

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION _____

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

vs.

Defendant and Appellant.

Court of Appeal
No.

Superior Court
No.

APPEAL FROM THE SUPERIOR COURT OF
_____ **COUNTY**

Honorable _____, Judge

APPELLANT'S CONFIDENTIAL EX PARTE
APPLICATION FOR AUTHORIZATION OF EXPERT FEES
AND
REQUEST THAT THE APPLICATION AND ALL
CORRESPONDING ORDERS AND DOCUMENTS
PRODUCED BE FILED UNDER SEAL

Name
State Bar No.
Attorney at Law
Address
Phone Number

Attorney for Appellant
Under the Appellate Defenders, Inc.
Independent (or Assisted) Case System

(See ADI Manual, Chapter 8, Putting on the Writs: California
Extraordinary Remedies, §8.4.)

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**TO THE HONORABLE _____, PRESIDING
JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF
THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION _____:**

Pursuant to rules 8.50 [applications] and 8.54(a) [motions], of the
California Rules of Court, appellant, _____, requests that this

court authorize and reimburse the expenditure of expert fees up to and including \$_____ in order to (briefly set forth what the services involve and why the services are reasonably necessary).

Pursuant to California Rules of Court, rules 8.46(e)(1) [application to file under seal] and *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320, fn. 12, appellant further requests that (1) this application be filed under seal and (2) all orders made, and all other documents produced or filed in connection with this application be sealed and served only upon counsel for appellant, with the exception of orders clearly containing no privileged information and no information which could lead to the discovery of privileged information, or otherwise lighten the burden of the prosecution in violation of appellant's privilege against self-incrimination.

Lastly, appellant requests that this application be deemed to be withdrawn in its entirety if this court declines to grant appellant's request for confidentiality and, in such event, that the court return to appellant's counsel all copies of the application and request.

The application and request are based upon the record in this appeal and the attached declaration of appellate counsel.

Dated:

Respectfully submitted,

Attorney for Appellant and Defendant

STATEMENT OF CASE AND FACTS

(Set forth procedure and facts with citations to the record and declaration of appellate counsel which are relevant to the issue that is being investigated.)

**THIS COURT IS STATUTORILY AND
CONSTITUTIONALLY OBLIGATED TO PROVIDE
FUNDS FOR ANCILLARY DEFENSE SERVICES,
INCLUDING EXPERT FEES, NEEDED TO ENSURE
EFFECTIVE LEGAL REPRESENTATION.**

Penal Code section 1241 provides, in part:

In any case in which counsel other than a public defender has been appointed by the Supreme Court or by a court of appeal to represent a party to any appeal or proceeding, such counsel shall receive a reasonable sum for compensation and necessary expenses, the amount of which shall be determined by the court and paid from any funds appropriated to the Judicial Council for that purpose.

The language of this statute is very similar to that of Penal Code section 987.2, subdivision (a), which provides that counsel other than the public defender appointed to represent a defendant in the municipal or superior court “shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county[.]”

The California Supreme Court has held that Penal Code sections 987 and 987.8 imply that indigent defendants have the right to court-ordered defense services, including experts and investigators. (*Corenevsky v. Superior Court, supra*, 36 Cal.3d 307, 319; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575.) Penal Code section 987.8, subdivision (g)(1),

defines the “legal assistance” furnished by courts to indigent defendants as “legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist the defendant in the preparation and presentation of the defendant’s case.”

Moreover, both the California Supreme Court and the United States Supreme Court have recognized that indigent defendants have a due process right to “the basic tools of an adequate defense,” (*Ake v. Oklahoma* (1985) 470 U.S. 68, 77 [105 S.Ct. 1087, 84 L.Ed.2d 53], citation omitted), including not only counsel, but expert and other services as needed. (*Ibid.*; see also *id.* at pp. 76-83; *Corenevsky v. Superior Court, supra*, 36 Cal.3d at pp. 319-320.) The California Supreme Court has stated in *Corenevsky* and other cases that a defendant’s constitutional right to effective counsel under both the state and federal constitutions also includes the right to reasonably necessary ancillary defense services. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §15; *Corenevsky v. Superior Court, supra*, at p. 319; *Keenan v. Superior Court, supra*, 31 Cal.3d at p. 428; *Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351.)

The California Supreme Court has also held that the constitutional right to ancillary services extends to defendants appealing their convictions.

(*In re Ketchel* (1968) 68 Cal.2d 397, 401-402 [could assist appellate counsel in overall strategy; could aid in determining whether the defendant was adequately represented by trial counsel].)

The importance of investigation in developing the evidence which, for example, a habeas corpus petitioner needs to prevail on his claims is illustrated in various cases in which habeas corpus relief has been granted to convicted defendants on the strength of evidence developed by investigation after trial. (See *In re Cordero* (1988) 46 Cal.3d 161; *In re Ledesma* (1986) 43 Cal.3d 171; *In re Hall* (1981) 30 Cal.3d 408; *Usher v. Ercole* (E.D.N.Y. 2010) 710 F.Supp.2d 287.)

Under these principles, it is clear that a court which may appoint counsel to represent a petitioner in habeas corpus proceedings undertakes the responsibility to provide ancillary services, including experts and investigators, needed to make such representation effective. Appointing an attorney without providing that attorney with the means of raising a successful habeas corpus claim makes the appointment one of form without substance, giving the client the surface appearance of representation without providing his counsel “access to the raw materials integral to the building of an effective defense.” (*Ake v. Oklahoma, supra*, 470 U.S. at p. 77.)

Hence, the court has a statutory and constitutional duty to provide funds for ancillary defense services.

II.

SERVICES ARE REASONABLY NECESSARY TO INVESTIGATE AND EXAMINE THE ISSUE OF WHETHER _____

The defendant has the burden of showing in his request that the services are “reasonably necessary by reference to the general lines of inquiry [to be] pursue[d], being as specific as possible.” (*Corenevsky v. Superior Court, supra*, 36 Cal.3d at p. 320.) However, it has been “recognized that because of the early stage at which the request typically arises, it will often be difficult for counsel to demonstrate a clear need for such funds.” (*Ibid.*; see also *In re Ketchel, supra*, 68 Cal.2d at p. 402 [“The right to such aid should hardly be conditioned upon a showing of its precise application or utility”].) Therefore, “in appropriate circumstances, [the request should be] ‘view[ed] with considerable liberality.’”(*Corenevsky v. Superior Court, supra*, at p. 320, quoting *Mason v. State of Arizona, supra*, 504 F.2d at p. 1352.)

(Describe the issue that is being investigated and examined, the reason for the fee request, the name of the expert, and the cost estimates obtained and cite to the declaration of appellate counsel in support.)

For these reasons, in order to assure that potential issues in appellant’s

case are fully explored and raised, funds should be authorized to investigate the above claim.

III.

THE CIRCUMSTANCES WARRANT THAT THIS APPLICATION AND ALL CORRESPONDING ORDERS AND ALL DOCUMENTS PRODUCED BE SEALED.

To protect the confidentiality of the factual information contained in this application and the declaration submitted herewith, which is based on (e.g., attorney-work product), appellant requests that this application and declaration be filed under seal and heard without service upon the other parties to this proceeding. (See Cal. Rules of Court, rule 8.46(e) [applications to file under seal accompanied by declaration containing facts sufficient to justify sealing] and *Corenevsky v. Superior Court, supra*, 36 Cal.3d 307, 320, fn. 12 [court rejected suggestion that the government may be present at a hearing on such requests, noting that such a procedure “would create unnecessary conflicts of interest” and “cannot be permitted because such petitions are entitled to be confidential”]; see also *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430; *People v. Worthy* (1980) 109 Cal.App.3d 514, 522, fn. 2; *Puett v. Superior Court* (1979) 96 Cal.App.3d 936, 940, fn. 2.; *People v. Faxel* (1979) 91 Cal.App.3d 327, 330, fn. 1.)

Additionally, he requests that all orders made, and all other documents produced or filed in connection with this application be sealed and served only upon counsel for appellant, with the exception of orders clearly containing no privileged information and no information which could lead to the discovery of privileged information, or otherwise lighten the burden of the prosecution in violation of appellant's privilege against self-incrimination.

(Set forth the grounds that support sealing, such as attorney-work product, and cite to the declaration of appellate counsel.)

For these reasons, the application and all orders and documents produced as a result should be ordered sealed.

In the event this court declines to grant appellant's request for confidentiality, appellant requests that this application be deemed to be withdrawn in its entirety and, in such event, that the court return to appellant's counsel all copies of this application.

CONCLUSION

For the foregoing reasons, appellant's request for authorization and reimbursement of the expenditure of expert fees up to and including \$_____ should be granted, and the application and orders and documents produced be sealed.

Dated:

Respectfully submitted,

Attorney for Appellant and Defendant

DECLARATION OF COUNSEL

ATTACH PROOF OF SERVICE

If the motion is being filed confidentially, no proof of service is needed.