The footnote demonstrates that this Court reconciled the language and legislative history of the statute with the overall habeas corpus scheme.

1. The Language of Footnote 2 Demonstrates that the Trial Court Does Not Determine Whether a Post-conviction Discovery Motion is Filed within a Reasonable Time

The first sentence of Footnote 2 acknowledges that there is no time limitation for filing a post-conviction discovery motion.

The second sentence states that "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."

Obviously, the measurement of a time period must start at a certain place or event. The only event mentioned in Footnote 2 that provides a logical

starting place for such a time period is the making of a motion. Thus, Footnote 2 should be read, as Justice Dawson suggested, “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.” (Slip opn., dissenting opn. of Dawson, J., p. 1, quoting *In re Steele, supra*, 32 Cal.4th at p. 692, fn. 2.) Such a reading is entirely consistent with the language of the footnote itself, the language of the statute, and the statute’s legislative history. Had this Court meant to reference a starting point for measuring a reasonable time other than the making of the motion, it would have done so explicitly.

The third sentence gives even more support for such a reading. This Court states that it (not the trial court) “will consider any unreasonable delay in seeking discovery under this section in determining whether the underlying habeas corpus petition is timely.” (*In re Steele, supra*, 32 Cal.4th at p. 692, fn. 2.) Any reading of Footnote 2 that allows the trial court to determine whether a post-conviction discovery motion is filed within a reasonable time vitiates the meaning of this sentence. This Court cannot make a determination of whether there was a reasonable delay in seeking discovery if the trial court has already found that delay to be unreasonable

and denied discovery.

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 the habeas petition is filed. 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.

Moreover, if the trial court determines the timeliness of discovery motions, this third sentence becomes problematic. If the trial court found a discovery motion untimely, then this Court is precluded from making the determination of timeliness that *Steele* says it will make. On the other hand, if the trial court determines that a discovery motion is timely, then questions arise whether this Court would then be bound by the trial court finding. If not, then a finding of timeliness could be challenged by the prosecution both by a petition for writ of mandate to the court of appeal and in its informal reply to the ensuing habeas petition. There exists the possibility that this Court and the trial court could reach different conclusions as to timeliness, which could create, at least, the appearance of unfairness. Conversely, the trial court could find a discovery motion untimely while this Court, in considering the ensuing habeas petition, could hold the claim to which the discovery motion related timely. While this Court's ruling would then be a repudiation of the trial court's finding, it would come too late to be of use in preparing the petition. Such a scenario would frustrate the problem that section 1054.9 sought to solve" "[t]he problem that occurs all too often ... a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain them ..." (Sen. Comm. on Public Safety,

Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 23, 2002. p. 4.)

Had the California Supreme Court meant to impose a certain timeline, it certainly knew how to do so. (See *In re Robbins* (1998) 18 Cal.4th 770, 780 [habeas petition presumptively timely if filed within 90 days of reply brief in direct appeal].) It did not. Had it meant to put the burden on petitioner to demonstrate good cause for the delay, the Court knew how to state so explicitly. (*Id.*) It did not.

The fourth, fifth, and sixth sentences of Footnote 2 lend further support to the reading that the trial court does not determine timeliness. These sentences, giving guidance to trial courts and practitioners, define the timeliness standard for challenging the trial court's ruling by petition for writ of mandate and for complying with discovery orders. No guidance is given for determining whether a post-conviction discovery motion is filed within a reasonable time. Had this Court intended the trial court to determine whether the motion was filed in a timely manner, it would have provided guidance for making that determination. The lack of guidance indicates that it is this Court, not the trial court, that determines timeliness.

2. When Footnote 2 is Read Within the Context of the *Steele* Opinion as a Whole, It Is Clear that the Trial Court Does Not Determine the Timeliness of a Post-conviction Discovery Motion

In *Steele*, this Court contemplated that a defendant could file a discovery motion after filing a state habeas petition, during the federal habeas proceedings, and after an execution date has been set. The Court directed petitioners to file a discovery motion in the California Supreme 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 contemplated that post-conviction discovery motions would be filed after the setting of an execution date which would, in most cases, be after the defendant's habeas corpus petitions in state and federal court had been denied. “[W]hen no execution is imminent, a person seeking specific discovery under section 1054.9 should first file the motion in the trial court that rendered the judgment.” (*In re Steele, supra*, 32 Cal.4th at p. 692.)

This Court went on to stress its hope that “discovery issues can be

resolved with a minimum of court involvement” by being “resolved expeditiously in the trial court (or informally between the parties).” (*Ibid.*)

As Justice Dawson notes,

[t]he 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.

(Slip opn., dissenting opn. of Dawson, J., p. 2.)

The need to justify the timeliness of a post-conviction discovery motion in the trial court is not conducive to the informal resolution of discovery issues between parties. Given the long delays that can occur between trial and the appointment of habeas counsel, the application of a fact-specific need to justify any delay in filing would serve as a disincentive for the parties to resolve issues informally. Death row inmates may not be appointed habeas counsel for years after conviction and some even wait years after their direct appeal has been decided. Apportioning responsibility for such long delays and determining their reasonableness becomes a roadblock to the efficient, informal resolution of discovery issues. It encourages prosecutors to think of arguments as to why the motion should be denied in its entirety rather than consider or evaluate the reasonableness of individual requests. Thus, trial courts would be faced

with an unwelcome, all-or-nothing opposition to discovery motions rather than being asked to decide the individual requests on which the parties disagree. The *Steele* Court's hope for "a minimum of court involvement" would be stymied by having the trial court determine the timeliness of discovery motions. (*In re Steele, supra*, 32 Cal.4th at p. 692.)

C. Engrafting a Requirement that Any Delay Be Justified By the Petitioner When a Post-conviction Discovery Motion is Filed in the Trial Court Would Frustrate the Intent of Section 1054.9

Engrafting a requirement that a defendant justify any delay in making a discovery motion would frustrate the intent of the statute to make discovery accessible to defendants facing death or life without the possibility of parole. Requiring that any delay be justified frustrates the intent of the statute. Moreover, given the time restraints in the overall habeas corpus scheme, even without a time limitation of the filing of a discovery motion, a petitioner already has every incentive to litigate such motions quickly and efficiently. An additional time restriction would be superfluous.

1. Any Time Limitations Would Frustrate the Intent of Section 1054.9 and Create Unnecessary Litigation

Section 1054.9 sought to rectify the post-conviction discovery scheme of *People v. Gonzalez*, (1990) 51 Cal. 3d 1179, under which “habeas corpus counsel [was] required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a [discovery] motion ...” (Sen. Comm. on Public Safety, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002. p. 4.) The *Gonzalez* discovery requirements led “to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.” (*Ibid.*)

Adding a requirement that any delay in making a post-conviction discovery motion must be justified, would reintroduce elements of the problem that section 1054.9 sought to address. First, it would lead to delays and unnecessary public expenditures as habeas counsel collected and presented evidence demonstrating the reasonableness of any delay for each item of discovery sought. Such a requirement would be similar to that of “establish[ing] all of the elements of a claim for habeas corpus relief before the court will entertain a [discovery] motion ...” (*Ibid.*)

The example of advances in scientific techniques for evaluating evidence demonstrates the pitfalls of requiring a defendant to prove the timeliness of his request. Scientific techniques may be developed years before they gain widespread use. Even after becoming widely used, questions as to the reliability of a technique may still exist. (See, for example, *People v. Wallace* (1993) 14 Cal.App.4th 651, 659 [finding DNA analysis not generally accepted as reliable].) In such a situation, before even addressing the merits of a post-conviction discovery motion, the trial court may have to have a hearing on the history of a scientific technique and determine whether timeliness should be measured from the development of that technique, from the amorphous time at which the technique became widely accepted, from the date of the technique's first acceptance in a trial court, or from the date of the first published opinion upholding the admissibility of the technique. Post-conviction counsel would have to present evidence of any possibly reasonable cause for delay in bringing the motion which would result in unnecessary, prolonged litigation. Such litigation would not advance the purpose of the section 1054.9 to prevent such delay and expenditure.

Furthermore, 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. So instead of streamlining the post-conviction discovery process, a time requirement for filing a motion could, ironically, unnecessarily increase the amount of post-conviction litigation on this issue.

Engrafting a need to justify any delay results in imposing upon a petitioner an additional burden that must be met before discovery is granted. Such a burden of proof on the petitioner is not found in the statute itself. Requiring a petitioner to demonstrate the reasonableness of any delay for each individual request, in practical terms, requires him to know the nature of the discovery requested before receiving it. 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]t 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.) To prove that any delay were reasonable, a petitioner would need to be able to have evidence demonstrating that some document was not turned over and the facts that led him to conclude that some document should have been but was not in trial counsel’s file.

In the guise of “justifying” the timeliness of a motion, the need to explain any delay requires a petitioner to demonstrate the necessity of his requests. If 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. A timeliness requirement merely adds an additional, unnecessary layer of litigation to the habeas scheme.

2. Without a Time Requirement for Seeking Post-conviction Discovery, the Current Habeas Corpus Scheme Provides Incentive to Seek Discovery Without Delay

Even without a time requirement for seeking post-conviction discovery, a petitioner has great incentive to seek discovery without delay. Under the current habeas corpus scheme, 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.) When a habeas petition is filed past the presumptive deadlines, any substantial delay must be justified. (*In re Robbins, supra*, 18 Cal.4th at p. 780-781.) If a second or successive petition is filed, high barriers must be overcome before its merits will be considered. (See *In re Clark, supra*, 5 Cal.4th at p. 797.) Against this backdrop, the only one prejudiced by any delay in bringing a discovery motion is the petitioner. Habeas counsel has little time to file belated post-conviction discovery motions and great incentive to deal with any post-conviction discovery issues in an efficient manner.

In this respect, 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. To obtain relief based upon any discovery obtained pursuant to section 1054.9, he would still need to meet the heightened standards for filing a successive habeas corpus petition regardless of whether or not the trial court determines the timeliness of discovery motion. Such incentives are sufficient to ensure the timeliness of post-conviction discovery motions without adding the extra litigation of determining timeliness at the trial court level.

In Footnote 2, this Court is also giving a stern warning that post-conviction discovery motions will not affect the overall timeline for bringing habeas corpus petitions. Footnote 2, placing section 1054.9 within the context of the habeas scheme, makes clear that limitations on filing habeas corpus petitions found in *Robbins* and *Clark* still apply.

D. Even if this Court Intended for the Trial Court to Determine Whether a Discovery Motion Was Filed Within a Reasonable Time, Footnote 2 Does Not Define Reasonable Time

Assuming, arguendo, that this Court intended to impose a time limitation for making a discovery motion in the trial court, *Steele* provides no definition of “reasonable time.” There is no explanation of how a reasonable time is measured. Under such circumstances, the practitioner who looked to other instances where this Court and the Courts of Appeal have used the phrase “reasonable time” would rationally conclude that such a phrase would not measure the length of time from a fixed starting point but rather would be measured by the stage of the proceedings at which the discovery motion is made and its prejudicial effect on the other side.

In *People v. Windham*, (1977) 19 Cal.3d 121, 128, fn. 5, this Court addressed the circumstances under which a *Faretta*⁶ motion for self-representation by a criminal defendant was timely. Within that context, this Court defined “reasonable 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*.

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

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. At the time Mr. Catlin moved for post-conviction discovery, his case was at the same stage of proceedings at which it had been when the right to bring such a motion arose. Section 1054.9 became effective in 2003. At that time, Mr. Catlin’s habeas petition was pending before this Court. In 2007, when Mr. Catlin filed his discovery motion, his habeas petition was still pending before this Court. The motion was not filed at time when it would cause delay. Moreover, in *Steele*, this Court specifically found that a discovery motion filed at a time when it might be expected to cause delay (i.e., after an execution date had been set) should be filed in this Court rather than the trial court. (*In re Steele, supra*, 32 Cal.4th at p. 692, fn. 1.) This language in *Steele* indicates that a discovery motion will be entertained, and, therefore, timely, up to the point of execution. Thus, *Steele* itself provides support for such a definition of timeliness.

Furthermore, there has been no prejudice to the opposing parties in this matter based upon the time at which Mr. Catlin’s motion was filed.

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. There was 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 below, Mr. Catlin is the one who suffers any prejudice arising from the timing of the motion. Based on this Court's past jurisprudence interpreting the phrase "reasonable time" in other contexts, Mr. Catlin's motion was timely.

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

As shown above in Argument I 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 of "reasonable time" would ultimately prevail.

A. Mr. Catlin Should Not Be Held to a Standard of Timeliness First Adopted in this Writ Proceeding

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].) Moreover, such a result would clearly violate the due process principles of *Hicks v. Oklahoma*, (1980) 447 U.S. 343. Therefore, petitioner should have been afforded relief and the trial court ordered to address the merits of his motion.

B. Although the Court of Appeal Declined to Identify the Point from which a Reasonable Time Period Should Be Measured, Using Any Rational Starting Point, Mr. Catlin’s Discovery Motion was Timely

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 opn., p. 9.)

In rejecting Mr. Catlin’s argument that his motion was timely, the

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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.

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. As explained below, none of these possibilities are viable starting points.

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 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.)

After funding for discovery motions was authorized, Mr. Catlin's then-appointed counsel, Mr. Schwartz, moved to be relieved of counsel eight months later and was relieved as counsel on August 10, 2005. For nine months Mr. Catlin had no appointed counsel, until May 5, 2006, when his current counsel was appointed. Prior to litigating a discovery motion, counsel had to read trial transcripts exceeding 8,000 pages and familiarize himself with the contents 54 boxes of documents as they related to a possible post-conviction discovery motion which had not been contemplated at the time the documents were compiled. (Pet., Exh. D (RT of Aug. 27, 2007 superior court proceedings), p. 12.) Moreover, trial counsel failed to maintain a discovery log and, given the lack of a mechanism or funding for obtaining post-conviction discovery, there was

no reason for prior habeas counsel to do so.

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.

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.

In the three years since *Steele* (decided March, 2004) first raised the suggestion of timeliness, the Supreme Court took over eight months to determine whether and how counsel would be compensated for bring a post-conviction discovery motion (November, 2004), one counsel withdrew

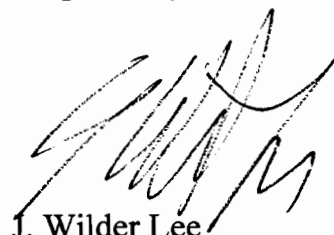
(2005), new counsel was appointed (2006), and the post-conviction discovery motion was filed (2007). Considering the unusually complicated fact pattern of this case – evidence of three deaths over a nine year period was presented at two separate trials in two counties –, as well as the time it took the Court to develop a compensation policy, the withdrawal of counsel, and the appointment of new counsel, there has been no substantial delay in the filing of a post-conviction discovery motion.

CONCLUSION

For the foregoing reasons, and in the interest of justice, petitioner respectfully requests that this Court find Mr. Catlin's post-conviction discovery was wrongly denied on grounds that it was not timely, reverse the Court of Appeal's ruling, and remand this matter with directions that the trial court address the substantive claims of Mr. Catlin's motion.

Dated: December 18, 2008

Respectfully submitted,

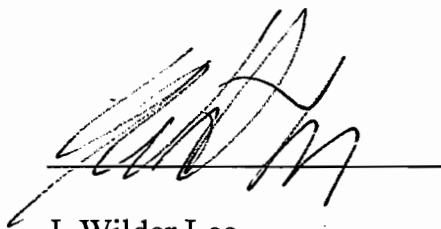


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Certification of Word Count

I hereby certify that the number of words in this Petition for Review is 7831 according to the word count function of the computer program used to prepare the document.

Dated: December 18, 2008



J. Wilder Lee
Attorney for Petitioner

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 **Petitioner's Opening Brief on the Merits** 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:

Kern County Superior Court
ATTN: Hon. Clarence Westra
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Bakersfield, CA 93301

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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

