

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TERRY LEE CEASOR,
Defendant-Appellant.

Supreme Court No.: 159948
Court of Appeals No.: 338431
Trial Court No.: 05-000220-FH

**DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

University of Michigan Law School
Michigan Innocence Clinic
David A. Moran (P45353)
Imran J. Syed (P75415)
Megan B. Richardson (PL1090)
Samuel White (Student Attorney)
Thomas Palumbo (Student Attorney)
ATTORNEYS FOR DEFENDANT-APPELLANT
701 S. State Street
Ann Arbor, MI 48109
(734) 763-9353

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF SUPPLEMENTAL QUESTION PRESENTEDv

INTRODUCTION1

STATEMENT OF FACTS AND PROCEDURE.....2

 A. The Underlying Incident and Hospital Examinations.....2

 B. The Retention of Trial Counsel and Lack of Expert Funding3

 C. The Trial.....4

 D. Direct Appeal and 2010 Motion for Relief from Judgment.....7

 E. Federal Habeas Relief Granted on Ineffective Assistance of Appellate Counsel.....8

 F. Reinstated Direct Appeal and Motion for New Trial.....8

 G. Evidentiary Hearing on Motion for New Trial9

 H. Trial Court Decision Denying Motion for New Trial10

 I. Court of Appeals Opinion Affirming Trial Court Decisions11

SUMMARY OF ARGUMENT13

ARGUMENT.....15

 I. This Court Should Reverse Or Grant Leave To Appeal Because Trial Counsel Was Constitutionally Ineffective For Failing To Request Expert Funds In A Shaken Baby Case Where Counsel Admitted An Expert Was “Absolutely” Necessary And He Knew His Client Could Not Afford The Expert Who Was Ready To Testify.15

 A. Trial Counsel Performed Deficiently In Failing To Request Expert Funds Based On A Mistaken Legal Belief That A Defendant With Retained Counsel Cannot Obtain Such Funding.....15

 1. There is no dispute that an expert was necessary here for an adequate defense.15

 2. There is no dispute that trial counsel had found a qualified expert ready to testify on Mr. Ceasor’s behalf.....16

 3. There is no dispute that the only reason counsel did not call Dr. Bandak (or another expert) was because Mr. Ceasor did not have the necessary funds.17

 4. There is no dispute that counsel did not request expert funds because he erroneously believed a client with retained counsel was ineligible for funds.17

5. Counsel’s failure to request expert funds was deficient performance because, as in *Hinton v Alabama*, it was based on a misunderstanding of the law.....18

6. Counsel’s failure to secure an expert cannot be blamed on Mr. Ceasor’s unsuccessful attempts to raise the money himself.20

7. Counsel’s deficient performance was not cured by his cross-examination of the State’s expert or by his closing argument21

B. The Court of Appeals Erred In Holding—Contrary to *Hinton v Alabama* And Its Own Published Precedent Issued The Same Day As This Case—That There Was No Prejudice Because The Trial Court Would Have Denied A Motion For Expert Funds Or Not Allocated Enough Funds To Retain An Adequate Expert.....22

1. Mr. Ceasor was prejudiced by trial counsel’s failure to move for funding even if the trial judge would have denied the motion.22

2. Testimony from a defense expert witness would have produced a reasonable probability of a different result.24

CONCLUSION AND RELIEF REQUESTED27

TABLE OF AUTHORITIES

Cases

Griffith v Kentucky, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987).....24

Hinton v Alabama, 571 US 263; 134 S Ct 1081; 188 L Ed 1 (2014) *passim*

In re Yarbrough Minors, 314 Mich App 111; 885 NW2d 878 (2016)11, 14, 22

People v Ackley, 497 Mich 381; 870 NW2d 858 (2015) *passim*

People v Arquette, 202 Mich App 227; 507 NW2d 824 (1993)11, 13, 14, 18, 22

People v Dimambro, 318 Mich App 204; 897 NW2d 233 (2016).....24

People v Grissom, 492 Mich 296; 821 NW2d 50 (2012)15

People v Leblanc, 465 Mich 575; 640 NW2d 246 (2002).....15

People v Leonard, 224 Mich App 569; 569 NW2d 663 (1997)15

People v Roberts, 503 Mich 895; 919 NW2d 275 (2018)24

People v Sexton, 458 Mich 43; 580 NW2d 404 (1998)24

People v Ulp, 504 Mich 964; 933 NW2d 37 (2019).....24

People v Williams, 328 Mich App 408; 938 NW2d 42 (2019).....24

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)15, 19, 24, 27

Rules and Statutes

MCL 775.15.....17

MCR7.208(B)8

MCR 7.211.....7

Other Authorities

F. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, FOR. SCI. INT’L 151:71-79 (2005).....26

John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 4 AM. J. FOR. MED.
PATH 24, Dec. 20035, 26

RECEIVED by MSC 6/5/2020 10:20:32 AM

STATEMENT OF SUPPLEMENTAL QUESTION PRESENTED

Was Mr. Ceasor Denied The Effective Assistance Of Trial Counsel Due To Counsel's Failure To Seek Funds From The Court To Hire An Expert Witness Or To Otherwise Obtain And Present The Testimony Of An Expert Witness?

Trial Court Answered, "No."

Court of Appeals Answered, "No."

Defendant-Appellant Answers, "Yes."

INTRODUCTION

It is undisputed that Defendant-Appellant Terry Ceasor was convicted of first-degree child abuse after a trial at which his lawyer did not present an expert witness, even though the lawyer knew an expert was “absolutely” necessary. It is also undisputed that trial counsel had found a qualified expert who was prepared to rebut the prosecution’s expert witness’s Shaken Baby Syndrome conclusion. As trial counsel repeatedly admitted to the jury, he did not present an expert witness only because Mr. Ceasor could not afford to pay for one.

It is also undisputed that trial counsel never asked the court for expert witness funding solely because he believed, erroneously, that a client with a retained lawyer could not ask for such funding even when, as here, the client was indigent and had a retained lawyer paid for by a relative. In fact, the Michigan Court of Appeals had held 12 years earlier (in a published opinion) that a client with a lawyer retained by someone else may still be indigent and therefore entitled to court funding for the requisites of a fair trial. The United States Supreme Court has also held that failure to request adequate funding for a competent expert because of a misunderstanding of the law constitutes ineffective assistance of counsel.

Finally, it is undisputed that this was a very close case even without a defense expert: the jury deliberated for days, declared itself deadlocked, and only convicted Mr. Ceasor after hearing parts of the un rebutted prosecution expert’s testimony *three times*. As this Court has unanimously recognized, a jury in a disputed Shaken Baby Syndrome case needs to hear both sides of the controversy. But the jury in this case never heard an expert explain that the short fall Mr. Ceasor described fully explains the injuries the child suffered.

These undisputed facts lead straight to the conclusion that Mr. Ceasor received ineffective assistance of counsel. This Court should reverse.

STATEMENT OF FACTS AND PROCEDURE

A. The Underlying Incident and Hospital Examinations

Following a jury trial in St Clair County before Judge James Adair, Terry Ceasor was convicted of first-degree child abuse. The case stems from an incident that occurred on October 3, 2004, when Mr. Ceasor babysat his girlfriend Cheryl Genna's 16-month-old son, Brenden, while she went swimming with her daughter. 23a-24a. Brenden and Mr. Ceasor played a game where Brenden ran back and forth on the sofa while Mr. Ceasor "chased him" behind the sofa. 57a, 80a-82a. At some point, Mr. Ceasor stepped out of the living room to use the bathroom, keeping the door open, and he then heard a loud thud. 58a, 59a, 84a-85a. He ran back into the living room and found Brenden on the floor, unconscious. 38a, 59a-60a, 84a-86a.

Moments later, Ms. Genna returned with her daughter. 24a, 85a-86a. Mr. Ceasor and Ms. Genna rushed Brenden to Port Huron Hospital. 24a, 33a-34a, 86a. Ms. Genna did not suspect that Mr. Ceasor intentionally injured Brenden, nor did she report any suspicion to the police officers who interviewed her. 35a, 37a-39a.

Upon his admission to the hospital, Brenden was unresponsive to stimulus. 40a. Nurse LeAnn Roulo examined Brenden and observed no bruises, scrapes, or abnormalities anywhere on his body. 44a-45a. She did note that one of Brenden's pupils was "vastly larger than the other," which is a neurological indicator that prompted the hospital staff to order a CAT scan. 41a. Mr. Ceasor was upset and crying, and he paced in front of Brenden's bed, asking whether Brenden would be okay. 36a, 43a, 46a-47a, 49a.

Dr. Christopher Hunt, the emergency room physician who treated Brenden also observed that Brenden was unresponsive to stimuli and that his pupils were of unequal size. 50a. Dr. Hunt also noted that he did not see any external signs of trauma. 50a, 53a-54a.

Approximately one hour after Brenden arrived at the hospital, he was alert and his pupils

were equal and reactive. 42a, 48a. Shortly thereafter he was crying, and his breathing was even and unlabored. 55a-56a. Brenden's CAT scan results showed a subdural hematoma. 51a. Dr. Hunt considered the subdural hematoma a serious condition and decided to send Brenden to Children's Hospital in Detroit to consult with a pediatric neurosurgeon. 52a.

Dr. Holly Gilmer-Hill, one of the neurosurgeons who evaluated Brenden at Children's Hospital, found that Brenden was awake, alert, and had no external bruising, scalp swelling, or other outward signs of trauma. 63a. However, progress notes and a diagram taken at Children's Hospital showed bruising to Brenden's forehead. 69a, 71a-73a.

Ms. Genna noticed a bite mark on Brenden's tongue while he was at Port Huron Hospital. 28a-29a. She and other family members also noted a red mark "about the size of a 50-cent piece" on Brenden's head after he was taken to Children's Hospital. 26a-27a, 28a.

Dr. Gilmer-Hill did not remember noticing any retinal hemorrhaging on October 3, the date of Brenden's admission. 78a. On October 5, an ophthalmologist reportedly noted retinal hemorrhaging in both of Brenden's eyes. 64a, 79a.

Brenden recovered fully without surgery. He was discharged on October 8. 67a, 31a-32a.

B. The Retention of Trial Counsel and Lack of Expert Funding

Mr. Ceasor was charged with first-degree child abuse, and his mother retained attorney David Black for the preliminary exam. 191a. After Dr. Gilmer-Hill testified for the prosecution at the exam, Mr. Black told the district judge, "I know this case is going to get bound over and so does my client, but there's no eyewitnesses to it. **It's going to be expert against expert[.]**" 19a.

Mr. Ceasor's mother retained a new attorney, Kenneth Lord, to represent Mr. Ceasor at trial. 191a. Mr. Ceasor's mother paid for both attorneys because Mr. Ceasor did not have the funds to hire an attorney. 188a-189a.

Both Mr. Black and Mr. Lord informed Mr. Ceasor that a defense expert was necessary. 189a-190a, 196a. Indeed, Mr. Lord, the trial counsel, testified at the 2017 evidentiary hearing that a defense expert was “absolutely” necessary. 197a.

Before trial, Mr. Lord contacted Dr. Faris Bandak, a prominent expert who had published widely about Shaken Baby Syndrome, and Mr. Lord told Mr. Ceasor that Dr. Bandak’s initial review of the case would cost \$1,500. 190a, 198a-199a. Dr. Bandak’s eventual fees for testifying on Mr. Ceasor’s behalf would be thousands of dollars more. 189a, 198a.

Mr. Ceasor could not afford the \$1,500 for Dr. Bandak’s initial review—much less the additional costs for his testimony. 190a. Mr. Lord later testified “that Mr. Ceasor himself was too poor to have the money” for an expert, and that “[Mr. Ceasor] didn’t want to put his mother in any further debt.” 209a.

Mr. Lord never asked the trial court for funds a defense expert, despite Mr. Ceasor’s indigence. 199a-200a. As Mr. Lord explained at the 2017 evidentiary hearing, when Mr. Ceasor told him he could not come up with the money to hire an expert, Mr. Lord did not ask the court for expert witness fees because the motion deadline had passed, **and because he did not believe that a judge could grant expert witness fees in a case where the defendant had a retained lawyer.** 209a-211a. Asking for funds even shortly before trial would not have delayed the trial, however, because Dr. Bandak had already reviewed the materials and was ready to testify. 204a-205a, 213a, 216a. (“I got [Dr.] Bandak on the line and he’s ready to come”).

C. The Trial

During jury selection, Mr. Lord repeatedly told the jury that Mr. Ceasor would not have an expert witness solely because he could not afford one:

MR. LORD: . . . Mr. Sams [juror], do you think that money can sometimes assist a person? **If we have a lot of money to hire expert witnesses and you’re wealthy and you bring a bunch of people in here to counteract their**

experts, that would help, wouldn't it?

JUROR SIX: Probably would.

MR. LORD: **What if you don't have a lot of money?**

MR. LORD: And we talked a little bit about money. **My client cannot afford to hire an expert.** I can tell you that right now.

MR. LORD: **But we can't afford to hire an expert, you understand that? Not everybody has that kind of money available.**

20a, 21a, 22a. (emphasis added).

At trial, Dr. Gilmer-Hill testified that Shaken Baby Syndrome is the violent shaking of a child, generally under two years old, which causes the brain to slam back and forth and a bridging vein to tear, and results in a subdural hematoma. 61a. She said that bruising might not be present in typical SBS cases. 62a. Dr. Gilmer-Hill testified that she did not see any bruising but acknowledged that a nurse did note bruising on Brenden's forehead, which would have been consistent with a fall from the sofa to the coffee table or the floor. 70a-73a.

Dr. Gilmer-Hill testified that although she was not an expert in biomechanics, she disputed a study published by forensic pathologist Dr. John Plunkett, which concluded that short falls can cause injuries in children, such as those Brendan suffered. John Plunkett, *Fatal Pediatric Head Injuries Caused by Short- Distance Falls*, 4 AM. J. FOR. MED. PATH 24, Dec. 2003; 74a. Dr. Gilmer-Hill testified that a fall from five to six feet produces much less force than shaking. 75a-76a. She claimed her opinion was supported by studies completed by Dr. Ann-Christine Duhaime, but this is not true: Dr. Duhaime's 1987 study found impact generated forces nearly 50 times greater than the forces generated by shaking. 106a-113a. Dr. Gilmer-Hill further testified that injuries such as Brenden's cannot be caused by a fall from a couch onto a carpeted floor. 67a-68a.

Dr. Gilmer-Hill placed particular emphasis on the ophthalmology exams she reviewed on

October 6 that showed retinal hemorrhaging. 64a. She testified that it takes a great deal of force to cause retinal hemorrhages and the only possible cause is being shaken or slammed on hard or soft surfaces, usually in a repeated fashion. 65a.

After the Michigan Innocence Clinic agreed to represent Mr. Ceasor in 2010, four experts—two forensic pathologists, a clinical neurosurgeon, and a biomedical engineer—examined Brendan’s records and signed affidavits concluding that his injuries were consistent with a short fall from the couch and not with violent shaking. *See* 104a, 129a, 145a, 158a.

Other than Dr. Gilmer-Hill’s unrebutted expert testimony, the prosecution presented no evidence of child abuse at Mr. Ceasor’s trial. Cheryl Genna testified that she had no reason to suspect Mr. Ceasor of abusing Brenden. 35a, 37a-39a.

The prosecution did present testimony to establish that Mr. Ceasor and Ms. Genna at first claimed that Ms. Genna was present when Brenden fell, 35a, 57a-58a, but they both subsequently admitted that Ms. Genna arrived back at the home shortly after the accident. 59a-60a. Ms. Genna admitted at trial that she was the one who came up with the false claim that she was present when Brenden fell and that she was the one who encouraged Mr. Ceasor to go along with this version of events. 25a, 30a. The detective who interviewed Mr. Ceasor confirmed that “everything else stayed the same” in Mr. Ceasor’s account other than whether Ms. Genna had arrived back in time to witness Brenden’s fall. 59a-60a.

Mr. Ceasor testified in his own defense at trial and described, as he had to the police before, playing the chasing game with Brenden on the couch, leaving Brenden on the couch when he went to the bathroom, and then hearing a thud and rushing back into the living room where he found Brenden unconscious on the floor. 80a-85a. Ms. Genna arrived back very shortly after the accident, and they rushed Brenden to the hospital. 85a-86a. Mr. Ceasor denied shaking or abusing Brenden in any way. 87a.

The jury began deliberating on December 15, 2005. The next day, the jury asked to hear Dr. Gilmer-Hill's testimony again in its entirety. 88a-89a. After deliberating another day, the jury asked to hear a portion of Dr. Gilmer-Hill's testimony a third time. 90a-94a. Later that day, the jury announced it was deadlocked. 95a. The court read a deadlocked jury instruction, and, after further deliberation, the jury returned a guilty verdict. 96a-97a.

D. Direct Appeal and 2010 Motion for Relief from Judgment

Mr. Ceasor appealed his conviction, claiming that counsel was ineffective for failing to obtain a defense expert. However, because appellate counsel did not file a motion to remand for a *Ginther* hearing, as required by MCR 7.211, the Court of Appeals concluded that its "review [was] limited to errors apparent on the record." 101a. Therefore, the Court of Appeals applied "the presumption that counsel's decision to not call an expert witness was a matter of sound trial strategy" and found that Mr. Ceasor could not "overcome the presumption that defense counsel declined to present an expert witness because any expert consulted was unwilling to support defendant's position that the injury was accidental or would not have presented favorable testimony after reviewing the evidence." 101a.

Mr. Ceasor filed a motion for relief from judgment in 2010, arguing that appellate counsel was ineffective in failing to file a motion to remand for the evidentiary hearing needed to establish the ineffective assistance of trial counsel claim. Mr. Ceasor attached affidavits from four medical experts who agreed that Brenden very likely suffered a short fall and that they would have been willing to testify to that effect at trial in 2005. 104a, 129a, 145a, 158a.

The trial court denied Mr. Ceasor's motion, and the Court of Appeals denied Mr. Ceasor's application for leave to appeal, *People v Ceasor*, No. 304703 (Mich App Oct 4, 2011), as did this Court. *People v Ceasor*, 491 Mich 908; 810 NW2d 578 (2012).

E. Federal Habeas Relief Granted on Ineffective Assistance of Appellate Counsel

Mr. Ceasor then pursued habeas corpus relief in federal court. After the district court denied the habeas petition, the Sixth Circuit issued an opinion ordering an evidentiary hearing on Mr. Ceasor's ineffective assistance of appellate counsel claim, "[b]ased on the strength of Ceasor's ineffective assistance of trial counsel claim." *Ceasor v Ocwieja*, 655 Fed App'x 263, 289 (CA 6 2016). The Sixth Circuit concluded that because trial counsel failed to obtain an expert, he "lacked the ability to refute Dr. Gilmer-Hill's allegedly erroneous assertions about causation, the biomechanics of short falls, and the etiology of Brenden's subdural hematoma and retinal hemorrhaging." *Id.* at 283.

On May 12, 2017, the federal district court issued a Stipulated Order granting habeas relief to Mr. Ceasor. 177a. The federal court ordered the Michigan Court of Appeals to grant Mr. Ceasor a new direct appeal of right because he had received ineffective assistance of appellate counsel during his original direct appeal. The district court recited that "the parties stipulate that appellate counsel's deficient performance prejudiced [Mr. Ceasor] because appellate counsel failed to litigate in state court a claim of ineffective assistance of trial counsel that was reasonably likely to succeed." *Id.*

F. Reinstated Direct Appeal and Motion for New Trial

On May 19, 2017, the Michigan Court of Appeals opened a new direct appeal, Docket No. 338431. On July 12, 2017, Mr. Ceasor filed a motion for new trial, pursuant to MCR 7.208(B), in the trial court based on an ineffective assistance of trial counsel claim for his trial counsel's failure to seek funds from the court to hire an expert witness or to otherwise obtain and present a defense expert witness. Mr. Ceasor attached to his Motion for New Trial the same four affidavits from experts that he had attached to his 2010 motion for relief from judgment.

On August 7, 2017, Judge Michael West, the successor circuit judge, suggested at a hearing on the Motion for New Trial that trial counsel could not be ineffective for failing to seek funding from the court for an expert witness because expert witness fees would not be available to a client who had retained counsel. 179a. Judge West explained that if he had made such a motion when he was a practicing lawyer, “I’d probably get laughed out of the courtroom. I would be very surprised knowing Judge Adair that he would grant that request and then if he did, my expectation would be that if an amount of funds were appropriated it would probably be a rather meager amount of money.” 181a-182a.

Judge West also indicated that he did not need Mr. Ceasor’s expert witnesses to testify because he expected they would testify “consistently with their affidavits. I don’t expect that they’re going to come in and tell me anything different than what they have already submitted by way of their written statement.” 180a; *see also* 183a-184a. One week later, Judge West ordered an evidentiary hearing solely to establish “additional facts . . . regarding the nature and extent of Defendant’s retained attorney-client relationship and specifically the issue of Defendant’s alleged indigence.” 185a-186a.

G. Evidentiary Hearing on Motion for New Trial

That evidentiary hearing was held on September 21, 2017. The defense called four witnesses: Terry Ceasor, Alan Hastings, Diana Hastings, and Kenneth Lord.

Terry Ceasor testified that, based on his Social Security statement, he earned \$15,107 in 2005. 187a. He testified that he did not retain Mr. Black or Mr. Lord because he had no money to do so, 188a-189a, nor did he have the money to retain Dr. Bandak. 190a. Both of his attorneys told him that a defense expert was critical, and he would have retained an expert rather than going to trial without one if he could have afforded one. 189a, 191a.

Diana Hastings, Mr. Ceasor's mother, testified that she retained both Mr. Black and Mr. Lord. 192a-193a. Alan Hastings, Mr. Ceasor's uncle, who employed Mr. Ceasor at his body shop, was present during several of Mr. Ceasor's meetings with Mr. Lord, and recalled him emphasizing the importance of retaining a defense expert. 194a, 196a. Mr. Hastings also testified that Mr. Lord said that an expert could cost up to \$10,000 for the trial. 196a.

Trial counsel Kenneth Lord testified that he agreed "absolutely" that an expert was necessary to the defense. 197a. Mr. Lord expected the total expert expenses at trial would have been roughly \$3,000. 203a. Dr. Bandak continued to consult with Mr. Lord as trial approached even though Mr. Ceasor had not paid the initial consultancy fee for the doctor. 205a.

Mr. Lord testified that "I knew that Mr. Ceasor himself was too poor to have the money," but he thought that Mr. Ceasor was working to raise the funds. 207a, 209a. About two weeks before trial, Mr. Ceasor informed Mr. Lord that he would not be able to come up with funds for an expert. 209a. By this time, the trial court's pre-trial motion deadline had passed, and Mr. Lord did not feel comfortable asking for a continuance, even though Dr. Bandak would have been ready to testify. 204a-205a, 208a-209a, 213a, 216a. Mr. Lord further testified that he had never requested money for an expert on behalf of a client who had retained his services. 211a, 214a-215a.

H. Trial Court Decision Denying Motion for New Trial

Judge West denied Mr. Ceasor's motion for new trial on February 1, 2018. 218a. He found that "Mr. Lord did not quarrel with Defendant's evidence and believed in 2005 Defendant did not have funds of his own to hire an expert." 229a. Further, Judge West acknowledged that "trial counsel recognized the importance of a defense expert." 230a. Indeed, the judge found that, had the case gone to trial today, "the decision in *People v Ackely* [sic] . . . could likely require a finding of ineffective assistance of trial counsel." 232a.

But Judge West ruled that a "perception still exists" that a retained attorney cannot ask for

public funding and that, therefore, “it is not unreasonable for retained defense counsel to believe they would not be successful in obtaining public funds to retain a defense expert even if the client’s indigency could be established.” 231a. Therefore, Judge West denied a new trial.

I. Court of Appeals Opinion Affirming Trial Court Decision

Mr. Ceasor appealed to the Court of Appeals, which affirmed Mr. Ceasor’s conviction. 237a. First, the panel held that trial counsel cannot be expected to make a “novel” argument that a defendant represented by retained counsel is eligible for funding for an expert. 246a. The Court of Appeals panel did not acknowledge or account for *People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993), which held that a defendant represented by retained counsel (paid for by another) is nonetheless eligible to seek funding for other litigation costs if he cannot afford to pay them.

Second, the panel held that trial counsel’s failure to ask for funds for an expert was not prejudicial because the trial court likely would have denied the motion or failed to provide enough money to hire an expert. 246a. The panel did not acknowledge or account for *Hinton v Alabama*, 571 US 263; 134 S Ct 1081, 1088-89; 188 L Ed 1 (2014), which held that trial counsel was ineffective in failing to file a motion for sufficient funds to hire an adequate expert—regardless of whether the trial judge in question would have granted the motion.

Third, the panel held that the absence of a defense expert did not prejudice Mr. Ceasor—even though his trial attorney testified that a defense expert was “absolutely” necessary—because his trial attorney cross-examined the State’s expert and presented Mr. Ceasor’s defense in closing argument. 243a. The panel did not cite or account for *In re Yarbrough Minors*, 314 Mich App 111, 132-33; 885 NW2d 878 (2016), which held that cross-examination of an expert “steeped in years of medical training, knowledge, and experience” is insufficient as a replacement for a defense expert when a legitimate medical controversy exists. 314 Mich App at 132-33. Nor did the panel

cite the prior opinion of the Sixth Circuit in this case, which had found that “although trial counsel attempted to undermine [the State’s expert’s] credibility by highlighting some of the weaknesses affecting her opinion, he lacked the ability to proffer evidence contradicting her opinions.” *Ceasor v Ocwieja*, 665 F App’x 263, 283 (CA 6 2016).

Mr. Ceasor filed an application for leave to appeal, and this Court issued an Order on April 17, 2020, for supplemental briefing and oral argument on the application. 248a.

Mr. Ceasor now requests that this Court reverse and remand for a new trial or, in the alternative, grant leave to appeal.

SUMMARY OF ARGUMENT

Trial counsel testified at the evidentiary hearing in this case that an expert was “absolutely” necessary to Mr. Ceasor’s defense, that he had a qualified expert who had reviewed the evidence and was ready to testify, but that he did not call an expert at trial because Mr. Ceasor did not have enough money to pay for the expert. Given those undisputed facts, any reasonable attorney would have filed a motion for expert witness funds from the trial court. As the U.S. Supreme Court held in *Hinton v Alabama*, trial counsel is ineffective in failing to ask the trial court for funds to obtain a competent expert when, as here, there is no dispute that expert testimony is critical to the outcome.

But trial counsel never filed such a motion and instead went to trial without an expert in a Shaken Baby Syndrome (SBS) case—the exact type of case where this Court recognized in *People v Ackley* that a defense expert is especially critical for a fair trial. Predictably, Mr. Ceasor was convicted after a trial at which the jury heard from only the prosecution’s expert.

Trial counsel also testified that he did not move for expert witness funds for his client, who he knew had no money, because he erroneously believed that a defendant with retained counsel is ineligible for such funding. But the Court of Appeals had held 12 years earlier in *People v Arquette* that when retained counsel is paid for by someone else, a defendant may still be considered indigent and therefore be entitled to court funding for other necessary litigation costs.

Given this undisputed record, and the holdings of *Hinton*, *Ackley*, and *Arquette*, there can be no doubt that trial counsel rendered deficient performance. Trial counsel absolutely needed an expert, he had an expert ready to testify, but he did not seek funds to pay for the expert because of a misunderstanding about the law.

That deficient performance prejudiced Mr. Ceasor because it left un rebutted the prosecution’s expert evidence, which could have been undermined by credible experts at the time

of trial. The jury had great difficulty deciding this case even without hearing from a defense expert. The undisputed fact that trial counsel had located a distinguished expert who was prepared to testify favorably for the defense in this contested SBS case, if only he could be paid, establishes the prejudice in this case.

The Court of Appeals' holding that there was no prejudice because the trial court might have denied a motion for adequate funding contradicts its own holding in *Arquette*, which would have required the judge to grant the motion. And that holding also contravenes *Hinton*, which makes clear that trial counsel cannot decline to file meritorious motions just because he thinks the judge will violate the law to denying them. And that argument ignores the fact that an erroneous denial of funding at trial still would have given Mr. Ceasor a winning claim for a new trial on appeal.

The Court of Appeals also erred by concluding that there was no prejudice because trial counsel performed adequately in cross-examining the State's expert and arguing Mr. Ceasor's theory to the jury. That conclusion contradicts *Ackley* and the Court of Appeals' published decision in *Yarbrough Minors*, both of which recognized, just as trial counsel did, that a defense expert is needed in a contested SBS case. That conclusion also contravenes the Sixth Circuit's opinion in this very case about the adequacy and competence of counsel's cross-examination.

ARGUMENT

I. This Court Should Reverse Or Grant Leave To Appeal Because Trial Counsel Was Constitutionally Ineffective For Failing To Request Expert Funds In A Shaken Baby Case Where Counsel Admitted An Expert Was “Absolutely” Necessary And He Knew His Client Could Not Afford The Expert Who Was Ready To Testify.

Standard of Review and Issue Preservation

A trial court’s decision denying a new trial is reviewed for abuse of discretion. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). Appellate courts “examine the reasons given by the trial court. Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion.” *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997) (citation omitted).

A defendant receives ineffective assistance of counsel, in violation of the Sixth Amendment, when his attorney engages in deficient performance that results in prejudice. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A claim of ineffective assistance of counsel is “a mixed question of fact and constitutional law.” *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Thus, trial court findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *Id.*

Mr. Ceasor preserved his ineffective assistance of trial counsel claim by filing a motion for new trial in the trial court, holding a *Ginther* hearing in the trial court, and litigating that claim in the Court of Appeals.

A. Trial Counsel Performed Deficiently In Failing To Request Expert Funds Based On A Mistaken Legal Belief That A Defendant With Retained Counsel Cannot Obtain Such Funding.

1. There is no dispute that an expert was necessary here for an adequate defense.

As the trial court correctly concluded after the evidentiary hearing, “[t]he importance of a defense expert is not disputed.” 229a. Mr. Ceasor’s first attorney told the district court during

the preliminary hearing that the case would be “expert against expert,” due to the highly technical nature of SBS cases. 19a. Kenneth Lord, Mr. Ceasor’s trial attorney, testified at the 2017 evidentiary hearing that an expert was “absolutely” necessary to defend the case. 197a.

The prosecution conceded in its Court of Appeals brief that Mr. Ceasor “needed an expert to testify that the victim’s injuries could have been caused by something other than abuse.” 234a. The prosecution also agreed that there was “no dispute in this case that Defendant’s trial counsel recommended an expert witness, and saw the importance of such a witness to the outcome of the case.” 236a.

This Court’s decision in *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015), makes it clear that trial counsel and the prosecutor are correct: a defense expert is necessary in a contested SBS case like this one. Thus, this Court concluded in *Ackley* that “counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant’s theory that the child’s injuries were caused by an accidental fall and prepare counsel to counter the prosecution’s expert medical testimony.” *Id.* at 389.

2. There is no dispute that trial counsel had found a qualified expert ready to testify on Mr. Ceasor’s behalf.

Before trial, counsel identified a qualified expert witness, Dr. Faris Bandak, who reviewed the case materials and was ready to testify at trial. As trial counsel testified: “I got Bandak on the line and he’s ready to come... He was ready because I’d sent him all the information.” 213a. It was undisputed, and the Court of Appeals specifically recognized, that Dr. Bandak would have testified favorably for Mr. Ceasor. 238a. Mr. Ceasor also attached affidavits to his motion for new trial from four additional highly qualified experts who would have testified that Brenden’s symptoms were entirely consistent with the short fall Mr. Ceasor described and inconsistent with shaking. 104a, 129a, 145a, 158a.

3. *There is no dispute that the only reason counsel did not call Dr. Bandak (or another expert) was because Mr. Ceasor did not have the necessary funds.*

Trial counsel went to trial without Dr. Bandak's favorable testimony because Mr. Ceasor could not come up with the thousands of dollars needed to pay him. Trial counsel, who had been retained by Mr. Ceasor's mother, testified that he was aware "that Mr. Ceasor himself was too poor to have the money" for an expert, and that "he didn't want to put his mother in any further debt." 209a. Indeed, counsel told the jury repeatedly during voir dire that he could not call an expert only because Mr. Ceasor could not afford one. 20a, 21a, 22a.

The trial court confirmed after the *Ginther* hearing that Mr. Ceasor lacked the money to retain Dr. Bandak: "Mr. Lord did not quarrel with Defendant's evidence and believed in 2005 Defendant did not have funds of his own to hire an expert." 229a. The prosecution also conceded in the Court of Appeals that it had "never questioned" that Mr. Ceasor was too poor to pay for an expert. 236a.

In sum, although Mr. Ceasor and his attorney both believed an expert was necessary, no expert testified because Mr. Ceasor could not afford one.

4. *There is no dispute that counsel did not request expert funds because he erroneously believed a client with retained counsel was ineligible for funds.*

Trial counsel testified at the *Ginther* hearing that he knew he could seek expert witness funds *when defending a client in a court-appointed case*. 201a-202a. But he also believed, erroneously, that a defendant with retained counsel could not ask for such funding. 202a.

In fact, an indigent defendant whose family pays for his attorney is still entitled to government funding for a necessary expert. In 2005, when Mr. Ceasor was tried, MCL 775.15 provided that a court shall make funds available for "any person who is accused of a crime. . . who is poor" in order to secure the appearance of a witness "without whose testimony [the defendant] cannot safely proceed to a trial." There is no language in that statute that bars a

defendant with retained counsel who cannot afford an expert from seeking funding.

Twelve years before Mr. Ceasor went to trial, the Court of Appeals had recognized that some defendants with retained lawyers are nevertheless indigent and may therefore need court funding for other necessary litigation expenses. *People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993). As the court explained in *Arquette*, “**indigence is to be determined by consideration of the defendant’s financial ability, not that of his friends and relatives.**” 202 Mich App at 230 (emphasis added). Therefore, “[t]he fact that a third party provided funds to retain counsel does not change this indigent defendant’s status and, therefore, does not trigger the general policy denying [funding for other litigation costs, in that case being the production of transcripts].” *Id.* at 231.

Here, the fact that Mr. Ceasor’s mother paid for his lawyer does not change the fact that he was too poor to afford an expert witness and could, therefore, seek funds from the trial court. Trial counsel’s belief to the contrary was wrong under *Arquette*, a binding precedent decided years before the trial. Given *Arquette*, the Court of Appeals’ conclusion that it would have been unreasonably “novel” for trial counsel to ask for funds for his indigent client is incomprehensible. 246a.

5. *Counsel’s failure to request expert funds was deficient performance because, as in Hinton v Alabama, it was based on a misunderstanding of the law.*

The record clearly shows that trial counsel did not present the expert witness he had already prepared to testify because he fundamentally misunderstood the law. In fact, counsel made almost the exact same legal mistake that led the United States Supreme Court to find ineffective assistance of counsel in *Hinton v Alabama*, 571 US 263; 134 S Ct 1081; 188 L Ed 1 (2014).

In *Hinton*, the crucial piece of evidence connecting the defendant to several robbery-murders was a gun found in his home. *Id.*, 571 US at 265-66. Defense counsel asked the court

for funding for a ballistics expert, but he mistakenly believed that funds were capped at \$1,000 when the law actually allowed for “any expenses reasonably incurred.” *Id.* at 266-67. As a result, defense counsel hired an incompetent expert whose credibility was destroyed by the prosecution on cross-examination. *Id.* at 268-69.

Using a “straightforward application” of *Strickland*, *id.* at 272, the Supreme Court reversed the conviction because “it was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire a competent expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped.” *Id.* at 273. Thus, “the only inadequate assistance of counsel here was the inexcusable mistake of law—**the unreasonable failure to understand the resources that state law made available to him**—that caused counsel to employ an expert that he himself deemed inadequate.” *Id.* at 275 (emphasis added).

Here, exactly as in *Hinton*, trial counsel did not seek funds to pay for a competent expert because he mistakenly believed that his client was not legally entitled to them. In fact, the error here was even worse than in *Hinton*, as trial counsel here not only failed to request adequate funds; he failed to request **any** funds, and went to trial without an expert at all—even though counsel knew that an expert witness was critical to the case.

Importantly, the question of whether or not the trial court would have granted a motion for funds is irrelevant under *Hinton*. The Court determined that counsel was ineffective for failing to **seek** more funds, without requiring any showing that the judge would have granted the request. Effective counsel must file a meritorious motion for assistance necessary to the defense, even if he believes the court will erroneously deny it, because filing the motion preserves the client’s right to receive a new trial on appeal if the judge does erroneously deny the motion.

6. *Counsel's failure to secure an expert cannot be blamed on Mr. Ceasor's unsuccessful attempts to raise the money himself.*

The trial court and the Court of Appeals both blamed Mr. Ceasor for the failure to obtain an expert because Mr. Ceasor attempted to raise money to pay Dr. Bandak's fees, but ultimately did not succeed. The trial court concluded that trial counsel was "in a box" when Mr. Ceasor told him two weeks before trial that he lacked the funds to hire an expert. 232a. The Court of Appeals also reasoned that Mr. Lord was reasonable in his reliance on Mr. Ceasor and had no duty to inform Mr. Ceasor of an alternative method of funding. 246a. Both lower courts are wrong as a matter of law.

First, the record belies the claim that two weeks before trial was too late to request court funding and have Dr. Bandak testify. Mr. Lord testified that Dr. Bandak had already reviewed the materials and was ready to testify. 204a-205a, 213a ("I got [Dr.] Bandak on the line and he's ready to come"), 216a. Thus, requesting funds to pay Dr. Bandak would not have delayed the trial.

Second, the trial court and the Court of Appeals both ignored the fact Mr. Lord testified that he knew that Mr. Ceasor was indigent throughout the entire representation. 209a-212a, 217a. As Mr. Lord told the jury during voir dire, it would have been completely unrealistic for Mr. Ceasor to pay an expert up front. 22a. ("Not everybody has that kind of money available. I can, I can take 25 bucks a week from him for the rest of his life, **but if we want a doctor we got to pay him up front**, you understand that?") (emphasis added). Therefore, news of Mr. Ceasor's inability to raise the money should not have been a surprise to anyone, let alone trial counsel.

Third, given that he knew Mr. Ceasor was indigent, **it was trial counsel's responsibility to tell Mr. Ceasor of the possibility of requesting funds from the court and to make that request.** MRPC Comment to Rule 1.0 ("As an advisor, a lawyer provides a client with an informed understand of the client's legal rights and obligations and explains their practical implication").

Mr. Lord's decision instead to go to trial without an expert, when he knew that expert testimony was "extremely critical to the outcome of this case," 196a, fell below an objective standard of reasonableness.

Finally, it is irrelevant that Mr. Ceasor agreed to go to trial without an expert once he concluded he could not raise the money. For one thing, regardless of anything Mr. Ceasor said, going to trial without an expert contradicted Mr. Lord's own professional judgment. 197a. Further, Mr. Ceasor did not "choose" to go to trial without an expert; he felt as though he had no "choice" because he did not have the money and his lawyer had failed to inform him of any other options. 189a, 191a.

7. *Counsel's deficient performance was not cured by his cross-examination of the State's expert or by his closing argument.*

This Court's decision in *Ackley* makes it clear that trial counsel here was correct in recognizing that a defense expert in a contested SBS case like Mr. Ceasor's is "absolutely" necessary. The Court of Appeals, however, "distinguished" *Ackley* because trial counsel here researched SBS, consulted an expert (but failed to call him), and challenged the prosecution's SBS evidence via cross-examination and argument. 242a-243a.

But this Court held in *Ackley*: "[c]ounsel performed deficiently by failing to investigate and attempt to secure an expert witness who could **both** testify in support of the defendant's theory that the child's injuries were caused by an accidental fall **and** prepare counsel to counter the prosecution's expert medical testimony." 471 Mich at 389 (emphasis added). The Court of Appeals nullified the core holding of *Ackley* by focusing on counsel's pretrial preparation, cross-examination, and argument, and by glossing over the central question in *Ackley* of whether counsel succeeded in presenting SBS expert testimony to the jury in a contested case where all parties believed a defense expert witness was necessary.

The Court of Appeals’ decision also contradicts the Sixth Circuit’s opinion in this case, which had found trial counsel’s cross-examination to be incomplete and insufficient. *Ceasor*, 665 F App’x at 283. The Court of Appeals also ignored its own binding precedent in *Yarbrough Minors*, 314 Mich App 111, 132-33; 885 NW2d 878 (2016), which held that cross-examination of an expert “steeped in years of medical training, knowledge, and experience” is insufficient as a replacement for a defense expert when a legitimate medical controversy exists.

In short, the Court of Appeals’ conclusion of no deficient performance conflicts with at least four binding decisions: *Ackley*, *Yarbrough Minors*, *Arquette*, and *Hinton*. It is also at odds with the prior Sixth Circuit decision in this case (based upon which the State conceded that appellate counsel was ineffective and Mr. Ceasor was granted a new direct appeal). Given the undisputed facts presented here, it is clear that trial counsel did perform deficiently by failing to move for funding for the expert witness he knew was absolutely necessary to the defense.

B. The Court Of Appeals Erred In Holding—Contrary To *Hinton v Alabama* And Its Own Published Precedent Issued The Same Day As This Case—That There Was No Prejudice Because The Trial Court Would Have Denied A Motion For Expert Funds Or Not Allocated Enough Funds To Retain An Adequate Expert.

1. *Mr. Ceasor was prejudiced by trial counsel’s failure to move for funding even if the trial judge would have denied the motion.*

The trial court and the Court of Appeals both concluded that there was no prejudice because the prior trial judge probably would have denied a motion for expert funds. *See e.g.* 181a-182a. (Judge West stating that a retained defense attorney who asked Judge Adair for funds for an expert would “get laughed out of the courtroom”); 230a. (“[T]he question is whether trial counsel... was constitutionally ineffective for not filing a motion he believed had no chance of being successful.”); 246a (finding no prejudice because trial court might have denied motion). The Court of Appeals also speculated that the judge might not have granted enough money to pay the expert. 246a (citing trial counsel’s testimony that “\$500 customary amount granted by

local courts” would not have been enough to afford an expert).

But the relevant question here is not whether the judge would have ruled correctly on the motion, but whether Mr. Ceasor was constitutionally entitled to sufficient expert funding and, therefore, whether the motion would have been meritorious. The Court of Appeals’ contrary approach, insulating attorney error from review on the ground that the judge would have made the same error, violates basic principles of American jurisprudence.

The approach taken by the Court of Appeals and the trial court cannot be correct because it would mean that there could never be an ineffective assistance claim against an attorney who fails to file meritorious motions before a judge who habitually rules against all defense motions. The Court of Appeals failed to recognize that it is crucial that an attorney file meritorious motions before even the most error-prone judge **to preserve the defendant’s right to relief on appeal.**

The Supreme Court’s decision in *Hinton* proves the point. In *Hinton*, the trial judge awarded Hinton’s attorney only \$1,000 in expert witness fees, believing that was the maximum he could grant. 571 US at 266. The trial judge was wrong, as Alabama law actually allowed the trial court to award “any expenses reasonably incurred.” *Id.* at 267. The Supreme Court still found Hinton was prejudiced by his attorney’s failure to seek more funds even though the trial judge had misread the law and awarded inadequate funding.

The Supreme Court granted relief to Hinton because his attorney should have moved for sufficient funds to hire a competent expert, **but the Court did not require Hinton to make any showing that the trial judge actually would have granted that motion.** In fact, that Court recognized, **despite** the trial judge’s erroneously limiting Hinton’s expert funding, he was still prejudiced by his attorney’s failure to ask for more funding.

Applying *Hinton* here, all Mr. Ceasor must do is show that the motion that should have been made would have been legally meritorious, which it was, such that a reasonable judge

correctly applying the law would have granted it. And if the judge would have denied the motion, Mr. Ceasor would have had an appellate issue entitling him to relief.

This Court's recent order in *People v Ulp*, 504 Mich 964; 933 NW2d 37 (2019), vacating a trial court's refusal to provide expert funding to assist a defendant on appeal, illustrates the importance of making the motion to preserve the defendant's right to appellate relief. Indeed, the **same panel of the Court of Appeals that rejected Mr. Ceasor's appeal** on May 23, 2019, issued a published opinion **that same day** reversing a trial court's failure to provide adequate expert witness funding. *People v Williams*, 328 Mich App 408; 938 NW2d 42 (2019).

In short, Mr. Ceasor was prejudiced by counsel's failure to file the motion for funding.

2. Testimony from a defense expert witness would have produced a reasonable probability of a different result.

Finally, the failure to present an expert was prejudicial as there was a reasonable probability of a different result had the jury heard from a defense expert. Indeed, the trial judge recognized after the *Ginther* hearing that if he was bound by *Ackley* (which he was, though he erroneously believed he was not¹), he would probably have to grant a new trial. 232a.

The trial judge was correct that the absence of a defense expert prejudiced Mr. Ceasor so as to require a new trial under *Ackley*. An expert witness would have pointed out changes in the science surrounding SBS and introduced a very different picture of what caused Brenden's injuries

¹ The judge erroneously believed *Ackley* did not apply because it was decided after Mr. Ceasor's trial. But *Ackley* did not establish new rights as it was only an application of *Strickland*. See *Ackley*, 497 Mich at 388-98. *Ackley* is therefore cited in cases where the trial occurred before the *Ackley* opinion was issued in June 2015. See e.g. *People v Dimambro*, 318 Mich App 204; 897 NW2d 233 (2016) (2014 conviction); *People v Roberts*, 503 Mich 895; 919 NW2d 275 (2018) (April 2015 conviction). Also, Mr. Ceasor's case is on direct appeal, so even a truly new constitutional rule would apply. *Griffith v Kentucky*, 479 US 314, 322; 107 S Ct 708; 93 L Ed 2d 649 (1987) (“[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”); *People v Sexton*, 458 Mich 43; 580 NW2d 404, 410 (1998) (*Griffith* rule applies to new decisions of Michigan Supreme Court, where the decisions are “mandated by the United States Constitution”).

than the sole perspective presented to the jury by the prosecution's expert. "[E]xpert testimony was. . . integral to [Mr. Ceasor]'s ability to counter [the prosecution's] narrative and supply his own. Had an impartial, scientifically trained expert corroborated [Mr. Ceasor]'s theory, [his] account. . . would not have existed in a vacuum of his own self-interest." *Ackley*, 497 Mich at 397.

This was a close case at trial even without a defense expert. The jury deliberated for parts of three days. On the second day, the jury asked to hear the State SBS expert's entire testimony again, and then asked to hear parts of it a third time the next day. 88a-89a, 94a. Even after all that, the jury initially indicated it could not reach a unanimous verdict. 95a.

A qualified defense expert such as Dr. Bandak would clearly have been material. Mr. Ceasor attached to his motion for new trial the affidavits of four renowned experts who would have testified at Mr. Ceasor's trial, just as Dr. Bandak would have, that the theory of SBS presented by the prosecution's expert was incorrect and that Brenden's injuries were fully consistent with the short, accidental fall from the couch that Mr. Ceasor described. 104a, 129a, 145a, 158a. The trial court accepted the affidavits on their face and therefore deemed it unnecessary to hear testimony from the affiants. 180a, 183a-184a.

Dr. Bandak or another expert witness would have rebutted the theory of SBS presented by Dr. Gilmer-Hill at trial. By 2005, it was known that short falls exactly like the one Mr. Ceasor described can cause serious and even fatal head injuries in children—including subdural hematomas and retinal hemorrhages far more severe than the ones Brenden had. 115a; 131a. But without an expert to offer this testimony, trial counsel was limited to his feeble attempt at scoring points on cross-examination. *See Ceasor*, 655 Fed App'x at 283 (CA 6 2016) (Sixth Circuit determining that because trial counsel failed to obtain an expert, he "lacked the ability to refute Dr. Gilmer-Hill's allegedly erroneous assertions about causation, the biomechanics of short falls, and the etiology of Brenden's subdural hematoma and retinal hemorrhaging.").

In 2001, Dr. John Plunkett published a highly influential paper, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 4 AM. J. FOR. MED. PATH 24, which concluded that children falling from a height of only three feet could suffer retinal hemorrhage, subdural hematoma, and fatal injury. 115a-116a. His reported cases included a videotaped short fall that produced findings identical to those in allegedly shaken children. 115a-116a. At that time, many doctors were testifying incorrectly that only falls from a height of 20 to 30 feet could cause these types of injuries, exactly as Dr. Gilmer-Hill testified in this case. 76a-77a.

While Dr. Gilmer-Hill claimed that Dr. Plunkett's 2001 study was not accepted in the medical community, the videotape in case study #5 is indisputable evidence of the types of injuries that can result from a short fall. 161a, 167a. Unlike the child in the videotape, Brenden's medical records confirm that his injuries were limited to a Grade III concussion with short-term loss of consciousness followed by full recovery within an hour or so of the incident. Such concussions are consistent with the short accidental fall that Mr. Ceasor described. 117a; 139a.

Since Brenden had no significant external injury to the head or body, the trauma that did occur was entirely consistent with a simple fall off a couch. 165a. As for the supposed lack of bruising consistent with the fall Mr. Ceasor described, Cheryl Genna *did* see a red mark roughly two inches long on Brenden's head. 26a-27a. The Children's Hospital progress notes also noted a bruise on Brenden's forehead. 72a-73a.

Not only were Brenden's injuries consistent with a short fall; they were inconsistent with shaking. In 2005, Dr. Faris Bandak, the same expert trial counsel attempted to retain in this case, published an article concluding that manual shaking of a baby would cause severe neck and spinal injuries (which were not present in this case) long before they would cause intracranial injury like subdural hematomas. F. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, FOR. SCI. INT'L 151:71-79 (2005); 115a-116a.

In short, had Mr. Ceasor's trial counsel consulted and retained an expert, the jury would have known that much of Dr. Gilmer-Hill's testimony was incorrect and that Brenden's symptoms were fully consistent with the short, accidental fall off of the couch as described by Mr. Ceasor. Given this Court's guidance regarding prejudice in *Ackley* and the closeness of the case at trial, it is clear that, had a defense expert testified at trial, there is a reasonable probability of a different outcome. Mr. Ceasor has therefore satisfied the prejudice prong of *Strickland* in addition to the performance prong.

CONCLUSION AND RELIEF REQUESTED

Defendant-Appellant Terry Ceasor respectfully requests that this Court reverse the decision of the Court of Appeals and remand this case for a new trial or, in the alternative, grant leave to appeal.

Respectfully Submitted,

s/David A. Moran (P45353)
Attorney for Defendant-Appellant

s/Megan Richardson (PL1090)
Attorney for Defendant-Appellant

s/Thomas Palumbo
Student-Attorney for Defendant-Appellant

MICHIGAN INNOCENCE CLINIC

s/Imran J. Syed (P75415)
Attorney for Defendant-Appellant

s/Sam White
Student-Attorney for Defendant-Appellant

Dated: June 5, 2020