

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

Ex Parte Notice of County Law § 722
Motion For Appointment of an Expert

v

CLIENT XXXX,

Indictment No. [REDACTED]

Defendant.

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Amber R. Poulos, Esq., the Affidavit of Dr. Tricia Peterson; and upon all the papers and proceedings heretofore had herein, Defendant's attorney will move this Court, Hon. [REDACTED], J.C.C., at 54 Broad Street, Lyons, New York 14489, on _____, for an *ex parte* order granting Mr. XXXX's request for expert services pursuant to County Law § 722-c, under sealing, and for such other and further relief as the Court may deem just and proper.

Respectfully,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

COUNTY COURT OF THE STATE OF NEW YORK
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Affirmation in support of County Law § 722
Motion For Appointment of an Expert

v

CLIENT XXXX,

Indictment No. 1 [REDACTED]

Defendant.

I, [REDACTED], Assigned Counsel, being duly sworn deposes and says:

1. [REDACTED] an attorney duly admitted to practice in New York, pursuant to CPLR 2106, affirms this statement is true under the penalties of perjury under the laws of New York.
2. I am an attorney duly licensed to practice law in the State of New York. I have been assigned to represent Client O. XXXX f/k/a Client Devine (Mr. XXXX) pursuant to CPL § 440.47 for the purpose of a re-sentencing motion under the Domestic Violence Survivor's Justice Act. As such I am fully familiar with the facts and circumstances herein, except for those stated to be made upon information and belief, and regarding same, I believe them to be true.
3. On August 16, 2018 Mr. XXXX plead guilty to one count of Murder in the Second Degree pursuant to PL § 125.25 (1). On October 18, 2018, Mr. XXXX was sentenced. Copies of the Certificate of Conviction and Uniform Sentence and Commitment are attached hereto as **Exhibit "A."**
4. On July 13, 2022, the Wayne County Assigned Counsel Program assigned your deponent to represent Mr. XXXX.

5. This affirmation is made in support of an application for appointment of Dr. Tricia Peterson of Peterson Psychological Services, PLLC, an expert in the areas of forensic psychology and domestic violence, pursuant to County Law § 722-c. I request that this application and any resulting order be sealed so that defense strategies (which are privileged pursuant to the attorney work-product privilege) are not revealed to the prosecution. Sealing is appropriate where there is good cause, and the protection of privileged materials constitute good cause. (*See Richard S. v City of New York*, 32 NY2d 592, 595-596 [1973]). In requesting sealing, I ask that neither this application nor any resulting order are or may be released or made available to the prosecution, the government, the media, or any other person or party not expressly authorized by this Court.
6. The statute itself, County Law § 722-c, provides for *ex parte* application. The statute allows a retained attorney to make this application, additionally, County Law § 722-c refers to “counsel, whether or not assigned in accordance with a plan”
7. Since the time of my assignment, I have met with and interviewed my client, reviewed the appellate file, reviewed approximately 20, 000 pages of records generated by Hillside Foster Care, the Monroe County Family Court, the Monroe County Department of Human Services, FOIL responses from various governmental entities, and researched the issues involved, among other actions.
8. As a result of my work thus far, I have determined there is a need for an expert to allow me to adequately prepare and properly prosecute the application pursuant to CPL § 440.47. Upon information and belief, Mr. XXXX meets the legal definition of a domestic

violence survivor and an expert evaluation as to the remaining statutory criteria for resentencing is necessary.

9. Unless the expert professional services of Dr. Tricia Peterson of Peterson Psychological Services, PLLC are provided to assist me in this case, Mr. XXXX would be prejudiced by ineffective assistance of counsel should your deponent not be granted permission to hire an expert. The Sixth Amendment's right to counsel applies to criminal matters on the state level (Gideon v Wainwright, 372 US 335, 344 [1963]). The right to counsel extends to effective assistance of counsel. (Strickland v Washington, 466 US 668, 684 [1984]).
10. Since the right to effective assistance of counsel is tied to "reasonableness under prevailing professional norms," that right has had to evolve as forensic evidence has played an increasingly central role in criminal prosecutions. (Harrington v Richter, 562 US 86 [2011]).
11. The importance of being allowed to hire experts in the early stages of a case relates to their use as consultants, the need for assistance in evaluating evidence to make reasonable strategic decisions. It is well settled that the defendant's right to effective representation entitles him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial. (People v Reed, 152 AD2d 481 [1st Dept 1989]).
12. The United States Supreme Court's 2012 decisions in *Lafler v Cooper*, 566 US 156 (2012) and *Missouri v Frye*, 566 US 133 (2012), regarding the critical nature of effective assistance counsel in plea cases, underscores how important it is that attorneys seek to use every available resource to investigate and properly counsel clients in the disposition of their cases. Similarly, the use of mitigation experts has been accepted in cases where a

defendant's history presents issues requiring evaluation. (Brandon L. Garrett, Constitutional Regulation of Forensic Evidence, 73 Wash. & Lee L. Rev. 1147 [2016]; See *People v Louis*, 161 Misc 2d 667 [Supreme Ct, New York Co 1994] (approval of fees in excess of statutory amount based on extraordinary circumstances for mitigation expert in pre-plea investigation).

13. Funds for expert assistance may be available for post-conviction practice in the discretion of the court. Experts may be necessary in order to establish compelling issues to vacate a judgment or sentence. In *People v Bailey*, 47 Misc 3d 355 (County Ct, Monroe Co 2014), the motion court ultimately granted § 722-c funds to cover fees of a slate of experts that presented evidence related to the state of the science in Shaken Baby Syndrome cases that had dramatically changed in the years following a prosecution and conviction on that basis.
14. CPL § 440.47 requires the Court to make a finding that the abuse Mr. XXXX suffered was a significant contributing factor to his commission of the offense and the original sentence imposed in this matter was unduly harsh. Analysis under the DVSJA requires courts to look at the “full picture” and “take into consideration the circumstances that [the applicant was] living under” in order to determine if abuse was a significant contributing factor to the criminal conduct. This includes looking beyond the immediate moment of the crime and considering the “cumulative effect of repeated abuse” over time. (see, New York State Senate, Regular Session, March 12, 2019, at 1572; New York State Senate, Regular Session, March 12, 2019, 1569-71; Coalition for Women Prisoners, Memo in Support of DVSJA, March 7, 2017, <http://files.meetup.com/1337582/dvsja-support-memo.pdf>.)

15. Similar to *People v D.L.*, 147 NYS3d 335 [Columbia Cnty 2021], Mr. XXXX's abuse is removed in time from the current crime. Unless the expert professional services of Dr. Tricia Peterson, of Peterson Psychological Services, PLLC are provided to assist me in this case, the defendant will be prejudiced in the prosecution of his matter. Further, an expert would benefit the Court in its determinations of material facts. (see, Dunn v Roberts, 963 F2d 308 [10th Cir 1992]; People v Seeley, 186 Misc 2d 715 [Supreme Ct Kings Co 2000]; see also, People v Caldavado, 26 NY 3d 1034 [2015]; People v Rodriguez [2022 NY Slip Op 07456]).
16. Upon information and belief, Mr. XXXX has been indigent and remains so and cannot afford to independently retain investigative services. The Certification of Continued Indigency is attached hereto as **Exhibit "B."**
17. I have contacted Dr. Tricia Peterson, of Peterson Psychological Services, PLLC, an expert in forensic psychology and domestic violence. I have been advised their hourly rate is \$300.00. I expect the total will exceed the cap of \$1000.00 per report.
18. The statutory cap may be exceeded for "extraordinary circumstances." In this case the forensic expertise needed requires an experienced and educated professional. The curriculum vitae and estimation necessary work and of associated costs is attached as **Exhibit "C."**
19. No prior application for relief requested has been made to any court.

WHEREFORE, it is requested that the court grant an order pursuant to County Law § 722-c permitting assigned counsel to employ expert services in this action, and that the reasonable cost of such services be paid by Wayne County following the submission of proper vouchers to the court upon the rendering of such services; that this application and any resulting order are sealed; and for such other and further relief as may be just and proper.

Respectfully,

[REDACTED]

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Defendant.

The defendant, by his attorney, having moved for an *ex parte* order pursuant to County Law § 722-c for permission to employ expert services that may be required to enable the attorney to adequately prepare and conduct the CPL §440.47 application and any future hearings; and that the cost of such services be paid first by Wayne County; and that the reasonable cost of such services be paid at a rate of \$300.00; and it appearing that the defendant is without means to employ or obtain the services of an expert to assist his assigned counsel in the preparation and conduct of the CPL §440.47 application; and the court finding that there are extraordinary circumstances, including that the defendant has plead guilty to one count of Murder in the Second Degree and having been sentenced to 20 years to life, which, upon a successful application, may be reduced to a determinate sentence of 5-15 years with 5 years post release supervision; and the complexity of the legal, factual, and medical issues involved in this case, and the need for defense counsel to employ an expert to assist both in preparing for an application, preparing for any hearings and testifying at said hearings;

Now, upon motion of [REDACTED] attorney for the defendant, it is

ORDERED pursuant to the provisions of the Criminal Procedure Law and County Law that Amber R. Poulos, Esq., is given leave to employ such expert professional services as in the attorney's discretion as they are material and necessary; and it is further

ORDERED that the expert shall be paid by Wayne County; and it is further

ORDERED that if the cost of such expert services to be paid by Wayne County shall exceed \$1,000 to be paid by Wayne County, then defense counsel shall be required to make further application to the Court, on notice to the Wayne County Attorney; and it is further

ORDERED that a copy of this Order shall be furnished to the defendant's counsel, and the original thereof, together with the application upon which it is based and the papers submitted in support thereof, shall be sealed by the Clerk of the Court and not be made available or released to the prosecution, the government, the media, or any other person or party not expressly authorized by this Court.

Enter:

Hon. [REDACTED]