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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JEFFREY FORTENBERRY,

15 Defendant.  
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Case No. 2:21-cr-00491-SB-1  
Hon. Stanley Blumenfeld, Jr.

**DECLARATION OF JOHN L.  
LITTRELL**

1 **DECLARATION OF JOHN L. LITTRELL**

2 I, John L. Littrell, declare as follows:

3 1. I am a partner at Bienert Katzman Littrell Williams LLP and counsel for  
4 Jeffrey Lane Fortenberry, the defendant in this case. I submit this declaration in  
5 response to the Court’s Order to Show Cause, Dkt. No. 225.

6 2. I was admitted to practice law in California in 2002. After a short period  
7 at a large law firm, I went on to serve as a law clerk for the Hon. A. Wallace Tashima  
8 on the Ninth Circuit Court of Appeals. In 2004, I started my career with the Federal  
9 Public Defender’s Office for the Central District of California. I worked as a Deputy  
10 Federal Public Defender for about 12 years. I have been in private practice since 2017.

11 3. I have spent most of my legal career as a criminal defense attorney,  
12 primarily practicing in federal court. I have never been disciplined or censured.

13 4. I made a strategic decision to address the fact that Mr. Fortenberry chose  
14 not to testify during closing argument in this case. I knew there was a risk that  
15 commenting on Mr. Fortenberry’s decision not to testify would open the door for the  
16 prosecution to comment on that choice too, which it otherwise could not have done.  
17 *See United States v. Robinson*, 485 U.S. 25, 32 (1988). This is what I meant when I  
18 told the Court that the “risk falls on the defense when we do that.” Dkt. No. 225 at 2;  
19 *see also* Dkt. No. 204 at 244 (“[T]he risk of making that argument falls on the defense.  
20 I mean, that could potentially open the door for the Government to respond.”).

21 5. I have made references in closing argument to my client’s decision not to  
22 testify on several occasions in the past. The theme of my comments has generally been  
23 to emphasize that the decision to testify cannot be considered by the jury, but also to  
24 acknowledge the difficulty jurors may have in following that instruction, and to try to  
25 place the decision not to testify in context of the risks it places on the defendant. I do  
26 not believe any prosecutor has objected to those remarks until this case.

1           6.     My intention in this case was to emphasize (1) that Mr. Fortenberry had  
2 already explained during his 2019 statements to FBI agents and prosecutors what he  
3 heard, understood, and remembered from the 2018 call from Dr. Ayoub, (2) that the  
4 explanation he gave in 2019 was credible, and (3) that because many years had passed,  
5 Mr. Fortenberry's testimony in 2022 would not have been more reliable than his  
6 statements in 2019. I did not mean that to suggest a fact that was unique to Mr.  
7 Fortenberry or to paraphrase the substance of testimony he would have given.

8           7.     Almost twelve years ago, when I was a Deputy Federal Public Defender,  
9 I argued in closing that my client's testimony was unnecessary and risky considering  
10 the evidence presented at trial in *United States v. Williams*, No. 10-cr-535-PSG. But I  
11 took it a step further in that case by saying that I told my client not to testify. Although  
12 there was no objection, Judge Gutierrez pointed out after the closing that he thought  
13 my argument about what I told my client was improper. I agree. He was right.

14           8.     I have not heard a judge comment on or criticize my remarks about the  
15 defendant's choice not to testify since Judge Gutierrez did so in 2010.

16           9.     I was not thinking about Judge Gutierrez' comments as I was preparing  
17 my closing argument in this case. I did not write out a script. I rarely do. One risk of  
18 speaking without notes is that I may make an argument that is imprecise or poorly  
19 worded. That is what happened here. In hindsight, I see that my comments were  
20 inartful and capable of being interpreted as arguing facts not in the record.

21           10.    In the process of responding to the Court's OSC I have reflected on my  
22 summation in this case and others. In hindsight, I understand that making any reference  
23 to the defendant's choice not to testify creates substantial risk to the defendant, which  
24 may outweigh the potential benefit. I also see how any attempt to explain or  
25 contextualize the defendant's choice not to testify is problematic because the specific  
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1 reasons for that choice are personal and different for each defendant and that any  
2 decision to comment on that could implicate facts that are not in the record.

3 I declare under penalty of perjury that the foregoing is true and correct. Executed  
4 this 25th day of July 2022, at San Clemente California.

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