SIXTH DISTRICT APPELLATE PROGRAM

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Attorney for Appellant,

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	No. H0
Plaintiff and Respondent,	County Superior Court No.
v.	
,	
Defendant and Appellant.	

CONFIDENTIAL EX PARTE APPLICATION FOR AUTHORIZATION OF EXPERT FEES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ATTORNEY ON APPEAL

TO THE HONORABLE CONRAD RUSHING, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT:

Appellant, through his appointed counsel, requests this court authorize the expenditure of $1650.00 for a psychiatric expert to evaluate trial testimony and reports about the incident giving rise to the conviction in this case and psychiatric records of appellant. This expert evaluation is necessary to show trial counsel

provided ineffective assistance in failing to investigate mental health issues relevant to a possible insanity defense and to mitigation at sentencing. This application is based upon the record on appeal and the attached declarations of counsel and a forensic psychiatrist.

To protect the confidentiality of the factual information contained in this application and the declaration submitted herewith, appellant requests 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.

DATED: December 2, 2003.

Respectfully submitted,

SIXTH DISTRICT APPELLATE PROGRAM

By: _____

MEMORANDUM OF POINTS AND AUTHORITIES

I.

AN EXPERT IS NEEDED TO DEMONSTRATE THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO RETAIN A COMPETENT PSYCHIATRIST TO: 1) EXAMINE PETITIONER AND RELEVANT RECORDS TO DETERMINE WHETHER HE WAS LEGALLY INSANE AT THE TIME OF THE CHARGED INCIDENT; AND, 2) TO RENDER AN OPINION WHETHER HIS MENTAL STATE AT THE TIME OF THE OFFENSE PROVIDED EVIDENCE IN MITIGATION FOR SENTENCING.

In a letter dated June 17, 2003, this Court asked appellate counsel to brief the question whether Petitioner's trial attorney provided ineffective assistance of counsel by failing to investigate an insanity defense. The basis of the court's order was a document from Petitioner's prison file in which a licensed clinical social worker whose last name was T. opined that Petitioner's behavior at the time of the charged offense was influenced by mental illness and the lack of proper medication at the time. (See CT 152.) T. further opined that "at the time of the incident [Petitioner] did not understand the nature of charges." (*Ibid*.) T. explained that "it appears to me that his level of functioning was impaired at the time of incident due to need for re-evaluation of psych medications." (*Ibid*.)

In a supplemental letter brief, appellate counsel presented the argument trial counsel provided ineffective assistance when he failed to retain a psychologist to examine appellant, review medical records and determine whether appellant was insane at the time of the offense. Appellate counsel further argued trial counsel

provided ineffective assistance when he failed to present mitigating evidence concerning Petitioner's mental illness at sentencing. However, the record on appeal does not adequately develop the facts supporting the claim of ineffective assistance of counsel in failing to investigate an insanity defense and present mitigating evidence at sentencing. While the opinion of a licensed clinical social worker is helpful, it is not sufficient to prove counsel's failings were prejudicial. A licensed clinical social worker does not have the training and expertise to render an opinion on insanity, particularly when the claim is based on inadequate psychiatric medication. Appellate counsel needs the services of an expert psychiatrist to examine the trial record and Petitioner's psychiatric records and render an expert opinion on whether there was a possible insanity defense counsel failed to investigate, and whether there was mitigating evidence counsel failed to present at sentencing in support of a request to dismiss strike priors.

Appellate counsel has found evidence outside the record on appeal supporting a claim trial counsel provided ineffective assistance by failing to investigate an insanity defense and mitigating evidence for sentencing, heightening the need for an expert to evaluate the issue. Petitioner has told appellate counsel he provided the document authored by T. to his trial counsel and asked him to present an insanity defense. (Declaration of Appellate Counsel, ["Counsel declaration"], attached to this application as Exhibit A.) Petitioner also told appellate counsel that about three weeks before the incident leading to the charges in this case his medication was

changed. He started hearing voices and felt like he was losing control. He complained to various guards, but nothing was done prior to the incident leading to the battery charge. About two weeks after the incident, his medication was changed again. After that change, Petitioner said his condition improved. (Counsel declaration, ¶ 8.)

Psychiatric records appellate counsel has obtained from Petitioner's prison records support Petitioner's claim about the change in his medication. Petitioner was, and is, diagnosed as a paranoid schizophrenic. He was prescribed psychotropic medication in prison for that condition. Medical records show that on June 28, 2001, Petitioner's medication was changed. The incident leading to the charges in this case occurred on July 18, 2001. According to a report by a prison guard, as Petitioner was being taken from his cell after the incident, he yelled, "I want my meds." On August 1, 2001, Petitioner's medication was changed back to what it was prior to June 28, 2001. There is no report in the prison records of any physical violence against guards by Petitioner after August 1, 2001. (Counsel declaration, ¶¶ 3, 9.)

Appellate counsel has reviewed Trial Counsel's trial file. Trial Counsel's trial file shows he did nothing to investigate the possibility of an insanity defense. He failed to obtain a release from Petitioner to examine Petitioner's medical records prior to trial. Instead, he served a subpoena for those records, which were delivered to the court when the jury trial began. It appears Trial Counsel never consulted with a psychiatrist. He apparently never asked a psychiatrist to examine Petitioner's medical

records, with particular attention to the changes in his medication treating his paranoid schizophrenia. He never asked a psychiatrist to evaluate Petitioner and the available records to determine whether an insanity defense was viable. (Counsel declaration, ¶ 6.) Appellate counsel has been unable to question Trial Counsel after obtaining his trial file because Trial Counsel has failed to return phone calls and has failed to respond to a letter requesting his input.

In January 2003, Trial Counsel told appellate counsel he did not pursue an insanity defense because Petitioner asked him not to. However, he has not responded to subsequent communication undertaken to determine why he failed to at least investigate the defense by obtaining pertinent records and consulting with an expert, and why he failed to present what evidence he had at sentencing to support a request the court dismiss Petitioner's strike priors in the interests of justice. (Counsel declaration, ¶¶ 4-5.)

The available evidence suggests an insanity defense should have been investigated by trial counsel. Schizophrenia is a "psychosis characterized by the breakdown of integrated personality functioning, withdrawal from reality, emotional blunting and distortion, and disturbances in thought and behavior." (R. Sbordone, Ph.D., *Neuropsychology for the Attorney* (1991), p. 341.) Paranoid schizophrenia is a "subtype of schizophrenic disorder characterized by absurd, illogical, and changeable ideas of hallucinations of grandeur and persecution." (*Id*., at p. 337.) It "affects and interferes with one's contact with reality, logical thinking, and emotional

processes." (*People v. Mord* (1988) 197 Cal.App.3d 1090, 1099.) Paranoid schizophrenia was the diagnosis which led to a finding of insanity in the seminal case of *People v. Skinner* (1985) 39 Cal.3d 765. It was also the basis of a finding of insanity in *People v. Mord*, *supra*.

An attorney who has a client who has been diagnosed as a paranoid schizophrenic and has a report from a licensed clinical social worker opining the client did not understand the nature of his conduct at the time of the charged incident should investigate the possibility of an insanity defense, even if the client opposes that defense. (*People v. Mozingo* (1983) 34 Cal.3d 926.) Even if an expert concluded there was insufficient evidence to prove Petitioner was insane at the time of the incident, evidence of his mental illness and the improper medication for that illness at the time of the incident would have provided mitigating evidence counsel could have presented in asking the court to exercise its discretion and dismiss Petitioner's strike priors in the interests of justice.

Appellate counsel has contacted Dr. Expert, a forensic psychiatrist and director of the Psychiatry and the Law program at the University of California San Francisco. Appellate counsel described the case, the document authored by N. T., and the contents of Petitioner's psychiatric records. (Declaration of Dr. Expert ["Expert declaration"], attached as Exhibit B, ¶¶ 4-5.) Dr. Expert concluded that, in her professional opinion,

> Mr. Petitioner's mental state at the time he engaged in the conduct leading to the charges in his case should have been investigated.

> People with psychotic illnesses frequently suffer psychiatric symptoms that impair their ability to correctly interpret and respond to reality. A change in medication, if not properly monitored, could exacerbate psychotic symptoms. Since Mr. Petitioner was diagnosed with a psychotic illness (paranoid schizophrenia), if he was experiencing symptoms typically caused by this illness his ability to correctly evaluate and respond to reality should have been considered by his trial attorney. If he was experiencing psychotic symptoms at the time of the charged incident, his mental state could possibly have supported an insanity defense at his trial. Even if his mental state did not rise to the level of an insanity defense, it should have been presented at sentencing as evidence in mitigation. Someone who engages in criminal conduct while experiencing psychotic symptoms that affect his ability to correctly evaluate and respond to reality is less culpable than someone who suffers no mental illness. (Expert declaration, ¶ 6.)

The posture of this case is similar to *People v. Mozingo*, *supra*, 34 Cal.3d 926. Mozingo was convicted of rape and murder with special circumstances and sentenced to death. In conjunction with his appeal he filed a habeas corpus petition arguing his trial counsel had provided ineffective assistance by failing to investigate a defense of insanity and diminished capacity and by failing to present evidence of mental illness in mitigation at sentencing. Prior to trial, counsel had received prison records from the prosecutor which "would alert a reasonably competent attorney to investigate possible mental defenses." (*Id*., at p. 932.) Counsel did not do so because defendant refused to enter an insanity plea and told counsel he would not submit to any psychiatric evaluations.

The Supreme Court found counsel had provided ineffective assistance by failing to investigate Mozingo's mental illness. Mozingo had been diagnosed as a paranoid schizophrenic. Two experts in the habeas proceeding opined Mozingo had

experienced a "dissociative reaction" during the killing, a state which "would fall within the legal definition of insanity." (*Id*., at p. 933.) The Supreme Court adopted a referee's finding that

> "trial counsel rendered inadequate representation in failing to investigate possible diminished capacity or insanity defenses, to request appointment of a psychiatrist, and to introduce at the penalty phase evidence of defendant's mental condition as a mitigating circumstance. . . . [C]ounsel's inadequate representation thereby deprived defendant of a potentially meritorious defense or mitigating circumstance." (*Ibid*.)

The Supreme Court also held counsel's omission was not excused because Mozingo opposes entering an insanity plea. The client's opposition was not determinative because counsel had failed to conduct sufficient investigation to adequately inform Mozingo concerning the viability of that defense. "'By his inaction, deliberate or otherwise, counsel deprived himself of the reasonable bases upon which to reach informed tactical and strategic trial decisions.'" (*Id*., at p. 934, quoting *People v. Frierson* (1979) 25 Cal.3d 142, 163.) Faced with initial opposition from the client, counsel should have "undertak[en] sufficient investigation of possible defenses to enable counsel to present an informed report and recommendation to his client." (*Ibid*.)

The record in this appeal parallels the record in *Mozingo*. As in *Mozingo*, prior to trial counsel received records which would have alerted a reasonably competent attorney to investigate possible mental defenses, specifically an insanity defense. Trial Counsel, Petitioner's trial counsel, has told appellate counsel he did not pursue an insanity defense because Petitioner opposed it. Even assuming this is true (which

Petitioner adamantly denies), counsel was ineffective by failing to conduct any investigation which would enable him to "present an informed report and recommendation to his client." (*Ibid*.) He failed to obtain Petitioner's medical records prior to trial. He failed to seek appointment of a psychiatrist to evaluate Petitioner and the records and determine whether an insanity defense was viable. Furthermore, he failed to present any mitigating evidence concerning Petitioner's mental illness when the trial court considered whether to dismiss any of Petitioner's strike priors in the interests of justice. (See RT 1023.)

This is an issue which can be presented adequately only in a habeas corpus petition. The appellate record does not sufficiently "disclose what [] evidence was available that was not presented, or what reasons defense counsel may have had for not presenting it." (*People v. Anderson* (2001) 25 Cal.4th 543, 598.) To show in a habeas corpus petition what evidence was available that was not presented, appellate counsel needs the services of a psychiatrist. Only an expert psychiatrist can determine the significance of Petitioner's diagnosis as a paranoid schizophrenic and the probable effects of a change in his medication. Only such an expert can provide a basis to show there was a viable insanity defense. An expert can also explain what mitigating evidence would have been available at sentencing to persuade a judge to dismiss strike priors in the interests of justice.

Appellate counsel has contacted an expert forensic psychiatrist, Dr. Expert, the director of the Program at the University. Dr. Expert has indicated that she and one

of her two students, both of whom are also psychiatrists, could review the transcripts in this case and Petitioner's medical and prison records to determine the impact of his mental illness on his conduct at the time of the charged battery. (Expert declaration, ¶¶ 2-3.) After hearing a synopsis of Petitioner's case and the contents of his medical records, Dr. Expert believed trial counsel should have investigated Petitioner's mental state at the time he engaged in the conduct leading to the battery charge. (*Id*., at ¶ 6.) She estimates it would take approximately 11 hours to review relevant portions of the trial transcripts and Petitioner's medical and prison records and prepare a report. The doctors charge $150.00 per hour for their services. (*Id*., at ¶ 7.) Thus appellant requests this court approve the expenditure of up to $1,650.00 to pay Dr. Expert and either Dr. A or Dr. B to review documents and prepare a report concerning the relationship between Petitioner's documented mental illness and his conduct at the time of the charged battery.

II.

THIS COURT IS STATUTORILY AND CONSTITUTIONALLY OBLIGATED TO PROVIDE FUNDS FOR ANCILLARY DEFENSE SERVICES, INCLUDING EXPERT FEES, 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 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. (*Coronevsky v. Superior Court* (1984) 36 Cal.3d 307, 320; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575, fn. 3.) 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, 398, 400-401.) 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 the usefulness of a psychiatric examination 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 investigation 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 l; *In re Ledesma* (1986) 43 Cal.3d 171; *People v. Mozingo*, *supra*, 34 Cal.3d 926; *In re Hall* (1981) 30 Cal.3d 408.)

Under these principles, a court that appoints counsel to represent a petitioner on appeal should provide ancillary services, including experts and investigators, when the record on appeal provides a strong basis to believe trial counsel provided ineffective assistance of counsel in failing to investigate a viable defense. This court specifically asked appellate counsel to address the question of ineffective assistance of counsel in failing to present an insanity defense. Asking counsel to make this argument without providing the means to determine whether an insanity defense was truly viable would make the court's request for supplemental briefing a matter 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.)

Funds should be authorized so that appellate counsel can retain a forensic psychiatrist to evaluate the transcripts in this case and available records and reports

to determine whether trial counsel provided ineffective assistance by failing to investigate whether there were grounds to present an insanity defense at trial, and by failing to present evidence of Petitioner's psychiatric condition as mitigation at sentencing. Appellate counsel will use the expert's opinion to support a habeas corpus petition on the issue of ineffective assistance of counsel.

DATED: December 2, 2003.

SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Appellate Counsel
Attorney for Appellant
Petitioner

DECLARATION OF APPELLATE COUNSEL

I, Appellate Counsel, 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.

1. On June 17, 2003, the court of appeal asked me to file a supplemental letter brief concerning whether trial counsel provided ineffective assistance "by failing to investigate and/or present the defense of not guilty by reason of insanity due to defendant's under-medication for paranoid schizophrenia at the time of the offense."

2. I had been considering that question since I first reviewed the record on appeal and noticed the document which gave rise to the court's concern. I also noticed there was no request in the record on appeal for the appointment of a psychiatrist to examine Petitioner. On September 4, 2002, I wrote to trial counsel, asking for his entire file in Petitioner's case. In the ensuing months I occasionally called trial counsel but was never able to reach him personally. I left messages asking him to call me.

3. In the meantime, in November 2002 I asked Petitioner to sign a release so I could obtain his prison, medical and psychiatric records from the California Department of Corrections. Using the release signed by Petitioner, I obtained those records in early January 2003.

4. On January 14, 2003, I left trial counsel another message asking him to call me. On January 16, 2003, trial counsel returned one of my calls for the first time, but

I was not in the office to take his call. On January 31, 2003, I was finally able to speak personally with trial counsel, Petitioner's trial counsel because he was in his office when I called him. He said before Petitioner's trial he had received a copy of the report stating that at the time of the charged crime Petitioner did not understand the nature of the charges. Trial counsel told me he did not present an insanity defense because Petitioner told him he did not want to rely on an insanity defense. I reminded trial counsel that I had requested his trial file the previous September. He promised to send it to me.

5. On February 10 I wrote trial counsel a letter reminding him of his promise to send me his trial file. I also asked him why he made no use of Petitioner's medical records at sentencing, particularly to request the dismissal of Petitioner's strike priors. During the ensuing months I left a few phone messages for trial counsel. He called back one time, on April 8, 2003, leaving me a message when I was not in the office. I have been unable to speak with trial counsel personally since our conversation on January 31, 2003. Other than the call on April 8, he has not returned any of my phone calls, nor has he responded to letters written on February 10 and June 26, 2003.

6. In May or June 2003 trial counsel finally sent me his trial file. When I reviewed the file I discovered that trial counsel made no effort to obtain Petitioner's medical and psychiatric records prior to the trial. Instead, on February 15, 2002, ten days before trial was scheduled to begin, he prepared and served a subpoena to have the records brought in person to the trial court at the time of trial. I also found no

evidence of any effort to consult with a psychiatrist concerning Petitioner's mental illness and its possible effect on Petitioner at the time of the battery.

7. On September 23 I visited Petitioner at Pelican Bay State Prison to discuss potential habeas issues. Petitioner denied refusing to plead not guilty by reason of insanity. He said he had personally given trial counsel a copy of the document which stated that at the time of the incident he did not know the nature of the charges. Based on some cases he had read in the prison library, Petitioner said he asked trial counsel to present an insanity defense. Petitioner said trial counsel was initially receptive, and told Petitioner he would have to see a psychiatrist. Petitioner told me he had no problem with that, particularly since he had been evaluated by psychiatrists several times in prison. However, trial counsel never sent a psychiatrist to see Petitioner.

8. Petitioner further told me that the medication prescribed to treat his mental illness had been changed two or three weeks prior to the incident which gave rise to the battery charge. The change was detrimental. He started hearing voices and feeling out of control. He complained about his medication to various guards, but nothing was done prior to the incident. Two weeks after the incident giving rise to the battery charge, Petitioner's medication was changed again, and his condition improved.

9. After visiting Petitioner, I reviewed his psychiatric records and found they substantiated his claim about the change in his medication. Petitioner's medical

records showed he routinely received medication for his mental illness, which was diagnosed as paranoid schizophrenia. On June 28, 2001, his medications were changed. The incident leading to the battery charge occurred on July 18, 2001. On August 1, 2001, Petitioner's medication was changed again. Prison records I reviewed also reported that as Petitioner was led from his cell on July 18, 2001, he yelled, "I want my meds."

10. In November 2003, I began searching for an expert who could evaluate the trial transcripts and Petitioner's records, including the records of his psychiatric medication, and consider whether there would have been grounds for an insanity defense or at least a basis to present mitigating evidence at sentencing. I spoke with Dr. Emily A. Expert, a forensic psychiatrist who is the director of the Program at the University. After hearing an outline of Petitioner's case, Dr. Expert told me in her opinion trial counsel should have investigated Petitioner's mental health at the time of the battery. She agreed that she would supervise one of her two students, who are both licensed psychiatrists, in reviewing pertinent records and preparing a report concerning Petitioner's mental state at the time of the battery. Dr. Expert's declaration, her curriculum vitae and those of her students, are attached to this application for expert funds.

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

Executed this December 4, 2003, at Santa Clara, California.

_____

Appellate Counsel