

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

vs.

Supreme Court No. 159948
Court of Appeals No. 338431
Lower Court No. 15-000220-FH

TERRY LEE CEASOR,

Defendant—Appellant.

_____ /

**PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF**

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STATEMENT OF JURISDICTION

The Plaintiff-Appellee agrees with and adopts the Statement of Jurisdiction set forth in the Defendant-Appellant's Supplemental Brief in Support of Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Did retained trial counsel deprive the Defendant of the effective assistance of counsel when he did not to seek funds from the circuit court to pay for an expert witness with whom he had already consulted, where the Defendant had previously indicated an intention and plan to pay for the expert and where no authority existed to support a retained attorney's request for public funds?**

The trial court answered: NO
The Plaintiff-Appellee answers: NO
The Defendant-Appellant answers: YES

INTRODUCTION

Terry Ceasor, the Defendant, retained two attorneys to represent him on a first-degree child abuse charge in 2005. The prosecution's case involved expert testimony that the victim suffered injury known as "shaken baby syndrome," now referred to as abusive head trauma (AHT). Both of the Defendant's attorneys recognized the need for an expert witness for trial. His second attorney, Ken Lord, pursued one on his behalf. The Defendant assured Mr. Lord that he would come up with the money to pay for the expert, and Mr. Lord repeatedly secured adjournments to allow time to gather funds. Two weeks before trial, past the deadline for pretrial motions, the Defendant advised Mr. Lord that he would not have the money for an expert. The Defendant never sought to be declared indigent by the trial court. Mr. Lord proceeded to trial without an expert witness, and the Defendant was convicted as charged.

After a lengthy post-conviction history, the Defendant was able to file a Motion for a New Trial in the circuit court, alleging that Mr. Lord deprived him of constitutionally effective assistance of counsel because he did not seek public funds to pay the expert witness. Mr. Lord reasonably relied on his client's representations that he would come up with the money. He paid the expert's initial fee with his retainer and encouraged the Defendant to forego paying his mounting legal fees and instead save money to pay the expert. Because Mr. Lord was a retained attorney, he did not have a legal basis to seek public funds for an expert witness. None of the

cases cited by the Defendant would have compelled the trial court to publicly fund an expert witness under the circumstances of this case where the Defendant had already paid two attorneys and had never sought to proceed as an indigent defendant. It is well-established that trial counsel need not make motions or arguments that have no likelihood of success. Accordingly, Mr. Lord's performance should not be deemed deficient by this Court.

STATEMENT OF FACTS

In October of 2004, Cheryl Genna left her sixteen-month-old son, Brenden, in the Defendant's care. At that time, Brenden had not suffered any type of fall or injury.¹ When she returned home, the Defendant was standing at the top of the stairs holding Brenden, who was unconscious. The Defendant told her that Brenden had fallen and hit his head and that he could not wake him.² The Defendant and Ms. Genna took Brenden to the hospital, where he regained consciousness and was transferred to Children's Hospital in Detroit.³ During the ambulance ride to Children's Hospital, Brenden was throwing up.⁴

Ms. Genna's statements to investigators about the incident and Brenden's injuries were inconsistent. Ms. Genna admitted that when she was first interviewed by investigating officers at Port Huron Hospital, she lied to them, saying she was present in the house when Brenden fell.⁵ Unlike her earlier statement, she said she saw a bite mark on Brenden's tongue while at Port Huron Hospital, but did not tell anyone at that hospital about it, and could not recall if she told anyone at Children's Hospital.⁶

¹Trial Transcript, p. 211-212, 216-217, 220; Plaintiff-Appellee's Appendix, p. 4b-6b

²Trial Transcript, p. 222-223; Plaintiff-Appellee's Appendix, p. 7b

³Trial Transcript, p. 227-228; Plaintiff-Appellee's Appendix, p. 8b

⁴Trial Transcript, p. 231-232; Plaintiff-Appellee's Appendix, p. 9b

⁵Trial Transcript, p. 229; Plaintiff-Appellee's Appendix, p. 9b

⁶Trial Transcript, p. 248-249; Defendant-Appellant's Appendix, p. 28a-29a

During the time she was with Brenden at Children's Hospital, Ms. Genna admitted to Detective Sandy Jacobson of the St Clair County Sheriff's Department, that she had not been at the house when the incident happened.⁷ On cross-examination, Ms. Genna recalled, contrary to her earlier testimony, that Brenden had fallen at day care. She was not able to recall whether it was Thursday or Friday.⁸

Ms. Genna and the Defendant made consistent statements to Deputy Garvin from the St. Clair County Sheriff's Department, specifically that the Defendant had been playing a game with Brenden that involved Brenden running back and forth on the sofa while the Defendant crawled back and forth behind it. After a while, the Defendant had to use the bathroom and left Brenden on the sofa. While he was in the bathroom, he heard a loud thud and came back into the living room to find Brenden on the floor with Ms. Genna kneeling next to him.⁹

When Brenden was assessed at Port Huron Hospital, one of his pupils was "vastly larger than the other," an abnormal neurological sign that required a CAT scan to look for trauma to the brain.¹⁰ During the CAT scan, Brenden was breathing on his own and was alert, and looking around, but not very active.¹¹ After the CAT scan was completed, Leann Roulo, a nurse, transported Brenden back to the emergency room and performed a head to toe assessment of his condition.¹² During

⁷Trial Transcript, p. 335-336; Plaintiff-Appellee's Appendix, p. 18b-19b

⁸Trial Transcript, p. 262; Plaintiff-Appellee's Appendix, p. 11b

⁹Trial Transcript, p. 288, 292-293, 294; Plaintiff-Appellee's Appendix, p. 12b-13b

¹⁰Trial Transcript, p. 312; Plaintiff-Appellee's Appendix, p. 16b

¹¹Trial Transcript, p. 314; Plaintiff-Appellee's Appendix, p. 16b

¹²Trial Transcript, p. 320; Plaintiff-Appellee's Appendix, p. 17b

her examination, she observed no lumps or bruising anywhere on his scalp or face. She found no scrapes, bruising, or abnormality of any kind anywhere on his body.¹³ Ms. Roulo also took a detailed history from Ms. Genna, during which she stated Brenden had been injured when he was running around or playing on a coffee table and had fallen and hit his head.¹⁴ Ms. Genna provided no information regarding a previous fall by Brenden.¹⁵

Christopher Hunt, M.D., examined Brenden at Port Huron Hospital and observed that his vitals were stable and he was breathing; but he was unresponsive to verbal or other stimuli and his pupils were of unequal size. He did not see any signs of trauma or injury.¹⁶ The CAT scan showed a subdural hematoma with a slight mass effect.¹⁷ Dr. Hunt described that a mass effect occurs when the blood under the dura is of such quantity that it begins to push the brain to the opposite side and it is considered a serious condition, which led Dr. Hunt to send Brenden to a hospital with a pediatric neurosurgeon.¹⁸

Dr. Hunt spoke to the Defendant twice to document how the injury had occurred. The first time, the Defendant told him that Brenden had fallen off a couch, hit his head on a table, and had become unresponsive. The second time, the Defendant said he did not know how the injury happened. Dr. Hunt documented this change in

¹³Trial Transcript, p. 320-321; Plaintiff-Appellee's Appendix, p. 17b

¹⁴Trial Transcript, p. 322-326; Plaintiff-Appellee's Appendix, p. 17b-18b

¹⁵Trial Transcript, p. 325-326; Plaintiff-Appellee's Appendix, p. 18b

¹⁶Trial Transcript, p. 351, 358; Defendant-Appellant's Appendix, p. 50a; Plaintiff-Appellee's Appendix, p. 22b

¹⁷Trial Transcript, p. 355; Defendant-Appellant's Appendix, p. 51a

¹⁸Id.

Defendant's account.¹⁹ In addition to the Defendant's conflicting statements, Dr. Hunt was bothered by the lack of any external trauma:

I mean most commonly it's something you'd see in a, in a fall, hit your head kind of thing. But you don't normally see some trauma, trauma in those kind of circumstances. You'd see some soft tissue damage, you know an abrasion, a laceration, a hematoma, something.²⁰

This caused Dr. Hunt to notify Child Protective Services:

Well, it, 16 month olds don't typically fall. I mean they're not very big and to fall off a couch and hit your head and get a subdural hematoma would be very strange. And the fact that he didn't, if he did get that and he did fall off the couch and get it, why didn't he have any external soft tissue trauma.

I, you know, I would have expected had he hit, hit something hard enough to bleed that you'd have been able to see some sort of hematomas on the skin or laceration or something.²¹

Detective Terry Baker interviewed both Ms. Genna and the Defendant before Brenden was transported to Children's Hospital.²² The Defendant told him that around 3:30 p.m. to 4:00 p.m. that Ms. Genna was in the kitchen and he was playing with Brenden. He described the game as "gotcha," which involved him crawling back and forth behind the sofa and Brenden running back and forth across the cushions on his hands and knees. He would holler "gotcha" when Brenden got to one end, then Brenden would run back the other way.²³ At some point, the Defendant had to use

¹⁹Trial Transcript, p. 359; Plaintiff-Appellee's Appendix, p. 22b

²⁰Trial Transcript, p. 360; Plaintiff-Appellee's Appendix, p. 23b

²¹Trial Transcript, p. 363; Plaintiff-Appellee's Appendix, p. 23b

²²Trial Transcript, p. 378, 381; Plaintiff-Appellee's Appendix, p. 24b-25b

²³Trial Transcript, p. 382; Plaintiff-Appellee's Appendix, p. 25b

the bathroom and left Brenden on the couch, approximately ten feet away. He heard a “thud or a smack” from the living room and went out to see what had happened.²⁴ He saw Ms. Genna kneeling at the end of the couch. When he was able to see behind the sofa, he saw her picking Brenden up from the floor. He was unconscious and unresponsive and they took him to the hospital.²⁵

The Defendant told Det. Baker that when he left Brenden to go to the bathroom, he was standing on the couch and appeared to have his foot wedged between the seat cushions. He did not think anything was wrong so he went to the bathroom.²⁶ Det. Baker described the couch as being about seven feet long with three large cushions.²⁷ Det. Baker tried to get a better description of the sound the Defendant said he heard, because he was indicating that Brenden must have fallen and hit his head on the coffee table in front of the couch.²⁸ Det. Baker was able to get an approximate idea of how loud the thud was when the Defendant demonstrated by striking a small table with his closed fist.²⁹

Detective Sandra Jacobson interviewed Ms. Genna on October 7, 2005.³⁰ Ms. Genna told her that the first statement she gave was not true and she needed to tell the truth.³¹ During the interview, Ms. Genna did not mention any previous falls

²⁴Trial Transcript, p. 383; Plaintiff-Appellee’s Appendix, p. 25b

²⁵Trial Transcript, p. 383-384; Plaintiff-Appellee’s Appendix, p. 26b

²⁶Trial Transcript, p. 384-385; Plaintiff-Appellee’s Appendix, p. 26b

²⁷Trial Transcript, p. 385; Plaintiff-Appellee’s Appendix, p. 26b

²⁸Trial Transcript, p. 386; Plaintiff-Appellee’s Appendix, p. 26b

²⁹Trial Transcript, p. 386-387; Plaintiff-Appellee’s Appendix, p. 26b

³⁰Trial Transcript, p. 297-298; Plaintiff-Appellee’s Appendix, p. 14b

³¹Trial Transcript, p. 301; Plaintiff-Appellee’s Appendix, p. 15b

Brenden might have suffered.³² When Det. Baker returned to the investigation, he reviewed Det. Jacobson's report and found that there was "180 degrees difference in statements."³³ At a subsequent interview, the Defendant told the same story, except that he admitted Ms. Genna was not present when the incident occurred.³⁴ He reiterated the same efforts to revive Brenden, culminating in his intention to call 911 just as Ms. Genna returned to the house.³⁵

Holly Gilmer-Hill, M.D. testified as an expert in the field of pediatric neurosurgery, and shaken baby syndrome.³⁶ She was Brenden's attending physician at Children's Hospital.³⁷ She spoke to Ms. Genna when Brenden was admitted and Ms. Genna told her that she had been told that Brenden fell from a couch.³⁸ She did not tell the doctor about any earlier fall.³⁹ When Dr. Gilmer-Hill examined Brenden, she did not notice any external bruising or swelling of the scalp. He was awake and alert.⁴⁰ After the physical examination she reviewed the CAT scan and observed that there was a subdural hemorrhage with some brain swelling with shift. She considered this a serious injury.⁴¹

On October 6, 2005, Dr. Gilmer-Hill again examined Brenden. At that time, he had been examined by an ophthalmologist who discovered retinal hemorrhages in

³²Trial Transcript, p. 302; Plaintiff-Appellee's Appendix, p. 15b

³³Trial Transcript, p. 400; Plaintiff-Appellee's Appendix, p. 30b

³⁴Trial Transcript, p. 403; Plaintiff-Appellee's Appendix, p. 30b

³⁵Trial Transcript, p. 403-404; Plaintiff-Appellee's Appendix, p. 30b-31b

³⁶Trial Transcript, p. 430-442; Plaintiff-Appellee's Appendix, p. 32b-35b

³⁷Trial Transcript, p. 444; Plaintiff-Appellee's Appendix, p. 36b

³⁸Trial Transcript, p. 447; Plaintiff-Appellee's Appendix, p. 36b

³⁹Trial Transcript, p. 492-493; Plaintiff-Appellee's Appendix, p. 42b

⁴⁰Trial Transcript, p. 447; Plaintiff-Appellee's Appendix, p. 36b

⁴¹Trial Transcript, p. 448; Plaintiff-Appellee's Appendix, p. 37b

both of his eyes.⁴² She described retinal hemorrhages as “bleeding in the retina, which is at the back of the eye. It takes a good deal of force to cause that, and the combination of subdural blood with retinal hemorrhage is child abuse.”⁴³ According to Dr. Gilmer-Hill, retinal hemorrhage is caused by “being shaken or slammed onto a surface, either hard or soft. Usually repeatedly.”⁴⁴

Dr. Gilmer-Hill explained that Brenden showed an elevated platelet count. A low platelet count could be responsible for subdural bleeding, but not an elevated count. Further, even when there was bleeding from a low platelet count, typically retinal hemorrhaging would not be seen in conjunction with it.⁴⁵ Based on her training and experience and her treatment of Brenden, Dr. Gilmer-Hill did not believe his injuries were the result of an accident.⁴⁶ She explained:

Well, we did, we weren't given a history that was consistent with the injuries. The history that was given was a fall from a couch onto a carpeted floor, which does not account for these injuries. Um, the accident that could have accounted for brain swelling with bleeding in the brain and shift is a much greater injury than just a fall. It's a, you know, a fall out of a second story window. It's a high speed car accident, and even then we take care of children with those injuries and we don't see retinal hemorrhages in association with the bleeding.

So, no, I do not believe this was accidental.⁴⁷

⁴²Trial Transcript, p. 452; Plaintiff-Appellee's Appendix, p. 38b

⁴³Trial Transcript, p. 452-453; Defendant-Appellant's Appendix, p. 64a-65a

⁴⁴Trial Transcript, p. 453; Defendant-Appellant's Appendix, p. 65a

⁴⁵Trial Transcript, p. 453-454; Defendant-Appellant's Appendix, p. 65a-66a

⁴⁶Trial Transcript, p. 455; Defendant-Appellant's Appendix, p. 67a

⁴⁷Trial Transcript, p. 456; Defendant-Appellant's Appendix, p. 68a

On cross-examination, the trial counsel challenged Dr. Gilmer-Hill with articles by John Plunkett, M. D. and Jennian Geddes, M. D., which claim that the accepted mechanism of shaken baby syndrome is incorrect.⁴⁸ The Defendant also advanced the theory that Brenden's recent vaccinations may have cause the subdural bleeding.⁴⁹ Dr. Gilmer-Hill disagreed with both positions.⁵⁰ She observed that Dr. Plunkett's theory was not consistent with "the body of evidence that's out there."⁵¹ She also disagreed with the proposition that a child can suffer this sort of injury and have up to two days of lucidity before the injury begins to have an effect. She opined that the time would be "several hours," at most,⁵² and not even that long when the injury produced both a subdural hematoma and retinal hemorrhaging." That degree of trauma would cause symptoms to appear immediately.⁵³

When challenged on the force of a fall as opposed to shaking, Dr. Gilmer-Hill stated that a fall from five or six feet would have much less force than a shaking.⁵⁴ It would, in her opinion, take a fall of 20 to 30 feet to create the same force.⁵⁵ The Defendant also questioned her about whether a subdural hematoma can "re-bleed," that is, heal and then, from some type of trauma, start to bleed again.⁵⁶ She explained that a "re-bleed" would occur when a scar formed "within the capsule that was

⁴⁸Trial Transcript, p. 473-474; Plaintiff-Appellee's Appendix, p. 38b

⁴⁹Trial Transcript, p. 475-476; Plaintiff-Appellee's Appendix, p. 38b-39b

⁵⁰Trial Transcript, p. 473-474, 475; Plaintiff-Appellee's Appendix, p. 38b

⁵¹Trial Transcript, p. 480; Plaintiff-Appellee's Appendix, p. 40b

⁵²Trial Transcript, p. 477; Plaintiff-Appellee's Appendix, p. 39b

⁵³Trial Transcript, p. 486-487; Plaintiff-Appellee's Appendix, p. 41b

⁵⁴Trial Transcript, p. 478-479; Plaintiff-Appellee's Appendix, p. 39b

⁵⁵Trial Transcript, p. 479; Plaintiff-Appellee's Appendix, p. 39b

⁵⁶Trial Transcript, p. 482; Plaintiff-Appellee's Appendix, p. 40b

surrounding the hemorrhage and then blood develops, have grown into that scar and they are friable, so they can spontaneously bleed not due to a trauma, but just spontaneously re-bleeding.” She also observed that both old and new blood would be observable within the space.⁵⁷ She had previously stated that the blood shown by the CAT scan from Port Huron Hospital was fresh, indicating that the injury had occurred very close to the time Brenden was taken to the hospital.⁵⁸

Defense counsel also attempted to confront Dr. Gilmer-Hill with articles by Gregory Reiber, M.D. and Irving Root, M.D., from the American Journal of Forensic Medicine and Pathology, which claimed children could receive injuries causing brain swelling and how short falls with rotational force can cause G-forces equivalent to long falls, respectively.⁵⁹ Dr. Gilmer-Hill admitted she was not familiar with either article, but noted that her professional reading was in the neuro-surgical field.⁶⁰ She also observed that both doctors were forensic pathologists, a specialty that did not take care of patients with head injuries. She stated: “I do not believe that there are experts within my field of neurosurgery who believe that a two foot fall onto carpet will cause a severe head injury with bleeding and within the brain.”⁶¹

The Defendant testified that on the day of the incident, Brenden “wasn’t himself. He wasn’t, he wasn’t, um, up and wanting to get into everything. He was

⁵⁷Trial Transcript, p. 483; Plaintiff-Appellee’s Appendix, p. 40b

⁵⁸Trial Transcript, p. 477; Plaintiff-Appellee’s Appendix, p. 39b

⁵⁹Trial Transcript, p. 483; Plaintiff-Appellee’s Appendix, p. 40b

⁶⁰Id.

⁶¹Trial Transcript, p. 484; Plaintiff-Appellee’s Appendix, p. 41b

kind of, kind of groggy the whole, the whole day.”⁶² The Defendant sat on the couch with him and “he sat there for a little while just kind of like just staring off.”⁶³ The Defendant began playing “gotcha” with him.⁶⁴ Brenden got his foot stuck between the cushions “a couple of times.”⁶⁵ However, he did not go to the bathroom when Brenden’s foot was stuck, but rather “when I seen him getting a drink of his sippy cup, that is when I went to the bathroom because I figured he’s occupied enough that I can step off for a second and there’s not going to be anything done.” While in the bathroom, the Defendant heard a thud, and then he said two hits.⁶⁶ The Defendant described what he found:

I got out to the living room as fast as I could to find out what had happened. Um, when I had come out to the living room I had noticed that Brenden was in between my couch and my table, kind of wedged a little bit and kind of propped up, and he was just in a position that there’s no way that he went down in this position on his own.

It wasn’t like he was playing in this position. And, um, when I came out and saw him there, his head was, his head was flung back as far as the neck could go. And when I picked up the child he was like, it was like he was dead and he was like limp noodles.

* * *

I picked him up. Um, I tried talking to him. I sprayed some water off my hands that were wet. Um, I touched his head. I, um, I tried everything I could do. I was calling his name. I was on my way to the phone to call, um, 911. Cheryl had came in the house and I told her that Brenden had fallen and he was unconscious. She started smiling and laughing like she thought that I was kidding with her because, um,

⁶²Trial Transcript, p. 528; Plaintiff-Appellee’s Appendix, p. 43b

⁶³Trial Transcript, p. 528-529; Plaintiff-Appellee’s Appendix, p. 43b

⁶⁴Trial Transcript, p. 529; Plaintiff-Appellee’s Appendix, p. 43b

⁶⁵Trial Transcript, p. 529, 531-532; Plaintiff-Appellee’s Appendix, p. 43b-44b

⁶⁶Trial Transcript, p. 533; Plaintiff-Appellee’s Appendix, p. 44b

I'm a person that has a pretty good sense of humor. I like to joke around a little bit.

Um, and I told her that I was not joking, that this was serious, um, and I told her that he's barely breathing. It almost sounds like he's snoring. Um, I didn't know what was, what was wrong. I, I did not see, I did not see him fall. I did not, I have no recollection of what did happen. All I can tell you is how I found him and picked him up. She came in, um, she went hysterical. Um, I feel so bad for her.⁶⁷

The Defendant indicated that Ms. Genna told him to say she was there when the incident happened. As a result, he told Det. Baker a story that was consistent with what Det. Baker had heard from Ms. Genna.⁶⁸ The Defendant denied grabbing or shaking or causing Brenden any physical harm. He said nothing Brenden had done had made him mad or upset on the day of the incident, or any other time he was with Brenden.⁶⁹

On cross-examination, the Defendant stated he would never discipline someone else's child, either physically or verbally. He would not touch another's child, nor would he correct someone else's child.⁷⁰ The Defendant said he would not even tell the child "no."⁷¹ In this case, had there been any problem he would have waited for Ms. Genna to return and let her handle it.⁷²

⁶⁷Trial Transcript, p. 534-535; Plaintiff-Appellee's Appendix, p. 45b

⁶⁸Id.

⁶⁹Trial Transcript, p. 547; Plaintiff-Appellee's Appendix, p. 45b

⁷⁰Trial Transcript, p. 548-549; Plaintiff-Appellee's Appendix, p. 46b

⁷¹Trial Transcript, p. 549-550; Plaintiff-Appellee's Appendix, p. 46b-47b

⁷²Trial Transcript, p. 550; Plaintiff-Appellee's Appendix, p. 47b

The Defendant admitted it would be important for the doctors to know exactly what happened so they could treat Brenden.⁷³ He admitted that the doctors did not know everything because he did not talk to them.⁷⁴ He also admitted that he did not tell Detective Baker the truth in his first interview and did not tell him the truth until Baker contacted him for a second interview some eight days after the incident.⁷⁵

At the conclusion of testimony and argument, the jury began deliberations and later asked to play back the testimony of Dr. Gilmer-Hill.⁷⁶ After listening to the video, the jury deliberated for the rest of that day, and returned to continue on the next trial day.⁷⁷ At that time, they requested a replay of a very specific portion of Dr. Gilmer-Hill's testimony, which was provided.⁷⁸ Later that day, the jury informed the Court that it could not reach a unanimous verdict. The Court read the deadlocked jury instruction, and after about 20 minutes of further deliberation, the jury returned a verdict of guilty as charged.⁷⁹ The Defendant was subsequently sentenced to a term of 24 months to 15 years.⁸⁰ He has since been released from prison, and also parole.

On direct appeal, the Defendant asserted a number of claims, including an ineffective assistance claim that Mr. Lord failed to present an expert witness to rebut the prosecutor's evidence or failed to convince the Defendant of the need to hire an

⁷³Trial Transcript, p. 560-561; Plaintiff-Appellee's Appendix, p. 48b

⁷⁴Trial Transcript, p. 561; Plaintiff-Appellee's Appendix, p. 48b

⁷⁵Trial Transcript, p. 562; Plaintiff-Appellee's Appendix, p. 49b

⁷⁶Trial Transcript, p. 650-651; Plaintiff-Appellee's Appendix, p. 50b

⁷⁷Trial Transcript, p. 734-735; Plaintiff-Appellee's Appendix, p. 51b

⁷⁸Trial Transcript, p. 738, 740-761; Plaintiff-Appellee's Appendix, p. 52b-58b

⁷⁹Trial Transcript, p. 767-768; Plaintiff-Appellee's Appendix, p. 59b-60b

⁸⁰Sentencing Transcript, p. 16; Plaintiff-Appellee's Appendix, p. 62b

expert. Because appellate counsel did not seek an evidentiary hearing to establish a factual record to support this claim, the Court of Appeals determined from the record available that the Defendant's claim failed. *People v Ceasor*, unpublished per curiam opinion of the Court of Appeals, issued July 12, 2007 (Docket No. 268150). This Court denied the Defendant's application for leave to appeal. *People v Ceasor*, 480 Mich 926 (2007).

The Defendant sought a writ of habeas corpus in the federal district court in 2008. As typically happens after the conclusion of the direct appeal, the Michigan Attorney General's Office represented the People in the federal system. The federal district court held the habeas petition in abeyance while the Defendant sought and was denied relief pursuant to MCR 6.500 *et. seq.* Upon returning to federal court, the district court initially denied relief but was reversed by the Sixth Circuit Court of Appeals in 2016. *Ceasor v Ocwieja*, 655 Fed Appx 263 (CA 6, 2016). The Sixth Circuit concluded that appellate counsel's performance was deficient because he did not file a separate motion seeking a remand to the trial court in defendant's direct appeal; he did not provide an affidavit or offer of proof in support of such a motion as is required by MCR 7.211(C)(1)(a); and he stated in his appellate brief that the question of trial counsel's effectiveness could be decided on the existing record. *Id.* at 279-282.

The Sixth Circuit remanded the case to the district court to hold an evidentiary hearing on the issue of prejudice; and if prejudice was found, directed the district court to conditionally grant the writ of habeas corpus "to allow the state courts to consider a new appeal or a renewed request for a *Ginther* hearing" *Id.* at 289-290.

On remand to the federal district court, the parties entered a stipulated order stating that “appellate counsel’s deficient performance prejudiced Petitioner because appellate counsel failed to litigate in state court a claim of ineffective assistance of trial counsel that was reasonably likely to succeed.” Specifically, the stipulated order “made no finding on whether the underlying claim of ineffective assistance of trial counsel [would] ultimately succeed.” The order directed the Court of Appeals to grant the Defendant a new direct appeal as of right. After the stipulation was entered, the case was transferred back to the St. Clair County Prosecutor’s Office for further proceedings.

The Defendant then filed a motion for a new trial in the trial court pursuant to MCR 7.208(B)(1). The trial court held an evidentiary hearing, wherein the Defendant presented witnesses: the Defendant himself, Diana Hastings (his mother), Alan Hastings (his uncle), and Mr. Lord. The testimony of these witnesses is detailed in the Argument section as it relates to the issues raised in this Application. Ultimately, the trial court denied the Defendant’s motion, finding that Mr. Lord’s representation was not objectively deficient.⁸¹

The Court of Appeals reviewed the decision of the trial court and affirmed it in an unpublished opinion on May 23, 2019. *People v Ceasor*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2019 (Docket No. 338431). The Defendant argued that the trial court erred and that Mr. Lord provided ineffective

⁸¹ Trial Court Order, dated February 1, 2018; Defendant-Appellant’s Appendix, p. 218a-233a

assistance for failing to seek public funds to hire an expert witness. He also argued that trial counsel was ineffective for failing to seek the assistance of an expert who would have provided services pro bono. The Court of Appeals concluded that the Defendant failed to establish that Mr. Lord's performance fell below an objective standard of reasonableness under the prevailing norms of competent practice at the time of the trial. The Court further found that the Defendant did not establish the requisite showing of prejudice to establish an ineffective assistance claim.

The Defendant next filed his Application for Leave to Appeal, on which this Court ordered oral argument in an Order dated April 17, 2020. The Order directed the parties to address whether the Defendant "was denied the effective assistance of trial counsel due to counsel's failure to seek funds from the circuit court to hire an expert witness or to otherwise obtain and present the testimony of an expert witness."

ARGUMENT

- I. **Retained trial counsel did not deprive the Defendant of the effective assistance of counsel when he did not to seek funds from the circuit court to pay for an expert witness with whom he had already consulted, where the Defendant had previously indicated an intention and plan to pay for the expert and where no authority existed to support a retained attorney's request for public funds.**

- A. **Standard of Review and Preservation of Error**

The trial court considered this issue as part of a motion for a new trial pursuant to MCR 7.208. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court abuses its discretion when it selects a decision outside the realm of reasonable and principled outcomes. *Rao*, at 279. The Defendant preserved the issue before this Court with a Motion for a New Trial filed pursuant to MCR 7.208(B).

- B. **Analysis**

The Defendant premised his Motion for New Trial on an ineffective assistance claim, wherein he argued that if an expert witness would have been called at trial, the expert could have testified that the victim's injuries were caused by a fall, rather than by abuse, as the prosecution's expert witness concluded. Even though Mr. Lord did consult with an expert witness, Dr. Faris Bandak, prior to trial, Mr. Lord could not call Dr. Bandak as a witness because the Defendant did not provide him with payment. Even though the Defendant never asserted indigency in the trial court, hired two trial attorneys to represent

him, and repeatedly assured Mr. Lord that he had a plan to pay for the expert; he now argues that Mr. Lord should have sought funds from the court to pay for Dr. Bandak. Because Mr. Lord did not do so, the Defendant believes Mr. Lord deprived him of effective assistance of counsel.

1. Legal Standards for Ineffective Assistance of Counsel Claims

Both the U.S. Constitution and the Michigan Constitution guarantee a criminal defendant the right to the assistance of counsel:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI]

* * * * *

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal. [Const 1963, art 1 § 20]

The issue of whether the Defendant was denied effective assistance of counsel requires this Court to evaluate both counsel's decisions, and their effect on the ultimate outcome. The Defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under professional norms; and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Of particular importance in this case, where this Court is asked to evaluate the performance of a trial attorney fifteen years post-trial, is that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, at 688. Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Moreover, "the performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances." *Id.* at 688. Counsel is not ineffective for failing to advance a meritless or unsupported position. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Counsel's performance is evaluated in the context of his communications with the client. In *Strickland*, the Court stated:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. [*Strickland*, at 691]

The Defendant bears the burden of showing both deficient performance and prejudice under *Strickland*, and the failure to make the required showing of either prong defeats the ineffectiveness claim. *Id.* at 696, 700.

2. The Defendant has never conclusively established that he was indigent at the time of his trial.

From the time he was charged, the Defendant did not want to be treated as an indigent person or to be represented by an attorney at public expense. This is evidenced by his decision to retain two different attorneys throughout his case. Although the People have never directly challenged the Defendant's assertion that he could have been deemed indigent at the time of trial, the Defendant has never demonstrated indigent status with financial records from the relevant time period. Assessing the Defendant's potential status as an indigent person, especially 15 years later, is not a straightforward inquiry. Indigency must be determined on a case by case basis and reviewing courts have declined to "lay down specific and intricate rules defining standards of indigency. *People v Chism*, 17 Mich App 196, 199; 169 NW2d 192 (1969).

MCR 6.005(B)⁸² provides the factors for the trial court to consider in determining indigence: (1) present employment, earning capacity and living expenses; (2) outstanding debts and liabilities, secured and unsecured; (3) whether the defendant has qualified for and is receiving any form of public assistance; (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and (5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel. The court rule also provides that the ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

It was unclear, even after the opportunity to demonstrate indigency at the evidentiary hearing, what the Defendant's actual financial position was at the time of trial. He admitted on cross-examination that he made money that was not accounted for on the exhibits presented to the trial court. He did not present any bank records to the court.⁸³ Mr. Hastings testified that he paid the Defendant in cash for his auto body work during this timeframe.⁸⁴ The Defendant's representations to the court to obtain appellate counsel and in his presentence report were inconsistent.⁸⁵

⁸² MCR 6.005 remains substantially the same today as in 2005.

⁸³ Evidentiary Hearing Transcript, p. 27; Plaintiff-Appellee's Appendix, p. 69b

⁸⁴ Evidentiary Hearing Transcript, p. 54; Plaintiff-Appellee's Appendix, p. 80b

⁸⁵ Evidentiary Hearing Transcript, p. 29-32; Plaintiff-Appellee's Appendix, p. 71b-74b

Prior to the preliminary examination in district court, the Defendant retained David Black to represent him. After his arraignment and pretrial in this Court, the Defendant retained Ken Lord, who substituted in for Mr. Black. His presentence investigation form reflects that at the time of conviction, he was employed doing auto body repair and had been in that position since 2001. At the time this case was tried, indigency would have been difficult to show because the Defendant was gainfully employed and had already retained two different attorneys to pursue his case.

The Court of Appeals concluded that the Defendant had not shown he was indigent:

To qualify for funds to pay an expert, defendant would have been required to demonstrate that he was, in fact, indigent at the time he sought funds. Defendant claims on appeal that the trial court concluded that he was indigent in 2005, and that such a finding is unquestionably correct. Defendant, however, misrepresents the trial court's decision. The trial court did not make a finding that defendant was indigent. The trial court simply noted that Lord did not testify that defendant had more financial resources available than defendant had represented to him. Further, Lord relied on defendant's representation that he lacked sufficient cash on hand to pay Dr. Bandak at the time of his trial. ***That does not conclusively establish indigence, and is not a finding of indigence by the trial court.*** [*People v Ceasor*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2019 (Docket No. 338431), p. 9 (Emphasis added)]

* * * * *

In this case, whether defendant would have been found indigent is questionable. The record reflects that defendant had regular employment for years, rented a home, and paid

utilities. No evidence establishes that he received any form of public assistance. The record reflects that his annual wages in 2005 were at least \$15,000. He also received \$50 a week in child support. Thus, he had an annual income of over \$17,000. While certainly not dispositive, in 2005, the federal poverty level for an individual with one dependent child was \$12,380. Defendant's income was nearly 140% of the federal poverty level in 2005. ***Defendant has not established that he would have been determined indigent at the time of his trial.*** [*Id.* at 9-10 (Emphasis added)]

It was the Defendant's burden to demonstrate that he was indigent and he has not met that burden.

3. Trial counsel located and consulted with a knowledgeable expert prior to trial to assist with the Defendant's case and reasonably relied on assurances that the Defendant would pay the expert witness fees.

Mr. Lord understood the importance of an expert witness. In his 30 years of practice as a criminal trial attorney, he had handled expert witness issues. Throughout the years, he tried hundreds of cases, mostly felonies.⁸⁶ He described how he sought out a reputable and qualified expert at the evidentiary hearing:

MR. LORD: . . . So I went to SADO. I don't remember if they gave me the name. I went online and I found Doctor Bandak. I called him. Um, I told him my client was going to be raising the money. He asked me to send him copies of the police report and the evidence, the Preliminary Exam transcript and I did. And I had two or three more conversations with him concerning what he thought of the case. He thought that he could help me. He thought that -- I, I believe his degree was in engineering and he had done studies to show that it could actually have occurred the way Mr. Ceasor had said it occurred. During the course of that conversation I talked to him about finances and indication was -- and, and I believe. Again, I can't swear but I believe

⁸⁶ Evidentiary Hearing Transcript, p. 69; Plaintiff-Appellee's Appendix, p. 63b

the initial consultation and all the phone calls I had with him was \$750.00 and I, I told him that Mr. Ceasor did not have a lot of money. That he was possibly going to sell his car. He had indicated buying it from a -- borrowing from his parents or from a relative and based upon that I filed for adjournments. I, I believe I filed a motion to adjourn so that we'd have more time to raise money because Mr. Ceasor was telling me he was going to get more money.

At that point I -- Doctor Bandak said that his fee would be approximately \$1,500.00 a day plus expenses and that's where the figure \$3,000.00 came up with. I don't know where the \$10,000.00 is coming from. I've done whole murder trials for less than \$10,000.00.⁸⁷

Understanding the importance of Dr. Bandak's opinion to his client's defense, Mr. Lord sought numerous adjournments to allow the Defendant to acquire the funds to pay him. On April 1, 2005, the parties stipulated to adjourn the trial, then scheduled for April 5, 2005, for the express reason that "defense counsel is currently seeking an independent Medical Expert Witness. . . ."⁸⁸ Further, trial counsel sought another adjournment of the trial, now scheduled for May 17, 2005:

Defense counsel has spoken to and forwarded materials to Dr. Faris Bandak, an expert in the field of injury biomechanics, who resides in Potomac, Maryland. Dr. Bandak has been qualified as an expert in shaken baby syndrome cases, and has agreed to review the materials in anticipation of payment of the retainer fee.⁸⁹

The trial was again adjourned to a new date of June 28, 2005.⁹⁰ That trial date was adjourned to August 2, 2005, then again by stipulation of the parties, to

⁸⁷ Evidentiary Hearing Transcript, p. 70-71; Plaintiff-Appellee's Appendix, p. 89b-90b

⁸⁸ Stipulated Order to Adjourn Trial, dated April 1, 2005; Plaintiff-Appellee's Appendix, p. 1b

⁸⁹ Defendant's Motion to Adjourn Jury Trial, dated May 9, 2005 ¶ 4; Plaintiff-Appellee's Appendix, p. 2b

⁹⁰ Online Register of Actions, 31st Circuit Court case no. A-05-220-FH; Defendant-Appellant's Appendix, p. 1a-12a.

September 13, 2005, then to November 1, 2005, and a final time to December 13, 2005.

Even if this Court assumed indigency, the testimony from Mr. Lord demonstrates that the lack of funds for the expert was more a matter of Defendant's choices than inability to pay. The Defendant wanted retained counsel of his choosing throughout the case:

Q Why didn't you apply for a court-appointed attorney?

A 'cause my mom got me a lawyer.

Q Did you talk to your mom about the expense of that and how long this case may take?

A No.

Q What was your understanding of the arrangement with Mr. Black? Was he going to represent you from the beginning of the case all the way through to the end?

A No.

Q Explain to me what your understanding was?

A Um, Dave Black was at court when I went -- when the -- when this first started and he wasn't going to let me go into court without counsel is -- that's what that was.

Q So, what was your agreement with him?

A I had no agreement with Dave Black.

Q So you had no agreement, but your mom paid \$1,000.00?

A My mom paid that with them.

Q So what did she pay it for? She just handed Dave Black --

A No no no. She retained David Black, but I fired David Black.

Q Okay. Why did you fire David Black?

A Because we hired Ken Lord.

Q Why did you hire Ken Lord?

A I didn't feel that Dave Black had my best interests.⁹¹

The People do not suggest that one's familial financial resources are properly considered in determining indigency, but the Defendant's failure to prove an absence of available funds corroborates Mr. Lord's testimony and shows that his belief that the Defendant would come up with the money was reasonable under the circumstances.

The Defendant has presented this as a case where he wanted the expert and Mr. Lord failed to request funds. Mr. Lord's testimony indicates otherwise. Mr. Lord felt he had a difference of opinion with the Defendant as to the importance of the expert witness.⁹² Mr. Lord described the way the Defendant ultimately told him he would not have the money and that he didn't really think an expert was necessary at several points during the evidentiary hearing:

Q When he came to you, what did he say? How did he tell you he wasn't going to get this money?

A I don't remember word for word, but roughly that -- Mr. Ceasor always maintained his innocence to me. He was very forthright in that, but *he also indicated that at*

⁹¹ Evidentiary Hearing Transcript, p. 22-23; Plaintiff-Appellee's Appendix, p. 64b-65b

⁹² Evidentiary Hearing Transcript, p. 85-86; Plaintiff-Appellee's Appendix, p. 104b-105b

that time that he didn't feel that he'd need an expert. That he was a witness and that the jury would believe his testimony. He'd be a good witness.

Q When Mr. Ceasor came to you and told you that he wasn't going to come up with the money, what were your options at that point?

A Go to trial. I was, I was -- I, I never thought of filing a motion because I did not believe that Mr. Ceasor could not -- honestly, I knew that Mr. Ceasor himself was too poor to have the money, perhaps, but he had indicated he was willing to borrow from his mother and his mother was willing to give it to him. Whether or not that's true I don't know, but that's what he represented. But he felt he didn't want to put his mother in any further debt.⁹³

* * * * *

Q Did Mr. Ceasor ever tell you that he couldn't come up with the money or was it a choice not to?

A My memory of the conversation was he didn't want to have his mother go into debt for the loan. That he was concerned about that. So, it was his choice not to ask his mother for the loan.

Q And he brought this to your attention?

A A couple weeks before trial.

Q Whereas throughout the pendency of the case he had been indicating he'd sell the car, he'd talked to mom, he would come up with it?

A Yes. Well, he was trying other options to avoid going to his mother.⁹⁴

* * * * *

Q And you were expecting that he was taking the money he should have been paying you monthly and saving that for the expert?

⁹³ Evidentiary Hearing Transcript, p. 78; Plaintiff-Appellee's Appendix, p. 97b

⁹⁴ Evidentiary Hearing Transcript, p. 80-81; Plaintiff-Appellee's Appendix, p. 99b-100b

A That was one -- we also had other conversations. Terry appeared to be a hard working guy. He said, he said: Maybe I can get more overtime. Maybe I can do this. We're going to build this car. We're going to try to sell this and also with his mother. The way that Terry explained the relation with his mother was touching. That she would do anything for him. It was her son and that if it became necessary she would do this. If she had to mortgage her house second, she would do this. She loved her son that much. He even said: I don't want to do that to my mother. I understood that, but that's kind of late.

Q And he only said that two weeks approximately before trial started?

A Again I, I give -- yes, approximately. It was well after all of the adjournments and the motions because I wouldn't have kept filing them otherwise.⁹⁵

The Defendant communicated clear plans to Mr. Lord to sell a car to obtain the funds, and also said he would borrow the money from his mother.⁹⁶ He never gave Mr. Lord any indication that his plans had changed:

Q Was there any point prior to that two week mark before the trial when he came to you and said: I am not going to be able to do this. I cannot afford this?

A No. I would not have gone repeatedly in front of the court nor filed a motion if my client told me he couldn't come up with the money. I, I would lose all integrity with the court and that's where I make my living or did.⁹⁷

Mr. Lord's testimony demonstrates that the Defendant did not believe the expert was as crucial as Mr. Lord did. Mr. Lord felt that an acquittal could be obtained with the aid of an expert, and when the Defendant told him he would not

⁹⁵ Evidentiary Hearing Transcript, p. 110; Plaintiff-Appellee's Appendix, p. 129b

⁹⁶ Evidentiary Hearing Transcript, p. 79; Plaintiff-Appellee's Appendix, p. 98b

⁹⁷ Evidentiary Hearing Transcript, p. 83; Plaintiff-Appellee's Appendix, p. 102b

have the money, Mr. Lord told him that the trial was in two weeks and they would do the best they could.⁹⁸ Counsel's actions are properly based on the strategic choices, actions, and information provided by the Defendant. *Strickland*, at 691.

Mr. Lord made payment of the expert a priority in the case. The Defendant never paid Mr. Lord anything beyond the initial retainer his mother paid, and Mr. Lord testified several times that he advised the Defendant not to worry about making payments to him but to save the money for the expert instead.⁹⁹ This was corroborated by Alan Hastings, who heard Mr. Lord tell the Defendant to focus on saving for the expert.¹⁰⁰ The Defendant should have been making payments to Mr. Lord during the months before trial, but did not pay him anything. There were approximately five months before trial where the Defendant was not making payments to Mr. Lord, with Mr. Lord believing that he was putting aside money for the expert.¹⁰¹ Mr. Lord's concern was winning the case and payment was not his primary motivation with the Defendant.¹⁰²

Mr. Lord delayed the trial as much as he could to allow for the Defendant to gather funds:

Q Okay. Turning to your communication with Mr. Ceasor. I, I don't think there's any dispute here you made it clear to him that he needed this expert?

A Yes.

⁹⁸ Evidentiary Hearing Transcript, p. 87; Plaintiff-Appellee's Appendix, p. 106b

⁹⁹ Evidentiary Hearing Transcript, p. 62, 73, 89; Plaintiff-Appellee's Appendix, p. 81b, 92b, 108b

¹⁰⁰ Evidentiary Hearing Transcript, p. 52; Plaintiff-Appellee's Appendix, p. 79b

¹⁰¹ Evidentiary Hearing Transcript, p. 101-102; Plaintiff-Appellee's Appendix, p. 120b-121b

¹⁰² Evidentiary Hearing Transcript, p. 89; 108b

Q And did you give him -- what did you represent to him as far as costs? Was it what you've testified to previously?

A Yes.

Q What did Mr. Ceasor tell you about coming up with this money?

A Well Mr. Ceasor told me he was going to try to raise the money, which is why I kept asking for adjournments. Otherwise I wouldn't have represented to the court or filed a motion for adjourn to give my client time to raise the money. Mr. Ceasor to my memory didn't tell me that we weren't going to get the money just shortly before trial after the Motion/Pre-Trial date had -- was cut off and after I had requested numerous times for adjournments and filed a motion to have more time.¹⁰³

In the weeks, leading up to trial, the Defendant continued to tell Mr. Lord that he was going to get the money.¹⁰⁴ They discussed the Defendant working more overtime, selling a car, and also borrowing money from his mother, who had already put forth \$3,500 for his representation with the expectation that there would be additional cost.¹⁰⁵ Mr. Lord was angry when the Defendant told him that he was not going to come up with the money because it was only weeks before trial.¹⁰⁶ Due to the numerous adjournments and representations Mr. Lord had made to the trial court, he was not in a position to seek any further extension of time. It would have appeared misleading for Mr. Lord to ask the court for money to fund the

¹⁰³ Evidentiary Hearing Transcript, p. 75; Plaintiff-Appellee's Appendix, p. 94b

¹⁰⁴ Evidentiary Hearing Transcript, p. 77; Plaintiff-Appellee's Appendix, p. 96b

¹⁰⁵ Evidentiary Hearing Transcript, p. 44-47, 109; Plaintiff-Appellee's Appendix, p. 75b-78b

¹⁰⁶ Evidentiary Hearing Transcript, p. 77-78; Plaintiff-Appellee's Appendix, p. 96b-97b

expert when the Defendant had already paid two attorneys and had proceeded thus far having not sought court appointed counsel.

The Defendant suggested repeatedly in the trial court that Mr. Lord should have advised the trial court that the Defendant had run out of money and needed funding for the expert, but this would not have been well received by a judge who had already adjourned the trial several times based on the Defendant's assurances that he was going to pay the expert. The Defendant left Mr. Lord with little other option than to proceed to trial when he had maintained for months that he would have the money in time for trial, but did not.

4. Trial counsel's performance in not seeking public funds for an expert was not deficient where there was no authority for a retained attorney to request such funding for a client who had not been deemed indigent.

At the time the Defendant was tried, MCL 775.15 was considered to apply to expert witnesses, although the law is different now.¹⁰⁷ The statute provided as follows:

If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that ***such accused person is poor and has not and cannot obtain the means to procure the attendance of such***

¹⁰⁷ This Court has since found in *People v Kennedy*, 502 Mich 206; 917 NW2d 355 (2018), that MCL 777.15 does not apply to expert witnesses. Instead, the statute was enacted to provide a means for subpoenaing and compensating other witnesses for the costs of attending trial. *Id.* at 222-223.

witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people. [MCL 777.15 (Emphasis added)]

Prior to trial, the Defendant never filed an application for appointed counsel, nor did he ever seek to be considered indigent by the trial court. The People have never questioned that he *may* have been entitled to proceed as an indigent person. The difficulty in this case is that he never sought to proceed in that manner. Because the Defendant was not deemed indigent, none of the caselaw that he cites applies to the circumstances that Mr. Lord faced going into trial in 2005.

The Defendant cites several cases in support of his assertion that Mr. Lord should have sought funds from the trial court in 2005: *Hinton v Alabama*, 571 US 263; 134 S Ct 1081; 188 L Ed 2d 1 (2014); *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015); *People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993); and *In re Yarbrough Minors*, 314 Mich App 111; 885 NW2d 878 (2016). All of these cases involved defendants (or respondents) who had been deemed indigent. The Defendant never demonstrated such a financial position or sought to be treated as indigent. He did not want a court-appointed lawyer but wanted the counsel of his choice. None of these cases provide any authority for a retained

attorney, such as Mr. Lord, to ask the court for funds to pay an expert. Each is discussed below.

In *Hinton*, the United States Supreme Court held that trial counsel was ineffective for failing to request additional funds to hire a different expert upon learning that the defendant's current expert was inadequate. Counsel in *Hinton* did not realize that he could seek reimbursement under state statute for any expenses reasonably incurred in the defense of the case. The *Hinton* case differs from the case before this Court because, again, the defendant in *Hinton* was already declared indigent and was therefore provided with funding by the state if needed.

The Defendant contends that the Court of Appeals failed to cite or account for the decision in *Yarbrough*, wherein a parental rights termination case was reversed because the indigent parents were denied an expert at public expense in a case where such an expert was necessary to rebut the evidence presented against them. Certainly, this decision supports an indigent client's request for an expert witness at public expense, but again, these parents—unlike the Defendant—were deemed indigent by the court.

In *Ackley*, this Court determined that in a case where expert testimony was critical to explain whether the cause of death of the victim was intentional or accidental, trial counsel was ineffective for failing to attempt to engage or consult with an expert witness. *Id.* at 383-384. Unlike the Defendant's case, the trial

court in *Ackley* had already provided funding for an expert because the defendant was indigent. The attorney had contacted one expert, and that expert advised that he could not be helpful to the case and gave the name of another person who could provide testimony that was in line with the defense. Trial counsel in *Ackley* admitted that he did not contact another expert, and he did not present an expert at trial. He further admitted that he did not read any articles or treatises about the medical diagnoses at issue. *Id.* at 386.

Counsel's actions (or lack thereof) in *Ackley* are in stark contrast to this case, where Mr. Lord advised the Defendant early on in the case that he needed an expert. Mr. Lord contacted an expert, and had that expert's cooperation. He would have called him as a witness at trial, but for the fact that the Defendant would not pay for him and did not feel his testimony was necessary.

Furthermore, trial counsel could not have cited *Ackley*, *Yarbrough*, or *Hinton* to the court in 2005, as these decisions were not yet in existence. The Defendant urges that these decisions, particularly *Ackley*, do not establish new rights and only apply the long-standing rule of Strickland. While *Ackley* may not have created a new right for a criminal defendant, it certainly was a significant legal precedent for indigent defendants. *Ackley* strongly supports a court appointed expert in the same type of criminal case as the Defendant's case, and it was not available to Mr. Lord at the time. In the five years since *Ackley* was published, it has been cited over 100 times in opinions in state and federal courts, as well as in countless pleadings in the trial courts.

Even *Ackley* does not compel the result the Defendant seeks, however. The *Ackley* decision does not require the court to fund the costs of an expert where the client has hired his own attorney and has represented to both the attorney and the court that he intends to pay for the expert. This Court did not consider the issue of whether someone who had retained two attorneys and arguably could have paid for an expert is entitled to one at public expense. That was the situation Mr. Lord faced in 2005. *Ackley* would not have given support for what would have been an otherwise unprecedented request for public funds for an expert in a case where the defendant retained an attorney.

The *Arquette* decision, unlike the other cases cited by the Defendant, would have been available to Mr. Lord in 2005, but this decision would not have supported a request for funds as conclusively as the Defendant suggests. The *Arquette* case involved transcripts prepared at public expense. The defendant in *Arquette* sought to be treated as indigent from the beginning of the case and the court found him to be indigent. Specifically, he filed a declaration of indigence and requested counsel. *Id.* at 229. The court appointed counsel, but then the defendant's parents retained an attorney to represent him. The retained attorney sought transcripts at public expense, which were denied by the court. The retained attorney then withdrew, counsel was appointed, and the transcript was prepared at public expense. Court-appointed counsel then withdrew, and the retained attorney submitted an appearance. The trial court allowed the appointed attorney to withdraw, but would not allow the retained attorney to appear on the case. The trial court found that the

maneuvers of the retained attorney had been fraudulent, with an intention to secure a transcript at public expense after one had been denied. *Id.* at 229-230.

The Court of Appeals reversed the trial court, finding that the trial court could not deny the defendant's retained attorney from representing him. In reaching this conclusion, the Court of Appeals drew a distinction that is significant to the case before this court, differentiating between defendants who proceed as indigent from the outset of the case, and those that retain an attorney and then seek to be treated as indigent:

There are clearly good reasons behind the circuit court's general policy denying transcripts at public expense to criminal defendants who can afford to retain attorneys. However, we find the trial court's concern, that if defendant were provided a transcript at public expense then everyone with a retained attorney would want free transcripts, to be meritless. It is undisputed that defendant was indigent throughout these proceedings, and indigent criminal defendants are entitled to transcripts at public expense. ***It would be a different case if defendant had retained an attorney and then declared indigence.*** The trial court's narrow interpretation of the court's policy leads to the ironic result of forcing the taxpayers to provide the entire cost of an indigent's defense even if the indigent's friends or family are willing to pay part of the cost. Public policy would be better served by a case by case determination rather than an inflexible rule in this matter. Although we do not believe the circuit court's policy is itself invalid, we find that this case presents an exception. The 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 transcripts at public expense. [*Id.* at 230-231 (Emphasis added)]

Despite the Defendant's arguments to the contrary, *Arquette* would not have provided Mr. Lord with authority to seek funds from the trial court, especially when

Mr. Lord was the Defendant's second retained attorney and the *Arquette* court saw a difference between a person who declared indigence at the beginning of the case and one who retained an attorney and then later declared indigence.

There is no question that *Arquette* established that the assets and ability to pay of a defendant's family should not determine whether a defendant is considered indigent. Had the Defendant ever sought to be deemed indigent by the trial court, Mr. Lord could have cited *Arquette* to argue that the Defendant's family contributions should not be considered in his ability to pay. The issue here is that this Defendant never sought to be deemed indigent by the court until after conviction, when he was sentenced to prison and would obviously be unable to retain appellate counsel. Had the Defendant claimed indigency in the trial court, he would have had to proceed with whatever attorney was assigned his case, and he wanted to choose his own representation. Perhaps the trial court would have found the Defendant indigent, but the Defendant did not want to proceed that way. He wanted his choice of attorneys. Having been retained and paid by the Defendant, Mr. Lord did not have a basis to ask the court for public funds. The *Arquette* decision would not have changed the legal position in which Mr. Lord found himself as a retained attorney to a client who had not claimed indigency in the trial court.

Mr. Lord testified about the futility of asking the trial court to grant him funds for an expert in 2005, as a retained attorney:

Q Was there any difference in the way you would handle a

need for an expert between a retained case or a court-appointed case?

A Well, yes, in a court-appointed case your client is already determined that he's indigent and then you would apply to the court prior to the ending of the motion period for court-appointed expert.

Q And --

A And then, and then you get what the court allows you.

Q And as far as retained cases how was that different?

A Well, you're not indigent. You don't apply.

Q Have you ever sought court-appointed expert funds in a case where you were retained?

A Not, not that I can remember ever.¹⁰⁸

* * * * *

Q In terms of filing a motion with the court for funds for an expert, did you feel that you could file such a motion?

A No.

Q Did you believe he was actually indigent and would have met the standard?

A I believed that Terry felt in his mind he was indigent and would have met the standards.

Q Okay. But as far as filing a motion you did not think that that was an appropriate course of action?

A Well, there were a lot of factors involved. One is we were well passed the Motion/Pre-Trial date. Two, I made numerous representations based on Mr. Ceasor's representation to me that there was. That close to trial and it was a date certain definite trial I'd not be able to get another adjournment and I never ever had the court on a retained case grant a court-appointed payment for an

¹⁰⁸ Evidentiary Hearing Transcript, p. 69-70; Plaintiff-Appellee's Appendix, p. 88b-89b

expert witness fee.¹⁰⁹

The Court of Appeals recognized the lack of precedent at the time that would have supported a request for public funds by a retained attorney:

Regardless, the question remains whether Lord's failure to seek funds from the trial court constituted objectively unreasonable conduct. Lord's testimony at the evidentiary hearing establishes that he knew that in the defense of an indigent defendant during 2005, he could turn to the court for funds to hire an expert witness, having done so on other occasions. Lord, however, testified that he had never himself sought such funding for a defendant who had retained him and he also lacked awareness of any other retained attorney who ever sought funding from the court for an expert witness. We cannot fault Lord for failing to advance what would have been a fairly novel position, that an individual in defendant's financial position, and who had twice retained counsel in this case, could nonetheless qualify as an indigent defendant entitled to court funding of an expert witness. See *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996) (counsel cannot be deemed ineffective for failing to advance a novel legal argument). [*Ceasor*, unpub op at 10]

The trial court would not have granted the expenditure of court funds for an expert under the circumstances as they existed in the Defendant's case in 2005, especially where the Defendant had retained two attorneys and sought several adjournments representing that he was gathering money for an expert. Counsel is not ineffective for not seeking relief that had no chance of being granted by the trial court.

¹⁰⁹ Evidentiary Hearing Transcript, p. 80; Plaintiff-Appellee's Appendix, p. 99b

As for preserving the issue for appeal, a trial court's decision whether to appoint an expert witness was reviewed for an abuse of discretion at the time the Defendant's case was tried, as it is now. *See, e.g., In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). An appeal of this denial of funds would have been similarly futile considering the abuse of discretion standard of review.

5. Trial counsel's performance was not deficient where he did not obtain a pro bono expert as a witness at trial.

The Defendant appears to have abandoned this argument in his Application for Leave to Appeal, but to follow this Court's order that the parties address the fact that trial counsel did not "otherwise obtain and present the testimony of an expert witness," some discussion of a pro bono expert appears appropriate. The theories and issues surrounding SBS/AHT were not nearly as prominent in the criminal defense community in 2005 as they are today. As Mr. Lord explained, the SBS/AHT issue was not as well-known in 2005:

Q If you could describe for the Court -- you've already kind of touched on this, but explain to the Court what you did to engage Mr. Bandak in this case as an expert?

A Well, my first was to find an expert. Back in -- my memory of the events is that shaking baby syndrome was - - the technology or the, the type of testimony Mr. Bandak was going to -- Doctor Bandak was going to provide was leading edge technology. My research indicated that he was on the forefront of that. There weren't a lot of people willing to come forward and everything. Prior to that it's just been acceptance of the doctors.¹¹⁰

¹¹⁰ Evidentiary Hearing Transcript, p. 70; Plaintiff-Appellee's Appendix, p. 89b

Mr. Lord's ability to locate an expert that could offer an exculpatory theory for the child's injury is evidence that he performed a competent investigation and preparation of the case. Yet, the Defendant has previously suggested that Mr. Lord fell short because he did not find an expert that was willing to take the case pro bono two weeks before a date-certain trial was to begin. The Defendant's attorneys claimed in the trial court and in the Court of Appeals that their experts would have come to testify on the Defendant's behalf for free, if only they had been asked back in 2005. The affidavits of their experts, however, do not indicate that they would have done so without compensation, a fact noted by the Court of Appeals in rejecting the argument. *Ceasor*, unpub op at 7.¹¹¹

That Mr. Lord should have been able to retain an expert pro bono is an unreasonable and unrealistic expectation, especially in hindsight. This is evidenced by the fact that Faris Bandak would not take the Defendant's case for free.¹¹² He negotiated with Mr. Lord a little on his fees and Mr. Lord made it clear to Dr. Bandak that funds were an issue for his client; but there was no offer for pro bono assistance and this was a case that Mr. Lord testified really interested Dr. Bandak.¹¹³ Mr. Lord testified that he could not find other experts that were willing to come forward and testify.¹¹⁴ He did what any practitioner would do, consulted the internet and the State Appellate Defender's Office, which should have been the leading resource on

¹¹¹ Defendant-Appellant's Appendix, p. 243a

¹¹² Evidentiary Hearing Transcript, p. 110; Plaintiff-Appellee's Appendix, p. 129b

¹¹³ Evidentiary Hearing Transcript, p. 71, 73, 115; Plaintiff-Appellee's Appendix, p. 90b, 92b, 134b

¹¹⁴ Evidentiary Hearing Transcript, p. 72, 106; Plaintiff-Appellee's Appendix, p. 91b, 125b

the issue at the time. It is simply not reasonable to expect Mr. Lord to have found a pro bono expert on a newly emerging and complex scientific issue two weeks before trial.

CONCLUSION AND RELIEF REQUESTED

Under the circumstances of this case, the Defendant has failed to show that Mr. Lord's representation was unreasonable by any objective standard. He recognized the need for an expert and pursued one. The Defendant repeatedly represented that he would come up with the funds to pay the expert. Shortly before trial, the Defendant decided that he did not want to pay for the expert and believed he could proceed to trial without one. It is obvious that Mr. Lord urged him to the contrary, emphasizing the need for an expert. It was not unreasonable in 2005 for retained trial counsel to conclude that he did not have legal support for a request for public funds. Any request would have been denied by the trial court and the Court of Appeals. Accordingly, the trial court and the Court of Appeals correctly determined that deficient performance had not been shown by the Defendant.

In examining and hearing argument on the Defendant's application, this Court has the ability to define what a defendant may seek in terms of public funding where he or she is able to hire his or her own lawyer, but then is unable to fund the defense of the case with experts. The People do not dispute the right of an indigent defendant to have the state bear the expense of a necessary expert at trial. The relief the Defendant seeks in this case, however, would obligate trial courts to fund experts where financial need has never been established.

If this Court seeks to establish a right of defendants to seek court funding for experts where they have already retained an attorney but cannot also afford the cost of a expert, it can do so without finding Mr. Lord's performance ineffective. This

Court should conclude that trial counsel was without a basis to ask for public funds due to his status as a retained attorney; to the fact that the Defendant repeatedly represented he would provide the money; and that he was never deemed indigent by the court before trial.

This Court has broad powers under MCR 7.316 to grant relief to the parties before it. If this Court is of the opinion that the Defendant was entitled to an expert at public expense, even though he retained his counsel in the trial court, this Court has the authority to remand. In recent Opinions, this Court has increasingly supported the appointment of experts at public expense. If this Court decides to extend that benefit to litigants who have paid for their own attorney but still seek a publicly funded expert, certainly the Court has that authority. If this Court determines that a remand for a new trial in this case is what justice requires, that remand should be based on an expansion of the eligibility of court funding for experts, not on a conclusion that counsel's representation was ineffective.

WHEREFORE, for the reasons stated above, the Plaintiff-Appellee requests that this Court deny the Defendant's Application for Leave to Appeal.

Respectfully Submitted,

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Dated: June 29, 2020