

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 REPLY 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)
Thomas Palumbo (Student Attorney)
ATTORNEYS FOR DEFENDANT-APPELLANT
701 S. State Street
Ann Arbor, MI 48109
(734) 763-935**

TABLE OF CONTENTS

STATEMENT OF FACTS1

ARGUMENT1

 I. Mr. Ceasor Was Indisputably Too Poor To Afford An Expert.....1

 II. Mr. Ceasor’s Attorney Was Ineffective For Failing To Seek Funding For An Expert To Testify In Mr. Ceasor’s Defense.3

 A. Mr. Ceasor Did Not “Choose” To Proceed Without an Expert as His Lawyer Never Gave Him Any Other Choice When He Could Not Come Up With the Money.4

 B. An Expert Witness Was Crucial to Mr. Ceasor’s Case.6

CONCLUSION AND RELIEF REQUESTED 6

TABLE OF AUTHORITIES

Cases

Hinton v Alabama, 571 US 263; 134 S Ct 1081; 188 L Ed 1 (2014)..... 4

People v Ackley, 497 Mich App 381; 870 NW2d 858 (2015) 1

People v Arquette, 202 Mich App 227; 507 NW2d 824 (1993) 3

People v Ulp, 504 Mich 964; 933 NW2d 37 (2019)..... 5

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)..... 3, 5

Statutes

MCL 775.15..... 2-4

STATEMENT OF FACTS

Mr. Ceasor relies on the facts stated in his Supplemental Brief in Support of Application for Leave to Appeal, filed on June 5, 2020.¹

ARGUMENT

The prosecution never denies that an expert witness was necessary to Mr. Ceasor's defense, just as this Court recognized in *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). Nor does it contest that this was a close case for the jury to ultimately convict, even though Mr. Ceasor did not have an expert witness testify in his defense. It also does not deny that Mr. Ceasor's proffered experts, all of whom agree that the injury Brenden suffered was consistent with the short fall from a couch that even the prosecution concedes Mr. Ceasor has always described, would make a different outcome probable on retrial.

Instead, the prosecution's entire argument boils down to questioning whether Mr. Ceasor was really indigent and blaming him for failing to "declare" himself indigent in order to request funding for an expert. In fact, the undisputed evidence from the evidentiary hearing established that Mr. Ceasor could not afford to pay an expert. And there is no dispute that trial counsel never advised Mr. Ceasor that there was any way to obtain an expert other than paying for one himself.

I. Mr. Ceasor Was Indisputably Too Poor To Afford An Expert.

The prosecution repeatedly blames Mr. Ceasor for not having himself formally "declared indigent" before trial, and it questions whether he was really indigent. Prosecution's Brief at vi,

¹ The prosecution notes that Mr. Ceasor's statements about whether his girlfriend was home at the time of the incident changed, but it does not acknowledge Mr. Ceasor's explanation for those changes provided in his Supplemental Brief. Namely, Mr. Ceasor's girlfriend (and Brendan's biological mother) asked him to say she was there. Supplemental Brief at 6. The prosecution admits that Mr. Ceasor's account was otherwise completely consistent. Prosecution's Brief at 2. The prosecution also states that there was no evidence of external injuries on Brandon's head, which directly contradicts the observations of a bruise on his head while he was in the hospital. See Supplemental Brief at 3.

19-22, 31, 36. The prosecution's argument misses the mark because the question under MCL 775.15 (which governed requests for expert witness funds at the time of Mr. Ceasor's trial) was not whether the defendant had been formally declared indigent, but whether he was too poor "to obtain the means to procure the attendance" of the desired witness. Under that standard, even a middle-class defendant may be too poor to pay an expert who will cost tens of thousands of dollars.

Following his evidentiary hearing, there was no dispute that Mr. Ceasor was too poor to pay for the expert himself and thus would have qualified for funds to procure an expert witness like Dr. Bandak at the time of trial. Contrary to the prosecution's false claim that "Defendant has never demonstrated indigent status with financial records from the relevant time period," Prosecution's Brief at 19, Mr. Ceasor, who was a single custodial parent in 2005 (the year leading up to the trial), introduced his Social Security earnings statement for 2005 as Exhibit A at the evidentiary hearing, and it showed he had an income of \$15,104 for that year. 187a.²

The prosecution repeatedly writes that Mr. Ceasor retained and paid for two separate attorneys in order to claim that he would not have been declared indigent or received funds from the court to pay for an expert. Prosecution Brief at 19, 21, 24, 30, 36. However, this argument ignores the undisputed fact established at the evidentiary hearing that Mr. Ceasor did not and could not pay either attorney, both of whom were retained and paid by Mr. Ceasor's mother. Supplemental Brief at 3, 188a-189a, 192a.

The prosecution conflates the status of indigency with having court-appointed counsel. Prosecution Brief at 30. However, the Court of Appeals had held more than a decade before Mr.

² The prosecution notes that Mr. Ceasor was above the federal poverty line at the time of his trial. Prosecution Brief at 22. However, a defendant's relation to the federal poverty line has no bearing on whether he is entitled to government funds for an expert witness. Again, the test under MCL 775.15 was whether the defendant was too poor to afford the cost of procuring the particular witness, not whether the defendant's income fell above or below an arbitrary poverty line.

Ceasor's trial that some defendants with retained lawyers (paid for by others) may require court funds for other necessary litigation expenses. *People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993). By ignoring the fact that Mr. Ceasor's mother retained his counsel for him, the prosecution erroneously argues that Mr. Ceasor was disqualified from seeking other funds from the court because he did not have court-appointed counsel. Prosecution Brief at 30, 31.³

Despite the prosecution's attempts to obfuscate the matter, there was no dispute after the evidentiary hearing that Mr. Ceasor could not afford to pay to have Dr. Bandak testify at his trial. There is also no dispute that trial counsel knew this fact, as he testified at the evidentiary hearing that "Mr. Ceasor himself was too poor to have the money" to pay the expert. 209a. Indeed, trial counsel repeatedly and explicitly told the jury that Mr. Ceasor did not have an expert only because he could not afford one. 20a, 21a, 22a.

Because Dr. Bandak had reviewed the case materials and was "ready to come," trial counsel could have simply moved for funding to pay Dr. Bandak at any time without delaying the trial. *Id.* at 204a-205a, 213a, 216a. But trial counsel never filed such a motion, nor did he advise Mr. Ceasor of any options other than proceeding to trial without the expert that counsel knew was necessary.

II. Mr. Ceasor's Attorney Was Ineffective For Failing To Seek Funding For An Expert To Testify In Mr. Ceasor's Defense

A defendant receives ineffective assistance of counsel 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). Mr. Ceasor's trial counsel rendered deficient performance by failing

³ The prosecution argues that *Arquette* is not applicable to this case because it only applies to defendants who have been formally declared indigent. Prosecution Brief at 31. As discussed above, however, the test under MCL 775.15 is not whether Mr. Ceasor was formally declared indigent but whether he was too poor to afford the expert. But even if there were a requirement that a defendant be formally declared indigent, then it was incumbent on trial counsel to seek that declaration as part of the motion for expert witness funding that trial counsel should have filed.

to present any options to Mr. Ceasor and by failing to move for funds for the expert witness that counsel knew was “absolutely” necessary to present an adequate defense. 197a.

A. Mr. Ceasor Did Not “Choose” to Proceed Without an Expert as His Lawyer Never Gave Him Any Other Choice When He Could Not Come Up With the Money.

As discussed above, the prosecution repeatedly argues that Mr. Ceasor should not be considered indigent because he never filed a motion to be formally declared indigent. Prosecution Brief at 16, 19, 20, 22. Even if, contrary to the plain language of MCL 775.15, such a formal declaration was needed to qualify for expert witness funding, it was not Mr. Ceasor’s responsibility to declare himself indigent – that was a job for his attorney.

Trial counsel admitted that he never considered filing a motion to have Mr. Ceasor declared indigent despite knowing that Mr. Ceasor was too poor to have the money to pay for an expert witness. 97b. Despite being fully aware that Mr. Ceasor could not afford an expert witness, trial counsel did not present Mr. Ceasor with any alternative options for obtaining an expert because he believed that a defendant with retained counsel could not ask for court funds to obtain an expert witness. 202a. But there was nothing in MCL 775.15 that barred a defendant with retained counsel from seeking expert witness fees, and that interpretation of the law is contrary to *Arquette*.

In other words, trial counsel, like counsel in *Hinton v Alabama*, 571 US 263; 134 S Ct 1081; 188 L Ed 1 (2014), simply misunderstood the law governing expert witness funding. He therefore did not advise Mr. Ceasor of any option other than proceeding to trial without an expert.

Having been given no options by trial counsel, Mr. Ceasor had no “choice” but to proceed to trial without an expert. 189a, 191a. Counsel’s failure to correctly explain the legal options to his client fell below an objective standard of reasonableness, just as it did in *Hinton*.

The prosecution further claims that the trial court probably would have denied a motion for expert funding and that an appeal would have been “futile.” Prosecution’s Brief at 39. If the trial

court had denied Mr. Ceasor expert funding because his trial counsel was retained, that would have constituted a clear error of law not subject to review for abuse of discretion. As this Court demonstrated in its recent decision in *People v Ulp*, 504 Mich 964; 933 NW2d 37 (2019) (vacating trial court's refusal to provide expert funding for defendant on appeal), it is critically important for trial counsel to make the motion for expert funding, even if the trial judge will deny it, in order to preserve the defendant's right to appellate relief. Mr. Ceasor was prejudiced by his trial counsel's failure to make such a motion for court funds because that failure denied him a crucial expert witness or, in the alternative, a winning appellate issue.

B. An Expert Witness Was Crucial to Mr. Ceasor's Case.

Finally, it remains undisputed that an expert witness was crucial to Mr. Ceasor's case. After the evidentiary hearing, the trial court explicitly stated that the importance of a defense expert testifying on Mr. Ceasor's behalf "is not disputed." 229a. Trial counsel himself acknowledged that expert testimony was "extremely critical to the outcome of this case." 196a.

The prosecution never denies that the failure to present an expert for Mr. Ceasor's case was prejudicial, as there was a reasonable probability of a different result had the jury heard from a defense expert. Even without testimony from a defense expert, the jury deliberated for parts of three days and requested to re-hear the entirety of the prosecution's expert's testimony. *Id.* at 88a-89a, 94a. There were experts available that could have testified to contradict the prosecution's expert's testimony, but trial counsel did not present one. If trial counsel had presented Dr. Bandak (or another well-qualified expert), it is clear that there is a reasonable probability of a different outcome at Mr. Ceasor's trial.

Because Mr. Ceasor satisfies both prongs of the *Strickland* test, he is entitled to a new trial.

CONCLUSION AND RELIEF REQUESTED

Therefore, and for the reasons explained more fully in the Supplemental Brief in Support of Application for Leave to Appeal, 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

Dated: July 8, 2020

MICHIGAN INNOCENCE CLINIC

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

s/Thomas Palumbo
Student-Attorney for Defendant-Appellant