IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN D. CATLIN,

Petitioner,

v.

THE SUPERIOR COURT OF KERN COUNTY,

Respondent.

[redacted]

No. S167148

Court of Appeal, 5 DCA
No. F053705

Kern County Sup. Ct.
No. 30594

ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

On September 29, 2008, petitioner Steven D. Catlin filed a Petition for Review from the denial by the Fifth District Court of Appeal of his Petition for Writ of Mandate. On October 15, 2008, this Court requested that the Attorney General file an answer on or before October 24, 2008. Following a one-week extension, the Attorney General submits this answer and requests that the Petition for Review be denied.

ISSUES PRESENTED

Did the Court of Appeal err by (1) finding that dicta in *In re Steele* (*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?

STATEMENT OF THE CASE

Petitioner stands convicted of murdering his fourth wife, Joyce Catlin (died May 1976, Kern County), his fifth wife, Glenna Kay Catlin (died March 1984, Fresno County), and his mother, Martha Catlin (died December 1984,

Kern County), by poisoning them to death with the herbicide paraquat. Petitioner was convicted of poisoning to death his fifth wife, Glenna Kay, in an earlier proceeding (transferred from Fresno to Monterey County on a change of venue) in *People v. Steven Catlin*, Monterey County Superior Court No. CR11388, affirmed on June 13, 1988, in an unpublished decision by the Court of Appeal of the State of California, Sixth Appellate District, No. H002078. In the Kern County proceeding, the jury sustained three special circumstance allegations: murder for financial gain, multiple murders, and murder by poison, all concerning the murder of Martha Catlin. Following the penalty phase, on July 6, 1990, petitioner was sentenced to life imprisonment for the murder of Joyce Catlin and death for the murder of Martha Catlin. On July 16, 2001, the California Supreme Court unanimously affirmed the judgment and sentence in its entirety. (*People v. Catlin* (2001) 26 Cal.4th 81.)

Meanwhile, on August 9, 2000, petitioner, represented by Jeffrey D. Schwartz, filed a Petition for Writ of Habeas Corpus in the California Supreme Court. (Exh. 1.) Significantly, J. Wilder Lee, petitioner's current lead counsel in state post-conviction proceedings, is listed on that petitioner's cover under Mr. Schwartz as an attorney for petitioner. On April 12, 2002, the Attorney General filed an Informal Response.

On July 22, 2005, Mr. Schwartz applied for permission to withdraw as attorney of record; on August 10, 2005, this application was granted; on May 5, 2006, J. Wilder Lee was appointed as attorney of record for petitioner.

On August 3, 2007, petitioner filed a Motion for Post-Conviction Discovery in the Kern County Superior Court seeking *all* materials in the possession of the prosecution and law enforcement authorities that he would have been entitled to at trial, including any evidence that could have been used to impeach any prosecution witness. The People, represented by the Attorney General, filed an Opposition on August 20, 2007. Petitioner filed his Reply on

August 27, 2007. That same day, the motion was heard and denied as untimely by Judge Clarence Westra, Jr., because it had been filed four and a half years after Penal Code section 1054.9 was effective, and petitioner could not justify the delay. (Exh. A, Reporter's Transcript, August 27, 2007.)

On September 25, 2007, the California Supreme Court denied the Petition for Writ of Habeas Corpus on the merits.

On October 5, 2007, the California Court of Appeal, Fifth Appellate District, denied petitioner's Petition for Writ of Mandate. On November 28, 2007, the California Supreme Court granted petitioner's review petition and transferred the matter to the appellate court with directions. On February 28, 2008, the Court of Appeal issued an alternative writ. Following briefing and argument, on August 22, 2008, the Court of Appeal filed an opinion discharging the alternative writ and denying the petition for writ of mandate. (Pet. Rev., Exh. A, hereinafter, Opn.) The instant proceeding ensued.

REASONS FOR DENIAL OF THE PETITION

Petitioner claims that post-conviction discovery motions pursuant to section 1054.9 may be filed at any time. He argues that the appellate court erred in concluding that *Steele* requires these motions to be brought within a reasonable time. And he also argues that if that time restriction exists, it was misapplied in his case. This petition should be denied because this Court determined in *Steele* that section 1054.9 motions must be filed within a reasonable time, and the trial court did not abuse its discretion in denying petitioner's motion as untimely. Accordingly, petitioner has not shown that this Court needs to grant review "to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b).)

I.

A PENAL CODE SECTION 1054.9 MOTION MUST BE FILED WITHIN A REASONABLE TIME PERIOD

In August 2007, petitioner filed a post-conviction discovery motion. Pursuant to *Steele*, the trial court denied the motion as untimely, and the appellate court agreed. Petitioner claims that there is no time limit for filing these motions, but that if this Court in *Steele* established a reasonable time limit, it was misapplied in his case. Review is unwarranted because all of petitioner's questions are answered by *Steele*.

A. Penal Code Section 1054.9

In 2002, the California legislature added section 1054.9 to the Penal Code; it became effective on January 1, 2003. (*Steele, supra,* 32 Cal.4th at p. 690.) Section 1054.9 provides:

> (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.

Steele is the seminal case interpreting this statute. There, the petitioner sought materials relating to mitigating evidence of his prison behavior, namely, that he had left the Nuestra Familia, he had provided information about Nuestra Familia, and he had assisted in prosecution against Nuestra Familia. (*Steele*, 32 Cal.4th at p. 689.) His section 1054.9 motion specifically alleged, with a declaration from his counsel in support, "that his current counsel had conducted a good faith review of trial counsel's files and interviewed trial counsel and has ascertained that the materials sought here were not provided to trial counsel. . . ." (*Ibid.*) This Court concluded that the prosecution did not have a duty to disclose the requested evidence at trial absent a specific request; however, since the prosecution would have had to turn over this material had it been requested, petitioner was entitled to it now under section 1054.9. (*Id.*, at p. 702.)

This Court summarized the statute as follows:

Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, 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.

(*Steele, supra*, 32 Cal.4th at p. 697.)

The high court reached several other conclusions about this statute. First, it does not allow "free-floating" discovery asking for virtually anything the prosecution possesses." (*Steele, supra*, 32 Cal.4th at p. 695, citation omitted.) Second, it embraces only materials those authorities currently possess. "The statute imposes no preservation duties that do not otherwise exist. It also does not impose a duty to search for or obtain materials not currently possessed." (*Ibid.*) And most significantly for these proceedings, motions pursuant to this section must be filed within a reasonable time period. (*Id.*, at p. 692, n. 2.) Concerning timeliness, this Court stated:

> 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, 77 Cal.Rptr.2d 153, 959 P.2d 1311; *In re Clark* (1993) 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729.) 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 p. 692, n. 2.)

B. The Trial Court Unremarkably Applied The *Steele* Timeliness Standard In This Case

As the appellate court noted, the trial court did not address the substantive issues in petitioner's motion. Instead, the trial court found that the

motion, filed 17 years after petitioner had been convicted, and seven years after he had filed his habeas petition in this Court, had not been filed within a reasonable time. (Opn., at p. 5.) This determination was correct. Section 1054.9 was effective January 2003, yet petitioner did not file his motion until August 2007. As the trial court found, this four and a half year delay was unreasonable. (Exh. A, pp. 36-38.) Moreover, *Steele*, establishing the reasonableness requirement, was decided in March 2004, yet petitioner did not file his motion until over three years later. (*Id.*, p. 38.) In short, petitioner substantially delayed in bringing his post-conviction discovery motion, and he offered no explanation to justify his unreasonable delay.

Instead, he sought – and continues to seek – to escape the application of *Steele's* timeliness standard. First, based on Justice Dawson's dissent, petitioner argues that this Court's "reasonable time" phrase was ambiguous. (Pet. Rev., pp. 8-10.) Respondent respectfully disagrees. Under this interpretation, only this Court will consider whether the motion was filed within a reasonable time, and that determination will only be made when this Court decides whether a resulting habeas corpus petition is timely. Certainly, whether a petitioner timely pursues discovery will be part of the evaluation of whether any resulting petition is timely. Indeed, this Court said that in footnote 2 of *Steele* (*Steele, supra*, 32 Cal.4th at p. 692, n. 2). But the preceding sentence says 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." (*Ibid.*) Petitioner's first interpretation renders this sentence meaningless. And it would result in lower courts deciding everything about a section 1054.9 motion *except* whether it is timely.

The appellate court noted the "mischief" that would result from this approach:

> 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.

(Opn., p. 7.)

Petitioner's second alternative explanation is worse. The dissent also thought this Court may have meant that the only actions that had to be done within a reasonable time were the filing of any writ petition challenging the ruling on the motion *or* the compliance by the producing party. (Pet. Rev., pp. 9-10.) This interpretation deletes the words "the motion" from the second sentence in footnote 2 – the very sentence that says that writ petitions and compliance must be done within a reasonable time. To state this interpretation reveals its absurdity.

In fact, the lower courts' interpretation gives full meaning to each word in footnote 2. In short, whether a section 1054.9 motion is timely is to be determined by the court in which it is filed at the time it is filed. It will be timely if it has been filed within a reasonable time as measured against the proceeding to which it pertains. Put differently, while a discovery motion can be filed at any time, whether it is timely or not depends on the circumstances at that time.

Petitioner's arguments to the contrary may be quickly dispatched. As shown, the majority below did not "ignore" the dissent or add a "new level of

confusion." (Pet. Rev., p. 10.) Nor did it fail to address what this Court meant in footnote 2. (Pet. Rev., pp. 11-15.) Rather, it carefully parsed the footnote and, unlike the dissent, gave full weight to every word. And the time petitioner uses to file a discovery motion is considered both as to the motion itself and later if any habeas petition is filed. (Pet. Rev., p. 12.)

Next, petitioner criticizes the reasonable time requirement because the Legislature did not include it in section 1054.9. (Pet. Rev., p. 16.) Petitioner relies on Justice Dawson's dissent which goes so far as to intimate that, by relying on this requirement, the Attorney General is doing an "end run" around the Legislature. (Dis. Opn., p. 1.) This argument is a non-starter. It is this Court, not the Attorney General, that adopted the reasonable time requirement.

There is nothing remarkable about the "reasonable time" standard for section 1054.9 motions. It is consistent with this Court's jurisprudence for the timely filing of habeas corpus petitions. It was against this backdrop that the *Steele* court adopted a timeliness requirement for these motions as well. No language in section 1054.9 precluded this interpretation.

Petitioner further argues that even if the lower courts got it right – that the trial court properly applied the reasonable time standard in *Steele* to his motion – it incorrectly defined that standard. (Pet. Rev., pp. 18-21.) Here, petitioner advances alternative interpretations more favorable to his case. But the appellate court decision is not standardless; it simply noted the reality that reasonableness is circumstance-specific when it stated that "we cannot list the factors or circumstances that would require a court to conclude that a delay was reasonable." (Opn., p. 8; see also Black's Law Dict. 5th ed. (1979) p. 1138, col. 2.)

Petitioner complains that the appellate court unfairly applied the reasonable time rule to his case because it was defined in the context of his writ proceeding. (Pet. Rev., p. 22.) Petitioner is wrong; that limitation period was

first announced by this Court in *Steele* in 2004, not by the appellate court in 2008. For all these reasons, respondent submits that the lower courts properly found that this Court in *Steele* established that post-conviction discovery motions must be filed within a reasonable time.

II.

THE APPELLATE COURT CORRECTLY FOUND THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE REASONABLE TIME STANDARD TO PETITIONER'S MOTION

As the trial court and appellate court agreed, petitioner did not file his motion as promptly as the circumstances allowed. (See *In re Robbins* (1998) 18 Cal.4th 770, 780, 787.) Manifestly, this ruling was within the bounds of reason. Once again, petitioner has not shown that this case raises an important question of law or is materially inconsistent with other cases.

Petitioner was convicted and sentenced to death for the murders of Joyce and Martha Catlin in 1990. His opening brief on direct appeal was filed in 1998, and his petition for writ of habeas corpus was filed in 2000. Importantly, J. Wilder Lee, petitioner's current lead counsel in state post-conviction proceedings, is listed on that petition's cover under Mr. Schwartz as an attorney for petitioner. In 2001, this Court denied the appeal.

Section 1054.9 went into effect in January 2003. *Steele* was decided March 2004. Yet petitioner's motion was not filed until August 2007. In short, his motion, signed by J. Wilder Lee, was filed four and a half years after section 1054.9 was effective and almost three and a half years after *Steele* announced the reasonable time requirement. These delays were unreasonable. As the appellate court explained:

> 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.

(Opn., pp. 9-11.)

Petitioner claims that the lower courts unfairly placed a burden on him to justify each of the items he requested. (Pet. Rev., p. 23.) Not so. Petitioner's request – for the district attorney's entire file – was significant only as one of the circumstances that showed his request was unreasonable. It is of no moment that petitioner at the motion hearing provided a list of items he was "willing to exclude from his discovery request." (Pet. Rev., pp. 23-24, n. 6.) The fact remains that petitioner sought review of the district attorney's file to reassure himself that he had everything to which he would have been entitled. It was unreasonable for counsel to ask for that at this late stage in state litigation with no explanation as to why he had not sought it years ago. The reasonable time standard places no "affirmative duty" or "burden of proof" on petitioner; to the extent there was an obligation, it resulted from petitioner's recalcitrance.

Petitioner faults the appellate court for failing to specify "the point from which any delay is measured, or, in other words, when the timeliness clock starts." (Pet. Rev., p 26.) Again, the appellate court properly applied this Court's reasonable time standard to the facts and circumstances of this case. (Opn., p. 11.) The appellate court did not go beyond this Court's ruling; it

specifically stated:

> "[W]e 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." (Opn., pp. 8-9.)[1/]

Petitioner claims the appellate court did not consider important factors like the date of the *Steele* opinion, whether his habeas counsel had expended resources or could expect compensation for post-conviction discovery motions, and uncertainty over "who counsel would be." (Pet. Rev., pp. 30-31.) None have any impact here. Petitioner's current counsel, Mr. Lee, worked with prior habeas counsel on the habeas petition that was filed in 2000. Yet no request by petitioner, either formal or informal, for the district attorney's file was made until several years after the enabling statute and controlling opinion were in place.

The only other factor – Mr. Lee replacing Mr. Schwartz as lead counsel in mid-2006 – did not justify petitioner's delay in filing, no matter what starting point is considered. (See *In re Clark* (1993) 5 Cal.4th 750, 765 and n. 6 [Delay is not justified merely because counsel asserts the claim is being filed as soon as the successor attorney became aware of the basis for the new claim. Any other conclusion would magnify the potential for abuse of the writ.].) In sum, Mr. Schwartz or Mr. Lee could have filed this motion in 2003, after section

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1. Thus, the concern expressed by petitioner on page 27 at footnote 8 is a false alarm.

1054.9 was enacted, in 2004, after *Steele* was decided, or a year after *Steele* in 2005, as in other cases. (See, e.g., *Curl v. Superior Court* (2006) 140 Cal.App.4th 310 (2004 motion); *People v. Superior Court (Maury)* (2006)145 Cal.App.4th 273 (2005 motion); *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359 (2005 motion).)

Petitioner misconstrues the appellate court's point about numerous post-conviction discovery motions. (Pet. Rev., pp. 32-35.) It is not with the possibility of several *duplicative* discovery motions with which the court was concerned. Rather, the court was responding to petitioner's argument that *no* time limits apply, despite the high court's designation of a "reasonable time" in *Steele*. (Opn., p. 7.) *Steele* gave trial courts the authority to deny discovery motions that were not filed within a reasonable time. If petitioner's no time limit rule were followed, trial courts could never deny these motions *as untimely* no matter how many motions were filed and despite what items were sought.

The final arguments raised by petitioner are based on similar misperceptions. The appellate court did not suggest that lengthy delays in bringing these motions must be explained item by item. (Pet. Rev., p. 35.) Nor did the appellate court fail to appreciate that petitioners have every incentive to seek discovery before the date that a habeas petition will be presumptively timely. (Pet. Rev., at p. 36.) The appellate court was concerned solely with this Court's requirement that post-conviction discovery motions must be filed within a reasonable time, and that assessment is made as to the motion itself, not just when – or if – an actual habeas petition is filed.

The appellate court properly concluded that the trial court did not abuse its discretion in concluding that petitioner's motion was untimely. (*Kennedy, supra*, 145 Cal.App.4th at p. 366.) The motion was filed four and a half years after section 1054.9 was effective and almost three and a half years after *Steele*

was issued. Petitioner sought the district attorney's file for reassurance that he had everything he was entitled to, even though he had known for a decade that his trial counsel had not numbered, indexed, or cataloged received discovery. Petitioner simply had no explanation for his lengthy delay. The lower courts properly found this delay unjustifiable.

CONCLUSION

Based on the foregoing, the Attorney General respectfully requests that the Petition for Review be denied.

Dated: October 30, 2008

Respectfully submitted,

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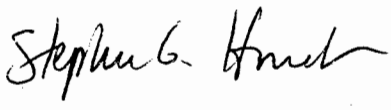

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 4681 words.

Dated: October 30, 2008

Respectfully submitted,

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EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BEFORE THE HON. CLARENCE WESTRA, JR., JUDGE, DEPT. 2

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

STEVEN DAVID CATLIN,

Respondent.

COPY

No. SC030594A

August 27, 2007

Bakersfield, California

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

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BAKERSFIELD, CA.; MONDAY, AUGUST 27, 2007, A.M.

DEPARTMENT 2 CLARENCE WESTRA, JR., JUDGE

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THE COURT: We have counsel here on a matter. I don't have a file, so counsel, do you want to state your names for the record.

MR. LEE: Wilder Lee. I'm here on behalf of Steven Catlin. The People versus Catlin.

THE COURT: Your name again?

MR. LEE: Wilder Lee.

THE COURT: All right. The clerk has cards. All right. Mr. Lee is here. And the other appearances?

MR. WITT: Your Honor, Jesse Witt, Deputy Attorney General on behalf of the Respondent.

MR. HERNDON: Good morning, Your Honor, Steve Herndon also from the AG's, also for Respondent.

MR. LEE: Your Honor, this case is on for a 1054.9 post-conviction discovery motion, which I filed, I think, August third. The AG's Office filed a opposition, which I believe was received by the Court on August 20th. I received my copy of the opposition on August 22nd, last Wednesday. I wrote a reply and I overnighted a copy of it to the Court and to Mr. Herndon on Thursday. Apparently that was not received, it is not in the file, the Court's file, and Mr. Herndon hasn't received a copy of it yet.

THE COURT: I'm glad to hear there is a

Court's file.

MR. LEE: Just to inform you, sort of where we are in this -- I don't know what the Court's pleasure is on how to proceed.

THE COURT: Well, go ahead because obviously I don't have the file, and I'm not sure where it's at.

MR. LEE: Sure.

THE COURT: You gentlemen know at least the posture of your situation. So go ahead, give me an update.

MR. LEE: Well, this is -- this is a large and complicated case and trial, just to give you a little background.

THE COURT: I don't need to get into the issues. I just want to get to what you were speaking about. Apparently you're suggesting counsel was provided with your response, but --

MR. LEE: Well, at least I attempted to provide counsel with my response. I don't believe it actually got to his hands. And apparently hasn't gotten into the Court's hands yet.

THE COURT: So where does that -- is that -- I'm not going to have him speak for you, but does that sound accurate that you haven't received your response yet, counsel?

MR. HERNDON: Yes, Your Honor. I talked to my secretary just before court this morning, and she's looking for it. I have no reason to doubt

Mr. Lee's -- Mr. Lee sent it overnight on Thursday. We just don't have it.

THE COURT: Where does that put us all?

MR. HERNDON: Exactly -- we're ready to proceed however the Court wants. We can proceed without it.

MR. LEE: Well, Your Honor, I think -- I mean, obviously, I would like the Court to consider my reply. I can provide the Court with a copy if it wants to do that today. I think that in this matter it may be fair to say there's an issue of timeliness. If that issue were resolved in my favor, if the Court ordered a meet and confer, might be possible for us to come closer to a resolution than having the Court issue a large order and arguing all the points in my motion this morning.

I don't know if the Court wants to proceed in that fashion or not. That is a general way that these 1054.9 cases are handled, according to my understanding.

THE COURT: Counsel, you want to respond?

MR. HERNDON: Well, I --

THE COURT: At least to that issue, going forward or not going forward?

MR. HERNDON: Well, I agree if the Court has the opportunity to review the motion and our opposition, the Court may be in a position to address that timeliness issue, and that is the threshold

issue. And before we get to anything else on the motion.

THE COURT: Well, since I don't have a file and don't have the moving or the, you know, what's been filed heretofore, exclusive of what Mr. Lee's talking about, I guess I've got a choice, have you come back at another time today so I can find the file and review what has been filed, or have you come back another date. I don't have any preference myself. I just, of course, need to read what's been filed heretofore.

MR. LEE: I think we're coming pretty far distances and probably like to minimize the number of Court appearances we make. At least I would.

MR. WITT: Why don't we give him the papers?

MR. HERNDON: We have copies we can provide the Court of the papers, speed up the whole thing.

THE COURT: Let me see if the clerk can do some tracking and see exactly what we have. The file must be around somewhere. Whether it just hasn't been delivered here from -- you started out in Department 1, so it may be somewhere there or maybe something that can be found.

If you want to, want to wait a minute or two, I do want to see if the Court received the document Mr. Lee is addressing before we go any further.

MR. LEE: I sent it to the Court with an application for order shortening time. It would be

less than two days' notice, which would be required for pretrial motions, but I think the Court Rules specifically apply to pretrial motions. I don't think there's necessarily a rule on post-trial motions. But better safe than sorry.

THE COURT: Well, what I do have -- I received the file, the People versus Catlin, Steven David Catlin. I do have the first filed document, Notice of Motion, Motion For Post-Conviction Discovery, etcetera, Memoranda of Points and Authorities. I have the opposition. The motion was filed August third. The opposition, at least the document entitled Opposition to Motion For Post-Conviction Discovery was filed August the 20th. So those are the two filings I have.

So it would appear if we're intending to go forward today, those are the two filings I have to consider, along with any oral comments you might wish to make.

Mr. Lee, I don't know if you wish to address that?

MR. LEE: Obviously, I would like the Court to consider my, my reply. I don't know if the Court would be willing to accept a copy for filing today and then look at it with the others. Otherwise, I'm making -- I'd be making a long argument by reading this into the record, which I don't think really is to the Court's advantage or my advantage.

THE COURT: Well, at this point I'm, of

course, reciting what we received. I'm not reciting what I've read. So I'm going to want to take an opportunity to read what's been filed.

Counsel, do any of you have flights that are immediate, like at ten o'clock or 11 o'clock?

MR. HERNDON: No.

MR. WITT: No.

MR. LEE: No.

THE COURT: What I'm going to do then is I've got a jury coming back at 9:15. I'm going to want to take the opportunity to read what's been filed. So if you want to be back, let's say, at 10:15, then we'll proceed at that time.

MR. WITT: Thank you, Your Honor.

MR. LEE: Your Honor, would you be willing to consider it?

THE COURT: Well, I think it is fair to say that I want to know what we're talking about before I consider whether I want to consider it or not.

MR. LEE: Okay. All right.

(Recess taken.)

BAKERSFIELD, CA.; MONDAY, AUGUST 27, 2007, P.M.
DEPARTMENT 2 CLARENCE WESTRA, JR., JUDGE
--oOo--

THE COURT: The People versus Steven Catlin. This matter is before the Court as might relate to a request for discovery, post-conviction discovery under Penal Code Section 1054.9.

As previously discussed, there is the motion for additional discovery. There is the opposition to that motion that had been filed in this matter. I've read those.

Mr. Lee, I don't know, of course, exactly what it is that you would wish to file additionally with the Court. I presume you've now provided counsel on the other side copies.

But it does appear to me it is a little late. That be fair to say?

MR. LEE: Your Honor, I received the AG's opposition on August 22nd. I mailed out my or overnighted my reply the next day. I don't see how that can possibly be untimely. If this Court is going to find so, I would ask for a continuance so that I might file the reply and have the Court consider it.

THE COURT: All right. Now we frame the issue. Response on this side of the table?

MR. HERNDON: As to the question of whether this Court should accept the late filing?

THE COURT: He is moving for continuance if I

don't, I guess, basically, is the way he framed it.

MR. HERNDON: Well, I've read the reply, and I don't want to speak for counsel on the other side, but I think it is straightforward and can easily be argued here so the Court can have the benefit of defendant's position. I don't think it's all that complicated. He's arguing that the issue of timeliness is to be decided by counsel pre-Malone and not before this Court. I think that we are here and we're -- I think we can adequately present that issue to this Court today.

THE COURT: Well, maybe I misunderstood. He was asking to file a response to your response; correct, Mr. Lee?

MR. LEE: Correct.

THE COURT: And he's suggested that if the Court finds it to be untimely for the purposes of this hearing, that he would request a continuance so that he could file it in a timely fashion.

MR. LEE: Unless there's no opposition to filing it today in court?

MR. HERNDON: We're here and ready to proceed. I leave it to the Court's discretion.

THE COURT: I guess you're speaking with one voice on this side of the table?

I'll order it filed. So do you have a copy for the Court?

MR. LEE: I do have a copy, Your Honor.

THE COURT: All right. This is a, appears to be a seven-page document entitled Reply to Opposition to Motion For Post-Conviction Discovery. And that is ordered filed. And acknowledge receipt of that copy, counsel --

MR. HERNDON: Yes, sir.

THE COURT: -- of that response? All right. Mr. Lee, go ahead and make your comments.

MR. LEE: Your Honor, I'd -- just before we start, I'd ask if you want us to address the timeliness issue or if you want us to address all the issues, including the order? I don't know what this Court's pleasure is. I obviously don't want to waste this Court's time burdening it with something it doesn't want to a hear.

THE COURT: Well, you better address the timeliness issue because it appears to be a part of the Attorney General's position that there is a question of timeliness.

MR. LEE: Correct. I'll just address timeliness at this time and then we can move on to the other --

THE COURT: Go ahead and address everything, and we'll determine whether or not the timeliness issue is necessary prohibition or not.

MR. LEE: First I'd just note that Mr. Catlin's position is still pending before the California Supreme Court. He won't have a chance

after this to amend the petition to add new facts, not necessarily adding new claims, which I think is very important part to the successive petition.

Furthermore, if we look at 1054.9, statute is not limited merely to a State post-conviction proceeding. It also would encompass Federal post-conviction habeas petition. I mean it just says petition for writ of habeas corpus or motion to vacate judgment. Doesn't limit it only to State proceedings.

Mr. Catlin anticipates filing a petition in Federal Court when and if the one in California before the California Supreme Court is denied.

It is also my understanding that the Federal Defender's Office has been filing these --

THE COURT: I'm sorry, has been?

MR. LEE: Has, has been filing post-conviction discovery motions on Federal petitions.

Looking further at footnote two, Steele, which I think is only, only thing on the case law that addresses the timeliness, and it appears to me that what the Supreme Court really is talking about there is more of the, the process of filing the motion, petition challenging the ruling and compliance, not necessarily when the motion, motion gets filed.

Although, obviously -- I mean I think it looks clear to me that the we, we'll consider unreasonable delay in seeking discovery, the we in that is the

California Supreme Court. The other part of that seems to go to having the process that moves along once it's begun.

You know, I can also say I was specifically appointed by the Court, understanding this was work that needed to be done, the filing of the Steele motion, and it is my understanding that a lot of attorneys on these cases have waited until there is some body of case law interpreting the statute before they filed an order to expedite the process of discovery.

Turning to the --

THE COURT: I'm sorry, let me interrupt. Your appointment was effective when?

MR. LEE: Effective May of last year. In that period of time I've read the transcripts of both trials, both the one here in Kern County and the one that was done in Monterey County from the Fresno case, and I estimate those transcripts are probably somewhere in the neighborhood of 8,000 pages.

I've also inherited about 54 banker's boxes worth of materials from previous habeas counsel, which were not in an organized state.

And for timeliness, that would be all I have to say on timeliness. Move on to the other issues involved.

I'd just note that I think what Respondent has addressed in its, in its -- in their second argument,

it is a showing of good cause. There's no requirement that good cause be shown at this point in time. Again, there would be no good cause to show filing of a Federal petition, which we anticipate will happen, which --

THE COURT: Well, anticipating that will happen and really having it have any impact on what we're talking about here today probably doesn't really carry a whole lot of weight; does it? On the issue we're talking about here?

MR. LEE: Your Honor, I think it would carry weight on timeliness because that would be an opportunity to allege different facts or new facts, even under the same claims.

THE COURT: Well, you're talking as a true death penalty litigant, I guess. What would prohibit someone to file the Federal habeas corpus writ now?

MR. LEE: What would prohibit someone? Well, the State when it is still pending, which is obvious --

THE COURT: Has been pending since --

MR. LEE: Since 2000. Obvious first part Federal Court, and the second one would be if, if the Supreme Court granted the petition here.

However, you know, I got to say that the odds aren't in my favor on that, if you look at the affirmance rate for the California Supreme Court on death penalty petitions.

I think under Section 1054.9 you can file it when you're anticipating filing a petition. Doesn't have to be after the petition was already filed. Clearly we are anticipating filing a Federal petition and have been doing so for years, and how any post-conviction death penalty litigation happens, everyone is looking at almost every stage of the proceeding for the Federal petition.

THE COURT: Let me ask you, from a standpoint of statutory interpretation, are you assuming the California legislature was addressing Federal habeas corpus litigation?

MR. LEE: Well, Your Honor, they could have limited it to the State. By the clear language of the statute, it just says, you know, petition for writ of habeas corpus. It is not that it was limited to any, any, any one court or jurisdiction underneath. So I think they clearly did. I think how the statute came, came about was to provide sort of a level of fairness for defendants who, who were having trouble sort of recreating what was or should have been in the trial counsel's file. And I think that level of fairness would apply regardless of the forum in which you're in front of.

THE COURT: Well, I take it you're making the argument because it has logic to it, but you're not in a position to say that the legislative history reflects an anticipation by the State legislature that

it was intended to include Federal litigation or there's no California appellate or Supreme Court decision which states that 1059 anticipates Federal litigation and was equally applicable to Federal litigation.

MR. LEE: Well, I've read the legislative history, and I have found no mention of, of any limit on where it could be filed within that history at all. It talks more simply of, you know, recreating the files and providing the discovery that should have been. It doesn't talk about what forum that would be in.

THE COURT: So what you're saying is that, assuming for a moment there was no habeas corpus petition in existence at this time, you would be in a position to be here to argue that you anticipate somebody would file a Federal habeas corpus petition?

MR. LEE: Well, that's part of my argument, yes, I would anticipate that a Federal habeas petition will be filed in this case.

THE COURT: Will be, but not -- hadn't been filed yet.

MR. LEE: Well, I think the statute is clearly perspective in that regard, that it doesn't kick in when a petition is filed, it only has to be in preparation of the petition.

THE COURT: I guess the question that I would ask, ordinarily there's some court proceeding in

existence that gives the basis for the Court having the ability to hear some type of motion such as this, and are you saying that 1059 allows or grants a Court certain amount of jurisdiction to hear a motion like this, even if nothing's pending?

MR. LEE: Yes, Your Honor, it does.

THE COURT: Legislative history says that?

MR. LEE: I wouldn't rely on the legislative history. I think it is clear from the words of the statute, itself.

THE COURT: All right. Go on to your next points. I was curious about that. I'm not sure that I'm convinced. But I -- you may be right.

MR. LEE: I think if you look at the literal words of the statute, it says in -- it's -- it says that -- I guess there's prosecution of post-conviction writ of habeas corpus. But I think it is clearly to be read to apply before the petition is actually filed is interpreted by the case law.

And I think that would also be in keeping with the Court's -- at least the California Supreme Court's desire for one habeas petition filed in a timely manner and would be instead of successive petitions, which they clearly don't like.

I don't, I don't think that the Court or the legislature would be saying, oh, we're going to reopen the door to successive petitions under Steele or under 1054.9.

THE COURT: All right. Go ahead.

MR. LEE: I was looking at -- with regards to the breadth of the discovery order, I'm not wedded to any particular language, as long as I am able to get the materials I don't have.

I have provided counsel with a recreation of what I believe the discovery index would have been had it been done by counsel at the time trial counsel had to file. Trial counsel did not prepare a discovery index, and they received materials from a lot of different places. They also got, for instance, Mr. Catlin's trial file from the Fresno County was sent to them, which they received outside the discovery process here in Kern County.

Where those documents that are in the file came from I have no way of, no way of knowing or anticipating.

I don't want to -- I provided this index, which, which if -- I mean if counsel takes the time to go through it, it's 90 pages long -- would show what we have that was most likely provided discovery, which doesn't need to be repeated. I'm not interested in getting what I already have again.

However, given the position of the case, very hard for me to tell what, what was provided, or impossible for me to tell what was provided through discovery. I think that speaks to point on the opposition on page six where Respondent finds my assertion that because I

didn't have a discovery index or discovery file from trial counsel, it is curious, as counsel puts it, that I couldn't tell what should have been provided.

And well, you know, it is one of those things with time it doesn't get any better. If I didn't know, you know, back, back, or if counsel -- even if previous counsel didn't know back in 1993 what was provided when he was appointed originally, there's no way that information is going to appear, you know, here 14 years later.

I would also note that Steele does provide for materials that would have been or should have been provided to Steele counsel, not just those that, that we know or that I know were in existence. I think that the Respondent tries to -- tries to sort of limit that in such a way.

I'll also note that in section five of Respondent's argument, which preservation order is overbroad, that because it says seeks everything generated during the investigation, prosecution of this case and the Fresno County case. I included in my order the Fresno County Sheriff's Department, which was the designated investigating agency here in Kern County, and did the -- by far the bulk of the investigation. And as well as the Fresno County District Attorney's Office, which, again, Mr. Catlin was arrested in 1985, he was tried in -- on the Fresno case, which was on change of venue to Monterey County

in 1986, convicted there with a life sentence, and then he came to Kern County to do the case, case here.

Clearly the evidence that went into the Fresno County case was also the evidence of the two alleged murders in Kern County. The evidence in Kern County included the evidence, and not just the fact of conviction, but the actual evidence of the murder for which he was convicted in Fresno County.

So it's really very cross-pollinated, and I think that the bulk of the work began in Fresno County. That Fresno County was the emphasis -- their investigation actually started and continued before Martha Catlin, which was the last death, before that death occurred. So I believe that it makes sense that the Fresno County prosecutorial agencies and the Sheriff's Department, Coroner's Office are all included.

Turn to specific requests. Just more of a general matter that, obviously, I'm asking for materials that are in the possession of the -- of the prosecution team. I'm not -- obviously there's no duty on their part to go out and collect things not already in their possession. I think that's clear from the case law and such.

I also think it is clear there's a right to file a Pitchess motion in these matters. Rather than bring -- it will be against the Fresno County Sheriff's Department would be the main agency. Rather

than bring those down today, I asked leave of the Court to file it so I could give notice to counsel, County Counsel up there. Just trying to choose a procedure that is most efficient and that doesn't waste resources across county, especially when --

THE COURT: Mr. Lee, let me clarify something. You're making some requests for, for lack of better terminology, lost documents; correct?

MR. LEE: Correct.

THE COURT: You're making an additional request for -- you want to fill in the blank?

MR. LEE: Documents that should have been provided to trial counsel, but were not. Or that trial counsel should have had access to, and weren't.

THE COURT: Well --

MR. LEE: Which is --

THE COURT: Documents that were in the possession of prosecution at the time of the prosecution of the case that should have been turned over, but weren't or --

MR. LEE: Correct.

THE COURT: -- some other category?

MR. LEE: I think you're -- what should have been provided at the time of trial is how the statute --

THE COURT: That is the second category then.

MR. LEE: Correct. Correct.

THE COURT: You're not -- okay. Now the

Pitchess aspect, then as to that category? I'm not sure how that fits?

MR. LEE: You're not sure how -- how it fits in?

THE COURT: Yes.

MR. LEE: Two -- I think there are two cases that deal with that. I think Herd versus Superior Court, which is a, I think, Third District case. Also another one, Curl versus Superior Court. Which state that Pitchess is part of the -- is -- you can bring a Pitchess motion as part of the 1054.9 motion and proceedings.

And it is information that should have been provided to trial counsel who had brought it, plus I think there's another issue involved in that the personnel files, while confidential, are also in the possession of the investigating agency.

THE COURT: Well, presumably, but they have a right to destroy those files within five -- in five-year time frame; correct?

MR. LEE: Well, I mean that's information that we don't know. It's not necessarily destroyed.

THE COURT: Is it reasonable -- reasonably probable for me to believe at this point that files generated concerning law enforcement officers in Fresno in the early 1980's would still be in existence now?

MR. LEE: I think it is. I think personnel

files are kept for many different reasons, not just Pitchess. And I think that as long as people are employed, and people are still employed from these agencies at this point in time, as Mr. Witt demonstrates, that those personnel files would still be in existence, still be kept.

The mere fact that something doesn't have to be kept, doesn't mean that it isn't kept.

THE COURT: You mentioned before, but I'm kind of feeling my way through this. You're suggesting, number one, you don't have to show any good cause or reasonable probability for access to this information under ten --

MR. LEE: Yeah, I believe I would, Your Honor. What I would ask for is leave to file a declaration for service on -- and motion for service on Fresno County Counsel that would allow me to make that showing.

THE COURT: Okay. Go ahead.

MR. LEE: I think the rest of my, my argument is, is covered in my moving papers. So at this point I will leave it at that.

THE COURT: All right. Your choice, counsel. Who wishes to?

MR. HERNDON: Yes, Your Honor. Let me talk about -- address the timeliness issue first. We believe that the Court should decide that issue and find the motion untimely really for two primary

reasons. One based on Steele and one based on the judicial economy. If -- in Steele our office actually argued that that discovery motion should go to the California Supreme Court first, and California Supreme Court rejected that, found that this Court was the proper court to hear that motion. Unless an execution was imminent, these kind of motions should be filed with trial courts, and that's why we're here today.

The Court also said that each step, the filing of the motion, any writs challenging this Court's order, and any compliance with the motion needed to be done within a reasonable time period. That was the time frame that they established.

So our position is this Court should decide everything associated with this motion. Doesn't make sense to just carve out time limits and say that is something this Court can't decide. I believe this Court needs to make that determination and then leave the parties to their remedy of written relief if they want to do that.

THE COURT: Reasonableness, then how do you -- how would you suggest reasonableness should be defined in this particular case?

MR. HERNDON: Well, it's going to depend case to case. In this case I think it is unreasonable because Mr. Lee has been associated with this case since the filing of the petition or before, in 2000 and 1999, the year before.

The statute's been on the books for four and a half years. It's -- the right to bring this motion belongs to the Petitioner, not to counsel. Otherwise, as soon as you change counsel, you get a new shot at bringing this motion. So we believe it is unreasonable in this case for four and a half years to have gone by since the statute was enacted for the motion to be brought.

The footnote in Steele where the Court talked about reasonableness, it only says that it would consider whether petition, itself, was timely or not. There's no determination in Steele that they're going to decide whether this motion is timely. They decide whether the petition or new petition or supplemental petition is timely. When they do that they look back over the entire history.

But the timeliness of this motion is, we believe, for this Court to determine.

The judicial economy argument is basically why do all the work of discovery if some time down the line some Court is going to say it's too late to begin this process. That doesn't make sense because it gives the Petitioner the power to control pace of discovery.

And so we think in interest of judicial economy the Court should decide the timeliness issue, and because of the unique facts of this case find it untimely.

There was some discussion also about filing of

Federal petition. And my understanding is Federal Court decides appropriate discovery when a Federal petition is filed. If -- and if Federal Court attorneys are coming back to State Court and filing -- filing these motions, then State Court decide that according to State rules. It is not for the Federal Court to make that determination.

In terms of the merits --

THE COURT: Let's get back to the reasonableness. Counsel has posited and you've responded, of course, that he's been in the case since May of 2006. Is the statute a statute that says within its four corners that there's any time frame factor at all in the statute?

MR. HERNDON: The statute? No. But as the California Supreme Court interpreted that --

THE COURT: But there is the reasonableness factor.

MR. HERNDON: Yeah. That was the only guidance they gave on that point. We only have that footnote here today. I'm not aware of any other published decision that addresses that.

But I don't think it is correct to say that counsel's only been in the case for a year because his name is on the petition that was filed in 2000 as second counsel. And I -- my understanding is he's worked in some capacity on this case with prior habeas counsel. Prior habeas counsel was on the case in 2003

when the statute was enacted, he was on the case in 2004. It was not until the middle of 2005 that he asked to withdraw. So that two and a half-year period there, I think, also is an unreasonable -- shows unreasonable delay.

THE COURT: Let me ask you this. Should it be that Mr. Lee, regardless of anything else, was really not counsel in charge of litigation until he was appointed. Take that as a scenario. Take as another scenario that the original counsel who was involved in filing of the writ actually, in fact, was counsel today and was here making this same motion, does the reasonableness relate in any way to the attorney of record or is it just a timeliness?

MR. HERNDON: I argue that it relates to -- because it is a right the Petitioner has, not counsel. That the counsel are interchangeable. It is not something that travels with the counsel or is determined by who was the counsel at the time.

He had counsel in 2003 and four and five. I don't know what capacity Mr. Lee was working on the case at that point. And then -- and then that prior counsel moved to withdraw in mid-2005.

THE COURT: So assuming for a moment, you know, and your argument basically is -- and apparently everybody agrees here, that California Supreme Court says it is the Trial Judge that determines timeliness; correct?

MR. HERNDON: Yes.

THE COURT: Assuming all I have in front of me is the record as both of you are talking about, is that the writ was filed in 2001 --

MR. HERNDON: 2000.

THE COURT: 2000, and remains in place, hasn't been ruled on here in August of 2007. Is it reasonable within the confines of reasonableness to think that since the writ is unresolved, that it is still reasonable for the Court to consider this motion or do you think that when the Supreme Court used the term reasonableness it was directing the Trial Judge to consider other factors?

MR. HERNDON: I believe it was directing the trial -- that was establishing the standard by which the Trial Court was to evaluate the timeliness of these motions.

I think the record that's before the Court is pretty sparse about Mr. Lee's involvement and work on the case. I provided the cover of the original petition that was filed in 2000. There is a declaration that counsel has submitted showing -- talking about his work with Mr. Schwartz and other counsel in the case. So there's some indication of his involvement with the case.

But, again, I believe the right is the one that the Petitioner has, and it doesn't depend on who his counsel was at the time. He was represented by

counsel when the statute went into effect, and that's been four and a half years.

THE COURT: Go ahead with your train of thought. I don't want to have you diverted by my question.

MR. HERNDON: Well, then we turn to the merits of the petition. I have a few objections that the papers, I think, adequately address there.

It did seem to me in reading the motion, although the representation here today is more nuance, that he was asking for everything, access to everything, to look over everything, to be reassured that he had everything. And I don't think that's the purpose of the statute. Steele said it wasn't to be -- warrant a fishing expedition. And that also is against the Supreme Court death penalty protocol. They're not supposed to be able to do discovery in search of a claim.

So we believe that as to the merits, and again, counsel's not wedded to any particular wording, but as to the merits as it comes to this Court today, it is way -- very overbroad.

THE COURT: Mr. Lee, I'll turn back to you.

MR. LEE: First of all, I mean the California Supreme Court has had this case seven years, and still hasn't made a decision. Steele is a case started in 2003. We've taken less time to bring this motion than the Court has in deciding the petition. If you look

at reasonableness in terms of time, obviously, that seven years it is telling you this is a huge case and huge undertaking.

My name is on the petition. You know, I did work on it for another attorney. I was not counsel of record. I did not make decisions on what to do. My work stopped in 2002 with the filing of the informal response.

THE COURT: Let's assume you weren't engaged at all. Let's just assume you became counsel of record May, 2006. There's a three-year period between -- or three and a half year period almost between effective date of the statute, January, 2003, and May, 2006.

MR. LEE: Are you saying that just merely counting the days is not --

THE COURT: I guess it is a factor I can consider; is it not?

MR. LEE: It is not dispositive of reasonableness. I think we have to look at the size of the case, whether there is an opportunity to go back and amend the petition for new facts, for new claims, which there clearly is in this matter.

Also I'm not -- I would disagree that the statement that the Trial Judge is the one that determines the reasonableness of the timeliness of the seeking discovery. Because if you look at footnote two, the third sentence, the Supreme Court says, we

will consider any unreasonable delay in seeking discovery under the section in determining whether the underlying habeas corpus petition is timely. The we there has to be the California Supreme Court in death penalty litigation. If they're the ones who are going to decide timeliness, they're saying, hey, you know, go ahead, you know, bring your discovery motion, let's see what happens, and then you can argue why it took so long at the time you file your petition.

So I'd say any argument about reasonableness here and timeliness is, is premature. The California Supreme Court is saying, hey, we'll look at all the facts and then we'll make our decision.

THE COURT: So you're in direct disagreement with the Attorney General's position that the Trial Court make some evaluation of the timeliness issue?

MR. LEE: Well, I think -- I think the timeliness of the Trial Court would make is whether the petition is -- you know, has been decided, whether there's any opportunity to file something further, and I would think -- you know, I think the Supreme Court wanting it to be filed there at the last minute would be a thing to stop folks from coming into Superior Court and trying to find a judge who will stop things that are already moving on at the other end.

This case hasn't yet moved on at the other end. Speaking when filing things, like there's no petition pending, execution date has been set. That would be

the situation that I would be talking about. Which I think would be keeping with the California Supreme Court statement that if, you know, if you're sort of in the end game of capital litigation, file it here, we'll decide it, because then they're the ones who can look at the timeliness issue. And I think that would be part of the -- one of the reasons why they would want it filed in their court toward the end of the capital litigation as opposed to the Trial Court.

THE COURT: Yeah, you always get to that question of who should be involved at what particular point in time.

MR. LEE: Right. Correct.

THE COURT: But still it gets -- it would seem to be the situation that Steele is trying to give some guidance here concerning a timeliness issue, and maybe -- certainly I'm kind of looking at this for the first time in terms of reading Steele and the section, but isn't there a difference between filing discovery order six months or a year after filing petition and filing it seven years after?

MR. LEE: Well, we were already four years -- four late when we filed in 2000, didn't come on until 2003.

I don't -- I don't think that there is. As long as the petition is pending, I have the same opportunity now that someone who filed their petition, you know, yesterday would have to, to amend the

petition and allege new facts. And hopefully we'll be taking advantage of that opportunity after this litigation is complete.

And I think, you know, I think the California Supreme Court is saying the timeliness is -- of the petition is, under Clark, is sort of totality thing that the Trial Judge looking at their one small slice of the litigation isn't really in a position to make.

The Supreme Court is saying that they're the ones who's in the position to decide the reasonableness and the timeliness.

How else does the Supreme Court find unreasonable time in seeking discovery if the Trial Court is making the reasonableness decision? I don't think it can. I think that would take a logical jump that would put us at odds with what the California Supreme Court has told us.

THE COURT: I'm going to ask for a response from the AG's Office.

MR. HERNDON: Your Honor, what that footnote says, the California Supreme Court will consider unreasonability in seeking discovery under the section in determining whether the underlying habeas corpus petition is timely. They don't decide the timeliness of this motion directly. That is for this Court to decide. All they're going to do, assuming discovery is done, assuming supplemental petition or new petition is filed, is look back on the entire history

to determine the reasonableness of that new pleading.

But the motion that's before this Court today and the reasonableness of the timing of that motion is for this Court to determine it. Just doesn't make any sense for this Court to determine everything about the motion, except for whether it is timely or not. It doesn't make sense for discovery to proceed only for a Court later somewhere down the line to say that was too late for you to have done that.

THE COURT: Mr. Lee?

MR. LEE: Well, I think that's exactly what the California Supreme Court is saying. They're saying that they're going to decide down the line the timeliness. They say, hey, you know, we're going to give you an opportunity to get in all the facts and then we'll decide whether or not you -- you've made a mistake in waiting too long.

THE COURT: Well, they -- I guess they have that residual ability in any event, so really the question comes down to whether this Court in some way or another should take a look and see whether there's a timeliness aspect to, in effect, litigation here, that's what you're doing, you're litigating a discovery motion. And just as in many other situations, it does come to a point of whether or not there are factors that point toward or point against the timeliness aspect of the particular action at hand, and so I do think that there is some, some need

for the Trial Court Judge to make that determination based on the situation.

Now whether you've convinced me it is timely, I guess, at this point you may address that if you can.

MR. LEE: Well, we respectfully disagree with the Court's position on that. But I would argue, in the alternative, that it is still timely because there is still an opportunity to use the facts we discover here to bolster the habeas petition that is on file with the California Supreme Court.

I think, you know, this is not useless litigation. This is litigation where those facts are going to be used, you know, we have the California Supreme Court petition pending, and looking forward to the Federal petition, too. There's another opportunity to use the facts we discover through this process.

THE COURT: And so what you're saying, basically, is the fact that the petition -- that a habeas corpus petition exists, the fact it hasn't been concluded shows timeliness, the fact that in the future there could be, and from your perspective there inevitably will be a Federal habeas corpus.

MR. LEE: I wouldn't say inevitably. I always hold out hope. But I think that odds are against me in the California Supreme Court. I think that anyone who would look at the statistics would see that.

I'll go ahead, and I'll just address -- counsel

addressed merits --

THE COURT: Go ahead.

MR. LEE: -- briefly, I'll just -- briefly that it would be improper for this Court to rely on the Supreme Court death penalty protocol as it applies to counsel. They're saying, you know, don't expect to get the money to turn over every rock. But they do leave counsel discretion as to which rocks to turn over. This is a rock that I -- you know, that in my discretion needs to be turned over. I think that -- this is a focused request, and also that -- I mean the whole point of Steele is that I, you know, Petitioner gets this stuff, gets -- gets what should have been provided through discovery at the trial.

THE COURT: What about their position? And I don't want to misstate it, but you're basically in your original motion were asking for everything.

MR. LEE: Well, I think, you know, part of the point of the litigation like this applies narrowing down of, of, you know, what's asked for and what's available. And, you know, I don't feel the need to do things, but I'm also in the position that I don't really know what's out there because of the way trial counsel kept their files, and that puts me at a bit of a disadvantage.

But, you know, again, like I said, I have tried to respond to that by providing counsel -- I didn't file my believed discovery index with the Court. It is 90

pages long. But, you know, we can certainly provide one as part of an order and where such specific items on there could be excluded, to the point they are legible. There are some items on here that are illegible.

I would like to point out, Your Honor, I noticed when I was reading this that I made an error in my reply on page seven -- excuse me, page five. I referred to prosecution witness Mark Skinner. I should -- that should be Robert Willoughby. I thought I'd made the correction, but I didn't. Just for the point of completeness.

THE COURT: All right. You know, counsel, I think the timeliness issue is an issue that probably needs to be addressed and needs to be addressed clearly. Obviously it has ramifications. And from the filings that are on file, the framework of this litigation is litigation that commenced in the -- had to do with events, circumstances in the time frame of 1984 through '86. Which I understand that the judgment, conviction and imposition of the death penalty were resolved on direct appeal in 2000, year 2000. The habeas corpus petition was filed shortly before that conviction was upheld on appeal in the year 2000. And the further filed motions and responding papers reflect the passage, and the Court will take judicial notice of the fact of the passage of the statute, 1054.9 and the effective date of that

statute, January 1, 2003.

All those dates and times are -- have some significance, particularly the effective date of the statute.

And the Court is inclined to think that when it comes to the reasonableness of the delay, the amount of delay between the date of January, 2003, and today's date, August -- well, the filing of this motion was August third, I guess, August 3, 2007, points the Court to that being a factor in determining possibility of unreasonable delay.

The fact that it is the Petitioner's remedy or attempted remedy to file a discovery motion under 1054.9, not a -- one of any respective number of attorneys representing a petitioner, is of significance to the Court, for the reality is that a person engaged in lengthy litigation ostensibly will have any number of attorneys representing that person, and that's obviously what has occasioned in this particular case.

So it would be -- it would appear to the Court that the factor mitigating against reasonableness is the actuality that for a period of three -- well, for a period of four and a half years since the effective date of the statute, this discovery motion brought under the auspices of 1054.9 was filed far -- in the Court's estimation at a very late date relates to the question of reasonableness.

There's been no showing why it could not have been filed before or that there was reason mitigating against the filing of the motion.

The Steele case is a case that was decided in March of 2004, a year and three months after the effective date of the Section 1054.9. The Steele case is fairly clear in what it indicates as appropriately discoverable upon the filing of a motion under 1054.9.

So it is very difficult to find that there are factors that point toward reasonableness in filing this motion at this date, and it is my considered opinion that the delay in the filing of this motion at the trial court level reflects, without any showing of anything more than what's been shown here, reflects a lack of reasonableness. And the Court will deny the granting of any discovery order at this level based on the lack of reasonable -- reasonableness and timely -- as to the timely filing of this motion.

Anything else, counsel?

MR. WITT: Thank you, Your Honor.

THE COURT: Thank you.

(The proceedings were adjourned.)

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STATE OF CALIFORNIA)
) ss:
COUNTY OF KERN)

I, Minnal R. Hummel, hereby certify that I, as Official Reporter, Kern County Superior Court, was present and took down correctly in stenotypy, to the best of my ability, all the testimony and proceedings in the foregoing-entitled matter; I further certify that the pages reported and certified by me are indicated with my name and CSR number at the bottom of the page; and I further certify that the annexed and foregoing is a full, true and correct statement of such testimony.

Dated at Bakersfield, California on September 7, 2007.

MINNAL R. HUMMEL CSR #5394

MINNAL R. HUMMEL - CSR 5394
Official Court Reporter

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Catlin v. The Superior Court of Kern County** No.: **S167148**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 30, 2008, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 30, 2008, at Sacramento, California.

_____
Declarant