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Attorney for Appellant

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,)	No.
)	
Plaintiff and Respondent,)	Orange County
)	Superior Court
v.)	No.
)	
)	
Defendant and Appellant.)	
)	
)	
)	

CONFIDENTIAL EX PARTE APPLICATION FOR AUTHORIZATION
OF EXPERT WITNESS FEES;
MEMORANDUM OF POINTS AND AUTHORITIES:
DECLARATION OF

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

Appellant , through his appointed counsel,
, requests that this court authorize and reimburse the expenditure of expert witness
fees up to and including \$700, to investigate a potential habeas corpus issue in this case.
Appellant seeks the services of an expert in forensic dentistry to examine an autopsy photo
of the victim's face in order to determine whether the bite mark which appears in the photo
was inflicted by an adult or by a child. Appellant testified at his trial that the victim was

bitten by her mother immediately prior to the infliction of the injury which resulted in the victim's death. The victim's mother reported to the police that the bite was inflicted by another child earlier in the day. Resolution of this disputed fact was essential to corroborate appellant's testimony, the veracity of which was attacked by the prosecutor who specifically argued that the bite mark was that of a child and, if it were not the bite of a child, the defense would have procured the testimony of an expert to corroborate defendant's testimony and to refute the mother's claim. Because appellant's trial counsel did not employ an expert to examine said bite mark, the omission may constitute ineffective assistance of counsel.

This application is based upon the record in this appeal and the attached declaration of counsel.

To protect the confidentiality of the factual information contained in this application and the declaration submitted herewith, appellant requests that this application and declaration be filed under seal and heard without service upon the other parties to this proceeding. Petitioner further 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 petitioner, with the exception of orders clearly containing no privileged information and no information which could lead to the discovery of privileged information, result of privilege or otherwise lighten the burden of the prosecution in violation of petitioner's privilege against self-incrimination.

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

DATED: August 4, 2005

Respectfully submitted,

Attorney for Defendant and
Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

I

THIS COURT IS STATUTORILY AND CONSTITUTIONALLY OBLIGATED TO PROVIDE FUNDS FOR ANCILLARY DEFENSE SERVICES, INCLUDING EXPERTS NEEDED TO ASSURE 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 by 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. (*Coronevsky v. Superior Court* (1984) 36 Cal.3d 307, 319; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575.) Penal Code section 982.8, 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," including not only counsel, but expert and other services as needed. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 76-78; *Coronevsky*, supra, 36 Cal.3d at pp. 319-320.) The California Supreme Court has stated in *Coronevsky* 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; *Coronevsky*, supra, at p. 319; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 428.)

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.) In *Ketchel*, the court affirmed an order by the superior court requiring the warden of San Quentin to permit the examination of the defendant by a psychiatrist selected by his appellate counsel. In response to arguments by the Attorney General that such an examination could serve no purpose on appeal because the scope of inquiry on appeal is limited to the record, the court noted that a psychiatric examination could be useful because it could assist appellate counsel in determining whether trial counsel had rendered effective assistance and could lead to possible bases for collateral attack on the defendant's conviction. (*Id.*, at p. 401.)

The importance of expert witnesses in developing the evidence which the 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. (*In re Cordero* (1988) 46 Cal.3d 161; *In re Martin* (1987) 44 Cal.3d 1; *In re Ledesma* (1986) 43 Cal.3d 171; *In re Hall* (1981) 30 Cal.3d 408.)

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. 68, 77.)

For these reasons, in order to assure that potential issues in Mr. _____'s case are fully explored and raised, funds should be authorized to investigate the above claim.

DATED: August 4, 2005

Respectfully submitted,

Attorney for Defendant and
Appellant

DECLARATION OF

I, _____, declare:

I am an attorney licensed to practice in the courts of the State of California.

I am the attorney for appellant _____, under appointment by this court, in the within appeal.

Mr. _____ is appealing his conviction for murder and child abuse causing death involving his daughter, _____, Mr. _____ and _____, mother, _____, were the only witnesses to the events which led to _____'s death. _____ died as a result of blunt force head trauma, although the autopsy revealed numerous other injuries including abdominal bleeding and a bite mark on her left cheek

Mr. _____ testified in his own defense that the injuries to his daughter were the result of an accidental fall which occurred when he forcefully pulled _____ away from her mother when he discovered _____ biting _____ on the cheek. _____, on the other hand, told the police that she was not responsible for any of _____'s injuries, that the bite on _____'s cheek was caused by another child earlier in the day, and that appellant intentionally pushed _____ into a wall. Fernandez's statements to the police were introduced as evidence at trial.

Defense counsel argued that _____'s injuries were either accidentally caused by appellant as described in his testimony and/or that the injuries were the result of intentional acts of abuse by _____ who was known by other defense witnesses to have abused _____ in the past.

The prosecutor argued that appellant was lying as evidenced by the fact that he had not called, as a witness in his defense, an expert to verify that the bite mark on _____'s cheek was caused by an adult rather than by a child.

I have personally examined the autopsy photograph of _____'s cheek.. Although a bite mark is clearly visible next to a ruler in the photograph, it is not apparent to me, as a lay person, whether it was caused by an adult or by a child. Because the jurors

were admonished not to conduct experiments, it is unlikely that they would have been able to determine this fact without the aid of an expert witness.

I have spoken with appellant's trial counsel and he has indicated that he did not employ an expert to examine the bite mark.

In light of the above facts, I believe that the services of an expert in forensic dentistry are necessary to determine whether trial counsel's failure to investigate the origin of the bite mark warrants raising a claim of ineffective assistance of counsel in a petition for writ of habeas corpus.

I have communicated with _____, a doctor of dental surgery who also holds a Juris Doctorate degree, and who has qualified on many, many occasions as an expert witness in forensic dentistry. Dr. _____' Curriculum Vitae is attached hereto as Exhibit A. Dr. _____ charges \$350 per hour for his services. I have explained what will be necessary for this investigation and Dr. _____ has indicated that he will need no more than two hours to examine the photograph and prepare a brief memorandum of his opinion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of August, 2005, at _____ California.