IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN D. CATLIN, Petitioner,	)	No. S167148
v.	)	
SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF KERN, Respondent,	)	Court of Appeal, Fifth Dist. No. F053705 Kern County Superior Court No. 30594
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)	

SUPREME COURT
FILED

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REPLY TO ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner

NO. ___________

v.

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

(Fifth District Court of Appeal, F053705)

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party In Interest

______________________________/

REPLY TO ANSWER TO PETITION FOR REVIEW

ARGUMENT

I. Real Party in Interest Fails, as Did the Court of Appeal, to Provide a Coherent Definition of "Reasonable Time" Based Upon the Majority's Opinion Below

Real party in interest's answer attempts to explicate the Court of Appeal's opinion, yet these efforts demonstrate instead an incoherent reading of Penal Code section 1054.9[1] and footnote 2 in *In re Steele*, (2004)

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[1] All further statutory references are to the Penal Code unless otherwise noted.

32 Cal.4th 682, 692 therein; the "explanation" thus emphasizes the need for this Court to grant review in this matter.

In attempting to explain the meaning of footnote 2 in *Steele*, neither the Court of Appeal nor real party in interest have provided any coherent explanation of the concept of "reasonable time" as used in the Court of Appeal's opinion. The opinion below states that a "lengthy delay must be explained" (slip opn., p. 8), but the Court of Appeal does not identify the point from which that delay is measured. (Pet. for Rev., p. 18.) The Attorney General, in its answer, does not even suggest a starting point, much less a rationally determined one. (Answer, p. 13.)

A. No Legal Authority Supports the Court of Appeal's Reading of *Steele*

The Court of Appeal and real party in interest state that they are following this Court's lead in interpreting a "reasonable time" (slip opn., pp. 6-7; Answer, pp. 6-7), but neither cites to a single legal authority that has interpreted the phrase "reasonable time" standing alone in the way the Court of Appeal did in its opinion. In fact, the interpretation of "reasonable time" adopted by the Court of Appeal below has no antecedent in this Court's jurisprudence. (See Pet. for Rev., pp. 18-21.)

B. The Court of Appeal Gives No Coherent Definition of a "Reasonable Time Period"

Despite the ambiguities of footnote 2 of *Steele* (see slip opn., dissenting opn. of Dawson, J., p. 1) and the inability of the Court of Appeal and real party in interest to find support for their vague concept of reasonable time, the Court of Appeal, wrongly, had no trouble applying this vague, unarticulated standard to Mr. Catlin: "we cannot provide [a definition of unreasonable delay] other than to suggest that if the practitioner is concerned about the delay, the trial court will also be concerned." (Slip opn., p. 8.) The Court of Appeal thus leaves it to practitioners to intuit whether the trial court will "be concerned" about timeliness without any guidance as to how to measure timeliness. The Court of Appeal merely found that some undefined standard was violated in some undefined way. (Slip opn., p. 8.) Real party in interest's answer sheds no light on this concept in the opinion. Instead, real party in interest merely serves as an apologist for the same vague, undefined concept of timeliness.

Real party in interest claims that *Steele*'s "reasonable time" standard is not ambiguous but nevertheless fails to explain away the concerns raised by Justice Dawson in her dissent. (See Answer, pp. 7-8.) Justice Dawson noted three reasonable interpretations of footnote 2 (slip opn., dissenting opn. of Dawson, J., p. 1), but real party in interest merely argues that one of

these interpretations is better. That one reading may serve a party's interest better than another does not make the language unambiguous. It is reasonable to believe that when this Court says ""[w]e will consider any unreasonable delay ...," this Court means that it is reserving for itself the determination of timeliness, not the trial court. Real party in interest is at a loss to explain how this Court can consider unreasonable delay of a postconviction discovery motion at the time that the habeas petition is filed if the trial court has already determined that an alleged delay was unreasonable.[2]

2

Having the trial court determine whether a postconviction discovery motion is timely and then having this Court make a new determination of timeliness when the habeas petition is filed would present additional problems in a situation where the trial court found the motion timely but this Court disagreed. Would the trial court's determination be given deference under an abuse of discretion standard or would this Court review the timeliness question de novo? If the trial court finds a motion timely, could the People file a petition for writ of mandate seeking review of timeliness or would the issue not be ripe for review until this Court determined the timeliness of the ultimate habeas petition?

C. The Court of Appeal Imagines "Mischief" Where None Exists

Real party in interest points to the "mischief" that the Court of Appeal imagines will result from having this Court determine timeliness. As explained in the petition for review (pp. 32-35) this argument is a red herring. Real party in interest does not address the multiple reasons raised in the petition for review as to why such multiple motions envisioned by the majority would not be filed for reasons other than timeliness. As Mr. Catlin explained, there are many factors that prevent such extended litigation apart from any notions of timeliness. Real party in interest is silent as to why these concepts are insufficient to prevent multiple motions and allay the Court of Appeal's fears more efficiently than its proposed, vague time limit.

Moreover, real party in interest could easily prevent multiple motions by taking a proactive stance on postconviction discovery by providing every discoverable item in its possession without a specific request from the condemned. If it did so, the only response to multiple postconviction discovery motions would be that the discovery has already been provided.

D. The Dissenting Opinion Gives a Better Reasoned Reading of *Steele*

Real party in interest (see Answer, pp. 8-9) rejects Justice Dawson's interpretation of the second sentence in footnote 2 that "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." (Slip opn., dissenting opn. of Dawson, J., quoting *Steele, supra*, 32 Cal.4th at p. 692, fn. 2.) Real party in interest believes this reading "deletes" the words "the motion" from the second sentence of footnote 2. (Answer, p. 8.) Not so.

In fact, under Justice Dawson's reading here, "the motion" is central to understanding the sentence. This reading acknowledges that footnote 2 does not explicitly state that the motion *must be filed* within a reasonable time period. It also acknowledges that the sentence lacks a reference to any event other than the motion, any petition, and compliance. It therefore reasonably concludes that the motion, any petition therefrom or compliance therewith must be done within a reasonable time period of each other. In other words, it is the filing of the motion that starts the time period running. Furthermore, this interpretation does not depend, as does the Court of Appeal's, on the occurrence of some unnamed event (be it the date of

conviction, the appointment of counsel, the filing of the record on appeal, or the filing of the reply brief) from which a reasonable length of time is measured. Therefore, it gives a completeness to footnote 2 that would is lacking in the Court of Appeal's interpretation. Footnote 2, considered in its entirety, sets out rules for the prompt resolution of the proceedings, once instituted, not a time limit for the initiation of them.

Contrary to real party in interest's assertions, the majority below did not give "full weight to every word" in interpreting *Steele*. (Answer, pp. 8-9.) Instead, it focused solely on the second sentence of footnote 2 without any attempt to place that sentence within the context of *Steele* as a whole, within the context of this Court's prior jurisprudence defining the phrase "a reasonable time," or within that of the overall habeas scheme. Had it done so, it would have realized the insufficiency of its interpretation of *Steele*. Instead, real party in interest, in its answer, can only gloss over the questions raised by Mr. Catlin in the petition for review.

Real party in interest describes as a "non-starter" the argument that the Legislature did not include, and in fact rejected, a time limit for filing a postconviction discovery motion when enacting section 1054.9. (Answer, p. 9.) 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.) Real party in interest appears deaf to any interpretation of *Steele* that differs from its own. It refuses to recognize that its interpretation of *Steele* is at odds with the legislative history and that, perhaps, its interpretation of *Steele*, and the Court of Appeal's, are wrong. Real party in interest prefers to remain steadfast in its erroneous beliefs even in the face of contradictory evidence. The better approach, and that taken by Mr. Catlin, is to attempt to reconcile *Steele* with the legislative history of section 1054.9. (See Pet. Rev., pp. 16-17.)

Finding "nothing remarkable" about a time standard, real party in interest, through a willful blindness, finds the Court of Appeal's interpretation of timeliness, "consistent with this Court's jurisprudence for the timely filing of habeas corpus petitions." (Answer, p. 9.) Real party in interest fails to cite any authority supporting its novel position. This failure is not surprising because, as Mr. Catlin has shown, if this Court intends to set time limits it does so explicitly. (See Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3, stds. 1-1.1 & 1-1.2.) As this Court understands, life and death – even by execution – are too important to turn on differing interpretations of vague standards of timeliness.

In response to Mr. Catlin's argument that, even if the trial court

determines timeliness, the Court of Appeal incorrectly defined the reasonable time standard, Real party in interest maintains that "the appellate court decision is not standardless." (Answer, p. 9.) There is a difference between applying the wrong standard and being standardless. Real party in interest's argument is illogical and ignores contrary authorities. The crux is that the Court of Appeal adopted a standard without precedent in this Court's jurisprudence and at odds with this Court's use of the phrase "reasonable time" in other contexts. In his petition for review, Mr. Catlin noted that the Court of Appeal did not cite any authority to support its interpretation of "reasonable time." (Pet. Rev., p. 18.) Real party in interest would rather proffer an unresponsive argument than concede that prior legal authorities are at odds with the Court of Appeal's opinion.

E. The Majority Created A New Definition of Reasonable Time that Should Not Be Applied to Mr. Catlin

Even if *Steele* did intend to impose a reasonable time standard by which a postconviction discovery motion must be filed, real party in interest errs by claiming that "that limitation period was first announced ... in *Steele*." (Answer, p. 9-10.) *Steele* never defined "reasonable time." The first time that a court attempted to define that phrase was in the majority's opinion below. It is, therefore, unfair to apply that standard to Mr. Catlin's proceedings, the one out of which that definition first arose. (Pet. Rev., p. 22.)

Despite the many factual inaccuracies and omissions contained in the Court of Appeal opinion, real party in interest argues that the Court of Appeal correctly found Mr. Catlin's motion to be untimely. Both the Court of Appeal and real party in interest are in error.

First, real party in interest errs by implying, as did the Court of Appeal, that Mr. Catlin's discovery request was only a sweeping request "for the district attorney's entire file."[3] (See Pet. for Rehearing, filed below.) This is not true. Mr. Catlin's motion requested sixteen specific categories of information including records of Mr. Catlin's juvenile

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Moreover, it was the California Attorney General, not the Kern County District Attorney who prosecuted Mr. Catlin.

proceedings, his medical records, communications between prosecutors and Chevron employees (who tested evidence and testified as expert witnesses). (See Exhibits in Support of Pet. for Writ of Mandate, Exh. A, filed below.) That Mr. Catlin's sixteen specific requests are broadly worded simply reflects the fact that "that one cannot prove what was not turned over if one does not know what was not turned over." (*Curl v. Superior Court (People)* (2006) 140 Cal.App.4th 310, 324.) Real party in interest repeats this erroneous description multiple times, which is quite misleading. (Answer, pp. 2, 13, 16.)

Real party in interest inexplicably finds it irrelevant, or of "no moment," that Mr. Catlin provided the Attorney General with a 90-page list of documents believed to have been provided to trial counsel through the discovery process that his counsel specifically excluded from his discovery request. (Answer, p. 13.) Mr. Catlin posits that this fact is of "no moment" because, otherwise, real party in interest would have to admit that the Court of Appeal was factually wrong in claiming Mr. Catlin only requested the prosecutor's entire file.

Real party in interest states that "[t]he 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." (Answer, p. 13.) This is

exactly the point of a postconviction discovery motion. (See sec. 1054.9, subd. (b) [discovery materials are "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial."].)

Just like the appellate court, real party in interest is unable to identify the point from which a reasonable time period is measured. (Answer, p. 13.) Its only recourse is to claim that, whatever that point is, it has passed. The result of this inability to sketch even the rudimentary outlines that could define a reasonable time period would require every postconviction discovery motion to present evidence that every request therein has been made within a reasonable time. (See Pet. Rev., pp. 25-28.)

Although real party in interest claims that Mr. Catlin's counsel could have filed this motion as early as 2003 (Answer, p. 14), real party in interest is silent on the fact that, until November, 2004, there was no mechanism for appointed counsel to be paid for such motions. (Pet. Rev., pp. 30-31.) Mr. Schwartz moved to be relieved of counsel eight months later and was relieved as counsel on August 10, 2005. (See Answer, p. 2.) For nine months Mr. Catlin had no appointed counsel, until May 5, 2006, when his current counsel was appointed. (Answer, p. 2.)

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 postconviction discovery motion (November, 2004), one counsel withdrew (2005), new counsel was appointed (2006), and the postconviction 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 postconviction discovery motion. Furthermore, Real Party in Interest has not alleged any prejudice based upon the time at which petitioner's motion was filed.

When discussing the majority's unfounded fears of multiple postconviction discovery motions (see slip opn., p. 7), real party in interest ignores the realities that counsel will not be paid for filing numerous motions, that the habeas scheme is designed to discourage such piecemeal litigation even in the absence of time limitations for such motions, and that other legal concepts would allow the trial court to bar or prevent multiple motions. (Compare Answer, p. 15 to Pet. Rev., pp. 32-35.) Moreover, neither the Court of Appeal nor real party in interest can point to a single

instance in which multiple motions have been filed.

Real party in interest wrongly claims that "[t]he appellate court did not suggest that lengthy delays in bringing these motions must be explained item by item." (Answer, p. 15.) Such an item by item explanation is contemplated by the majority's opinion when it looks to the substance of Mr. Catlin's claim as "important" in determining whether delay was reasonable. (Slip opn., p. 10.) The majority suggests that, as to items which the petitioner can show are missing or based on new information, a delay in filing a discovery motion might be justified.[4] (*Ibid.*)

4

The majority faults Mr. Catlin for not suggesting "that examination or testing of evidence would be beneficial" to him. (Slip opn., p. 10.) This argument is inapposite because Mr. Catlin made no request for access to physical evidence under section 1054.9, subdivision (c). It does, however, suggest that the Court of Appeal lacked a fundamental understanding of the items requested in the postconviction discovery motion and the statute which was being explicated.

F. Review Should Be Granted

The overarching purpose of section 1054.9 was to provide for disclosure of pretrial discovery materials during state habeas corpus proceedings, so that habeas claims can be decided on their merits in the state courts, without the protracted process of taking the case to federal court, getting discovery there, and returning to state court to exhaust claims revealed by the federal discovery in a state successor petition which would have to be parsed claim by claim for timeliness. Allowing the trail courts to set up procedural bars to obtaining discovery in the first place will defeat the purpose of section 1054.9, adding more litigation and more delay.

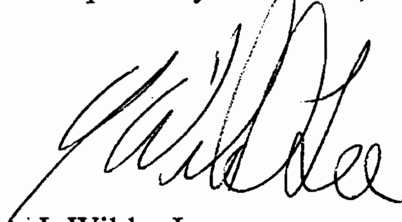
In sum, the Court of Appeal's opinion fails to acknowledge that *Steele* is ambiguous as to the meaning of a "reasonable time period" in footnote 2, fails to consider relevant legislative intent, cannot provide a coherent definition of reasonable time or even identify the point from which such time is measured, and wrongly applies the rule developed in its very opinion to Mr. Catlin, who had no notice that the majority would read *Steele* as it did at the time he filed his motion. Given the heightened importance – which may literally be whether Mr. Catlin is executed – of the questions presented and the fact that it is a matter of first impression, this Court should grant review in this matter.

CONCLUSION

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

Dated: November 7, 2008

Respectfully submitted,



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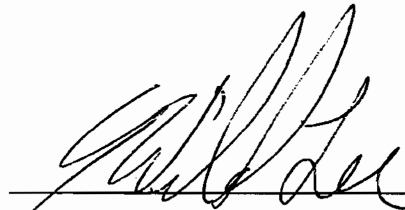
Attorney for Petitioner
Steven D. Catlin

Certification of Word Count

I hereby certify that the number of words in this Petition for Review is 3192 according to the word count function of the computer program used to prepare the document.

Dated: November 7, 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 **Reply to Answer to Petition for Review** to the following parties hereinafter named by:

> Placing a true copy thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:
>
> Hon. Clarence Westra
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I declare under penalty of perjury the foregoing is true and correct. Executed this ___ day

of ____________, _________ at Berkeley, California.

____
J. Wilder Lee