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Attorneys for Petitioner,
TERRY D. BEMORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

TERRY D. BEMORE, Petitioner, v. DANIEL CUEVA, Warden of California Medical Facility Respondent.	Case No. _____ [Original San Diego County Super. Ct. No. CR84617] **MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO RACIAL JUSTICE ACT (Pen. Code § 745)**

COMES Petitioner, TERRY D. BEMORE, through attorneys Pamala Sayasane and Cheryl J. Cotterill, who respectfully move that they be appointed to represent Mr. Bemore in his claims for relief under California's Racial Justice Act ("RJA"). (Pen. Code § 745.) Ms. Sayasane previously represented Mr. Bemore in his capital habeas corpus proceedings before the California Supreme Court, and Ms. Cotterill federally.

A violation under the RJA is established if Petitioner shows by a preponderance of the evidence that racial bias played an impermissible a role in his conviction or sentence. The law provides for the appointment of counsel to present and litigate such potentially meritorious issues on habeas corpus. (Pen. Code, § 1473, subd. (e).)

This motion is based on the accompanying Memorandum of Points and Authorities, the declarations of counsel, and the attached exhibits.

Dated: March 18, 2024

Respectfully submitted,

/s/ Pamala Sayasane
PAMALA SAYASANE

/s/ Cheryl Cotterill
CHERYL COTTERILL

Attorneys for Petitioner,
Terry D. Bemore

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Facts presently known establish that the conviction and incarceration of Petitioner, who is Black, were attributable to racial bias and animus. As discussed below, Petitioner is entitled under the law to the appointment of counsel so that he can thoroughly and effectively investigate, develop, and present his claims for relief under the RJA.

II. Background

On June 6, 1989, a jury convicted Petitioner of first-degree murder, robbery, burglary, and found true the special circumstance. (CT 1747-1748.) A verdict of death was rendered on August 7, 1989, and Petitioner was sentenced accordingly on November 2, 1989. (CT 1775-1778.) The automatic appeal was filed February 18, 1998. (*People v. Bemore*, Cal. Sup. Ct. No. S012762.) The California Supreme Court affirmed the judgment on April 20, 2000. (*People v. Bemore* (2000) 22 Cal.4th 809.) Petitioner's petition for writ of habeas corpus, filed June 19, 2000, was denied on October 17, 2007. (*In re Bemore*, Cal. Sup. Ct. No. S089272.)

Petitioner's federal habeas petition was filed on January 13, 2009. (*Bemore v. Ayers*, U.S. Dist. Ct. No. 08CV0311-LAB.) After the district court denied relief, Petitioner appealed. On June 9, 2015, the Court of Appeals for the Ninth Circuit reversed the denial of habeas relief with respect to the penalty phase due to the ineffectiveness of trial counsel. (*Bemore v. Chappell* (2015) 788 F.3d 1151.)[1]

On December 5, 2016, the San Diego Superior Court overturned the death sentence, and

[1] Ms. Cotterill represented Petitioner before the Ninth Circuit.

Petitioner was thereafter sentenced to life without the possibility of parole. (Abstract of Judgment, *People v. Bemore*, San Diego County Super. Ct. No. CR84617, Jan. 3, 2017.) Petitioner is currently serving his sentence at the California Medical Facility, in Vacaville, California. (Declaration of Terry D. Bemore, Feb. 27, 2024, attached hereto as Exhibit A.)

III. Petitioner Has a Credible Claim Under the RJA

Under Penal Code section 745, also known as the RJA, a petitioner is entitled to relief on habeas corpus if racial discrimination played a role in his conviction or sentence. The statute provides that "[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." (§ 745, subd. (a).) A violation is established if the defendant proves "by a preponderance of the evidence" any of the following:

> (1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.
>
> (2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.
>
> (3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4) (A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

(Pen. Code, § 745.)

A. Evidence Previously Presented in State Court Supports a Credible Claim Under the RJA

In 2000, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (*In re Bemore*, Cal. Sup. Ct. No. S089272, June 19, 2000.) Among other constitutional errors, Petitioner alleged that his conviction and death judgment should be overturned because his lead trial attorney, C. Logan McKechnie: (1) was ineffective, (2) labored under a conflict of interest, (3) committed billing fraud by misappropriating funds meant for the case investigation to support his gambling habit, and accordingly, (4) did not adequately investigate and prepare his client's case for trial. (Pet. Claims 1-16, at pp. 9-170.) The petition also alleged that Mr. McKechnie had a prejudicial conflict of interest due to his racism against Petitioner. (Pet. at p. 167.) Elizabeth Barranco, second trial counsel, recalled that as Petitioner was about to take the stand and testify, Mr. McKechnie whispered to him words to the effect, "[j]ust don't act like a nigger." (*Id*. at p. 125; see also, Declaration of Elizabeth Barranco [second trial counsel] at p. 7

¶ 26, June 12, 2000, attached hereto as Exhibit B[2].) While Ms. Barranco did not hear Mr. McKechnie say these words, she said that Petitioner "found this statement unnerving enough to tell me about it later." (Exhibit B, at p. 7 ¶ 26.)

The lead defense investigator, Charles Small, was also racist. As Ms. Barranco stated: "Logan [McKechnie] and Charlie Small were also prejudiced against black people. I remember Logan and Small making racial jokes about an investigator, Jim Murphy, who is African-American." (*Ibid*.) Ms. Barranco recalled: "On the times when we traveled to petitioner's boyhood neighborhood in South Central Los Angeles, Small would frequently irritate me with the racist comments he made about the people we would see walking down the street." (*Ibid*.) She added: "In my opinion Logan and Small's feelings toward black people prevented them from investigating prosecution witnesses who were African American because they did not want to be around them." (*Ibid*.) And like Mr. McKechnie, Mr. Small engaged in egregious billing fraud while doing very little actual work on the case. (*Id*. at pp. 3-6; see also, Pet. Claim 1, at pp. 9-25.)

While Petitioner was denied relief in state court, the Court of Appeals for the Ninth Circuit ultimately reversed as to penalty due to trial counsels' ineffectiveness, finding that "[t]he representation Bemore received at the penalty phase . . . was 'outside the wide range of professionally competent assistance.'" (*Bemore v. Chappell* (2015) 788 F.3d 1151, 1170 [citation omitted].). While the Ninth Circuit did not reverse as to guilt, the Court did observe

[2] Exhibit B is Ms. Barranco's declaration submitted in support of the habeas petition filed in the California Supreme Court in 2000. Ms. Barranco has been contacted regarding an updated declaration in support of Petitioner's claims under the RJA.

that Mr. McKechnie's performance was also deficient in this regard. (*Ibid*.) In a footnote, the Court further noted: "McKechnie not only failed to prepare Bemore to testify, according to Barranco, but also rattled Bemore just before he took the stand by leaning over and whispering, "'Just don't act like a nigger' or words to that effect." (*Id*. at p. 1164, fn. 11.)

B. Newly-Obtained Evidence Further Establishes Violation of the RJA

New evidence establishes that Mr. McKechnie did in fact used racist language towards Petitioner. In his own words, Mr. McKechnie recently confirmed that he told Petitioner the following before the latter took the stand at his capital trial: "*Don't get up there and act like a fucking nigger*." (Declaration of C. Logan McKechnie, Nov. 1, 2023, at p. 2 (emphasis added), attached hereto as Exhibit C.) Mr. McKechnie claimed he only said this because he "could tell [Mr. Bemore] was nervous because he was hyper and using street slang at counsel table" and that he "was not acting like his normal self – he was acting like a criminal." (*Id.* at pp. 1-2.) The attorney further justified his choice of words by stating that he "knew that Mr. Bemore was an upstanding person" but "noticed that he was putting on a ghetto impression for the jury because he was nervous to testify." (*Id*. at p. 2.) Mr. McKechnie suggested he intended no harm by using such language towards his client because he knew him to be a good man, stating: "I had no problem saying what I said because of the kind of man I knew Bemore was. I would have said it to him in the privacy of my home. I would have felt comfortable saying that to him in the jail cell. I would have said it to him at counsel table, but I would not have it in public in front of the jury." (*Ibid*.)

However, despite his opinion that there was nothing wrong with using such racist language towards his Black client, Mr. McKechnie did not want other racial remarks to be

made public. In the fall of 2023, Mr. McKechnie was contacted by the University of San Francisco School of Law, Racial Justice Clinic ("RJC"). He subsequently signed a declaration based on their telephone interview with him, submitted herewith as Exhibit C. According to Gabby Sergi, Assistant Professor and RJC's Supervising Attorney, Mr. McKechnie made another revealing racist remark during their interview; at his request, it was omitted from his signed declaration because he was concerned it sounded "too racist" (i.e., his reference to Petitioner "shucking and jiving" at counsel table). As Ms. Sergi states:

> I am an Assistant Professor and Supervising Attorney at the University of San Francisco School of Law Racial Justice Clinic (RJC). In the summer of 2023, the RJC began working with attorneys Pamala Sayasane and Cheryl Cotterill on behalf of an incarcerated individual, Mr. Terry Bemore. In the Fall 2023 semester, I supervised David Ruize and Derick Morgan, two USF law students. David and Derick were assigned to investigate any potential Racial Justice Act (RJA) claims for Terry Bemore. As part of their investigation, Derick and David interviewed C. Logan McKechnie, Mr. Bemore's former trial defense attorney. The initial interview with Mr. McKechnie took place on October 24, 2023 at approximately 9:15 am via telephone. I was supervising Derick and David during the interview and Mr. McKechnie was aware of my presence on the call. On November 1, 2023 at approximately 12:45 pm, I supervised Derick and David during a follow-up call with Mr. McKechnie to review the declaration. Mr. McKechnie was again aware that I was on the call.
>
> During both calls, Derick and David spoke with Mr. McKechnie while I took detailed notes. Mr. McKechnie's declaration is a true and accurate representation of the initial conversation we had with him on October 24. However, during our follow-up call, Mr. McKechnie requested that we omit one notable quote from his first conversation with us.
>
> During our first call, Mr. McKechnie told Derick, David and me that immediately before Mr. Bemore took the stand, he could tell Mr. Bemore was nervous because he was "shucking and jiving" at counsel table. Mr. McKechnie requested that we remove that quotation from the declaration. Specifically, Mr. McKechnie said, *"Don't say shucking and jiving because that's too racist."* In response, Derick asked Mr. McKechnie what he meant by "shucking and jiving" and if he had a suggested edit. Mr. McKechnie requested replacing the phrase "shucking and jiving" with "hyper and using street slang."

(Declaration of Gabby Sergi, Nov. 2, 2023, at p. 1 lns. 25-26 (emphasis added), attached hereto as Exhibit D.)

IV. The Appointment of Counsel is Warranted Under the Law

As provided above, the facts establish a credible claim under the RJA. To obtain relief, a petitioner need only show by a preponderance of the evidence that "an attorney in the case . . . exhibited bias or animus towards [him] because of [his] race, ethnicity, or national origin. (Pen. Code, § 745(a)(1).) Additionally, relief is warranted if "[d]uring the defendant's trial, in court and during the proceedings . . . an attorney in the case, . . . used racially discriminatory language about the defendant's race, . . . or otherwise exhibited bias or animus towards the defendant because of the defendant's race, . . . whether or not purposeful." (Pen. Code, § 745(a)(2).) Here, Petitioner has provided credible evidence that his lead attorney, Mr. McKechnie, treated him with racial animus and used derogatory and racist language towards him. (See, e.g., Exhibits B, C, and D, *supra*.) The evidence also shows that both Mr. McKechnie and the defense investigator, Mr. Small, were biased against Black people in general, frequently making disparaging and racist remarks. (Exhibit B, *supra*.)

In addition to the racial bias exhibited by members of Petitioner's defense team, there is evidence of systemic bias.[3] For example, as Ms. Barranco observed, law enforcement arrested Petitioner as part of their investigation of a series of 55 armed robberies, referred to as "The Tall Black Male" series simply because the perpetrator was tall and black. (See Exhibit B, *supra*, at p. 4, ¶ 13.) Bias also impacted jury selection, where those suspected of being

[3] Preliminary research has been conducted, but a constitutionally effective examination of this and other potential issues cannot be accomplished without court-ordered funding.

homosexual were excluded. (*Id*. at p. 7, ¶ 25.)

Penal Code section 1473, subdivision (e) provides that counsel should be appointed if "the petitioner requests [such appointment]," "cannot afford counsel," and "alleges facts that would establish a violation of subdivision (a) of Section 745 . . . ." Here, Petitioner's indigency has been long established. As provided in his attached declaration, he is requesting that counsel be appointed in this matter. (See Exhibit A, *supra*.) And as discussed above, the facts alleged would support a credible claim under the act.

Accordingly, Petitioner has met all of the statutory requirements for this Court to grant his motion for the appointment of counsel,[4] and to provide essential funds[5] for the investigation, development, and preparation of a petition for writ of habeas corpus.

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[4] The appointment should be made effective as of July 18, 2023, the date Ms. Sayasane and Ms. Cotterill began working on behalf of Petitioner.

[5] See Senate Bill 101 (Budget Act of 2023), which provides:

> Schedule (1) 0150010-Support for Operation of Trial Courts . . . 2,719,070,000.
>
> . . .
>
> [Provision] 40. Of the amount appropriated in Schedule (1), $2,000,000 shall be used solely for legal representation in non-capital cases for private counsel appointed in superior court for a claim filed pursuant to subdivision (f) of Section 1473 of the Penal Code. Funds shall supplement and shall not supplant existing funding for court-appointed counsel. Funds may be used for attorneys' fees, experts, investigators, paralegals, or other ancillary needs.

Subdivision (f) of Penal Code section1473 was later amended to (e).

Dated: March 18, 2024

Respectfully submitted,

/s/ Pamala Sayasane
PAMALA SAYASANE

/s/ Cheryl J. Cotterill
CHERYL J. COTTERILL

Attorneys for Petitioner,
Terry D. Bemore

DECLARATION OF PAMALA SAYASANE

I, Pamala Sayasane, declare as follows:

1. I am an attorney in good standing, licensed to practice in the courts of the state of California and other jurisdictions.

2. I have over 25 years of capital litigation experience, and currently serve as lead counsel in capital appeals and/or habeas corpus cases pending before the California Supreme Court, state trial courts, and federal court. (E.g., *People v. Fuller*, Cal. Sup. Ct. No. S223978; *People v. Aguayo*, Cal. Sup. Ct. No. S149039 [*In re Aguayo*, No. S237699]; *People v. Lewis*, Cal. Sup. Ct. No. S086355 [*In re Lewis*, No. S224701]; *In re Doolin*, Fresno County Super. Ct. Nos. 19CRWR684930 and 19CRWR684931; *In re Ervin*, Alameda County Super. Ct. No. HC87023A-1; *Ervin v. Broomfield*, U.S. Dist. Ct. No. 00-cv-01228-VC.)

3. I have met the required 10 hours of RJA training, having attended courses in 2024 and 2023 at the annual Capital Case Defense Seminar held by the California Attorneys for Criminal Justice, and seminars in 2023 presented separately by the California Appellate Project and Habeas Corpus Resource Center. (See Pen. Code, §1473.1 [Standards for appoint of private counsel].) Documentation of my credits and training will be provided upon request.

4. I previously represented Terry Bemore from approximately 1999-2003, and assisted in the investigation and preparation of his petition for writ of habeas corpus, filed June 19, 2000, in the California Supreme Court. (*In re Bemore*, Cal. Sup. Ct. No. S089272.)

5. In the summer of 2023, I was approached by Joseph Schlesinger, Executive Director of the California Project, regarding whether I would consider representing Mr. Bemore pursuant to the RJA. I was also told that USF's Racial Justice Act Clinic was interested in

assisting in this effort. Thereafter I consulted with Cheryl Cotterill, who previously represented Mr. Bemore federally, and it was decided that we should work together in this matter. We have since been working diligently on his behalf.

6. Based on my knowledge of Mr. Bemore's case, and my recent preliminary research, investigation and review of the facts, a meritorious claim exists under the RJA. As provided in the accompanying memorandum of points and authorities, the facts alleged are sufficient to warrant the appointment of counsel in this matter. (Pen. Code § 1473, subd. (e).)

7. Without the assistance of counsel, Mr. Bemore will be unable on his own to competently prepare and present his credible claims for relief. I recently met with Mr. Bemore in December of 2023 at the California Medical Facility in Vacaville, California. In addition to lacking the legal training and knowledge to litigate this matter on his own, Mr. Bemore is 67 years old, suffers from daily pain due to chronic medical issues, and has trouble with focus and concentration. Thus, he is unable to effectively represent himself.

8. As this was a capital case, the record is extensive, consisting of 44 volumes of Reporter's Transcripts and 11 volumes of Clerk's Transcripts.

9. It is therefore requested that Ms. Cotterill and I be appointed as Mr. Bemore's counsel in this matter, and granted the funds necessary to investigate and prepare the petition for writ of habeas corpus. As we are already familiar with the case and have a good attorney-client relationship with Mr. Bemore, our appointment (as opposed to the Public Defender's Office) would be both judicially expedient and in the best interests of Petitioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed the 18th day of March, 2024, in Brisbane, California.

/s/ Pamala Sayasane
PAMALA SAYASANE

DECLARATION OF CHERYL J. COTTERILL

I, Cheryl J. Cotterill, declare as follows:

1. I am an attorney in good standing and am licensed to practice in the courts of the state of California and other jurisdictions.

2. I have been litigating capital cases since 2011 and I also represent post-conviction clients sentenced to Life Without the Possibility of Parole (LWOP). Below are some of the cases and oral arguments in which I have participated as Associate Counsel:

Cases include:

- *Bemore v. Chappell,* U.S. Ct. of Appeals No. 12-99005 [death penalty]
- *Bemore v. Chappell,* U.S. Dist. (S.D. Cal.) No. 08-CV-0311-LAB [death penalty]
- *In re Carrasco,* Cal. Sup. Ct. No. S191869 [death penalty]
- *People v. Carrasco,* Cal. Sup. Ct. No. S077009 [death penalty]
- *In re Bacigalupo,* Cal. Sup. Ct. No. S079656 [death penalty]
- *In re Lightsey,* Cal. Sup. Ct. No. S176414 [death penalty]

Oral arguments:

- Ninth Circuit Court of Appeals, *Bemore v. Chappell,* Case No. 12-99005, Sept. 10, 2014
- California Supreme Court, *People v. Carrasco,* Case No. S077009, May 29, 2014

3. Additionally, I have completed 12.25 hours of RJA training, thereby satisfying the requirements for the appointment of counsel in an LWOP retroactive case pursuant to Penal Code section 1473.1. Documentation of my credits and training will be provided upon request.

4. I previously represented Terry Bemore from approximately 2011 to 2023. Following litigation in the Ninth Circuit Court of Appeals, Mr. Bemore's case was sent back to San Diego for penalty phase resentencing. (*Bemore v. Chappell* (2015) 788 F.3d 1151.) As

stated above, on December 5, 2016, the San Diego Superior Court overturned the death sentence, and Mr. Bemore was thereafter sentenced to LWOP. (Abstract of Judgment, *People v. Bemore,* San Diego County Super. Ct. No. CR84617, Jan. 3, 2017.) The record in this case is extensive, consisting of 44 volumes of Reporter's Transcripts and 11 volumes of Clerk's Transcripts.

5. It is respectfully requested that this court appoint both myself and Pamala Sayasane to represent Mr. Bemore in his Racial Justice Act litigation.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on the 18th day of March, 2024, in San Francisco, California.

/s/ Cheryl J. Cotterill
CHERYL J. COTTERILL

PROOF OF SERVICE

I declare that I am over 18 years of age and not a party to the within cause. My business address is 660 4th Street, No. 341; San Francisco, California 94107. Today I served a copy of the attached

MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO RACIAL JUSTICE ACT (Pen. Code § 745)

electronically, or via U.S. Postal Mail, properly addressed to:

The Honorable Summer Stephan
District Attorney
Hall of Justice
330 W. Broadway
San Diego, California 92101

Terry D. Bemore
CDC# E-36301
California Medical Facility (CMF)
1600 California Drive
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California Appellate Project
345 California Street, No. 1400
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Habeas Corpus Resource Center
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San Francisco, California 94107
docketing@hcrc.ca.gov

Cheryl J. Cotterill, Esq.
1770 Post Street, No. 207
San Francisco, California 94115
cheryljcotterill@gmail.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on the 18th day of March, 2024, at Brisbane, California.

/s/ Pamala Sayasane
Pamala Sayasane

EXHIBIT A
(Declaration of Terry D. Bemore, Feb. 27, 2024)

TERRY D. BEMORE
CDC# E-36301
California Medical Facility (CMF)
1600 California Drive
Vacaville, California 95696-2000

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

TERRY D. BEMORE, Petitioner, v. DANIEL CUEVA, Warden of California Medical Facility Respondent.	Case No.: _____ **DECLARATION IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL IN RACIAL JUSTICE ACT CASE**

I, TERRY D. BEMORE, in support of my motion that this Court appoint Pamala Sayasane and Cheryl J. Cotterill to represent me in forthcoming Racial Justice Act proceedings, I declare the following under penalty of perjury:

1. In 1989, I was capitally tried, convicted, and sentenced to death in San Diego County Superior Court.

2. In 2015, the Court of Appeals for the Ninth Circuit reversed the district court's denial of habeas relief with respect to the penalty phase and returned the case to the state court to reduce my sentence to life without parole. I am now serving a sentence of life without the possibility of parole at the California Medical Facility in Vacaville, California.

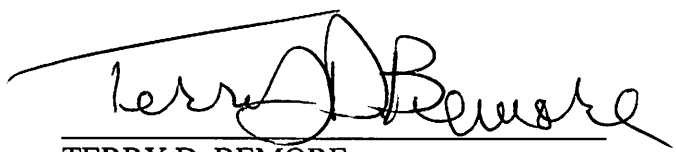
3. Both Ms. Sayasane and Ms. Cotterill have represented me at various stages of my habeas petition and appeals. They are familiar with the record and facts of my case. Given that this was a death penalty case, the record consists of 44 volumes of Reporter's Transcripts

and 9 volumes of Clerk's Transcripts. Their representation would save this court valuable time and resources. Moreover, I am indigent, and lack the legal training, knowledge, and resources to competently draft my own petition or litigate this matter.

4. I therefore request the appointment of Pamala Sayasane and Cheryl Cotterill to represent me in my Racial Justice Act litigation. The appointment of counsel is codified pursuant to Penal Code section 1473, subdivision (e).

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

Executed on this the 27th day of February 2024, at the California Medical Facility, Vacaville, California.



TERRY D. BEMORE

EXHIBIT B
(Declaration of Elizabeth Barranco, June 12, 2000)

I, ELIZABETH A. BARRANCO, declare under penalty of perjury the following:

1. I am an attorney licensed to practice in the State of California. I am certified by the State Bar Board of Legal Specialization as a criminal and appellate law specialist. I was one of two lawyers who represented Petitioner Terry Douglas Bemore ("Terry") in San Diego County Superior Court Case No. CR84617. I was appointed as second ("Keenan") counsel on the morning of October 6, 1986, before the preliminary hearing began. At that time, I was 26 years old and a partner in the law firm of Sheela, Barranco & Sheela with offices at 2368 Second Avenue, San Diego, California. Lead counsel was C. Logan McKechnie ("Logan"), a solo practitioner who is 18 years my senior. His offices were in the Tierrasanta area of San Diego.
2. Although I had worked as a law clerk on one capital murder case prior to being admitted to the bar in 1984, I had not personally handled a murder case as lead counsel prior to my appointment to the *Bemore* matter. I was appointed at the suggestion of and as replacement for prior second counsel Timothy C. Rutherford, who was leaving the practice of criminal law. Prior to my representation of petitioner, I had not represented anyone charged with murder.
3. I have been a member of the San Diego County Bar Association Appointed Attorneys Screening Committee since 1992. I am a member of an eight person committee comprised of lawyers and judges charged with evaluating and approving attorney applications for various levels of appointed case practice. In that regard, I am familiar with the requirements for an attorney seeking court appointed first or second chair work in capital cases. At the time I was appointed to the *Bemore* matter, I would not have been able to meet the standards currently in place for second chair counsel. For one thing, I had only been in practice for less than two years. Currently, second chair counsel must have practiced for three years. Under current requirements, I would have to have had five jury trials. In October 1986, I had only tried four cases, all in 1985. Three were in federal court (alien smuggling, drug smuggling and felon in possession of a firearm cases) and the fourth was a possession for sale case in state court. In 1986, however, the appointment of second counsel was made at the discretion of lead counsel. As such, my qualifications were never examined by anyone other that Mssrs. Rutherford and McKechnie.
4. My association with Mr. Rutherford began in 1983 when I obtained work as his law clerk prior to graduating from law school. During my third year of law school, I worked for Sheela, Rutherford & Sheela almost full time as a law clerk. In 1984, I went to work for Federal Defenders, Inc., in San Diego. After eight months in that office, I worked for a real estate litigation firm. In San Diego at that time, second counsel attended trial and sat at counsel table but rarely examined witnesses or addressed the jury. In that regard, I felt privileged to be allowed complete control over the penalty phase.. I wrote motions and did other case work for the firm in exchange for rent. By

October 1986, Mr. Rutherford had decided to leave the practice of criminal law. I was quite flattered that he was recommending me for appointment as second counsel in the *Bemore* matter and that his former partners, my mentors, wanted me to become their law partner. I later discovered the financial motives they had for keeping the case in the firm. At the time of my appointment, however, I felt truly honored.

5. It was explained to me by Mssrs. Rutherford and McKechnie that as second chair, my primary responsibility was to prepare all legal motions in the case. I was also to prepare the penalty phase. Logan was handling preparation of the guilt phase of the case. Logan told me that the defense was one of alibi and mistaken identity. Logan intended to focus on discrepancies between petitioner's car and the one witnesses saw at the crime scene. He thought that if the jury convicted petitioner notwithstanding his arguments in that regard, the jury would have doubts about Logan's sincerity. For that reason, he thought it best to have another attorney present and argue the penalty phase. I agreed with this decision and welcomed the responsibility. In San Diego at that time, second counsel attended trial and sat at counsel table but rarely examined witnesses or addressed the jury. In that regard, I felt privileged to be allowed complete control over the penalty phase. Accordingly, I spent most of my time preparing the pleadings we filed and directing the investigation and preparation of the penalty phase case.
6. Although I had only been in practice for two years, I was a very bright, energetic, creative lawyer. As such, I never felt incompetent or unable to represent petitioner. Having always excelled beyond my peers, it was not unusual for me to find myself, at the age of 26, preparing a penalty phase case. Eleven years later, however, I have to admit that my lack of experience prejudiced petitioner.
7. The first main area relates to my investigation of mental health defenses. The trial of the co-defendant, Keith S. Cosby, was severed from that of petitioner. The *Cosby* case involved two separate murders, one of which had no connection with petitioner. The *Cosby* case was tried in front of Judge Gill and concluded before the start of the *Bemore* trial. Cosby was found guilty of both murders but did not receive the death penalty. Neither I nor Logan sat in on the *Cosby* trial although I did read transcripts of portions of it. A mental defense was presented to Cosby's jury and as a result, he did not receive a death sentence even though he was convicted of two separate murders.
8. My lack of experience regarding the presentation of mental health evidence caused me to abandon my initial inquiry into petitioner's mental condition. In preparation for the penalty phase, I sought the services of Kenneth R. Fineman, Ph.D., a noted psychologist who I was told had taught at the University of Southern California. I was referred to Dr. Fineman by the author of an article I read in the Los Angeles Times concerning the "sun children" phenomenon. Such people were described as members of minority groups coming from poor homes and gaining admission into the upper class

"white" world by virtue of their talents. Where to most people they would appear to have been favored and thus have no excuse for subsequent criminal conduct, in fact, that behavior, most of which was drug related, was a product of the unique stress they experienced from having to live in two different worlds. I initially consulted with Dr. Fineman to see if petitioner fit the profile described in the news article I read. I thought he might because his personal history was consistent with what the article described.

9. Dr. Fineman administered a battery of psychological tests to petitioner in the San Diego County Jail in January and March, 1988, a year before our trial started. I was shocked to read the report he thereafter submitted to me. If I recall, it contained little if no mention of the "sun children" phenomenon and whether petitioner fit into that profile. Instead, it diagnosed him with some significant impairments that I thought were completely inapposite with the guilt and penalty phase defense and evidence we were planning on presenting at trial. The report indicated, among other things, that petitioner had "bi-polar affective disorder, neuropsychological difficulty, organic impairment, poor impulse control, pathologically impaired judgment [and] problems with ability to control impulsivity."

10. In 1988, I did not have much experience in dealing with mental defenses and working with experts. I was angry that the "sun children" idea that had initially drawn me to Dr. Fineman had been virtually ignored by him in his report. Still, I assumed that any other expert reviewing the Fineman test results would draw the same conclusions about my client. Those conclusions were contrary to Logan's defense that petitioner did not commit the homicide and my penalty phase plan to present him as a good guy with a drug problem, garnering whatever benefit I could from the notion of lingering doubt. I placed my copy of the Fineman report in the back of a file drawer and wished I'd never read it. No follow-up work was done by Dr. Fineman nor any other mental health expert.[1]

11. I never showed petitioner Dr. Fineman's report and only discussed it with him in minimal detail. I did not relate to him any of Fineman's diagnoses. I remember simply telling him that the report was "bad" and something we needed to bury.

12. The second area where my lack of experience as an attorney had a negative impact was with respect to supervising Logan's investigator, the late Charles H. Small, Jr. One of the tasks delegated to me was the preparation of funding requests pursuant to Penal Code section 987.9. I was also supposed to make all ex parte court appearances in connection with those requests. I had no control whatsoever over the trust account checkbook, however. Logan maintained that account at his office. I was not a signatory on that account and never saw any bank statements regarding it. I am informed and believe, however, that a total of $293,678.18 was paid to Logan

[1] Steven F. Bucky, Ph.D., a psychologist, testified at the penalty phase. I did not inform him that petitioner had been psychologically tested. Further, I never disclosed to him the Fineman report.

for deposit into the *Bemore* trust account for expert and investigation services. Of that, Small was paid approximately $145,851.81. Prior to November 1987, I made 987.9 requests for various experts and investigators.

13. Some time near the end of 1987, I became aware that large sums of money that were court ordered for investigation and law clerk expenses were not being properly used. Every thirty days or so, Logan would direct me to seek additional funding for Small. The grounds cited were that the robberies that were initially charged against petitioner in the Information were part of a series of 55 armed robberies (the "Tall Black Male" series). It was hoped that we could disprove petitioner was the "Tall Black Male" by thoroughly investigating the robberies that were charged along with those that weren't. [The charged robberies were later deleted when a second amended information was filed on January 6, 1989.]
14. Initially, I accepted Logan's representations regarding the need for funding for Small for this purpose. It became increasingly apparent to me, however, as time went on, that this was simply an excuse and that little if no work was being done to investigate the Tall Black Male series. Instead, Small was billing the investigator rate of $25.00 per hour for his wife (who Small later told me was receiving disability benefits from a job she used to have with the San Diego County Sheriff) to type up transcripts of the various tape recorded interviews provided in discovery. This work was, in my opinion, unnecessary since the DA's office also provided transcripts. In addition, most of the money I was requesting for my own law clerks was being routinely drained from the account to pay Small. I was becoming increasingly frustrated by the fact that the court would approve and pay for two months of law clerk services yet when my clerks presented their bills for payment, the account was dry due to payments to Small. I would then have to reapply for law clerk funding and my law firm would have to advance payment to my law clerks. Law clerks were an essential part of the defense team in those years before CD-ROM or affordable on-line research. My firm was one of the first in San Diego to acquire networked office computers but at that time, the only on-line legal research available was Lexis and was very expensive. For that reason, most of the legal research that needed to be done had to be performed manually in a library.
15. When I advised Logan of Small's improper conduct, he assured me that the investigator's billing practices were legitimate, that he was doing a fine job on the guilt-phase investigation and that they had enjoyed a good working relationship together for years on other cases. Thus, I reluctantly went along with requesting funds for Small to continue his work for Logan on the guilt-phase.
16. After the money requested in July 1988 was drained from the trust account almost immediately after the county check was deposited and prior to the time when it could have been earned by Small, I discussed my concerns with the late Barton C. Sheela, Sr., my law partner and mentor. At his suggestion,

I refrained from signing any 987.9 applications seeking funding for Mr. Small for work to be performed by him that I would not be directly supervising. I made a point of only requesting money the expenditure of which I would directly supervise. In that regard, Mr. Small was assisting me with contacting various individuals Terry had known over the course of his life.

17. In late 1987 and early 1988, I determined that it was necessary to travel to various locations to interview some of these close friends and associates of Terry's. Mr. Small accompanied me on these trips as my investigator. He would locate important witnesses and then tell me where they were. I would then request funds to travel to their location to interview them. I went on several fruitful trips with Mr. Small but after a time, it became apparent that Mr. Small was suggesting travel to various places for the sole purpose of earning easy money and not for any reason necessary to the case. Even the work I "supervised" thus became problematic.
18. To illustrate, in March 1988, Mr. Small advised me that it was imperative we go to Shreveport, Louisiana, to interview one of petitioner's basketball coaches. I have a fear of flying and did not want to make the long trip but Small emphasized that this was a very important witness regarding Terry's time at Morehead State. When we finally arrived in the rain in a small, commuter twin-engine plane and met the coach for dinner, I was shocked to hear the first words out of the coach's mouth. He said to Small: "You know, like I told you on the phone, I really don't remember Terry Bemore at all." I was furious with Small for wasting our time when he knew the witness had no helpful information. It was clear that he had set up this trip purely to justify his fees and earn frequent flier miles. Another concern of mine related to Small's allocation of per diem funds. Because the court authorized a maximum of $150.00 per day for hotel and meals, Small interpreted this to mean that every time we spent one night somewhere, we were to receive $300.00 in county funds. If we went to Los Angeles, for example, leaving by car at 9:30 a. m. and returning the following afternoon, Small insisted we were to be paid $300.00. He insisted that this was how per diem money was allocated as this was how it was done when he was a deputy United States Marshal transporting prisoners around the country. Initially, I believed Small, who was old enough to be my father. Nevertheless, I was uncomfortable with accepting his $300.00 cash payments for a one night trip to Los Angeles when my hotel and meals were barely $150.00. It seemed dishonest to pocket an additional $150.00. [Eventually, I wrote a check to the *Bemore* trust account in an amount slightly over $1,500.00 to repay what I deemed were excessive per diem payments to me by Small. I have no idea whether this money was actually deposited into the trust account although I do know the check was negotiated.]
19. In January and February of 1989, while I was doing an accounting of the 987.9 funds, I discovered for the first time that Small was routinely paid in advance from the general trust account by Logan. Small would then turn in

post-dated bills equaling the amount he was paid. Those amounts ranged anywhere from $5,000 to $10,000. At the county rate of $25.00 per hour, Small's work clearly did not justify the huge payments he was receiving. There were nowhere near the volume of reports to substantiate that the claimed investigation had even been done at all. One bill in particular, for July of 1988, was missing. When I asked Small for his copy of it, he provided me with a bill. Later, I found the missing bill. When I compared the bill Small had initially submitted in 1988 in order to be paid with the alleged duplicate bill provided by Mr. Small at my request in 1989, purportedly as a copy, I found no points of similarity other than the total amount due. This led me to suspect that Small's bills were all a fiction.

20. When I again confronted Logan regarding my suspicions about Small's fraudulent billing practices, Logan confided in me that he was aware of Small's improprieties. Logan stated that he continued to tolerate Small because the investigator knew that Logan had cheated on his wife, Barbara, on some business trip the two had taken. Logan was afraid that Small would reveal this information to his wife if crossed. Logan also expressed concern about Small's state of mind in that he persisted in telling people that he was to be the next appointee to the United States Marshal's position in San Diego. According to Logan, Small appeared to have delusions of grandeur.
21. By the time the *Bemore* case went to trial, Mr. Small was no longer working on it in any capacity. Because I had refused his request to seek court appointed funds enabling him to sit in the courtroom observing the trial, Small completely ignored the matter. (Logan's application for such funding was denied.) [Thereafter, I hired another investigator, Dorothy Ballew, to assist me with the penalty phase.]
22. The third area where my lack of experience proved prejudicial for petitioner concerns the fact that I did not express to the court my concerns that petitioner was receiving ineffective assistance of counsel during his trial. Although he gave me wide latitude in connection with my work, Logan was technically my superior in all aspects of the case At that time, it was my understanding that second counsel worked at the prerogative of lead counsel. In that regard, my lack of experience caused me to tolerate behaviors that I no longer find acceptable and which I currently have no hesitation in bringing to any court's attention.
23. Since Logan and I worked out of different offices, I did not know the extent of his lack of preparation until I moved my office into his building shortly before the start of trial in January 1989. Thereafter, we commuted to court together every day. At that point, it became apparent to me that, contrary to what I had been told for the preceding three years, Logan was not prepared to try the *Bemore* case and substantial amounts of investigation remained to be done. Notwithstanding this, Logan never took any files home to review. The case files remained in the courtroom.

24. During jury selection, Logan never took home any questionnaires. As a result, he did not review these materials before speaking with the prospective panel members. I would review them each night as would our jury expert, Jo-Ellan Dimitrius. Both of us had many conversations about our frustration over the fact that Logan never seemed to prepare for voir dire. It was as if he relied on us to tell him what he needed to ask. Logan's lack of preparedness was visibly noticeable even to our trial judge. On the day set for examination of the panel as a group (versus the individualized Hovey inquiry), the court criticized Logan out of the prospective jurors' presence. The court stated that if he had read the jurors' questionnaires, he would have found the answers to most the questions he posed. Logan was so offended by the judge's comment that when court reconvened, he only asked a couple more questions and then angrily stated that he passed for cause as he slammed his files onto the table. As a result of this, to my horror, several of the jurors who eventually sat on Petitioner's case were never examined during general voir dire. Logan was so angered by the court's comments that he refused to do any more voir dire even though the alternates had not been examined. That was why I questioned the prospective alternates the following morning.
25. The other troubling aspect of voir dire was that Logan insisted we excuse all men he suspected might be homosexual. He persuaded Steve Anear, the deputy district attorney trying the case, to stipulate to excusing any such person who seemed gay during the Hovey inquiry. I can recall at least one instance when the court asked why the parties were stipulating to the removal of one such man. I cannot recall whether Logan told the judge the reason nor whether the discussion about this was on the record. I didn't have a problem with allowing "suspected homosexuals" to sit in the jury but Logan was adamant about the fact that he "just couldn't trust 'queers.'"
26. Logan and Charlie Small were also prejudiced against black people. I remember Logan and Small making racial jokes about an investigator, Jim Murphy, who is African-American. On the times when we traveled to petitioner's boyhood neighborhood in South Central Los Angeles, Small would frequently irritate me with the racist comments he made about the people we would see walking down the street. In my opinion Logan and Small's feelings toward black people prevented them from investigating prosecution witnesses who were African American because they did not want to be around them. I think it also affected the way the client testified. Petitioner told me that just before he took the witness stand, Logan leaned over and whispered to him "Just don't act like a nigger" or words to that effect. I remember that petitioner found this statement unnerving enough to tell me about it later.
27. As a lawyer, Logan has a certain "stage presence" in the courtroom and is quite adept at thinking on his feet. He is capable of performances that one sees in the movies by actors pretending to be lawyers. Logan has all of the skills of a great trial lawyer but, as any lawyer knows, there is no substitute

for preparation. Logan's guilt phase preparation was disappointing. He had apparently not directed investigators to interview a number of key witnesses like Yolanda Salvatierra and Walter Cardwell. In fact, he did not even see the obvious inconsistency between their testimony. Cardwell, if I recall, placed the maroon Buick Electra at the scene of the homicide at about the same time that Salvatierra claimed petitioner was robbing her at the Wherehouse records store. Although this inconsistency was apparent at the preliminary hearing, Small conducted no witness interviews to substantiate it. In fact, one of the other Wherehouse victim/witnesses had moved to Alabama by the time the trial occurred and was unavailable. Logan's cross examination of the people who claimed petitioner had confessed to them consisted of nothing more than a review of their criminal records which the DA conceded they had. There was little if any impeachment with their prior statements which, to me, was surprising since most of them were drug addicts. In my experience, people who use drugs have memory lapses and are often inconsistent even when not trying to lie. It was during these examinations that it became apparent to me that little if no investigation into the backgrounds of the prosecution's witnesses had been conducted by Mr. Small.

28. Notwithstanding the complete lack of an adequately prepared defense, Logan kept telling me he thought we could win the case. In retrospect, Logan was gambling with petitioner's life. As the guilt phase wore on, it became apparent to me that we were definitely headed for a penalty phase. I enlisted the services of Isabel Wright and Dorothy Ballew to assist me in preparing for this phase. The presentation of evidence at the penalty phase was the product of their advice, counsel and assistance. During the presentation of the penalty phase case, I was pretty much on my own. Logan and I still commuted to court together each morning. He would ask me who was testifying and I would tell him. Other than that, he played no role whatsoever in the penalty phase case with one notable exception—he urged me to present "good prisoner" evidence and assured me that doing so would not open the door to any negative evidence. Logan assured me that petitioner's only serious write up in the jail was with respect to a "food tampering" allegation and that there had been a "factual finding of innocence" on that charge at petitioner's preliminary hearing. It is with regard to these issues that I know my lack of experience not only contributed to but likely caused petitioner to receive a sentence of death.

29. I had planned to present petitioner's life history to the jury in two phases. The first was to be his "life on the streets." That phase ended just prior to the Fourth of July holiday with the testimony of his wife Bernetta. When we recessed that afternoon, it was after an extremely emotional week during which many witnesses and even a few jurors were tearful. (I myself can remember on more than one occasion having to spend a little extra time in the hallway summoning a witness so that I could regain my own composure.)

The second week of testimony was going to be a description of petitioner's prison life. I wanted to show the jury that he was not a problem in a custodial setting and would be an asset to any prison where he was housed. By allowing him to live, society would actually benefit since he was a leader by nature and would be a powerful positive influence on any young criminals serving determinate sentences with whom he might be housed. His history of rendering assistance to deputies in distress was also a good sign that showed he would never be a threat to any prison guard and if push came to shove, would probably assist them in any kind of altercation with inmates.

30. Because we ended the life on the streets portion of the case on such a sympathetic note, I was unsure as to whether I should even go into the prison behavior information. I didn't want the jury to forget about what they had heard during the first week. I was also concerned about opening the door to rebuttal evidence that I could not foresee. Where I was fairly certain that there were no rebuttal witnesses regarding petitioner's life history, I didn't want the good jail behavior testimony to open the door to evidence about an otherwise inadmissible food tampering allegation.

31. In the summer before his trial, petitioner had been charged with food tampering in the county jail. Logan was appointed to represent petitioner in connection with that case. Both he and petitioner assured me that the charges were bogus and my review of the discovery in connection with that matter confirmed their assessment. Logan told me that the case was dismissed at preliminary hearing and that the court had made a "factual finding of innocence." He used that phrase whenever he mentioned the food tampering case to me. When I questioned him in July 1989 about the matter out of concern that having the deputies testify would open the door to this evidence, he again told me there had been a "factual finding of innocence." As such, by putting on the deputies to testify about petitioner's good conduct, I would not be opening any doors to that incident since the court had ruled it never occurred. I was busy preparing witness exams and doing other work on my case and accepted Logan's representations. I never went to the court file to verify the factual finding of innocence. As a result, I was completely taken aback when informed in court that no such finding had been made but that the case had been dismissed because petitioner's misconduct did not fit the statutory definition of the crime charged. I was even more surprised to hear inmate witnesses describe other bad acts allegedly committed by petitioner, acts that were never mentioned in any of their prior reported statements regarding the food tampering charges.

32. When preparing the deputies who did testify, I was careful to ask if they had ever heard of *Bemore* engaging in any misconduct. After all, many of them offered reputation character evidence. None of them had ever heard of any incident other than the food tampering one. I was not aware of any other acts of jailhouse misconduct allegedly committed by petitioner that were described

by the prosecutor's rebuttal witnesses.[2] Had I known that by having deputies testify about petitioner's behavior as a model prisoner, I would be opening the door to some of the worst allegations that can be made about an inmate at his penalty phase hearing (i.e., that he intimidated other young inmates by suggesting they would have to provide sexual favors and that he tolerated drug use in prison), I would never have introduced the good jailhouse behavior. No lawyer in her right mind would knowingly open the door to such evidence at her client's penalty phase trial. The prosecutor's rebuttal case eviscerated my good prisoner evidence and destroyed all of the other "life on the streets" evidence presented the previous week. Many of the life history witnesses knew petitioner from his church related activities. To have anyone testify that he feigned his faith in order to manipulate severely undercut that other evidence. Against that backdrop, "lingering doubt" became more and more a fantasy.

33. In affirming petitioner's conviction, the Supreme Court stated that the rebuttal evidence could not have materially affected the balance of factors in aggravation and mitigation. This is not the way I remember the impact of that evidence in the courtroom, however. The admission of the rebuttal evidence changed the mood in the courtroom dramatically. Whereas the jurors had previously seemed sympathetic and at times tearful, I watched in horror as some began to glare at our table during the prosecution's rebuttal case. Those who stopped looking at our table started sitting with crossed arms staring at the floor. It was as if they felt they had been conned by petitioner, a man with two personalities and two very different behavior patterns. All of the jurors were at least ten years older than I and none of them, like me, were noticeably pregnant during the penalty phase.[3] When any of them ever did look my way, it was with an expression of pity. I knew before I even gave my closing argument that we had lost the jury.
34. My decision to introduce evidence regarding petitioner's good behavior was based, per Logan's information, on the fact that he had been found factually innocent of any misconduct regarding the food tampering case **and** my lack of knowledge of any other negative conduct. In my heart, no matter what anyone who wasn't there wants to believe now, over ten years later, I know what changed the climate in that courtroom and the outcome of the case. It *was* prejudicial. I know that if I had never opened the door to evidence I didn't even know existed, petitioner would have received life without parole. It is this thought that has been nagging at me for the last ten years.

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[2] In its opinion affirming petitioner's conviction, the Supreme Court stated that "[n]othing in the record indicates that Barranco was unaware of all the other evidence admitted on rebuttal, including various threatening and assaultive acts similar to conduct described by inmate Heflin at the guilt phase." (People v. *Bemore* (2000) 94 Cal.Rptr.2d 840, 869.) In fact I was **completely** unaware of any of the conduct described by Heflin and the prosecutor's other rebuttal witnesses. **I still believe they were lying with regard to most of it.**

[3] Petitioner's trial began when my first son was three months old having been born on October 14, 1988. During the penalty phase, I was six months pregnant with my second son who was born December 26, 1989.

35. Assuming it was proper to admit the totally unexpected "bad jailhouse behavior" evidence, my response thereto again demonstrated a lack of criminal law experience. If I knew then what I know now, I would have subpoenaed each witness's central file and cross examined him about his racist prison gang affiliations. I should have demanded a continuance to do a full background investigation on each one of the rebuttal witnesses in petitioner's case, all of whom had been housed with him in 2F, the protective custody "tank" at the jail. All or most had been to state prison and as such would have had documented in their prison files the reasons why they needed protection. In 1989, I had been a lawyer for five years and prison life was unfamiliar to me. Currently, I know that most such inmates have prison gang affiliations and that those affiliations are based entirely on race. They are in need of protection because they have incurred drug debts they cannot pay and have either been stabbed or fear they will be as a result. Rarely are inmates housed in protective custody because they have done some valiant act or, like petitioner, because they have a law enforcement background.
36. Even if the inmates' central files disclosed no impeaching information, I still should have questioned the witnesses regarding what I now know to be the racist prison environment where they had spent their time. In 1989, however, I did not have this knowledge. I was unaware, for example, that mixed race inmates never cell up together. It would be rare to find an Hispanic and black inmate agreeing to live together in the same cell and even rarer for the Hispanic inmate to take direction from the black inmate. I now know that prison is one of the final frontiers of racism in our society. I have since visited clients at prisons and been shocked to see signs on the visiting door informing visitors that "Mexicans" are all on "lock down" for some indefinite period or that "blacks" cannot receive visitors. In prison, when a member of one race commits misconduct, it can cause a loss of visits for every other member of that race, whether he was involved in the misconduct or not. The system engenders racial group identification and fosters existing biases and hatreds. Inmates live in a racist world while in prison. I had no idea about the extent of it in 1989, nor that the glue holding the whole inmate culture together was the underground trafficking of the street drugs. Inmates who interrupt this flow are hated by the rest.
37. I never appreciated this issue until 1996, seven years after petitioner's trial. I was in the county jail with an investigator talking to a client, Virgil Garrett. He was telling us about his history as an informant for the CDC and various law enforcement agencies dating back to 1985 when he prevented two murderers from escaping from San Quentin's mainline population. I mentioned to him that I had a former client currently at San Quentin named Terry Bemore. He told me that he was briefly housed in the 2F tank with Bemore and remembered him well. What he remembered most, he said, was that Bemore was tank captain and was black. Garrett, who is white and a former Aryan Brotherhood member, said that this was particularly disturbing

to him and the other white inmates who resented having to take orders from, as he put it, a "nigger." The inmates were frustrated because petitioner, who if I recall is close to 7 feet tall and physically fit, was not someone they felt comfortable challenging. [In fact, Garrett told me that he started a fight with Bemore on one occasion over the issue of him being tank captain and lost.] In 2F, the "snitch tank," there was also much resentment against Bemore for his anti-drug policies. Finally, Garrett reminded me that during this time, jailhouse informing was in vogue as a means for lessening one's sentence. In fact, the infamous Leslie Vernon White story was on 60 Minutes during the Hovey portion of petitioner's case and was discussed with potential jurors the following morning. Snitches would pay particular attention to high profile inmates, usually those charged with first degree or capital murder. They would learn as much about their cases as they could and then invent a jailhouse confession that sounded credible. Inmates in the 2F "snitch tank" were actively trying to learn as much about Bemore's case as they could so as to parlay a false confession they claimed he made into a reduction in their own sentences. Garrett told me that he was moved out of the tank prior to petitioner's trial so he didn't know whether anyone ever actually was able to do that.

38. After the trial, I had Dorothy Ballew, an investigator, interview jurors. Augustin Albarran, who I remember as being in his 70's, admitted to her that he performed a timing experiment during guilt-phase deliberations. The guilt phase defense had been that petitioner did not commit the homicide at the Aztec Liquor Store because he was committing a robbery at the time at a Wherehouse record store. Mr. Albarran told Ms. Ballew that a key issue for the jury was whether to believe the alibi defense. In order to assist his determination of this fact, Mr. Albarran drove the route from the Wherehouse record store to the Aztec Liquor Store. Based on the results of his test, Mr. Albarran decided that petitioner could have committed the Wherehouse robbery and also the Aztec robbery-homicide. Based on the evidence Mr. Albarran developed in his experiment, he found the alibi defense not credible since it was possible for the petitioner to commit both crimes. Consequently Mr. Albarran rejected the defense argument.
39. Ms. Ballew advised me of the disclosures made by Mr. Albarran. Although I can now see how his clearly established juror misconduct and tainted the jury verdict, I did not direct Ms. Ballew to obtain a declaration from Mr. Albarran.
40. In the years since the *Bemore* case, I have handled several other capital murder cases. In 1991, I succeeded in having special circumstances dismissed due to prosecutorial misconduct. My last murder trial in 1997 resulted in a not guilty verdict. The issues that troubled me about the *Bemore* case back in 1987, 1988 and 1989 are now glaring examples of ineffective assistance of counsel. I blame myself to this day for not being more assertive and, if necessary, seeking a substitution of counsel for Logan McKechnie and a replacement for the investigator. In the last capital case I

handled in 1993, a similar circumstance existed where co-counsel was not holding up his end of the case. I disclosed my concerns to the client and I persuaded my co-counsel to join in the client's motion to have him relieved rather than go through an embarrassing hearing. Due in part to my inexperience and naiveté and in part to what I perceived the role of second counsel to be, I did not do this in the *Bemore* case. While I may rationalize that I had no choice and no real control, in my heart it feels like I abandoned my fiduciary duty to the client. I can't help but feel that as a result, he received one of the first death sentences imposed in our county since 1978, a sentence that never should have been imposed against this petitioner based on the evidence against him and the mitigating factors in his background.

41. Terry Bemore was not adequately represented in the guilt and penalty phases. As a result, he was prejudiced.

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

Executed on this 12th day of June, 2000, in San Diego County, California.

ELIZABETH A. BARRANCO

EXHIBIT C
(Declaration of C. Logan McKechnie, Nov. 1, 2023)

DECLARATION OF C. LOGAN MCKECHNIE

I, C. Logan McKechnie, declare as follows:

I am a criminal defense attorney with over forty years of experience. I have tried over 500 trials including ten death cases. I was Terry Bemore's trial counsel from 1987-1989, when he was charged and put on trial for capital murder. Elizabeth Barranco was my co-counsel. On August 26, 1985, Terry Bemore was convicted and sentenced to death for first degree murder, robbery, burglary and two special circumstance enhancements: torture and murder occurring during the commission of a robbery. Mr. Bemore was eligible to receive the death penalty because the murder occurred during the commission of a robbery and the murder involved the infliction of torture.

At the time of the trial, San Diego County was very conservative. The prosecution originally thought that Mr. Bemore and his co-defendant Mr. Cosby were gangsters because there was a lot of gang violence in San Diego. I did my best to pick a fair jury. Jury selection in this case took approximately eleven days. But in the end, I do not think Mr. Bemore got a fair trial because of his race.

Mr. Bemore was an athlete, a college graduate, a pastor, a cop, a military man, and a family man. I believe that the jury did not have any sympathy for Mr. Bemore because the jury perceived he did not take the "breaks" that were given to him, especially because Mr. Bemore is black. The jury also had no sympathy for his drug addiction. I think the jury would have looked at Mr. Bemore more sympathetically if he were white.

I developed a close relationship with Mr. Bemore over the course of the four years that I represented him. He was very educated, well-spoken, bright, and articulate. We understood each other and were able to speak candidly. Mr. Bemore was a good man.

Immediately before Mr. Bemore took the stand, I could tell he was nervous because he was hyper and using street slang at counsel table. He was not acting like his normal self—he was

acting like a criminal. I told Mr. Bemore, "Don't get up there and act like a fucking nigger." I made this comment to Mr. Bemore because I knew that Mr. Bemore was an upstanding person. I noticed that he was putting on a ghetto impression for the jury because he was nervous to testify. I had never seen Mr. Bemore act ghetto like that before and I was afraid of how the jury would perceive him.

I had no problem saying what I said because of the kind of man I knew Mr. Bemore was. I would have said it to him in the privacy of my home. I would have felt comfortable saying that to him in the jail cell. I would have said it to him at counsel table, but I would not have said it in public in front of the jury.

Lastly, I have a lot of frustration with my co-counsel in the case, Elizabeth Barranco. Elizabeth was hiding information from me during the course of our representation of Mr. Bemore. Ms. Barranco was keeping secrets from me and I did not find out until after the trial when it was disclosed in an opinion from the appellate court.

I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on November 1, 2023.

11/01/2023
Dated

C. Logan McKechnie

EXHIBIT D
(Declaration of Gabby Sergi, Nov. 1, 2023)

DECLARATION OF GABBY SERGI

I, Gabby Sergi, declare as follows:

I am an Assistant Professor and Supervising Attorney at the University of San Francisco School of Law Racial Justice Clinic (RJC). In the summer of 2023, the RJC began working with attorneys Pamala Sayasane and Cheryl Cotterill on behalf of an incarcerated individual, Mr. Terry Bemore. In the Fall 2023 semester, I supervised David Ruize and Derick Morgan, two USF law students. David and Derick were assigned to investigate any potential Racial Justice Act (RJA) claims for Terry Bemore. As part of their investigation, Derick and David interviewed C. Logan McKechnie, Mr. Bemore's former trial defense attorney. The initial interview with Mr. McKechnie took place on October 24, 2023 at approximately 9:15 am via telephone. I was supervising Derick and David during the interview and Mr. McKechnie was aware of my presence on the call. On November 1, 2023 at approximately 12:45 pm, I supervised Derick and David during a follow-up call with Mr. McKechnie to review the declaration. Mr. McKechnie was again aware that I was on the call.

During both calls, Derick and David spoke with Mr. McKechnie while I took detailed notes.Mr. McKechnie's declaration is a true and accurate representation of the initial conversation we had with him on October 24. However, during our follow-up call, Mr. McKechnie requested that we omit one notable quote from his first conversation with us.

During our first call, Mr. McKechnie told Derick, David and me that immediately before Mr. Bemore took the stand, he could tell Mr. Bemore was nervous because he was "shucking and jiving" at counsel table. Mr. McKechnie requested that we remove that quotation from the declaration. Specifically, Mr. McKechnie said, "Don't say shucking and jiving because that's too racist." In response, Derick asked Mr. McKechnie what he meant by "shucking and jiving" and if he had a suggested edit. Mr. McKechnie requested replacing the phrase "shucking and jiving" with "hyper and using street slang."

I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on November 1, 2023.

November 1, 2023
Dated

Gabby Sergi