IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

After the Denial of a Petition for Writ of Mandate

by the Court of Appeal, Fifth District

J. WILDER LEE (SBN: 168442)
Attorney at Law
360 Ritch Street, Suite 201
San Francisco, CA 94107
415-495-3115

Attorney for Petitioner,
STEVEN D. CATLIN

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STEVEN DAVID CATLIN.
Petitioner

NO. S167148

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
_____/

PETITIONER'S REPLY BRIEF

ARGUMENT

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

Real party in interest fails again to cite any authority supporting its interpretation of "reasonable time" as used in footnote 2 of *Steele*. Real party in interest again ignores contrary authority showing that the phrase has a meaning different from that adopted below. Real party in interest refuses to identify the point at which its alleged interpretation of "reasonable time

period" begins and ends or at which a petitioner must justify any delay. Instead, real party in interest asks this Court to add another layer of uncertainty to post-conviction capital cases by adopting an amorphous standard of timeliness that will have the perverse effect of creating more and unnecessary litigation.

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

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

Curiously, real party in interest titles its argument subheading as "1. The Language and History Of Penal Code Section 1054.9 Do Not Preclude A Timeliness Requirement ... a. Language," yet that subsection does not discuss the language of section 1054. (See Resp. Brief, p. 8.) Instead, real party in interest discusses the language of footnote 2 in *Steele*. Petitioner can only interpret this bit of misdirection as a concession that the plain language of the statute "provides no time limits for making the discovery motion ..." (*Steele, supra*, 32 Cal.4th at p. 692, fn. 2.)

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

Real party in interest fails to find any support for its position in the legislative history of section 1054.9. (See Resp. Brief, pp. 9-11.) Instead, it argues that this Court should ignore its attempts to influence the legislation that ultimately became section 1054.9.

Real party in interest discounts the legislative history of section 1054.9 by arguing that material showing the understanding of an individual legislator or interested party does not generally show legislative intent. (See Resp. Brief, p. 10.) This argument is inapposite. Petitioner does not seek to show what the Attorney General understood or thought about the legislation. Instead, the committee analysis of the bill demonstrates the intent of the Legislature as a whole. The committee analyses relied upon by petitioner are the exact type of authority that this Court has used to establish legislative intent in the past. (See *Richardson v. Superior Court (People)* (2008) 43 Cal.4th 1040, 1049; *In re Smith* (2008) 42 Cal.4th 1251, 1260-1261.)

The Attorney General is a powerful government official who commands legislators' attention. It is disingenuous for real party in interest to pretend that the Attorney General's opinion carries no weight with the

Legislature. The fact that the Attorney General raised an objection that was presented in several committee analyses of the bill but was not ultimately adopted by the legislature is evidence that the legislature considered and rejected that objection.

Courts have considered the comments by the Attorney General contained within committee analyses of bills when considering legislative intent. (See *Richardson v. Superior Court (People), supra,* 43 Cal.4th at p. 1049 ["This reading ... is supported by the legislative history of section 1405. The analysis for Senate Bill No. 1342 notes that the Attorney General preferred ..." (citation omitted)]; *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 446-447 ["The bill analysis ... noted that the state Attorney General, although not opposed to the bill, was concerned that it could have 'the unintended consequence ...'" (citation omitted)]; *People v. Narron* (1987) 192 Cal.App.3d 724, 737 ["Some insight is provided by the comments of the Assembly Office of Research ... [that] states: 'This bill is sponsored by the Attorney General ...'" (footnote and citation omitted)].) Petitioner seeks to have this Court, by considering the exact type of legislative history that it has considered in other contexts, continue a long-standing practice of interpretation that is based on the full evidence from legislative history.

3. Policy

Real party in interest errs by relying on its claim that "an 'informal discovery' procedure ... is also not explicitly invoked in section 1054.9." (Resp. Brief, p. 11.) Technically, real party in interest is correct: section 1054.9 contains no reference to informal discovery. However, such an argument divorces section 1054.9 from its essential context. Section 1054.9 is part of chapter 10 of title 6 of part 2 of the Penal Code. That chapter of the Penal Code commences with section 1054 which states "This chapter shall be interpreted to give effect to all of the following purposes ... (b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested." (See also sec. 1054.5, subd. (b) ["Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel ..."].) That the Legislature chose to include section 1054.9 in a chapter that has the purpose of informally conducting discovery and requires an informal request before court enforcement of any required disclosures certainly indicates an intention to invoke an informal discovery process. In contrast, the legislative history of section 1054.9 indicates that a timeliness requirement was considered and rejected.

Respondent invokes *In re Clark*, (1993) 5 Cal.4th 750, 796, fn. 31, for the proposition that inmates under a sentence of death have a powerful incentive to delay. (Resp. Brief, p. 11.) This argument is a non sequitur. What real party in interest fails to grasp is that delay in the filing of a discovery motion does not delay the execution itself. The strict time limits for bringing a habeas petition coupled with the high bar that must be overcome before a second habeas petition will be considered are a sufficient incentive to prevent delay in filing such motions. Adding a time limit to the filing of a post-conviction discovery motion will not speed up litigation.

Ironically, a time limit may slow down the pace of litigation in those cases in which a timely post-conviction discovery motion is not filed. In such a case, the petitioner would revert to the same position in which he would have been before the passage of section 1054.9. That situation – in which discovery requirements led "to many delays and cause[d] unnecessary public expenditures as prosecutors and habeas counsel litigate[d] whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial" – was what the legislature sought to prevent by passing section 1054.9. (Sen. Comm. on Public Safety, Analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002. p. 4.) Under such a scenario, the standard

arc of litigation was that the state habeas petition was promptly denied but the federal habeas petition resulted in a hearing. Any new claims or facts discovered during the federal court litigation meant that the petitioner had to return to state court to exhaust his state remedies. This often resulted in the stay of federal claims while the new claims were exhausted in state court. Therefore, an unmet time requirement for post-conviction discovery motions can easily result in longer delays before the capital litigation ends.

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

Real party in interest, surprisingly, presents very little rebuttal to petitioner's argument that the language of footnote 2 in *Steele* is open to differing reasonable interpretations. That fact that Justice Dawson in her dissent, this Court in prior cases, and the Courts of Appeal have interpreted the phrase "reasonable time" differently from the majority below has made little impression on real party in interest. (See AOB, pp. 28-31.) As a result of blindness to any other interpretation of *Steele*'s footnote 2 – except the Court of Appeal's conclusory finding that, even without defining a reasonable time period, petitioner's motion was untimely – real party in interest fails to demonstrate that its own interpretation of *Steele* has any precedent.

Moreover real party in interest makes no attempt to provide a cogent reading of footnote 2. It appears to acknowledge that its reading of the third sentence of footnote 2 ("We will consider any unreasonable delay in seeking discovery under this section in determining whether the underlying habeas corpus petition is timely") is at odds with its interpretation of the second sentence. (See Resp. Brief, p. 8.) Instead of seeking an interpretation that gives meaning to each sentence, real party in interest

chooses to excise any meaning from the third sentence of footnote 2. Real party in interest makes no attempt to explain how this Court can consider unreasonable delay in seeking post-conviction discovery in determining if the habeas petition is timely if the trial court has already denied such a motion as untimely. Real party in interest's reading renders the third sentence meaningless.

Real party in interest raises the imagined specter that a petitioner could file "numerous" post-conviction discovery motions and the trial court "would be without power to deny those motions on the grounds that he or she had waited too long." (Slip opn., p. 7; Resp. Brief, p. 9.) As petitioner explained in his petition for review, such imagined "mischief" is prevented by other legal concepts that, unlike time limitations, are specifically designed to prevent multiple motions litigating the same issue. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 252-255 [equitable principles of res judicata (direct estoppel) and law of the case]; *People v. DeLouize* (2004) 32 Cal.4th 1223, 1232 [trial court cannot reconsider final orders].) Even without imposing a reasonable time requirement on section 1054.9, trial courts have plenty of tools to prevent endless litigation once a petitioner had a fair chance to obtain a ruling on his substantive requests.

Furthermore, such multiple motions would serve little purpose. The

practical considerations of habeas litigation disprove real party in interest's argument. The presumptive deadlines for filing a petition for writ of habeas corpus lay to rest the Court of Appeal's imagined fears of "numerous" motions over a number of years. A petition for a writ of habeas corpus is presumed to be filed without substantial delay if it is filed within 180 days after the filing of the appellant's reply brief on the direct appeal, or within 36 months after appointment of habeas corpus counsel, whichever is later. (Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3, stds. 1-1.1 & 1-1.2.) Habeas counsel has little time to file successive post-conviction discovery motions. Rather, counsel has great incentive to deal with any post-conviction discovery issues in an efficient manner.[1] Given the high barriers that must be overcome before a second or successive petition for habeas corpus will be considered (see *In re Clark, supra,* 5 Cal.4th at p. 797), a post-conviction discovery motion submitted after the habeas petition has been filed would normally do little good. Mr. Catlin is in the unusual position of having the right to post-conviction discovery arise after his habeas petition was filed. In this respect, his case is not typical and real party in interest's attempt to invoke a flood of

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In reality, habeas counsel could not expect compensation from the Supreme Court for "numerous" post-conviction discovery motions.

litigation on this basis is misleading.

It is folly to believe that a petitioner would file numerous motions based upon the same evidence with any rational expectation of a different result. It would be irrational, once the trial court had ruled, to file the same motion in the same court, even if the second motion were filed within a reasonable time. Discovery, even if granted, is limited to items possessed by the prosecution at the time of trial. (Sec. 1054.9, subd. (b).) This is a closed set of items of finite proportions.

Real party in interest makes the unusual argument that section 1054.9 "is not a testing statute." (Reap. Brief, p. 12.) However subdivision (c) of section 1054.9 provides for "the defendant [to] be provided access to physical evidence for the purpose of examination ..." While DNA testing is specifically excluded, the language of subdivision (c) plainly includes testing as part of that examination. "Examination" is defined as "[t]he act of examining, or state of being examined; a careful search, investigation, or inquiry; scrutiny by study or experiment." (Examination. Webster's Revised Unabridged Dictionary. Retrieved Jan. 30, 2009, from Dictionary.com website: http://dictionary.reference.com/browse/examination.) Testing is merely "scrutiny by study or experiment." While DNA testing provides a clear example of scientific advance in case law, other similar advancements

in other areas could easily apply in areas such as ballistics, fingerprint analysis, or drug detection tests. Adding a timeliness requirement to post-conviction discovery motions could result in an expensive, protracted *Kelly/Frye*[2] hearing as part of the discovery motion just to determine whether the petitioner could access the item to be tested, not whether the actual test results had real evidentiary value. Real party in interest's idea of timeliness could prevent petitioners from benefitting from scientific advances that could prove to be dispositive of guilt or innocence.

Real party in interest engages in circular argument by claiming that a petitioner can justify any delay without evidence demonstrating that a particular item was not provided as discovery. (Resp. Brief, p. 12.) To rebut Mr. Catlin's argument that demonstrating the reasonableness of any delay for each individual request, in practical terms, requires him to know the nature of the discovery requested before receiving it, real party in interest looks to the substance of petitioner's previous requests. (Resp. Brief, p. 12.) Real party in interest finds no justification for the requests because, in its view, Mr. Catlin filed an "all-encompassing motion" "simply

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People v. Kelly (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

for reassurance that he had everything."[3] (Resp. Brief, p. 12.) Real party in interest offers no explanation of how delay can be explained in the absence of demonstrating knowledge of the items that were not discovered. The need for such knowledge runs counter to the finding in *Curl v. Superior Court (People),* (2006) 140 Cal.App.4th 310, 324, that "[i]t is axiomatic that one cannot prove what was not turned over if one does not know what was not turned over."

Real party in interest believes the standard undefined in *Steele* and not articulated by the Court of Appeal below is "consistent with the standard of timeliness for habeas corpus petitions." (Resp. Brief, pp. 12-13.) Not so. The standard for habeas corpus petitions has a well-defined period – with a defined starting point – in which a petition is presumed timely. (Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3, stds. 1-1.1 & 1-1.2.) If a habeas corpus petition is filed outside the defined period, the petitioner is told exactly what he must allege to get a

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[3] Real party in interest's description of Mr. Catlin's motion is a simplification to the point of parody. At the time that the trial court denied the motion for post-conviction discovery, Mr. Catlin had submitted a proposed order that listed 16 specific discovery requests. (Pet. for Writ of Mandate (F053705), Exh. A [Proposed Order pp. 1-10].) Mr. Catlin had also provided peal Party in interest with a 90-page-long list of documents that were believed to have been provided during pretrial discovery, all of which Mr. Catlin was willing to exclude from his discovery request. (*Id.*, Exh D [Reporter's Transcript of August 27, 2007, pp. 35-36].)

decision on the substantive issues. (*Ibid*; see also *In re Clark, supra,* 5 Cal.4th at pp. 783-787.) There is no equivalent law laying out the requirements for post-conviction discovery motions. The lack of explicit standards for determining how timeliness is measured, nor even the point from which it is measured, indicates that this Court did not seek to impose a time limit on filing post-conviction discovery motions and that it is unfair to impose upon a petitioner such an ill-defined time requirement.

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

Real party in interest errs in reasoning that the Court of Appeal correctly applied a timeliness standard in Mr. Catlin's case. (Resp. Brief, p. 16-17.)

First, real party in interest errs, as shown above and in the Opening Brief, by claiming that *Steele* established a timeliness standard for filing post-conviction discovery motions. (Resp. Brief, p. 16.) *Steele* did not articulate a definition of reasonable time.

Real party in interest further errs in arguing that the change in counsel was not significant. (Resp. Brief, p. 16.) It cites *People v. Clark, supra*, 5 Cal.4th at p. 765, n. 6, out of context. *Clark* is not concerned with a post-conviction discovery motion but rather the question of when a second habeas petition, filed after the first one has been denied, is timely. (*Id.* at p. 763.) It stands for the unremarkable proposition that a second habeas petition cannot be justified merely by successor counsel's claim that he filed the petition as soon as he became aware of the new claim.

As practical matter, the substitution of attorneys makes a difference. (*In re Sodersten*, (2007) 146 Cal.App.4th 1163, 1221; *In re Sanders* (1999) 21 Cal.4th 697, 708–709.) Prior to litigating a discovery motion, counsel

had to read trial transcripts exceeding 8,000 pages and familiarize himself with the contents of 54 boxes of documents as they related to a possible post-conviction discovery motion which had not been contemplated at the time the documents were compiled. (Pet. for Writ of Mandate (F053705), Exh. D (RT of Aug. 27, 2007), p. 12.)

Real party in interest simply ignores the fact that there was no mechanism in place to pay counsel for litigating post-conviction discovery motions until November, 2004. (See AOB, pp. 34-35.) Respondent, in effect, asks this Court to overrule *In re Gallego*, (1998) 18 Cal.4th 825, 833 ("Private appointed counsel ... is under no obligation to fund ... an investigation out-of-pocket.").

Real party in interest ignores this Court's explicit standards for the different roles of appointed and supervised counsels. Real party in interest's argument, that the name of an attorney on the habeas petition usurps the appointment process for post-conviction counsel, is specious. (See Resp. Brief, p. 16.) This Court's promulgated rules for the appointment of qualified counsel are clear. (See Cal. Rules of Court, rule 8.605.) Rule 8.605, subdivision (c)(4), provides for "'supervised counsel'" who "works under the immediate supervision and direction of lead or associate counsel but is not appointed by the Supreme Court." Under these

standards, lead counsel "is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel" while associate counsel "has casewide responsibility to perform the duties for which that attorney was appointed ..." (Rule 8.605, subd. (c)(2) and (3); see also Gov't Code sec. 68665 ["The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty [cases]"].) Current counsel, who was not appointed until 2006, was supervised counsel at the time the habeas petition was filed. Contrary to these standards, real party in interest suggests that supervised counsel has a duty to act even when not immediately supervised by, or at the direction of, appointed counsel. Such an argument asks this Court to make an end run around its own policy. Moreover, real party in interest does not explain how supervised counsel could reasonably expect to be paid for filing motions that were neither created nor submitted under the immediate supervision of appointed counsel.

Real party in interest further ignores actual facts on the period of time in which Mr. Catlin was unrepresented. There was a gap of nine months, from August, 2005 to May, 2006, between the withdrawal of prior counsel and the appointment of current counsel. (See AOB, p. 35.)

Real party in interest makes much of the fact that "petitioner's attorneys have known for a decade that trial counsel did not catalog discovery" or make a discovery index. (Resp. Brief, pp. 16-17.) This point is irrelevant. For most of that "decade" post-conviction discovery was not available prior to the issuance of an order to show cause. Prior to the enactment of section 1054.9 and assuming that post-conviction counsel could discern which documents were provided through discovery and which were obtained elsewhere, there would be little point in recreating a discovery index if habeas counsel could not obtain any documents believed to be missing. The mere fact that trial counsel's file was missing documents is not a cognizable habeas claim. Real party in interest expects counsel to do work that would not benefit the petitioner.

After the enactment of section 1054.9, counsel had no assurance that he would be compensated for such work until November, 2004. At that point, then-counsel Mr. Schwartz was less than eight months from moving to withdraw. (See AOB, p. 3.) Mr. Catlin subsequently spent nine months unrepresented between Mr. Schwartz's withdrawal and appoint of new counsel. An informal discovery request was made in July, 2007. (See AOB, p. 3-4.) Under these circumstances, Mr. Catlin's post-conviction discovery motion was timely.

CONCLUSION

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

Dated: February 3, 2009

Respectfully submitted,

J. Wilder Lee
Attorney for Petitioner
Steven D. Catlin

Certification of Word Count

I hereby certify that the number of words in this Reply Brief is 3737 according to the word count function of the computer program used to prepare the document.

Dated: Feb. 3, 2009

J. Wilder Lee
Attorney for Petitioner

PROOF OF SERVICE

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

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

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

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

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

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

_____
J. Wilder Lee