No. D084579

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

TERRY D. BEMORE,
Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

San Diego County Superior Court
Case Nos. CR84617, HC26799
Hon. Polly H. Shamoon

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND [PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER TERRY D. BEMORE

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APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 8.487(e) of the California Rules of Court, proposed *amici curiae* respectfully request leave to file the accompanying proposed *amici curiae* brief in support of Petitioner Terry D. Bemore.

INTERESTS OF *AMICI CURIAE*[1]

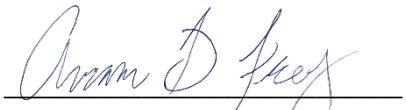
The American Civil Liberties Union of Northern California and the American Civil Liberties Union of San Diego and Imperial Counties ("*Amici*") are California affiliates of the national American Civil Liberties Union ("ACLU"), a non-profit, non-partisan civil liberties organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions. *Amici* have a keen interest in the Racial Justice Act, having advocated for its passage, collected and disseminated statistical data for analysis of potential claims statewide, and litigated as amicus and direct counsel in support of individual petitioners. Seeing the RJA meaningfully enforced is among the affiliates' most significant commitments. *Amici* also perform significant policy and litigation advocacy on behalf of indigent people charged with criminal offenses. As a result, the affiliates are acutely sensitive to the burdens and capacities of the state's

[1] Proposed *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amici curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. (*See* Cal. Rules of Court, rule 8.200(c)(3).)

many public defender offices and work collaboratively with county and state actors to assure the best possible public defense function. *Amici* therefore request leave to file the accompanying proposed brief.

Dated: November 26, 2024

Respectfully submitted,



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BRIEF OF *AMICI CURIAE*

INTRODUCTION

This case presents a confluence of factors that require appointment of private counsel under Penal Code section 987.2, subdivision (e). Mr. Bemore has been represented by private counsel, Pamala Sayasane and Cheryl Cotterill, for nearly 20 years—counsel who succeeded in vacating his death sentence. After the Legislature passed the Racial Justice Act and made it retroactive for non-capital cases, counsel immediately recognized that Mr. Bemore had a viable claim and contacted attorneys with the Office of the San Diego Public Defender (OPD). That office demurred, and private counsel filed the petition on their own. In turn, the superior court issued an Order to Show Cause. But the superior court appointed the OPD, finding it "available" despite an admission from the assigned attorney that he would need a year to get up to speed. This appointment was an abuse of discretion.

When a public defender agency is "available" for appointment under Penal Code section 987.2, subdivision (e), is not defined by statute, but caselaw suggests an overarching standard and a context-specific inquiry. Here, culmination of several factors unique to this particular case require that the OPD be determined "unavailable." These factors include the OPD's repeated, prior statements encouraging private counsel to take the case; private counsel's reliance on those statements in researching, drafting, and filing a habeas petition; the OPD's admitted inability to advance Mr. Bemore's habeas petition for a

period of at least a year; private counsel's readiness to advance the matter immediately; private counsel's longstanding relationship of trust and confidence with Mr. Bemore, in contrast to the absence of any relationship between OPD and this client; Mr. Bemore's advanced age and poor health; the purposes of California's Racial Justice Act (RJA); and the practical realities of RJA appointments in retroactive cases. Taken together, these case-specific factors warrant a writ of mandate directing the superior court to find the OPD "unavailable" and to appoint private counsel.[2]

ARGUMENT

Under the facts of this particular case, section 987.2, subdivision (e)[3] should be interpreted to find the OPD unavailable for appointment to represent Mr. Bemore in his habeas petition raising post-conviction claims under the RJA.

In pertinent part, section 987.2 states:

> In a county of the first, second, or third class, the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants. In the event

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[2] Upon finding the OPD unavailable, the superior court may appoint private counsel in lieu of alternate public defender agencies as the interests of justice require. (§ 987.2, subd. (e) ["In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record."].) *Amici* do not here argue the basis for a finding of good cause to appoint private counsel out of order but concur in and defer to the arguments of private counsel in this regard.

[3] All statutory citations are to the Penal Code unless otherwise noted.

> that the public defender is unavailable and the county has created a second public defender and contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record.

(§ 987.2, subd. (e).) San Diego is a county of the third class, (§ 987.2, subd. (j) [citing Gov. Code, §§ 28020, 28022]), so the superior court was required to appoint the OPD unless that office is "unavailable." It is.

"Availability" is not defined by statute, but decisional law holds: "Whether an attorney can be ready for trial and in court on the trial date designated by the court is the standard we use in determining whether an attorney is available for appointment." (*Williams v. Super. Ct.* (1996) 46 Cal.App.4th 320, 330.) *Williams* identified this standard by reference to section 987.05, which provides:

> In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code.

(*Id.* at p. 329 [citing (§ 987.05].) Trial readiness and availability, the Court concluded, are one and the same. In determining an attorney's trial readiness, *Williams* explained, courts must not "adhere to a fixed policy" but must consider any relevant factors, including the "number and trial age of cases . . . , the expected length of those trials and their scheduled dates . . . . [and] the reliability of counsel's representation of readiness based upon past experience." (*Id.* at pp. 330-31.)

There is no published decisional law applying the "trial readiness" standard in the post-conviction context; it is accordingly an open question whether a public defender agency must be found ready to *file* a habeas petition, or rather to litigate a petition upon a court's issuance of an order to show cause. But even adopting the more lenient, latter application, the OPD is unavailable here given the confluence of several factors.

First, the OPD stated to private counsel repeatedly and consistently that private counsel should represent Mr. Bemore in a habeas petition on behalf of Mr. Bemore. From before private counsel began work until after the superior court issued an OSC, OPD attorneys maintained that private counsel should represent Mr. Bemore. It was only after the superior court directed the OPD to address application of section 987.2 that the OPD

reversed course, apparently out of concern over the impact of a finding of unavailability on future cases. (*See* Reply at pp. 14-15.) In evaluating a public defender agency's statement of availability, "a trial court is not obligated to accept an attorney's representation at face value." (*Williams*, *supra*, 46 Cal.App.4th at p. 331.) Here, where OPD attorneys made numerous and continuing representations that private counsel were better situated to handle Mr. Bemore's petition, and where the agency's reversal seemingly reflected institutional concerns rather than any change in facts, the superior court should have found OPD's initial representations more credible than its later one. (*See People v. Cole* (2004) 33 Cal.4th 1158, 1188 [superior court reasonably viewed with skepticism counsel's representation of readiness given prior representations].)

Second, private counsel reasonably relied on the OPD's repeated representations of unavailability in researching, drafting, and filing Mr. Bemore's petition. Appointment of the OPD now would not only deprive private counsel of compensation for their work—efforts that the superior court agreed establish a prima facie violation of the RJA—it would entail the opportunity cost of lost future compensation for any work private counsel did not accept or work up in reliance on the OPD's prior representations. Such a result is, of course, unfair to private counsel, but more broadly, it threatens to undermine the purpose of the RJA in general.

The RJA was enacted to redress a failure of existing legal doctrines to root out the influence of racial bias in the criminal

legal system. (*See Young v. Super. Ct. of Solano Cnty.* (2022) 79 Cal.App.5th 138, 149-50 ["[T]he Legislature states an intent to purge racial discrimination from our criminal justice system."] In furtherance of this purpose, the statute includes "a lower standard of proof at the prima facie stage," (*Finley v. Super. Ct.* (2023) 95 Cal.App.5th 12, 22 [citation omitted]), a low threshold for discovery, (*see* § 745, subd. (d)), and significantly here, it is fully retroactive, (§ 745, subd. (j)). The Legislature thus plainly intended to encourage filing and facilitate merits determination of all meritorious claims in cases where the conviction and sentence are final, considering this necessary to fully "purge" the taint of racism from the criminal legal system.

The RJA is not self-executing, however. It creates no agency for systematic review of pending or closed cases, and it appropriates no funding for counsel. The task of investigating and preparing claims accordingly falls to defense attorneys as funded in the ordinary course, whether through the counties or by private retainer. For people who are indigent, this poses a challenge, particularly in retroactive applications, because public defender agencies do not, and cannot, systematically review all closed cases for potential claims in habeas corpus. The labor and resources required to scour the record for potential violations of section 745, subdivisions (a)(1) and (2)—let alone to build and analyze data sets for potential violations of subdivisions (a)(3) and (4), which rely on statistical, aggregate proof—are monumental for *a single case*. There are, of course, many thousand of closes cases at a minimum in every county state-

wide. Public defender agencies are thus reliant on notice and inquiries—from incarcerated people, their support networks, and outside counsel—to help identify potential RJA violations retroactively. That is what happened here. Attorneys Sayasane and Cotterill alerted the OPD, in detail and on multiple occasions, to the viability of an RJA claim on behalf of Mr. Bemore, but the OPD demurred. If private counsel cannot rely on the word of public defender agencies that they are unavailable and that private counsel should proceed with preparing an RJA claim to be filed in a petition for writ of habeas, they simply will not do so. As a result, fewer meritorious RJA claims will be filed, and fewer convictions and sentences marred by racial prejudice will be identified and remedied—in direct contravention of the Legislature's purpose in enacting the RJA.

The Court may and should consider this impact in interpreting "unavailability" under section 987.2. In construing the language of a statutory provision, courts take account of other sections of the code and, where possible, construe them in harmony. (*See Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838 ["[Courts] must, where reasonably possible, harmonize statutes" (citation and quotation marks omitted).] "Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute." (*State Dept. of Public Health v. Super. Ct.* (2015) 60 Cal.4th 940, 955 (citation and quotation marks omitted); *see also Newark Unified Sch. Dist. v. Super. Ct.* (2015) 245 Cal.App.4th 887, 908 [where two provisions may be read

consistently, courts must do so to "maintain the integrity of both statutes, thereby honoring the presumed intent of the Legislature" (citations and quotation marks omitted).] Under these circumstances, private counsel's reliance on the representations of the OPD should be vindicated to give effect to the purpose of the RJA.

Third, the OPD admits that it will require one year to get up to speed. In *People v. Mungia*, the California Supreme Court held this precise delay sufficient to support a finding of unavailability, particularly where, as here, alternative counsel could advance the matter much more quickly. ((2008) 44 Cal.4th 1101, 1121; *see also People v. Avila* (2009) 46 Cal.4th 680, 695 [upholding removal of indigent defense counsel who requested "a continuance of at least 12 months"].); *see also People v. Cole*, *supra*, 33 Cal.4th at p. 1188 [upholding removal and reappointment of counsel in light of repeated defense motions for continuance to prepare for trial].) Mses. Sayasane and Cotterill are intimately familiar with Mr. Bemore's trial record, the basis for his habeas petition, and the pertinent provisions and decisional law making out a claim under the RJA; they have also established a relationship of trust and confidence with Mr. Bemore over decades of representation. They are accordingly ready to brief the matter and, as necessary, bring it to an evidentiary hearing as soon as practicable. Furthermore, the delay of a year is particularly prejudicial in this case because Mr. Bemore is of advanced age and infirm. (Reply at pp. 29-30; Decl. of Cheryl Cotterill at ¶ 15.) After serving over 30 years in prison,

he should not be required to wait an additional year for resolution of a claim the superior court agrees raises at least a prima facie claim of racism in his underlying conviction and sentence.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Mandate.

Dated: November 26, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amici Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 2,136 words. This total includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Application to File *Amici Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. (*See* Rule 8.204(c)(3).)

Dated: November 26, 2024

By: /s/ Avram D. Frey
Avram D. Frey

PROOF OF SERVICE

I, Kassie Dibble, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is kdibble@aclunc.org. On November 26, 2024, I served

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND [PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER TERRY D. BEMORE

BY ELECTRONIC TRANSMISSION OR U.S. MAIL: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 26, 2024 in Estes Park, CO.

Kassie Dibble