CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

January 6, 2020

Please respond to:
JOHN T. PHILIPSBORN
Law Office of John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94102

The Honorable Jorge E. Navarrete
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Re: *Bracamontes v. Superior Court*, S259739 (Court of Appeal Case No. D075671, Fourth Appellate District, Division 1; San Diego Superior Court No. SCD178329), cited below as *Bracamontes v. Superior Court* (2019) 32 Cal. App. 5th 102 for the convenience of the parties

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY MANUEL BRACAMONTES, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. Navarrete:

This letter is respectfully submitted by California Attorneys for Criminal Justice (hereafter "CACJ") pursuant to the California Rules of Court, Rule 8.500(g), in support of the Petition for Review filed by Manuel Bracamontes (hereafter referred to as "Petitioner").

Identification of *Amicus Curiae*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the

Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws.) CACJ's membership consists of approximately 1,700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before this Court as an amicus curiae on matters of importance to the administration of justice and to its membership.[1]

Interest of CACJ in this Matter

CACJ and the California Public Defenders' Association (CPDA) have co-sponsored the nation's largest forum for training lawyers in death penalty defense practice – the annual CACJ/CPDA capital case seminar held in the month of February. CACJ has also sponsored focused training for appellate and post conviction counsel. CACJ counts among its members some of the most experienced post conviction capital case litigators in California. CACJ has appeared before this Court to present arguments on a number of matters that are involved in the protection of the rights of individuals who are subject to the death penalty in California. A number of CACJ's lawyer-members represent persons seeking post conviction review of convictions and judgments that involve the death penalty.

The case at hand raises question about the legally available frame for capital case related habeas corpus litigation. Habeas investigations are among the most challenging endeavors that defense counsel are called upon to undertake. To conduct a habeas investigation, it is a given that counsel must go beyond the basic record on appeal. Indeed, the Court's *Policies Regarding Cases Arising from Judgments of Death* and the related *Appendix to Supreme Court Policies* in death

[1]The undersigned certify by their signatures and as Officers of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

penalty cases describe wide-ranging duties and expected activities, including the "...duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus...." (*Appendix*, at p. 2.) If it is clear that expert witnesses worked on important aspects of the case, and in certain instances testified as part of the underlying proceedings, it is incumbent on defense counsel according to prevailing standards of practice to seek access to the experts' case file including bench or laboratory notes, charts and diagrams, sketches, photographs, worksheets and other documents that may include quality assurance documents, internal review, and proficiency testing records. Any indication by the courts, no matter how subtle, that the experts need not preserve their case files, undermines the ability of counsel and of reviewing courts to assess the facts in a given case.

The Court of Appeal's ruling undermines the need for legally recognizable reliability in the assessment of a death penalty judgment. It undermines the standards of practice currently maintained both in the legal and the scientific communities. For scientists and experts, forensic or otherwise, maintenance of the documentation and records that comprise a case file allows for review and verifiability – an ability for colleagues and other scientists and experts to review work for adherence to scientific and/or technical guidelines and reproducibility, all of which all assessment of the reliability of expert opinions and case related evidence.

Such documentation has usually been made available on request at the trial level and in post-conviction litigation. It is important for this Court to reinforce the requirement that such records be preserved particularly in capital to permit necessary and meaningful post-conviction review. CACJ notes that among the cases that its members have litigated in this Court is *In re Steele* (2004) 32 Cal 4th 682 (*Steele*), a case that addresses the fundamental principles for post-conviction litigation related discovery and that served to establish the current legal basis for post-conviction discovery orders.

For all of the reasons set forth above, CACJ has an interest in presenting its views to the Court about the need for review in this case.

ARGUMENT AND AUTHORITIES

I. The Court of Appeal Conflates Multiple Legal Standards

CACJ begins its argument by underscoring that it is joining and seconding Petitioner in urging the Court to grant review in this case. The Court of Appeal has erred by essentially declaring as 'untouchable' for evidence preservation and post-conviction discovery purposes two experts who were part of the preparation and presentation of the prosecution's case at trial – Dr. Norman Sperber and Mr. Rod Englert. Moreover in what should be a discussion of post-conviction evidence preservation, and the prerogative of a California trial court to enter orders to allow (and require) preservation of case-related evidence, the Court of Appeal erred in reaching into unrelated legal doctrines to find purported authority for its ruling on the preservation of evidence concerning the work done by these two experts. As set forth in more detail in the Petition for Review, Dr. Sperber and Mr. Englert were involved in the preparation and prosecution of the case. Rather than looking at authority related to a trial court's ability to manage the litigation before it, and to preserve the opportunity for a defensible judicial review on habeas corpus, the Court of Appeal inexplicably relied case law that cannot be viewed as logically related to the remedy sought by Petitioner.

Among the cases relied upon by the Court of Appal is a ruling that addressed an allegation of perjury against a Federal Lab Director (*U.S. v. Stewart,* (2d Cir. 2006) 433 F. 3d 273, 295-97 (*Stewart*)). The case is cited as useful authority. Not so. That case involved the question of whether the misdeeds of a civilian employee of a Federal Lab could be imputed to the Government's prosecution team given the circumstances of that case. The analysis in the ruling had nothing to do with evidence preservation. The second line of cases relied upon by the Court of Appeal is equally unhelpful. Included there was the ruling in *U.S. v. Skelly* (2d Cir. 2006) 442 F.3d 94 (*Skelly*), that involved an allegation that a retained Government expert in a financial crimes case failed to disclose notes that could have been used to impeach him, where the reviewing court concluded that the evidence of guilt was "overwhelming" and that the failure was not

consequential. The Circuit Court concluded there was no abuse of discretion by the trial court in failing to provide relief. (*Id.* at 100-101.) Neither of these cases is instructive on the issues.

A somewhat better, though admittedly still not definitive, discussion to have borrowed from Federal litigations might have been the ruling from the Ninth Circuit in *Calderon v. U.S. District Court* (9th Cir, 1997) 120 F. 3d 927, 928 (*Calderon*), a case in which a California death row litigant (prosepctive habeas corpus petitioner Michael Hill) was seeking assistance from a Federal Court to preserve all prosecution files and records in his case. That matter had "transitioned" into Federal court without any prior habeas litigation in this Court or in any California court. The habeas issues were unexhausted. Newly appointed counsel sought a pre-petition discovery and evidence preservation order for the first time in Federal court. The California Attorney General sought to vacate the discovery order (which he did successfully), but he then agreed to preserve all pertinent files to permit what has turned out to be both State and Federal habeas litigation on behalf of the Petitioner in that case.

In *Calderon*, the State agreed to accept the responsibility of preserving the files. The case–admittedly–is not one that involved *this* Court (at least at that time), and rather than force the Ninth Circuit to rule on pre-petition evidence preservation, the State agreed to preserve files and evidence in that case. For that reason, *Calderon* is arguably a more informative decision on preservation issues related to capital case litigation in California cases than the more tangential cases cited by the Court of Appeal in the part of its opinion sought to be reviewed here.[2]

Here, the Court of Appeal was clearly aware that this Court did not view its summary denial of relief in the first instance as the legally correct outcome. CACJ

[2] Perhaps confirming the interest that CACJ members have had in the issues presented here, the referenced *Calderon* ruling was litigated by undersigned long time CACJ *Amicus Committee* Chair, now Vice Chair, John Philipsborn.

respectfully submits that the Court of Appeal's second attempt still has serious limitations that the Court should recognize by granting review.

In the above-cited *Stewart* ruling which was relied upon by the Court of Appeal, the issue was whether the defendant was entitled to a new trial based on allegedly newly discovered evidence that the prosecution's ink expert testified falsely. (*Stewart*, *supra*, 433 F.3d at pp. 295-299.) Although the *Stewart* panel did not cite *Napue v. Illinois* (1959) 360 U.S. 264, it appears that the criticism of the prosecutor, rejected by the Second Circuit, was that the prosecutor had knowingly put a witness on the stand to testify falsely. (*Stewart*, *supra*, 433 F.3d at p. 297.) The issue presented in this case is not a current demand for a new trial based on either *Brady* claims or *Napue*. This case involves a request for preservation of evidence including experts' records to allow a full and fair litigation of a capital case in its post-conviction phase. The preservation of materials relating to Dr. Sperber and Mr. Englert should be analyzed under Penal Code section 1054, *et seq.*[3] and this Court's precedents.

This Court in *Steele* and *Barnett*, "analogized section 1054.9" to *Brady* (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 904 (*Barnett*)) for the purpose of determining whether or not 1054.9 discovery *extended* to law enforcement agencies that "...were not involved in investigating or preparing the case against the defendant." (*Steele*, *supra*, 32 Cal.4th at p. 696.) The discussion did *not* limit section 1054.9 discovery as to those involved in the "investigation or prosecution of the case." (*Steele*, *supra*, 32 Cal.4th at p. 697.) The *Brady* analogy was used to determine whether section 1054.9 *extended* to other agencies that "were *not* involved in investigating or preparing the case against the defendant." (*Steele*, *supra*, 32 Cal.4th at p. 696, emphasis added.)

While the discussions in *Steele* and *Barnett* are important to an understanding of any extension of 1054.9 to non-investigating law enforcement

[3] All references to code sections are to the California Penal Code unless otherwise stated.

agencies, using the *Brady* analogy to limit 1054.9 obligations of those who were actually involved in the investigation or prosecution of the case would be contrary to the entire statutory discovery scheme. There is no requirement under section 1054, *et seq.*, that discovery of the statements of witnesses, for instance, must be exculpatory. Similarly, there is no "*Brady* limitation" on section 1054.9 discovery regarding those who were "involved in investigating or preparing the case against the defendant." (*Steele*, *supra*, 32 Cal.4th at p. 696.)

II. Discovery Under Penal Code Section 1054.9 Applies to Those Involved in the Investigation or Prosecution of the Case, Which Includes Prosecution Experts Hired after the Defendant's Arrest.

A preservation order provides the opportunity for litigants to obtain access to materials under section 1054.9 when habeas counsel are eventually appointed. (*People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 534-35 (*Morales*).) Any preservation order entered cannot be viewed through the same analytical lens as a later substantive claim that there was a *Brady* violation related to the presentation of a given expert's testimony (as alleged in *Stewart, supra,* on appeal). This Court made that clear in *Morales*.

In *Steele*, this Court held that section 1054.9 requires the trial court, upon a 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." (*Steele*, *supra*, 32 Cal.4th at p. 697, emphasis added.) This rule was reiterated in *Barnett*. (*Barnett*, *supra*, 50 Cal.4th at p. 901 [stating that in Steele this Court "concluded that the statute governs discovery '*materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case*'" (emphasis added)].) Thus, the scope of discovery provided for under section 1054.9 is not just limited to materials in the possession of any persons or agencies involved in the *investigation* of the case, but *also* those who were involved in its *prosecution.*

This Court has explained that section 1054.5, subdivision (a), states that the statutory discovery rules, like section 1054.9, apply to "'any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.'" (*Steele, supra*, 32 Cal.4th at p. 696, quoting Pen. Code, § 1054.5, subd. (a).) A prosecuting attorney and investigating agency's duties include continuing the investigation during the prosecution of the case. This investigation and preparation, in turn, includes consulting with forensic or clinical experts to investigate, develop and eventually present the facts in court.

The focus in *Steele* and *Barnett* was on the involvement of tangential law enforcement agencies in the case. In *Steele*, the petitioner requested an order pursuant to 1054.9 for production of specific information included in the petitioner's prison file. (*Steele, supra*, 32 Cal.4th at p. 689.) There this Court found that the Department of Corrections[4] "did not investigate or help prosecute any of these crimes..." and that, in any event, California case law limits the self-executing discovery obligation to provide "favorable information" to Department of Corrections records *related to the charges*. (*Steele, supra*, 32 Cal.4th at p. 701.) Moreover, in that case, the prosecutor and investigator reviewed the file and selected materials they felt were relevant. (*Id.* at p. 702.) This Court went on to hold that if the defense had specifically requested "all of petitioner's prison records...", the prosecution would have been obligated to provide them. (*Ibid.*) During post conviction litigation, the petitioner in *Steele* had made a showing of the relevance of additional prison record information, and the Court found that it should be provided under section 1054.9. (*Ibid.*)

The point is that far from supporting the Court of Appeal's ruling here, this Court's analysis in *Steele* confirms that a wide swath of records can be ordered disclosed for post conviction litigation–and for that reason entering preservation orders of the type sought here, which involved experts who were actually involved

[4] Now the Department of Corrections and Rehabilitation.

in the prosecution makes both policy and legal sense for the reasons explained in *Morales, supra.* In the instant case, a more fundamental basis for disclosure under section 1054.9 applies since, unlike the prison officials in *Steele*, Dr. Sperber and Mr. Englert *did* "investigate" and "help prosecute" the case.

In *Barnett*, the petitioner requested materials possessed by "22 law enforcement officers working for six different out-of-state agencies, one outside the country, regarding crimes committed between 1965 and 1988." (*Barnett, supra*, 50 Cal.4th at p. 903.) The out-of-state agencies had "provided certain limited assistance on request." (*Id.* at p. 904.) The fact that the out-of-state agencies provided this limited information to California prosecutors obligated the prosecutors to turn over that information but did not make the out-of-state agencies' entire files subject to Section 1054.9 discovery. This *Barnett* limitation does not apply in the current case. Both Dr. Sperber and Mr. Englert were actively involved in the trial preparation and were witnesses during the prosecution and not merely "'law enforcement agencies that were not involved in investigating or preparing the case against the defendant.'" (*Barnett, supra*, 50 Cal.4th at p. 902, quoting *Steele, supra*, 32 Cal.4th at p. 696.)

As described in the Petition for Review, Dr. Sperber and Mr. Englert were prosecution experts who went to the scene of the charged homicide and obtained evidence for the trial. These two experts investigated case facts, developed theories of the case and, as discussed in more detail below, were not minimally or tangentially involved in the investigation and prosecution of the case. That brings them within the scope of section 1054.9.

In *Steele* and *Barnett* this Court referenced "investigation" and "prosecution" as two overlapping aspects of a case. Contrary to what the Court of Appeal suggests (See *Bracamontes, supra*, 32 Cal. App. 5th at pp. 106-107, 119), the investigation and preparation continues as the prosecution's case proceeds through trial. From a habeas corpus viewpoint they are concurrent functions. Dr. Sperber and Mr. Englert were involved in both the investigation and the prosecution of the case along with the prosecutors and law enforcement agency

investigators. They come within section 1054.9 as "'any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in the performance of their duties.'" (*Steele, supra*, 32 Cal.4th at p. 696, quoting § 1054.5, subd. (a).)

The Court of Appeal's ruling undermines this Court's opinion and analysis in *Morales, supra*, and cannot be reconciled with Policies concerning habeas corpus preparation that contemplate fulsome investigation and litigation of habeas corpus issues in a death penalty case.

III. The Preservation of the Files and Records of Experts Involved in the Preparation and Presentation of Evidence in a Death Penalty Case Is Consistent with the Court's Rulings to Date, and with Policies and Procedures That Exist to Provide the Basis for Informed and Factually Accurate Review of Scientific and Technical Evidence.

Forensic experts maintain case files with contemporaneous bench or laboratory notes, charts and diagrams, sketches, photographs, worksheets and other documents. For scientists, forensic or otherwise, maintenance of records and documentation of analyses is recognized as enhancing the opportunity for technical review, transparency, repeatability, and reproducibility. These functions underlie the concept of scientific and technical validity and reliability.

A. The Significance of the Case File in the Forensic Scientific Setting

When involved in forensic work, experts may produce a report that states little more than their conclusions. (Goetz, *Crime Scene Reconstruction* in Forensic Science Reform: Protecting the Innocent (Koen & Bowers edits., 2017), p. 318 (hereafter "Crime Scene Reconstruction").) As a result, just having access to a 'final' report may make it difficult or impossible to adequately review the basis and reasoning for the expert's opinions. (See Giannelli, Bench Notes and Lab Reports (Summer 2007) 22 CRIM. JUST. 50, 51 (hereafter "Bench Notes and Lab Reports").)

Experts' case files may include "photography, sketches, a chain of custody, forms required by the agency or department, worksheets, notes, reports, and visual aids for court testimony." (Daluz, Fundamentals of Fingerprint Analysis (2d ed. 2019) chapter 14, p. 206 (hereafter "Fundamentals of Fingerprint Analysis").)

Bench notes may include information "on evidence packaging, condition, location of evidence, amount of evidence, distribution of evidence, tests conducted, both positive and negative results, sampling strategies, observations, and conclusions." (Crime Scene Reconstruction, *supra*, p. 318.) Sometimes, the conclusions written in the final report may not be supported by the expert's bench notes. (*Ibid.*) In crime scene reconstruction, "it is vital to look at the examiner's bench notes, all the charts and diagrams created, and all of the photographs taken by the examiners." (Crime Scene Reconstruction, *supra*, p. 318.)

Where specifics of mental health assessment are at issue, this Court has recognized the importance of providing raw data of psychological tests in discovery. In *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, this Court stated that under Penal Code section 1054.3, subdivision (a)(1), the defense must disclose "the raw results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely." (*People v. Hajek and Vo,* 58 Cal.4th at 1233 (*Hajek and Vo*), citing *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 184-185 (*Woods*).)

In *Woods*, the Court of Appeal explained that the purpose of providing these materials is that it "allows access to information necessary to prepare the case, reduces the chance of surprise at trial, furthers the attainment of truth and lessens the risk of a judgment based on incomplete testimony." (*Woods*, *supra*, 25 Cal.App.4th at pp. 184-185.) For all forensic disciplines, "sitting down with the examiner and going through their case folder is always informative." (Crime Scene Reconstruction, *supra*, p. 318.)

The President's Council of Advisors on Science and Technology's (PCAST) 2016 Report to the President highlighted the importance of taking bench or

laboratory, specifically for feature-comparison methods such as DNA, hair, latent fingerprints, firearms and spent ammunition, toolmarks and bitemarks, shoeprints and tire tracks, and handwriting. (President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (Sept. 2016), p. 56 (hereafter "Forensic Science in Criminal Courts").) Examining the conclusions of a forensic expert requires showing "validity as applied," meaning showing "that the method has been reliably applied in practice." (*Id.* at p. 1, emphasis omitted.) To show validity as applied, the "forensic examiner must have been shown to be capable of reliably applying the method and must actually have done so." (*Id.* at p. 56, emphasis omitted.) Making these assessments "requires that the procedures actually used in the case, the results obtained, and the laboratory notes be made available for scientific review by others." (*Ibid.*) Thus, bench notes or laboratory notes, along with the rest of the expert's case file, are essential to adequately evaluating the work of a forensic expert.

Organizations such as the American Bar Association (ABA) and the Department of Justice's National Commission on Forensic Sciences (NCFS) have taken the position that an expert's case file, including the bench notes, are materials that must be provided to the defense in discovery. The ABA recommends that "[e]ach step" a DNA expert takes in testing and interpreting test results "should be recorded contemporaneously in case notes." (ABA Stds. for Crim. Justice: DNA Evid. (3d ed. 2007) std. 3.2, subd. (b).) These case notes should "document all information necessary to allow an independent expert to evaluate the process used and the conclusions reached." (*Id.* at std. 3.2, subd. (c).) The ABA also takes the position that the prosecutor should make available to the defense before trial "the laboratory case file and case notes." (*Id.* at std. 4.1, subd. (a)(iii).)

Similarly, in 2014, the NCFS, then partnered with the National Institute of Standards and Technology, recognized the significance of the expert's case file in evaluating the expert's conclusions and opinions. The NCFS approved policy recommendations to the Attorney General that included a recommendation to

"direct federal prosecutors to allow the defendant full access to the expert's case records." (Reporting and Testimony Subcommittee of the National Commission on Forensic Science, Recommendations to the Attorney General: Pretrial Discovery (Approved, June 21, 2014) p. 2.) The NCFS also recognized with respect to recommendations specifically for pretrial discovery in forensic evidence cases that "[t]he lack of bench notes is often cited in laboratory scandals." (Reporting and Testimony Subcommittee of the National Commission on Forensic Science, Pretrial Discovery in Forensic Evidence Cases (Initial Draft, Oct. 2014) p. 14.)

B. The Significance of the Case File for Review of Adherence to Methodology and Reliability

The type of documentation described above – including bench or laboratory notes, charts and diagrams, sketches, photographs, worksheets and other documents created – is a historic part of the scientific method. Scientists' research records, "composed of notes and protocols have long played a role in these efforts to understand the origins of what have come to be seen as the established milestones in the development of modern science." (Holmes, et al., *Introduction* in Reworking the Bench: Research Notebooks in the History of Science (2003).)

In 1985, Howard M. Kanare stressed that the "laboratory notebook is one of a scientist's most valuable tools" and is "an essential part of 'doing good science.'" (Kanare, Writing the Laboratory Notebook (1985), p. 1 (hereafter "Writing the Laboratory Notebook".) The laboratory notebook "preserve[s] the experimental data and observations that are part of any scientific investigation." (*Ibid.*) These notes must record both the failed experiments and the successful ones to be "of any value." (*Ibid.*) The "guiding principle" for creating a laboratory notebook is to "write with enough detail and clarity that another scientist could pick up the notebook at some time in the future, repeat the work based on the written descriptions, and make the same observations that were originally recorded." (*Ibid.*)

In line with these principles of good science, the National Institutes of Health (NIH) emphasizes keeping contemporaneous records while conducting research, in part, because "[g]ood record keeping promotes both accountability and integrity in research." (National Institutes of Health Committee on Scientific Conduct and Ethics, Guidelines for Scientific Record Keeping in the Intramural Research Program at the NIH, (Dec. 2008), p. 2.) The NIH specifies that the scientists' biomedical research activities "should be kept in sufficient detail to allow another scientist skilled in the art to repeat the work and obtain the same result." (*Ibid.*)

C. Obtaining the Prosecution Expert's Case File Is Critical to Effectively Representing a Defendant, Appellant or Petitioner at All Stages of the Proceedings

It is the duty of the defense lawyer to competently represent his or her clients. This requires "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" of the client. (ABA Model Rules Prof. Conduct, rule 1.1; see also California Rules of Professional Conduct, rule 1.1, subd. (a) [stating that competence means "to apply the (I) learning and skill, and (ii) mental, emotional and physical ability reasonably necessary for the performance of" legal service].) Under the ABA's Criminal Justice Standards, counsel is required to "promptly" commence its investigation and "should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings and potential dispositions and penalties." (ABA Stds. for Crim. Justice: Defense Function (4th ed. 2017) std. 4-4.1, subd. (c).) This investigation should include efforts to "secure relevant information" from the prosecution, law enforcement and others as well as evaluate the prosecution's "physical, forensic and expert" evidence. (*Ibid.*)

These duties are all the more important in cases involving forensic evidence because "the danger of an unfair trial from a failure to provide effective assistance of counsel is presumably heightened in a case involving complex scientific evidence, where the defendant is even more dependent than in a typical case on

'access to counsel's skill and knowledge.'" (Roth, *Ethical Duties of Attorneys and Experts in Cases Involving Forensic Evidence* in the Perspective of the Defense in Ethics and Forensic Science (Downs & Swienton edits., 2012) p. 315, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 685.) For example, Fred Zain "the chief serologist in the West Virginia State Police Crime Laboratory . . . falsified test results in as many as 134 cases." (Bench Notes & Lab Reports, *supra*, p. 50.) As one forensic examiner commented: "'It is clear that in case after case, defense counsel failed to review the case notes of the prosecution's forensic serologists. Even a layperson would have seen that Fred Zain's written reports and sworn testimony were contradicted by his own case notes.'" (*Ibid.*, quoting Rowe, Commentary in Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (Connors, et al., edits. 1996) pp. xvii-xviii.)

In criminal cases in general and capital cases in particular, especially with regard to experts like Dr. Sperber and Mr. Englert, unless case-related documentation is preserved, habeas counsel will have no ability to seek inspection of the underlying data. The preservation of case files under section 1054.9 and *Morales*, *supra*, 2 Cal.5th 523, does no more than preserve the opportunity for discovery and litigation. There is no prejudice to anyone in preserving the files.

D. The Court of Appeal Opinion Creates Unnecessary Distinctions Between Experts' Participation in the Investigation, Preparation and Trial of the Case for Evidence Retention and Preservation Purposes

The Court of Appeal has sought to establish categories of participation in a case by an expert that should not be deemed significant for evidence retention and preservation purposes. The Court of Appeal read into its use of the *Steele, supra,* analysis a distinction between participation in the "investigation" as opposed to the "prosecution" which it contends follows a line drawn by the Court in *Steele*, *supra*, 32 Cal.4th at p. 697. First, as argued throughout this letter brief, the distinction for evidence preservation purposes is fragile. Second, and more to the

point, both experts focused on here, Dr. Sperber and Mr. Englert, played roles in post-arrest investigation, preparation and in the prosecution of the case. The distinction may be useful in some other context, but it cannot be viewed as a useful one in this case. Regardless of how many pages of transcript their testimony took, these experts were clearly part of the investigation and prosecution of the case.

In fact, the relatively brief conclusory testimony that each of these two experts gave gives rise to a rationale for habeas counsel and any reviewing court to scrutinize the basis for the opinion(s) stated.

CONCLUSION

For the foregoing reasons, CACJ respectfully urges this Court to grant review to address the issues framed by Petitioner in the Petition for Review and by CACJ here.

Respectfully submitted,
STEPHEN K. DUNKLE, *Chair*
JOHN T. PHILIPSBORN, *Vice Chair*
CACJ Amicus Curiae Committee

By_____
John T. Philipsborn, SBN 83944
Counsel for CACJ

SANGER, SWYSEN & DUNKLE
SARAH. S. SANGER

By_____
Sarah S. Sanger, SBN 322722
Counsel for CACJ

PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within document entitled:

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY MANUEL BRACAMONTES, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

( ) By electronically transmitting a true copy thereof;

AJ Kutchins
Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, CA 94607
Counsel for Petitioner Manuel Bracamantes

Superior Court of San Diego County
250 East Main Street, Department EC-12
El Cajon, CA 92020
Respondent

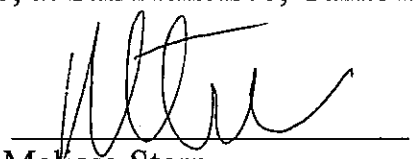
Karl Kristian Husoe
San Diego District Attorney
330 West Broadway, Suite 860
San Diego, CA 92101-3827

Attorney General - San Diego Office
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
Counsel for the People: Real Party in Interest

California Court of Appeal
Fourth District, Division 1
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of January, 2020, at San Francisco, California.



Melissa Stern