IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVEN D. CATLIN, Petitioner, **v.** **THE SUPERIOR COURT OF KERN COUNTY,** Respondent.	**CAPITAL CASE** No. S167148 Court of Appeal, 5DCA No. F053705 Kern County Superior Court No. 30594

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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?

INTRODUCTION

In August 2007, petitioner filed a post-conviction discovery motion seeking access to all materials in the possession of the prosecution and law enforcement. This motion came seven years after he filed his habeas corpus petition in this Court, four and a half years after the post-conviction discovery statute was enacted (Pen. Code, § 1054.9), and three years after this Court stated that post-conviction discovery motions must be filed within a reasonable time. The superior and appellate courts found petitioner's filing delay unreasonable. Nevertheless, petitioner argues that this Court did not establish

a time limit, if it did, timeliness may only be assessed by this Court, and that any time limit ought not apply to his motion. Respondent submits that the trial court properly applied *Steele's* reasonable time requirement in denying petitioner's motion.

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of venue) in *People v. Steven Catlin*, Monterey County Superior Court No. CR11388, affirmed on June 13, 1988, in an unpublished decision by the Court of Appeal of the State of California, Sixth Appellate District, No. H002078. Subsequently, a Kern County 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, this 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 and on May 5, 2006, J. Wilder Lee was appointed as attorney of record for petitioner.

On August 2, 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, in Answer to Petition for Review.)

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. (Exh. B, hereinafter, Opn.) On November 19, 2008, this Court granted review.

SUMMARY OF ARGUMENT

This Court has determined that post-conviction discovery motions (Pen. Code, § 1054.9) must be filed within a reasonable time. (*Steele*, *supra*, 32

Cal.4that p. 697.) Since Penal Code section 1054.9 is triggered by the "prosecution" of a habeas corpus petition, this Court's interpretation is consistent with its jurisprudence requiring the timely filing of habeas corpus petitions. This circumstance-specific standard is workable and promotes the prompt resolution of discovery issues. This Court had the inherit judicial power to regulate the practice and procedure of these motions by construing section 1054.9 to contain an implied reasonable time requirement. Petitioner unreasonably delayed in filing his motion in August 2007. By then, section 1054.9 and *Steele* had been in place for several years. Petitioner's explanation (change in counsel and uncertainty over payment) does not justify his considerable delay. Thus, the trial court did not abuse its discretion in denying petitioner's motion.

ARGUMENT

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. He was mistaken.

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 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.)

This 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. Application To 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 reasonable 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.

1. The Language And History Of Penal Code Section 1054.9 Do Not Preclude A Timeliness Requirement

a. Language

Petitioner argues that this Court's *Steele* decision did not establish any time limit for filing these motions. (AOB 7-28.) By petitioner's 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 any resulting habeas corpus petition is timely. However, petitioner's argument conflates two separate and distinct considerations -- whether the motion is timely and whether the petition is timely. This Court did say whether a petitioner timely pursues discovery will be part of the evaluation of whether any resulting petition is timely. (*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 correctly 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 also suggests that the only actions that must be done within a reasonable time are the filing of any writ petition challenging the ruling on the motion or the compliance by the producing party. (AOB 15.) 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.

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, the timeliness of a discovery motion depends on the circumstances at that time.

b. History

Petitioner asserts that the legislative history shows that the Legislature considered and rejected a time limit for these motions. (AOB 11-13.) He notes, quoting the dissent below, that the Attorney General initially sought a time limitation but withdrew that opposition when the bill was limited to life-without-parole and death cases. (*Ibid.*) Whatever the reasons for the Attorney

General's actions, this point is irrelevant; it is this Court, not the Attorney General, that interpreted the statute as implying that these motions must be brought within a reasonable time. The Attorney General's actions do not shed any light on collective legislative intent. (See e.g. *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, n. 5, quoting *Metropolitan Water Dist. v. Imperial Irrigation District* (2000) 80 Cal.App.4th 1403, 1426 ("Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. [Citations.] This is because such materials are generally not evidence of the Legislature's *collective* intent.") Relatedly, petitioner claims that adding a time limitation is "inserting into the statute that which the legislature specifically considered and rejected." (AOB 13.) But the legislature did not explicitly consider and reject a reasonable time standard. In any event, this would be a cryptic way for the Legislative to restrict a court's inherent judicial power to regulate practice and procedure. (*Cf. McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 116-117; *Scott v. Larson* (1927) 82 Cal.App. 46, 51; *Johnson v. Superior Court* (1926) 79 Cal.App. 650, 654.)

Moreover, if legislative history is considered, it suggests that the bill's proponents were concerned with defendants meeting their threshold burden in their *initial* habeas petitions.

> "Currently, as expressed in *People v. Gonzalez*, (1990) 51 Cal.3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in *Gonzalez*, is woefully inadequate in cases where a defendant's file, through no fault of their own, no longer

exists. The purpose of this bill is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled."

(Petitioner's Motion for Judicial Notice, Exh. B, p. 3; Exh. C, p. 4.)

In other words, the focus of the bill was pre-petition discovery, not, as in this case, post-petition discovery many years after the fact. Petitioner can hardly fault this Court for contemplating that post-conviction discovery motions could be brought after a habeas petition was filed. (AOB 19.)

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. Neither the language of section 1054.9 nor its legislative history precluded this interpretation.

c. Policy

Petitioner argues that the reasonable time requirement will frustrate informal resolution of discovery issues and increase litigation. Ironically, in arguing that this court cannot interpret section 1054.9 to include a timeliness requirement, petitioner gives great weight to an "informal discovery" procedure that is also not explicitly invoked in section 1054.9. (AOB 19-21.) In truth, this requirement promotes the prompt resolution of discovery issues and discourages abuses like serial discovery motions. And petitioners do not "already [have] every incentive to litigate such motions quickly and efficiently." (AOB 19.) Delay can be a powerful incentive for a petitioner under a sentence of death. (*In re Clark* (1993) 5 Cal.4th 750, 796 n. 31.) A reasonable time standard serves the ends of justice by stimulating discovery and the prompt resolution of claims. Hence, contrary to petitioner's argument this requirement fosters the intent of section 1054.9. No one has suggested that individual

requests within each motion must each be timely. (AOB 22-25.) And petitioner's theory that scientific advancements will have to be assessed to determine reasonableness, further slowing down discovery, is curious. Section 1054.9 is not a testing statute; it merely provides for access to discovery materials. (*Steele*, *supra*, 32 Cal.4th at p. 693.) Nor are advancements in scientific techniques at issue in assessing the timeliness of petitioner's motion.

C. Steele's "Reasonableness" Standard Is Sufficient

Petitioner also posits that, to prove the reasonableness of a delay, defendants will have "to have evidence demonstrating that some document was not turned over and the facts that led him to conclude that some document should have been but was not in trial counsel's file." (AOB 25.) Not so. If the prosecution asserts that a petitioner has unreasonably delayed in seeking discovery, petitioner must only explain why he is making his request now. This case shows how easily this standard can be applied. Petitioner offered no explanation at all for why he filed his all-encompassing motion many years after filing his habeas petition and several years after section 1054.9 and *Steele* were in place. It appears he filed his motion simply for reassurance that he had everything many years ago. The trial court did not abuse it's discretion in finding this unexplained delay unreasonable.

Even if the lower courts got it right - that the trial court properly applied the reasonable time standard in *Steele* to his motion - petitioner claims it incorrectly defined that standard. (AOB 28-31.) 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.) Again, this standard is consistent with the standard of timeliness for habeas

corpus petitions. (*In re Clark, supra*, 5 Cal.4th at 784-785.) It is also consistent with society's interest in resolving capital cases. (*In re Sanders* (1999) 21 Cal.4th 697, 703.)

Petitioner complains that the appellate court unfairly applied the reasonable time rule in his case because it was first defined in the context of his writ proceedings. (AOB 32.) He is mistaken; that limitations period was first announced by this Court in *Steele* in 2004.

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. This Court should not retreat from its well-considered determination in *Steele* that these motions must be brought 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

Petitioner claims that, even if this Court established a reasonableness standard, it was misapplied in this case. However, 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.

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 form 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.)

In response, petitioner claims

"In the three years since *Steele* (decided March, 2004) first raised the suggestion of timeliness, the Supreme Court took over eight months to determine whether and how counsel would be compensated for bring a post-conviction discovery motion (November, 2004), one counsel withdrew (2005), new counsel was appointed (2006), and the post-conviction discovery motion was filed (2007). Considering the unusually complicated fact pattern of this case - evidence of three deaths over a nine year period was presented at two separate trials in two counties -, as well as the time it took the Court to develop a compensation policy, the withdrawal of counsel, and the appointment of

new counsel, there has been no substantial delay in the filing of a post-conviction discovery motion."

(AOB 36-37.)

This timeline obscures key points. This Court did not raise a suggestion of timeliness in *Steele* - it established one. Nor was the change in counsel significant. (See *In re Clark*, *supra*, 5 Cal.4th at p. 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 fact, whether petitioner had a change in counsel is irrelevant. (*Id.*, at p. 779.)

Moreover, current counsel's (Mr. Lee) name is on the cover of the habeas petition that was filed in 2000. Apparently, he has acted as counsel for petitioner for a decade. Prior counsel, Mr. Schwartz, did not apply for permission to withdraw until July 2005, two and a half years after section 1054.9 went into effect. Succinctly stated, either Mr. Schwartz or Mr. Lee could have filed this motion in 2003, 2004, or 2005. (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 473 (2005 Motion); *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359 (2005 Motion).)

As the appellate court noted, it is significant that petitioner's attorneys have known for a decade that trial counsel did not catalog discovery they had received. Yet, petitioner never requested, either informally or formally, for access to the prosecution's file until he filed this motion in 2007. Against this backdrop, the appellate court properly concluded that the trial court did not abuse its discretion in concluding that petitioner's motion was untimely. (*Kennedy v. Superior Court*, *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. Thus, the trial court did not abuse its discretion in denying petitioner's motion.

CONCLUSION

Accordingly, the Attorney General respectfully requests that the judgment be affirmed.

Dated: January 16, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4920 words.

Dated: January 16, 2009

Respectfully submitted,

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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 January 16, 2009, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** 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 January 16, 2009, at Sacramento, California.

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Declarant