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Note – Exposing Misconduct: Fixing the California Supreme Court's Limitation of Post-Conviction Discovery

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Exposing Misconduct: Fixing the California Supreme Court's Limitation of Post-Conviction Discovery

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Following the Los Angeles Rampart Scandal, a concerned California legislature created post-conviction procedures intended to help wrongfully convicted people challenge convictions resulting from government misconduct. One of these mechanisms was California Penal Code section 1054.9, which allowed defendant-petitioners attacking sentences of death or life without parole to discover evidence to which they would have been entitled at trial upon a minimal showing. After years of broadly interpreting the statute, the California Supreme Court reversed direction with its decision in Barnett v. Superior Court*, where it created a new hurdle for those seeking discovery: Defendant-petitioners must now show a reasonable basis for believing the requested discovery actually exists. This Note questions the bases for the* Barnett *decision's narrowing of post-conviction discovery and considers how this case will affect defendant-petitioners' ability to discover evidence of government misconduct in the future. In order to better identify and present claims of government misconduct, this Note looks to North Carolina's open-file discovery statute as inspiration for new California legislation.*

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TABLE OF CONTENTS

INTRODUCTION

In March 2011, San Francisco's Public Defender, Jeff Adachi, exposed a rash of police misconduct when he released surveillance videotapes that showed plain-clothes police officers conducting illegal drug searches in residential hotels.[1] These tapes caused particular outrage because they revealed significant inaccuracies in the officers' incident reports and in-court testimony.[2] According to the officers' sworn statements, they had made legal searches and seizures following the applicable law, but the videos portrayed Fourth Amendment violations.[3]

On March 2, 2011, San Francisco's District Attorney and former Police Chief,[4] George Gascon, announced that his office would be

1. *See* Michael Cabanatuan, *SF Officers Accused of Illegal Searches, Perjury*, S.F. CHRONICLE, Mar. 3, 2011, at A1; Dan McMenamin, *Gascon Says DA's Office Will Investigate Alleged Police Misconduct Videos*, SF APPEAL (Mar. 2, 2011), http://sfappeal.com/news/2011/03/public-defender-releases-videos-he-claims-show-police-misconduct.php.

2. *See* Cabanatuan, *supra* note 1.

3. *Id.*

4. Gascon, who had become Police Chief in August 2009, was appointed District Attorney by Mayor Gavin Newsom in January 2011. Brent Begin, *George Gascon's Impartiality in Dealing with San Francisco Police Tested*, S.F. EXAMINER (Mar. 10, 2001, 4:00 AM), http://www.sfexaminer.com/local/2011/03/george-gascon-s-impartiality-dealing-san-francisco-police-tested.

investigating the events.[5] In less than a week, his office dropped sixty-eight pending cases involving the same police officers due to insufficient evidence.[6] Although Gascon disclaimed any conflict of interest based on the fact that he had been the Police Chief at the time one of the videos was shot, he eventually bowed to pressure and turned the investigation over to the FBI.[7]

The dismissed cases and ongoing FBI investigation demonstrate what Adachi initially predicted: The police misconduct in the videos was "clearly not an isolated case."[8] Adachi further pointed out that, "[i]t's just chance that [the Public Defender was] able to get the videos."[9] Concerned about the rights of defendants whose convictions were based on the work of the same police officers, Adachi sought to probe into convictions going back seven years involving the eight identified officers.[10] To emphasize the need for this review, he noted the results of his office's recent investigation of the misconduct of a single San Francisco Police Department criminalist in 2010.[11] After the dismissal of 700 pending cases, the Public Defenders' Office reviewed 1170 prior convictions, 127 of which had sentences dismissed or reduced.[12]

This situation raises a number of pressing questions: How significant an issue is misconduct by government officers engaged in law enforcement? Do criminal defendants have a fair chance to unearth such misconduct at trial? When the public trusts government officials to pursue justice and public safety, how can defendants identify and prove government misconduct?

Presumably, California was asking these and similar questions in the late 1990s when news of the Rampart Scandal shocked the state. The Rampart Scandal involved widespread misconduct by officers in an antigang unit within the Los Angeles Police Department.[13] State investigators found that the officers had engaged in a continuous system

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5. *See* Cabanatuan, *supra* note 1.

6. Ari Burack, *Nearly 70 Cases Dropped by San Francisco DA's Office in Police Misconduct Investigation*, S.F. EXAMINER (Mar. 15, 2001, 9:01 AM), http://www.sfexaminer.com/local/crime/2011/03/nearly-70-cases-dropped-san-francisco-da-s-office-police-misconduct-investigatio.

7. Ari Burack, *San Francisco's Criminal-Case Dismissals Might Slow Down*, S.F. EXAMINER (Mar. 15, 2011, 9:00 PM), http://www.sfexaminer.com/local/crime/2011/03/san-franciscos-criminal-case-dismissals-might-slow-down.

8. McMenamin, *supra* note 1.

9. *Id.*

10. Burack, *supra* note 7.

11. *Id.* The San Francisco District Attorney's Office evidently was aware that the criminalist's work was "jeopardizing" cases, but failed to alert defense attorneys. *See* Jaxon Van Derbeken, *Harris Turns Drug Lab Scandal over to State*, S.F. CHRONICLE, Apr. 24, 2010, at A1; Jaxon Van Derbeken, *Harris' Top Aide Retiring—Sat on Scandal Tip*, S.F. CHRONICLE, June 12, 2010, at A1.

12. Burack, *supra* note 7.

13. Matt Lait & Scott Glover, *Rampart Case Takes on Momentum of Its Own*, L.A. TIMES (Dec. 31, 1999), http://articles.latimes.com/print/1999/dec/31/news/mn-49335.

of misconduct, using planted evidence, false testimony, and other abuses of power to arrest and convict people.[14] This scandal raised questions about a huge number of past and pending criminal cases, and the District Attorney's ability to address all of the related cases was questionable at best.[15]

The California state legislature responded to the Rampart Scandal with Senate Bill 1391. The bill was intended to "create[] a process for a convicted person, whether or not in custody, to vacate a judgment based on fraud or the presentation of false evidence by the government."[16] One part of that bill created section 1054.9 of the California Penal Code, which established a statutory system of post-conviction discovery for prisoners pursuing collateral challenges to sentences of death or life without the possibility of parole.[17] The plain language of the statute instructs courts to grant a defendant-petitioner discovery of all materials to which he would have been entitled at trial, upon a showing that good faith attempts to retrieve the same materials from his own trial counsel were unsuccessful.[18] Though it did not reach all potential convictions based on government misconduct, the statute gave defendant-petitioners facing the most serious sentences access to materials to support habeas claims involving the conduct of police officers,[19] prosecutors,[20] and defense counsel.[21]

After many years of broad interpretation of section 1054.9,[22] the prognosis for state post-conviction discovery changed dramatically in August 2010, when the California Supreme Court issued its decision in *Barnett v. Superior Court*.[23] In *Barnett*, the court announced that defendant-petitioners seeking to obtain discovery beyond what was already provided at trial "must show a reasonable basis to believe that specific requested materials actually exist."[24] While this "reasonable

14. *Id.*

15. *See* Henry Weinstein, *Rampart Probe May Now Affect Over 3,000 Cases*, L.A. TIMES (Dec. 15, 1999), http://articles.latimes.com/print/1999/dec/15/news/mn-44050.

16. ASSEMB. COMM. ON PUB. SAFETY, PUBLIC SAFETY 2002: CREATING A SAFER CALIFORNIA 104 (2002).

17. Act of Sept. 29, 2002, ch. 1105, § 1, 2002 Cal. Stat. 7100, 7100–01.

18. CAL. PENAL CODE § 1054.9(a)–(b) (2011).

19. At trial, defendants who file a specific motion are entitled to evidence of police misconduct from officers' personnel files under certain circumstances. CAL. EVID. CODE §§ 1043–1047 (2011).

20. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Napue v. Illinois, 360 U.S. 264, 270 (1959) ("[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (citing People v. Savvides, 154 N.Y.S. 2d 885, 887 (N.Y. 1956))).

21. *See infra* text accompanying notes 130–31.

22. *In re* Steele, 85 P.3d 444, 451 (Cal. 2004).

23. 237 P.3d 980 (Cal. 2010).

24. *Id.* at 981.

basis" language seems innocuous, in reality it means that the most egregious cases of government misconduct will continue undetected. Because materials that were not disclosed at trial are by their nature hidden from the defense, the likelihood of a defendant-petitioner producing evidence that such items actually exists is a matter of luck.

This Note argues that the *Barnett* court got it wrong when it stated that the purpose of section 1054.9 was only "to allow defendants to receive materials they have reason to believe they are missing."[25] This position disregards the historical context that led to Senate Bill 1391, the plain language of the statute, and the demonstrable legislative intent that, using section 1054.9, defendant-petitioners should be able to access any material to which they would have been entitled at trial simply by showing that the same evidence could not be obtained from trial counsel. The *Barnett* decision significantly narrows the reach of discovery requests under section 1054.9 and has the potential to undermine its use in the very situations it was intended to address.

This Note is divided into four parts. Part I traces the history of post-conviction discovery in California, from the judicially created rule that preceded the statutory scheme, through section 1054.9's creation and early interpretation to the *Barnett* decision.[26] Part II critically analyzes the *Barnett* court's stated justifications for creating the reasonable-basis requirement and explains why each lacks merit. Part III describes how the *Barnett* decision could impact each of three categories of discovery requests: specific document identification, pattern and practice, and preexisting duty. Finally, Part IV looks to North Carolina's open-file discovery statute as inspiration for new California legislation to preserve habeas petitioners' ability to access evidence of government misconduct for post-conviction challenges.

I. HISTORICAL BACKGROUND

The last decade has seen rapid changes in California's system of post-conviction discovery. The first major case to interpret section 1054.9 specified the types of discovery request included within the plain language of the statute but did not limit its scope. Just six years later, the California Supreme Court narrowed the application of the statute by imposing a "reasonable basis" requirement that will prevent discovery in some of the very situations for which it was intended.

25. *Id.* at 985.

26. *Catlin v. Superior Court*, 245 P.3d 860 (Cal. 2011), decided after *Barnett*, addressed the question of time limits for section 1054.9 discovery motions.

A. Section 1054.9 of the California Penal Code

Prior to 2002, California lacked a statute governing post-conviction discovery.[27] Instead, courts addressed discovery requests on a case-by-case basis,[28] and *People v. Gonzalez* governed.[29]

Gonzalez concerned a habeas petitioner's right to receive discovery in the face of breaking news of a ten-year "conspiracy to suborn perjury involving the police, prosecutors and informants."[30] Eight years after Gonzalez's conviction, a scandal erupted involving the use of jailhouse informants known to be unreliable by the District Attorney's Office.[31] When Gonzalez learned that this practice overlapped with his own case, he filed a motion seeking discovery of the prosecution's files on the jailhouse informant who had testified against him.[32] Though he did not know whether the informant in his case was involved in the scandal, Gonzalez claimed that the scandal cast a doubt on the informant's veracity and that the materials were necessary to attack his conviction on habeas.[33] The trial court ordered the requested discovery.[34]

On appeal, the California Supreme Court found that because there was no longer any proceeding in the case before the trial court, the trial court had no jurisdiction over the case and therefore no authority "to order 'free-floating' post-judgment discovery."[35] It went on to explain that pretrial discovery rights did not extend post-conviction.[36] The court stated that unless a defendant-petitioner states a prima facie claim, which the court would be required to grant if true, there is no jurisdiction for even the California Supreme Court to order discovery.[37] Because Gonzalez had not made a prima facie case that the informant who testified against him had given false testimony or that the prosecutor had withheld evidence of the same, the court would not order discovery in his case.[38] The court rejected the defendant-petitioner's argument that this created a "Catch-22" that required him to prove his claim in order for

27. Cal. S. Rules Comm., Bill Analysis, S. 2002-1391, 2002 Sess., at 2.

28. *See id.* at 5.

29. *Id.* (discussing People v. Gonzalez, 800 P.2d 1159 (Cal. 1990)).

30. People v. Gonzalez, 800 P.2d 1159, 1203 (Cal. 1990); *see* Ted Rohrlich, *Scandal over Jail Informants Forces Retrial*, L.A. Times, Dec. 16, 1989, at 1; *see also* Ted Rohrlich, *Man Fingered by Informant to Be Freed*, L.A. Times, Apr. 5, 1991, at 3 (describing informant scandal); Ted Rohrlich, *Perjurer Sentenced to 3 Years*, L.A. Times, May 20, 1992, at 1 (stating that despite their suspected involvement, no law-enforcement agents were convicted in the scandal because it was impossible to prove).

31. *Gonzalez*, 800 P.2d at 1203.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1204.

37. *Id.* at 1205.

38. *Id.*

the court to grant discovery of the evidence needed to prove his claim.[39] Because the defendant-petitioner had no presumption of innocence and no right to post-conviction discovery, the court concluded that "[t]he state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment."[40] The court found that the prosecution's knowledge of a merely potential scandal and their failure to investigate it did not require post-judicial intervention. It reasoned that the defendant-petitioner had not provided the requisite independent, concrete information that the informant in his case had given false testimony.[41]

Another scandal compromising the criminal justice system erupted in the Rampart Division of the Los Angeles Police Department in 1999. When prosecutors charged former police officer Rafael Perez for theft of cocaine from the department's evidence locker, Perez offered to make a deal with state investigators.[42] He agreed to testify in state court about the corruption he witnessed in the department in exchange for favorable treatment.[43] His subsequent confession opened a Pandora's box of police misconduct. As investigators corroborated Perez's testimony, they learned that it implicated seventy police officers in a range of misconduct including illegal shootings and beatings, planting evidence, committing perjury, selling drugs, and intimidating witnesses.[44] Courts threw out many pending cases, and attorneys challenged previously obtained convictions.[45]

The Rampart Scandal revealed shortcomings in the legal system's readiness to unearth and address law-enforcement misconduct. Wrongdoing and poor performance reached beyond the police department to prosecutors and defense attorneys. As the evidence of police misconduct came to light, prosecutors were less than forthcoming about the progression of the investigation and the number of affected cases. Though the District Attorney's Office knew people had been falsely convicted, it began reopening cases only after the police department threatened to go to the press with the story.[46] Representatives from the District Attorney's Office misled the public about the number of police officers implicated in the scandal.[47] The scandal even revealed defense counsel misconduct: In a civil lawsuit, a

39. *Id.*
40. *Id.* at 1206.
41. *Id.*
42. *See* Lait & Glover, *supra* note 13.
43. *Id.*
44. Steve Berry et al., *D.A. Says No New Charges Expected in Rampart Probe*, L.A. TIMES, Nov. 8, 2001, at 1.
45. *Id.*
46. *See* Lait & Glover, *supra* note 13.
47. Scott Glover & Matt Lait, *Transcripts on Rampart Belie D.A.*, L.A. TIMES, Mar. 1, 2003, at 1.

jury found the public defender who represented a victim of the scandal negligent for failing to uncover the police misconduct that led to the victim's wrongful conviction.[48]

In response, in 2002 Senator John Burton introduced Senate Bill 1391, a three-part bill designed to correct the post-conviction system's inability to provide meaningful review for prisoners who had been victims of government misconduct.[49] The purpose of the bill was "to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled."[50] For purposes of this Note, the most relevant provision of the bill was the addition of section 1054.9 to the California Penal Code, which permitted and regulated post-conviction discovery for defendants filing writs of habeas corpus or motions to vacate judgment.[51] Specifically, the law provides that courts shall grant discovery after the defendant-petitioner shows an unsuccessful, good faith effort to get discovery materials from his trial counsel.[52] "Discovery materials" for purposes of this provision are all materials (except DNA and other physical evidence) to which the defendant would have been entitled at trial.[53]

Senate Bill 1391 has two major provisions besides 1054.9 that are significant to an understanding of the legislature's purpose. First, the bill created a right for someone who discovers new evidence of police misconduct after his incarceration ends to challenge his conviction within a year of the discovery.[54] The Legislative Counsel's Digest explained that this was necessary because defendants had no recourse to challenge their convictions if evidence of government misconduct came to light only after they had served their sentences.[55] As a result, they could not use this new evidence of innocence to clear their names and to ameliorate the collateral effects of the conviction.[56] Second, the bill removed the sunset provision then in place on California Penal Code section 1417.9, which governs the preservation and destruction of DNA evidence.[57] This change ensured that a system for the preservation of DNA used to convict people of crimes would remain in place.

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48. Police officers shot and paralyzed an unarmed man before planting an assault rifle on him. Andrew Blankstein, *Jury Awards $6.5 Million in Frame-Up*, L.A. TIMES, May 26, 2005, at 3.

49. Act of Sept. 29, 2002, ch. 1105, 2002 Cal. Stat. 7100.

50. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 5.

51. CAL. PENAL CODE § 1054.9(a)–(b) (2011).

52. *Id.* § 1054.9(a).

53. *Id.* § 1054.9(b). Section 1054.9 reserves different procedures for the examination of physical evidence and DNA evidence, which are not within the scope of this Note. *Id.* § 1054.9(c).

54. § 3, 2002 Cal. Stat. 7100, 7102 (codified as amended at CAL. PENAL CODE § 1473.6 (2011)).

55. *Id.*

56. *Id.*

57. *Id.* § 2.

The legislative history of Senate Bill 1391 shows that proponents of section 1054.9 focused their argument on the problem of defendants whose trial files were lost or destroyed.[58] Under *Gonzalez*, defendant-petitioners were required to make a prima facie case for relief in order to obtain replacements of discovery to which they would have been entitled at trial.[59] But defendant-petitioners could not meet that requirement because the very evidence they needed to present could be found only by means of the requested discovery.[60] Though simple file reconstruction was clearly one legislative prerogative, when considered in the context of the Senate Bill as a whole, it seems that the file-reconstruction argument was meant to illustrate how "woefully inadequate" the *Gonzalez* rule was, rather than to limit the reach of section 1054.9.[61]

Further, the historical context discussed above,[62] a statement made by the Governor, and the House Committee on Public Safety's statement in its 2002 report of legislation all depict section 1054.9 as one part of a broad effort to confront government misconduct. When he signed Senate Bill 1391 into law, Governor Gray Davis described, in a letter to the Senate, his position and some of the background that went into the bill's creation:

> As Governor, I strongly support the hard working men and women of law enforcement. However, nobody is above the law and in the rare cases where governmental officials deceive the Courts, there must be appropriate remedies.
>
> This legislation was introduced in the wake of the Rampart cases in which numerous felons were released from prison because their conviction depended heavily on testimony from law enforcement that subsequently turned out to be false. Thus, the provisions of this bill were worked out after extensive discussions with the Los Angeles District Attorney, the Attorney General, California District Attorney's Association and the California Public Defender's Association.[63]

Similarly, the Assembly Committee on Public Safety issued a report in which it discussed the purpose of the bill.[64] Senate Bill 1391 is discussed in this report under the title "Government Misconduct: Motion to Vacate Judgment."[65] After briefly explaining the inadequate legal procedures available to convicted prisoners seeking to prove innocence in the face of government misconduct such as the Rampart Scandal, the report summarized the bill as "creat[ing] a process for a convicted

58. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 4.
59. People v. Gonzalez, 800 P.2d 1159, 1205 (Cal. 1990).
60. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 5.
61. *See id.*
62. *See supra* text accompanying notes 27–48.
63. S. JOURNAL, 2001–2002 Reg. Sess., at 6211 (Cal. 2002).
64. ASSEMB. COMM. ON PUBLIC SAFETY, *supra* note 16, at 104.
65. *Id.*

person, whether or not in custody, to vacate a judgment based on fraud or the presentation of false evidence by the government."[66] It then paraphrased the different components of the bill, including the provisions of 1054.9.[67]

B. *IN RE STEELE*

The California Supreme Court first described the scope of section 1054.9 in the case of *In re Steele*.[68] The defendant-petitioner in *Steele* filed a motion pursuant to section 1054.9 directly in the Supreme Court, asking the court to order the prosecutor and law-enforcement authorities in his case to provide him with any materials they possessed pertaining to his cooperation with prison officials during a prior incarceration.[69] The defendant-petitioner knew only that the prosecution had some records pertaining to his prior incarceration, but did not know whether they actually possessed any records responsive to the request.[70] The Attorney General claimed that the requested records were outside the scope of the statute.[71] Because this was the court's first opportunity to apply 1054.9, it analyzed the statutory text and legislative history to instruct future lower courts in making determinations regarding the proper scope of the statute.[72] The court found that both the plain language of the statute and the legislative history indicated that section 1054.9 applied to four categories of materials. The court summarized:

> 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

66. *Id.*

67. *Id.* at 104–05; *see supra* text accompanying notes 52–57.

68. 85 P.3d 444 (Cal. 2004).

69. *Id.* at 447–48.

70. *Id.* at 448.

71. *Id.*

72. *Id.* at 450 (stating that, while the court could dismiss the motion without prejudice, instead it would consider the merits in order to provide guidance to future courts addressing such motions). The court also articulated the procedure for section 1054.9 motions because the statute did not specifically describe one. *Id.* at 449–50 (explaining that petitioners should first attempt to arrange for permissible discovery informally and then, in the case of conflicts, the defendant generally should file a section 1054.9 motion in the trial court of his conviction).

> 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.[73]

Of the four categories of discoverable evidence described in *Steele*, only the first describes file reconstruction, while the remaining three refer to material that the defendant-petitioner never received in the first place, though he was, or would have been, entitled to it. The court then found that Steele's request fell into the fourth category described above because it dealt with information that would not necessarily be considered exculpatory by the prosecutor.[74] However, if defense counsel had requested this information in support of a mitigation theory at trial, the prosecutor would have been on notice of its exculpatory nature and been obligated to provide it.[75]

The court also reviewed the language of the request made in *Steele* and found it "reasonably specific."[76] The request asked for:

> Any and all reports, memoranda, notes, tape recordings, statements, transcripts, confidential files, debriefing documents, and/or summaries documenting or referring to petitioner's leaving the Nuestra Familia; to information provided by petitioner regarding the Nuestra Familia, its members and associates, and non-member collaborators; and to assistance provided by petitioner in prosecutions pursued by the State of California and/or local prosecutors against the Nuestra Familia and others accused of collaborating with the Nuestra Familia in the commission of crimes.[77]

Although the defendant-petitioner did not identify specific documents or prove that such documents existed, the court described the request as a "focused request for specific information . . . . within the scope of section 1054.9."[78] As a result, the court remanded the case to the lower court, ordering discovery of the requested records.[79]

C. *Barnett v. Superior Court*

In the summer of 2010, in *Barnett v. Superior Court* the California Supreme Court changed the scope of discovery materials that habeas petitioners in California courts can seek under section 1054.9.[80] The *Barnett* court reviewed the lower court's ruling that a defendant-petitioner seeking post-conviction discovery was not required to show

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73. *Id.* at 453.
74. *Id.* at 456.
75. The court found it insignificant that the record was unclear whether the material had, in fact, been requested at trial. *Id.*
76. *Id.* at 457.
77. *Id.* at 447–48.
78. *Id.* at 457.
79. *Id.*
80. 237 P.3d 980 (Cal. 2010).

that the requested materials actually existed.[81] Because *Barnett* involved twenty-four different discovery requests of varying specificity, the court addressed the issue abstractly.[82] It held that because the main goal of the legislature when creating section 1054.9 was file reconstruction, and because the statute was meant to be an efficient tool, "defendants must show they have a reasonable basis to believe that the specific materials they seek actually exist" in order to receive discovery beyond file reconstruction.[83]

The exact contours of the reasonable-basis requirement were not outlined in the decision. The California Supreme Court's response to the lower court's reasoning for refusing to require the reasonable-basis standard suggests how the California Supreme Court might interpret the standard in the future.[84] The California Court of Appeal had found that the standard would be virtually impossible for defendant-petitioners to meet.[85] The California Supreme Court conceded that would be true if the purpose of the statute were to allow a defendant-petitioner to discover "any material that might exist," but asserted instead that the purpose of the statute was to permit defendant-petitioners to discover "materials they have reason to believe they are missing."[86] The court then listed a number of circumstances where evidence would allow defendant-petitioners to meet the reasonable-basis requirement: references in witness testimony, documents already possessed by the defense, or evidence in the trial transcripts of specific documents that the defense was never provided.[87] If these examples define the scope of discovery, then *Barnett* imposes a higher threshold than that stated in the plain language of section 1054.9 and in the court's earlier interpretation in *Steele*.

II. THE *BARNETT* COURT'S MISREADING OF THE MEANING AND PURPOSE OF SECTION 1054.9

Although the language of section 1054.9 of the California Penal Code is clear on the issues of scope and the defendant-petitioner's threshold showing, the *Barnett* court relied instead on its earlier decisions, legislative history, and the evidence code to ascertain a legislative purpose contradictory to the plain language. Because the plain language of section 1054.9 clearly requires a defendant-petitioner to show nothing more than that good faith efforts to obtain materials from

81. *Id.* at 982.
82. *Id.*
83. *Id.* at 986.
84. *Id.* at 984–85.
85. *Id.*
86. *Id.* at 985.
87. *Id.* at 984–85.

trial counsel were unsuccessful, the *Barnett* court never should have considered legislative intent. However, if the court was determined to look at more than just the statute's plain meaning, then it should have considered the historical context and legislative materials indicating that the legislature intended the statute to have a broad reach.

A. Disregarding the Plain Meaning

The plain language a statute is regarded as the first indication of the legislature's intent.[88] If the language of the statute is clear, the courts should refrain from engaging in statutory construction.[89] Section 1054.9 states in relevant part:

> (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) [relating to physical evidence], 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.[90]

When the court in *Steele* analyzed the statutory language with regard to scope, the court found that language unambiguous.[91] It rejected the Attorney General's assertion that the statute was intended as a file-reconstruction statute and explained, "The plain language here does not limit the discovery materials to materials the defense once actually possessed to the exclusion of materials the defense did not possess but to which it would have been entitled at time of trial."[92] The court specifically noted that the legislature used the words "would have been entitled to at time of trial"[93] rather than "actually possessed."[94] As a result, the court described all of the categories of evidence that fell within the statute's scope.[95]

Section 1054.9 is similarly clear with regard to the showing required when requesting discovery. Specifically, the statute states that courts shall order discovery to defendant-petitioners "on a showing that good

88. *In re* Steele, 85 P.3d 444, 450 (Cal. 2004) (quoting People v. Statum, 50 P.3d 355, 359 (Cal. 2002)).
89. People v. Statum, 50 P.3d 355, 359 (Cal. 2002).
90. *Barnett*, 237 P.3d at 983 (alteration in original) (quoting Cal. Penal Code § 1054.9 (2011)).
91. 85 P.3d at 451.
92. *Id.*
93. *Id.* at 450 (quoting Cal. Penal Code § 1054.9).
94. *Id.*
95. *See supra* text accompanying note 73.

faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful."[96] The statute requires nothing more and makes no distinction between the showing required for discovery to replace documents that were already provided at trial (file reconstruction) and discovery that the defendant-petitioner never received. The legislature could have, but did not, impose different or additional requirements for requests of material beyond file reconstruction. For instance, the legislature could have insisted that in order to obtain materials beyond file reconstruction, *the defendant-petitioner must show an evidentiary basis for believing the materials actually exist*, along with the stated showing that the discovery could not be obtained from trial counsel. Its decision not to do so indicates that it intended no such limitation.

The *Barnett* court should have noted the statute's clarity on scope and threshold showing and stopped its analysis there. Despite the fact that the court previously had found the statutory language clear as to the scope of section 1054.9 and applied it to each of the four evidence categories in *Steele*,[97] in *Barnett* it asserted that the statute had a narrower scope.[98] It said that the scope of discovery was no longer the materials that the defendant-petitioner "would have been entitled to at trial," but only those "materials they have reason to believe they are missing."[99] The court added the related threshold showing, requiring defendant-petitioners to present a reasonable basis for their belief that discovery documents exist.[100] As Justice Werdegar noted in her dissenting opinion, the court's "interpretation of the post-conviction discovery statute (§ 1054.9), lack[ed] any basis in the statute's language, [and was] wholly illegitimate."[101]

B. The *Barnett* Court's Arguments for the Reasonable-Basis Requirement

Instead of resting on the previously interpreted plain meaning of the statute, the court embarked on the project of discerning legislative intent. However, it failed to identify any expression of the legislature that would support its finding regarding intent. The court misapplied its own precedent and used the legislature's desire for efficiency to craft its labored claim that section 1054.9 "requires defendants who seek discovery beyond file reconstruction to show a reasonable basis to believe that other specific materials actually exist."[102] The court considered four different

96. Cal. Penal Code § 1054.9.
97. *See supra* text accompanying note 73.
98. Barnett v. Superior Court, 237 P.3d 983, 985 (Cal. 2010).
99. *Id.* at 985.
100. *Id.* at 986.
101. *Id.* at 990 (Werdegar, J., dissenting).
102. *Id.* at 984 (majority opinion).

pieces of information before coming to this summary conclusion. Upon examination, not a single one of these points suggests that the legislature intended for the court to rule as it did.

First, the court framed its discussion by noting the limits on section 1054.9 recognized in *Steele*. It suggested that the scope of discovery should be circumscribed, stating that the statute permits only "limited discovery," not "free floating" discovery requests.[103] While these phrases appear to support the court's position when read on their own, their original contexts reveal the very specific meaning these phrases were first used to convey. When the *Steele* court used these phrases to describe the scope of section 1054.9, it was not to narrow the plain language of the statute, but merely to identify the limits that were evident on its face. It explained that the statute does not permit "'free floating' discovery asking for virtually anything the prosecution possesses";[104] instead, it applies exclusively to materials that the prosecution and law-enforcement agencies currently possess and to which the defendant-petitioner was entitled at trial and does not currently possess.[105] The term "free floating" was taken from *Gonzalez*, where the court used the term to refer to discovery requests made to a court that has no jurisdiction over a case.[106]

Next, the court discussed the repeated use of the word "specific" in *Steele* to describe certain categories of evidence to which a defendant-petitioner is entitled (beyond file reconstruction).[107] The court gave one such example of its use of the word "specific": "[W]e said the obtainable discovery 'includes *specific* materials that the defendant can show the prosecution should have provided (but did not provide) at the time of trial . . . .'"[108] With this, the court suggested that *Steele* referred to the defendant-petitioner's need to identify specific documents. In fact, though the *Steele* court repeatedly used the word "specific," it did so to convey a meaning different from the one implied in *Barnett*. *Steele* referred to a defendant-petitioner's need to describe with specificity in the discovery request the kind of materials sought so as to make clear what material is sought and why it must be provided.[109] Thus, the court explained that the prosecution would have been obligated to provide evidence that Steele informed on a prison gang after the defense made a

103. *Id.*

104. *In re* Steele, 85 P.3d 444, 451 (Cal. 2004) (citing People v. Gonzalez, 800 P.2d 1159, 1203 (Cal. 1990)).

105. *Id.*

106. People v. Gonzalez, 800 P.2d 1159, 1203 (Cal. 1990).

107. *Barnett*, 237 P.3d at 984.

108. *Id.* (emphasis added) (quoting *Steele*, 85 P.3d at 451).

109. 85 P.3d at 452–57.

specific request for that material, thereby identifying such information as mitigating.[110]

The facts of *Steele* clearly demonstrate that the case did not impose a requirement on defendant-petitioners to show that specific evidence exists.[111] The court considered Steele's discovery request for documents relating to the defendant-petitioner's leaving, informing on, and assisting in the investigation and prosecution of a prison gang.[112] It determined that, because the evidence supported the defense's mitigation theory, the requested material fell in the category of evidence to which the defendant-petitioner would have been entitled at trial had he made a specific request, but the exculpatory value would not have been evident to the prosecutor.[113] The court determined that the wording of Steele's request met the specificity requirement and was "a focused request for specific information."[114] Thus, the specificity required is not a showing that a specific document exists, but that the request describes the specific type of information sought.

The court's third offer in support of the reasonable-basis requirement was the mention in *Steele* that a defendant-petitioner requesting discovery must overcome the presumption under section 664 of the California Evidence Code[115] that an official duty has been regularly performed.[116] However, the presumption provided by the Evidence Code affects burden of proof and is not relevant in discovery proceedings.[117] Each of the cases cited to support the government's position involved the burden of proof for elements of substantive legal claims where the prosecutor's actions were at issue.[118] Unlike those substantive elements,

110. *Id.* at 456–57.

111. *See* Brief of Amicus Curiae Habeas Corpus Resource Center in Partial Support of Both Parties and Otherwise in Support of Petitioner Lee Max Barnett at 31–32, *Barnett*, 237 P.3d 980 (No. S165522), 2009 CA S. Ct. Briefs LEXIS 1268, at *56–57 [hereinafter Brief of Amicus Curiae Habeas Corpus Resource Center].

112. *Steele*, 85 P.3d at 447–48.

113. *Id.* at 456.

114. *Id.* at 457.

115. CAL. EVID. CODE § 664 (2011) ("It is presumed that official duty has been regularly performed.").

116. *Barnett*, 237 P.3d at 984.

117. CAL. EVID. CODE § 660 (2011); *see also* Application of California Public Defenders' Association for Leave to File Brief of Amicus Curiae on Behalf of Petitioner Lee Max Barnett, Brief of Amicus Curiae at 8, *Barnett*, 237 P.3d 980 (No. S165522), 2009 CA S. Ct. Briefs LEXIS 1269, at *6 [hereinafter Brief of Amicus Curiae California Public Defenders' Ass'n].

118. *See* Petition for Review at 21, *Barnett*, 237 P.3d 980 (No. S150229), 2007 CA S. Ct. Briefs LEXIS 3236, at 35–36. (citing People v. Superior Court, 47 P.2d 724, 729–30 (Cal. 1935), Miller v. Superior Court, 124 Cal. Rptr. 2d 591, 606 (Ct. App. 2002), and People v. Cummings, 296 P.2d 610, 615 (Cal. Ct. App. 1956)). *But see* People v. Superior Court, 47 P.2d at 729–30 (holding that, in a case to set aside an order vacating judgment, the state did not have to prove that the prosecutor performed his duty because of the evidentiary presumption); *Miller*, 124 Cal. Rptr. 2d at 606 ("Where a criminal defendant raises official misconduct as a defense, he or she bears the burden of proof on this issue."); *Cummings*, 296 P.2d at 615 (stating that in an appeal from a criminal conviction and absent evidence of bad faith in cross examination, courts presume the prosecutor acted in good faith).

section 1054.9 does not require defendant-petitioners to show anything at all about the prosecutor. The statute merely requires a showing that the defendant-petitioner made a good faith attempt to obtain the discovery from his own trial counsel. Furthermore, *Steele* only alluded to the presumption under the Evidence Code in dicta, after dismissing the Attorney General's argument that section 664 limited the scope of discovery.[119] In so doing, it cited *Gonzalez*, which the legislature explicitly rejected when it created a replacement post-conviction scheme.[120] The legislature created section 1054.9 from whole cloth with only one threshold barrier to discovery: that the defendant-petitioner made a good faith effort to first obtain from trial counsel any evidence to which he was entitled at trial.[121]

Assuming arguendo that Evidence Code section 664 is relevant to discovery requests under section 1054.9, application of *Barnett's* reasonable-basis requirement to all post-conviction discovery requests is overbroad. *Steele* specifically stated that section 1054.9 gave defendant-petitioners access to evidence that would have been available only upon request at trial, even if no such request was made (the fourth category of discoverable evidence described in *Steele*).[122] For example, a criminal defendant is not automatically entitled to the prosecution's evidence that the defendant was exposed to toxic chemicals as an infant or toddler *unless* the defense attorney makes a request that would put the prosecutor on notice that such evidence is material to a defense mitigation theory. A defendant-petitioner who requests this evidence for the first time post-conviction does so without suggesting that the prosecutor engaged in misconduct. Despite the inapplicability of section 664 of the Evidence Code in such circumstances, the *Barnett* decision imposed the reasonable-basis requirement on evidence that the prosecution never had a prior duty to provide, just as it did on those categories that imply misconduct.

Finally, the *Barnett* court was wrong in stating that file reconstruction was the legislature's primary concern in passing the statute.[123] There is no doubt that one goal the legislature sought to achieve through the implementation of section 1054.9 was simplified file reconstruction. Proponents of the bill explained to the legislature the injustice that befell defendant-petitioners whose trial files were lost or destroyed under the preexisting *Gonzalez* scheme.[124] However, the court in *Steele* acknowledged that both the plain text of the statute and the

119. 85 P.3d at 451.
120. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 5.
121. CAL. PENAL CODE § 1054.9 (2011).
122. *See supra* text accompanying notes 73–74.
123. Barnett v. Superior Court, 237 P.3d 983, 984 (Cal. 2010).
124. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 5.

legislative history indicated that section 1054.9 served a purpose much "broader than mere file reconstruction."[125] In the legislature's own words, "The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled."[126] The events that led to the adoption of this statute and the legislative history also demonstrate that the legislature had the overarching goal of giving defendant-petitioners additional tools to challenge convictions resulting from government misconduct.[127]

The *Barnett* court alluded to several factors in support of imposing a reasonable-basis requirement on defendant-petitioners seeking post-conviction discovery. However, none of those reasons is consistent with the context in which the legislation was adopted, the legislative history, or California precedent. More importantly, the reasonable-basis requirement is contrary to the plain language of the statute.

III. EFFECT OF THE REASONABLE-BASIS REQUIREMENT

In *Barnett*, the defendant-petitioner, amici curiae, and the lower court all raised concerns that the reasonable-basis requirement would make the discovery of previously undisclosed evidence to which a defendant-petitioner was entitled under *Steele* virtually impossible.[128] The *Barnett* court was not bothered by this, having concluded that section 1054.9's "purpose is to allow defendants to receive materials they have reason to believe they are missing."[129] Despite the court's rejection of this concern, the practical result is that in many circumstances, defendant-petitioners will never have access to potentially exculpatory discovery that they did not obtain at trial.[130] In order to understand the impact that *Barnett* will have on discovery requests that seek to obtain material for the first time, it is helpful to address these requests based on specificity. The specificity of these requests can be described using the following categories: extrinsic-document identification, pattern-and-practice claims, and preexisting duty.

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125. *In re* Steele, 85 P.3d 444, 451 (Cal. 2004).

126. CAL. S. RULES COMM., BILL ANALYSIS, S. 2002-1391, 2002 Sess., at 5.

127. *See supra* text accompanying notes 49–67.

128. *See Barnett*, 237 P.3d at 984–85; Mr. Barnett's Answer to Attorney General's Petition for Review at 23, *Barnett*, 237 P.3d 980 (No. S150229), 2007 CA S. Ct. Briefs LEXIS 3269, at *37; Brief of Amicus Curiae Habeas Corpus Resource Center, *supra* note 111, at 39–40; Brief of Amicus Curiae California Public Defenders' Ass'n, *supra* note 117, at 15.

129. 237 P.3d at 985.

130. In other words, *Barnett* threatens discovery of the three *Steele* categories of evidence that defendant did not receive at trial: evidence that the prosecution had a duty to disclose because of a court order, statutory duty, or constitutional duty; evidence the prosecutor had a duty to disclose because the defendant specifically asked for it; and evidence that the prosecution would have been obligated to disclose had the defendant made a specific request. *See supra* text accompanying note 73.

A. Extrinsic-Document Identification

In several situations, defendant-petitioners will have extrinsic evidence that identifies additional discovery. The *Barnett* court identified a number of cases of this type that involved internal cross-referencing of the previously provided discovery and the trial record.[131] If a police report or a witness's testimony at trial reveals that there were additional reports or interviews not disclosed in discovery, this internal cross-reference to an undisclosed document would be sufficient to meet the reasonable-basis requirement.[132]

Looking beyond the trial documents, independent habeas investigation also may yield evidence in support of an identifying-evidence-based request. For example, attorneys and investigators conducting additional investigation post-conviction may obtain a declaration from a witness years after the conviction, stating that he made exculpatory statements to the police that the discovery record indicates were never disclosed at trial. An investigator may find records from an unrelated case where an informant is impeached using deals or information that the prosecution did not disclose at the defendant-petitioner's trial. Though these examples are not specifically described by the *Barnett* court, this type of evidence also identifies specific discovery that the prosecution failed to disclose at trial despite the defendant-petitioner's entitlement and would presumably meet the reasonable-basis requirement.

Based on the *Barnett* court's explicit endorsement of requests substantiated by cross-reference, it seems as though all extrinsic-document identification requests will satisfy the reasonable-basis requirement and continue to be discoverable. This, then, is the only category of discovery request likely to remain unchanged by *Barnett*.

B. Pattern-and-Practice Requests

There are times when a defendant-petitioner will lack identifying evidence of the type described above but will strongly suspect that additional discoverable evidence exists because of a known pattern or practice of involved players or law enforcement. The pattern and practice relied on may be newly discovered or long-standing.

The facts in *Gonzalez* present an example of a newly discovered pattern and practice that supports a discovery request.[133] After news broke that the District Attorney had knowingly used the testimony of unreliable informants in the Los Angeles County Jail during the period relevant to his case, Gonzalez requested discovery relating to the

131. 237 P.3d at 985.
132. *Id.*
133. People v. Gonzalez, 800 P.2d 1159, 1203 (Cal. 1990).

jailhouse informant who testified against him.[134] Although Gonzalez had no specific evidence that the prosecution possessed undisclosed information tending to impeach or discredit the informant at the time of his request, his suspicion was supported by the existence of a known conspiracy that lasted ten years and that might have impacted his case.[135]

In addition to newly discovered practices like those in *Gonzalez*, long-standing patterns and practices may lead a defendant-petitioner to believe that the prosecutor has certain evidence that would support the defendant-petitioner's theory of the case and undermine the prosecution's story.[136] If the evidence was not so patently exculpatory that the prosecutor would have been required to disclose it without a discovery request from the defense, then the absence of a request in the trial file raises the suspicion that undisclosed evidence may exist. Defendant-petitioners requesting this type of discovery cannot show that specific documents within the category they are requesting actually exist (if they could, their request would fall into the extrinsic-document identification category). However, because there was no duty to disclose them at trial, there is enhanced suspicion that such material might exist. Examples include evidence that could be mitigating under a specific theory, but is not inherently so;[137] evidence regarding the prior record of a third party otherwise unconnected to the case but whom the defense intends to argue was the culpable party;[138] and evidence of a police officer's prior misconduct in certain circumstances.[139]

Such a scenario is illustrated by the *Steele* facts. For use in mitigation, Steele sought records regarding his cooperation with prison officials and law enforcement in their investigation and prosecution of the Nuestra Familia prison gang.[140] Law-enforcement pattern and practice suggested that this type of information was likely to be collected in a prison file, which the prosecution reviewed in the course of its investigation. Such evidence would be considered exculpatory under *Brady v. Maryland* only if the defendant-petitioner put the prosecution on notice of its mitigating value by specifically requesting it.[141] Unlike other requests for information not previously disclosed, there is no implication of prosecutorial misconduct in *Steele*-type requests. Despite this significant difference, the *Barnett* court appeared to treat a request

134. *Id.*

135. *Id.*

136. These are the kinds of requests described in the fourth *Steele* category. *See supra* notes 73–74 and accompanying text.

137. *In re* Steele, 85 P.3d 444, 456 (Cal. 2004).

138. *Id.* at 456 n.5.

139. *See, e.g.*, Hurd v. Superior Court, 50 Cal. Rptr. 3d 893, 897 (Ct. App. 2006).

140. *Steele*, 85 P.3d at 447–48.

141. *Id.* at 456.

like that in *Steele* the same as it would treat any other request beyond file reconstruction—by subjecting it to the reasonable-basis requirement.

California appellate courts have not ruled on a pattern-and-practice request in a section 1054.9 motion since *Barnett*, and *Barnett*'s language shed little to no light on such cases. On the one hand, although pattern-and-practice requests involve enhanced suspicion, they do not find support in the kind of direct extrinsic evidence present in the cross-reference examples given in *Barnett*. On the other hand, *Barnett* did not announce a *definitive evidence* standard; it announced a reasonable-basis standard. The pattern and practice described in the *Gonzalez* case, as in the cases that challenged convictions after the Rampart Scandal, involve founded fears of government misconduct. Because evidence that is frequently kept in the course of business is asked for in the first instance in *Steele*-type requests, there is an enhanced likelihood that such evidence may exist. Justice would be best served by granting these requests; yet at best, *Barnett* leaves these requests in grey territory. Lower courts can minimize the limiting effects of *Barnett* by interpreting pattern-and-practice cases as meeting the reasonable-basis requirement.

C. Preexisting-Duty Requests

Each of the two previous categories involves a constitutional or statutory duty and *something more*—some extra reason to believe that undisclosed documents might exist. The preexisting-duty category, by contrast, relies merely on the prosecutor's duty to disclose certain documents that existed at the time of trial. This kind of request yields useful evidence only when a prosecutor's file contains documents it failed to disclose at trial despite a duty to do so, either intentionally or due to oversight or confusion about the law.

Barnett itself contained an example of such an exclusion. Earlier in the proceedings, Barnett had submitted a discovery request that mirrored a discovery order entered at trial.[142] In response, the prosecutor produced police reports that had not been turned over pursuant to the order, despite the fact that they had been in the trial prosecutor's possession.[143] Had Barnett been required to make a showing that these police reports existed, he would not have been able to do so.[144]

The *Barnett* court's decision will prevent courts from granting discovery in response to these preexisting-duty requests based on the presumption that government officers have properly performed their duties.[145]

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142. Barnett v. Superior Court, 237 P.3d 980, 991 (Cal. 2010) (Werdegar, J., dissenting).
143. *Id.*
144. *Id.*
145. *Id.* at 984 (majority opinion).

In summary, although the language of section 1054.9 makes no distinction between file-reconstruction requests and other requests for information to which the defendant-petitioner would have been entitled at trial, the *Barnett* decision does. It assesses requests for material that the defendant-petitioner never received based on the specificity of the request. Whether a defendant-petitioner obtains discovery depends on whether his request is based on extrinsic evidence, pattern and practice, or preexisting duty. The *Barnett* court explicitly approved of requests that offer extrinsic evidence that a certain document has been in the possession of the prosecution. On the other hand, it explicitly disapproved of preexisting-duty requests and left uncertain the fate of pattern-and-practice requests. The resulting risk is that some defendant-petitioners will not be able to identify prosecutors' failure to disclose evidence they had a duty to provide, and thus that credible habeas claims will remain hidden. As stated by Justice Werdegar in her dissent, this precedent calls out for "the Legislature to reassert its prerogative in terms that cannot so easily be ignored."[146]

IV. Opportunities for New California Legislation

The California Supreme Court has, at the very least, undermined the legislature's goal of providing criminal defendants with the necessary tools to identify and prove government misconduct. Properly interpreted, section 1054.9 should allow defendant-petitioners a second opportunity to ask for materials to that they were already entitled to receive at trial but either had lost or never received. Even if California courts find that pattern-and-practice requests satisfy the reasonable-basis requirement set forth in *Barnett*, the court's imposition of new barriers to discovery for preexisting-duty-based requests threatens to deprive defendant-petitioners of a meaningful opportunity to identify government misconduct and to challenge their convictions in state post-conviction proceedings.

To address this judicial abrogation of legislative intent and to provide defendant-petitioners with the tools that lawmakers intended, the California legislature should heed Justice Werdegar's call for clarifying legislation. The simplest and most obvious way to do this would be for the legislature to add a clarifying statute that rejects the court's *Barnett* decision and returns to a pre-*Barnett* meaning of section 1054.9.

Alternatively, the legislature might better promote both justice and efficiency by adopting an open-file post-conviction discovery scheme. Such a set of laws would eliminate the gatekeeper role of prosecutors, thereby maximizing the ability of defendant-petitioners to identify and

146. *Id.* at 990 (Werdegar, J., dissenting).

prove government misconduct. The policy would also lower costs, because it would reduce the need for the post-conviction investigation now required to support more specific discovery requests without creating additional work for prosecutors.

North Carolina has adopted an open-file discovery statute for post-conviction use in death-penalty cases, which should be used as a model for California.[147] North Carolina's law took effect in 1996 and applies only to prisoners sentenced to death and pursuing a post-conviction challenge to their conviction or sentence.[148] As in California, the North Carolina statute requires defense trial counsel to give its files to the defendant for post-conviction challenge.[149] The North Carolina law goes further by also requiring the state to "make available to the defendant's counsel the complete files of all law-enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[150] If the state believes that the disclosure of any portion of the files would not serve the "interest of justice," it can submit those portions to the court for review.[151] The court may allow the state to withhold those portions only if the files "could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief."[152]

A California statute providing open-file discovery for defendant-petitioners raising collateral challenges to death and life without parole sentences, similar to the statute implemented for death-penalty cases in North Carolina, would promote justice and fairness.[153] The language

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147. N.C. GEN. STAT. § 15A-1415(f) (2010) provides:

> In the case of a defendant who is represented by counsel in postconviction proceedings in superior court, the defendant's prior trial or appellate counsel shall make available to the defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

148. *See id.* § 15A-1415(a)–(b).

149. *Compare* Rose v. State Bar, 779 P.2d 761, 765 (Cal. 1989), *with* N.C. GEN. STAT. § 15A-1415(f).

150. N.C. GEN. STAT. § 15A-1415(f).

151. *Id.*

152. *Id.*

153. As a result of the lessons revealed by North Carolina's post-conviction discovery provisions in capital cases, the state elected to adopt open-file *pretrial* discovery in all felony cases. Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–76 (2008). Changes to pretrial criminal discovery in California would require either a two-thirds vote of the legislature or a

should parallel that of the North Carolina statute, including the allowance of access to prosecutorial and law-enforcement files. It also should specifically include post-conviction access to the personnel files of law-enforcement officers as allowed pretrial by the California Evidence Code in order to identify police misconduct.[154]

Open-file discovery is likely to reveal the prosecution's failure to disclose exculpatory evidence to the defendant at trial.[155] Intentional and inadvertent failure to disclose information in violation of a prosecutor's duty is a significant problem, although it is currently difficult to diagnose.[156] Although the U.S. Supreme Court grants certiorari in only one percent of all petitions that pass before it, it has ruled on a case involving *Brady* violations at least once each decade since the *Brady* decision in 1963.[157] A review of California cases raising *Brady* claims specifically found that exculpatory information had been improperly withheld in 129 cases, and the failures to disclose were found material and reversible in sixteen of those cases.[158] The results in North Carolina after the implementation of open-file discovery in capital cases demonstrate that open-file discovery does reveal *Brady* violations. From the time North Carolina's statute was passed in 1995 to 2004, seven death-row prisoners were granted relief based on *Brady* violations.[159]

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voter initiative, whereas changes to post-conviction discovery can be passed by a simple majority of the legislature. *See* People v. Superior Court, 227 P.3d 858, 860–61 (Cal. 2010) (holding that Proposition 115 placed limits on the legislature's ability to address pretrial discovery, but not post-conviction discovery). It is because of this distinction that this Note advocates for changes to post-conviction, rather than pretrial, discovery.

154. *See* CAL. EVID. CODE §§ 1043–1047 (2011) (describing circumstances in which criminal defendants can discover law-enforcement personnel files); *see also* Pitchess v. Superior Court, 522 P.2d 305, 309 (Cal. 1974) (finding the defendant's request for materials about prior complaints against a police officer were relevant to his self-defense to battery charges and discoverable for purposes of obtaining prior statements of unavailable witnesses, refreshing witness memory, and proving the character of the police officer). *Pitchess* materials have been considered within the category of information to which the defendant would have been entitled at trial had he requested it, and therefore discoverable under section 1054.9. Hurd v. Superior Court, 50 Cal. Rptr. 3d 893, 897 (Ct. App. 2006).

155. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

156. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686–88 (2006) (describing both the high number of appellate cases raising claims of *Brady* error and how *Brady* evidence hidden by the prosecution "may never be discovered").

157. Maitri Klinkosum & Brad Bannon, *Advocating for Those Left Behind: The Need for Discovery Reform in Non-Capital Post-Conviction Cases*, TRIAL BRIEFS, Feb. 2005, at 8.

158. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 70 n.2 (2008) (describing the results of a study conducted for the California Commission on the Fair Administration of Justice by Cookie Ridolfi, a law professor at Santa Clara University and the Executive Director of the Northern California Innocence Project).

159. Klinkosum & Bannon, *supra* note 157, at 10.

Ineffective assistance of defense counsel also can be revealed through an open-file discovery system.[160] In California, ineffective assistance of counsel claims comprised the largest percentage of successful claims in death-penalty cases from 1977 to 2005,[161] further emphasizing the importance of enabling the pursuit of these claims. By allowing defendant-petitioners to review prosecution files for materials to which the defense would have been entitled only upon request, the defense will be able to ascertain whether trial counsel was deficient by failing to request certain types of discovery.

Take, for instance, the case of Javier Ovando, whom police officers from the Rampart Division shot and then framed for assault and brandishing a firearm against a police officer.[162] Fortunately for Ovando, one of the police officers confessed to the true course of events and the District Attorney filed a writ for Ovando's release.[163] However, a hypothetical derived from Ovando's case is an instructive example of the potential effectiveness of the proposed legislation. If the offending officer had never come forward, and if Ovando had access to open-file discovery to file his habeas claim, his habeas attorney could have requested and received information from the personnel files of the two officers that were involved in the shooting.[164] Such a request would have made sense based on Ovando's version of events and may have led to evidence that would have discredited the police officers or revealed patterns of misconduct.

Ovando filed a malpractice claim against the county and his public defender,[165] and the results suggest that his attorney's inadequate representation may have been substantial enough for him to prevail under the *Strickland* test on an ineffective assistance of counsel claim. Ovando won a $6.5 million jury verdict for malpractice based on his claims that his attorney "failed to adequately investigate the facts and circumstances of his alleged crimes, failed to adequately investigate the backgrounds of Officers Perez and Durden, and failed to undertake

160. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding that the Sixth Amendment right to counsel includes the right to competent and effective assistance of counsel); Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that petitioners seeking post-conviction relief because of ineffective assistance of counsel must prove that the trial attorney's performance fell substantially below professional standards and resulted in prejudice to the defendant).

161. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 158, at 125.

162. Ovando v. Cnty. of Los Angeles, 71 Cal. Rptr. 3d 415, 420 (Ct. App. 2008). Though Mr. Ovando did not receive a sentence severe enough to entitle him to post-conviction discovery under the current or proposed legislation, his circumstances are still instructive.

163. *Id.* at 420–21.

164. *See* CAL. EVID. CODE §§ 1043–47 (2011).

165. *Ovando*, 71 Cal. Rptr. 3d at 422.

reasonable measures to locate and present the testimony at trial of percipient witnesses who could have exonerated Ovando."[166]

Perhaps most important, open-file discovery will allow defendants who suspect they have been the victims of police misconduct to review law-enforcement materials with a critical eye in light of new information. This would allow defendant-petitioners such as Gonzalez[167] to review law-enforcement files on the informant used against him. Ovando[168] would have been able to request the records of the officers who shot and framed him for assault and brandishing a weapon and to review the prosecutor's files for any evidence that could prove things happened the way he said they did.

Not only would open-file discovery promote the presentation of claims necessary to the pursuit of justice, it would be a particularly efficient means of doing so. Because defendants would no longer have to find independent evidence that materials exist, as they currently do under *Barnett*, open-file discovery would reduce the time and money spent on defense investigation of issues that would be addressed by a review of the prosecution and law-enforcement files. Also, because the prosecution would be providing all of its files to the defense, open-file discovery would save the prosecution the time of culling through a case file for information to which the defendant would be entitled. Finally, the criminal legal system would be freed from the additional litigation caused by disputes regarding whether or not a defendant would have been entitled to discovery at trial and whether the defendant-petitioner can meet the reasonable-basis requirement.

CONCLUSION

The California Supreme Court's recent decision in *Barnett v. Superior Court* stands to dramatically limit defendant-petitioners' ability to use section 1054.9 of the California Penal Code as a tool to uncover evidence of government misconduct. But the court's holding is contrary to California lawmakers' intentions for creating the law. In light of the clandestine nature of government misconduct and the recent and ongoing scandals in law-enforcement offices, the *Barnett* decision is likely to perpetuate the concealment of evidence of government misconduct. A legislative intervention is needed both to restore and to further expand defense discovery rights in California. A state law for open-file discovery in post-conviction proceedings would provide a cost-effective means of promoting greater justice in cases involving government misconduct.

166. *Id.*
167. *See supra* notes 30–41.
168. *See supra* notes 162–66.