IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

CASE NUMBER S20A1522

RYAN ALEXANDER DUKE,
Appellant,

v.

STATE OF GEORGIA,
Appellee

BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AS *AMICUS CURIAE*

Kelly J. Long Pridgen
General Counsel
State Bar No. 587945
kpridgen@accg.org

Larry Ramsey
Deputy General Counsel
State Bar No. 593613
lramsey@accg.org

G. Joseph Scheuer
Assistant General Counsel
State Bar No. 629179
jscheuer@accg.org

191 Peachtree St., NE, Suite 700
Atlanta, Georgia 30303
(404) 522-5022

ATTORNEYS FOR *AMICUS CURIAE* ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA

I. INTRODUCTION

Amicus Curiae Association County Commissioners of Georgia ("ACCG") files this brief at the invitation of this Court expressed in its November 16, 2020 letter to ACCG and the Georgia Public Defender Council ("GPDC"). Such letter constituted leave of the Court for ACCG to file this brief under Supreme Court Rule 23. The Court has posed three questions in its letter:

(1) Did the trial court err in holding that an indigent defendant in a criminal case who is represented by private, pro bono counsel does not have a constitutional right or a statutory right under the Indigent Defense Act, O.C.G.A. § 17-12-1 et seq., to state-funded experts and investigators?

(2) Does an indigent defendant have a due process right to publicly funded experts if he chooses to be represented by private, pro bono counsel?

(3) If so, then what government entity is responsible for providing the funding for such experts and investigators in this case?

ACCG submits to the Court that the answers to Questions 1 and 2 are 'no', such that Question 3 need not be reached by the Court. However, based solely on the presumption in Question 3 that Defendant is entitled to taxpayer funded experts and investigators

in this case, there is no legal basis upon which to impose the burden of such expenses on Georgia's counties and taxpayers.

II. STATEMENT OF INTEREST

ACCG is a nonprofit instrumentality of Georgia's county governments formed in 1914 and serves as the consensus-building, training, and legislative organization for all 159 county governments in Georgia. The constituency of ACCG includes more than 800 county commissioners; at least 426 appointed county clerks, managers, administrators, and attorneys; and more than 85,000 full-time and part-time employees. ACCG works to ensure that counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of Georgia citizens through education and technical assistance with the objective of promoting more effective and efficient county government.

This case presents questions posed by this Court that are exceptionally important to all ACCG's members. A holding in Defendant's favor requiring counties to pay criminal indigent defense expenditures in superior court would have broad, adverse statewide impacts upon all counties in this state and would turn on its head the system carefully crafted by the General Assembly in 2003 (with subsequent refinements) to remedy the serious

shortcomings of the prior piecemeal, inconsistent manner in which indigent defense was provided on a county-by-county basis.

III. ARGUMENT AND CITATION OF AUTHORITY

(1) Did the trial court err in holding that an indigent defendant in a criminal case who is represented by private, pro bono counsel does not have a constitutional right or a statutory right under the Indigent Defense Act, O.C.G.A. § 17-12-1, *et seq.*, to state-funded experts and investigators?

(2) Does an indigent defendant have a due process right to publicly funded experts if he chooses to be represented by private, pro bono counsel?

Questions 1 and 2 are interconnected and have an interconnected answer. The trial court did not err in its holding. An indigent defendant in a criminal case who chooses to be represented by private, pro bono counsel, in lieu of representation by the GPDC, does not have a due process or other constitutional right, or a statutory right under the Indigent Defense Act (the "Act") or any other general law, to state-funded or county-funded ancillary services such as experts or investigators.

A. The Indigent Defense Act is consistent with federal and state constitutional requirements.

Under the Sixth Amendment to the U.S. Constitution, the Defendant is guaranteed a right to effective assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Under Article I, Section I, Paragraph XIV of the Constitution of Georgia a similar requirement exists to provide counsel at public expense for those who otherwise cannot obtain such counsel. *Walker v. State*, 194 Ga. 727 (1942).

It is undisputed though, that these constitutional rights to select and choose counsel are limited. Under cases such as *Wheat v. U.S.*, 486 U.S. 153, 159 (1988); *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); *Britt v. North Carolina*, 404 U.S. 226 (1971); *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985); and *Ross v. Moffit*, 417 U.S. 600, 611 (1974), an indigent defendant might qualify to be provided with a competent expert (ancillary services) addressing a significant factor at trial (*e.g.*, a psychiatrist for a sanity determination) but does not qualify for all experts for all possible defenses. The *Ake* case makes it clear that a state can establish the manner for providing ancillary services and supply basic tools needed to ensure constitutional rights to counsel and due process. In Georgia, the Act establishes the manner

for providing ancillary services and supplying basic tools needed to ensure constitutional rights.

1. *Ake*: Fundamental Fairness and Basic Tools

The Supreme Court's *Ake* decision lists the factors for determining whether the government must fund particular "tools" or "safeguards" as part of the defense of an indigent defendant. Those factors include: (1) the private interest in the accuracy of the outcome of a criminal proceeding and how that will be affected by the state refusing to pay for such tools; (2) the interest of the government in not providing the particular "safeguard" requested; and (3) "the probable value of the additional or substitute procedural safeguards that" are requested and the risk that the failure to provide such safeguards will result in "an erroneous deprivation of the affected interest…." 470 U.S. at 77.

a. What private interest will be affected by the action of the state?

Assuming that the safeguards/ancillary services requested to be funded by the taxpayers are basic, supplementary, or necessary to the Defendant's defense, then there is a private and public interest in the accuracy of the outcome of the case. The Defendant has a significant private and personal interest in the accuracy of

the outcome of this case, facing a life sentence. Under this prong of the analysis, the Defendant stands to benefit if, under the Act, he qualifies as an indigent and thus would further qualify for taxpayer paid ancillary services (experts and investigators). The taxpayers made these services available to the Defendant when he was provided competent legal counsel through the Act. However, the Defendant voluntarily discontinued representation under the Act.

b. What governmental interest is affected if the safeguard is provided?

The governmental interest, as well as the interest of indigents and society in general, is that providing taxpayer reimbursement to self-appointed "public defenders" is the beginning of the undoing of the Act and the return to the system that served neither indigent defendant nor taxpayer adequately. As will be addressed in detail *infra*, ACCG points out that when the state legislature enacted the Act, it combined and bundled the services to be provided to indigents by the Georgia Public Defender Council ("GPDC"). These ancillary services consist of representation by a public defender or conflict counsel, investigators, and expert services. Defendant suggests that ancillary services should also be provided to a defendant who

exercised their constitutional right to be represented not by GPDC but by pro bono or private counsel. Were this Court to agree that defendants who choose to be represented outside the services of the GPDC should also be entitled to public funding of the ancillary services the Act provides solely to those represented thereunder, it would place an impossible and overwhelming financial burden upon the taxpayers. Indigent defendants would be free to engage private counsel from any sources of funding (or *pro bono* counsel) but still be able to benefit from ancillary services to be provided at government expense.

State and local governments possess the same interest in the *Ake* fundamental fairness prong. They seek only the correct outcome of criminal cases. Likewise, the state and counties also maintain a paramount interest in acting as responsible stewards of limited taxpayer funds. When the legislature enacted the Act, it created a new indigent defense system of not only public defender representation but also ancillary services – but limited that system to indigents who qualify under the terms of the Act. That state system affords Defendant – and any other defendant who qualifies under the provision of the Act – to a state-provided defense, including ancillary services such as necessary expert witnesses. In addition to indigent defendants, both the state and

Georgia's counties have a strong interest in a uniform and predictable system for protecting the constitutional rights of indigent defendants – a system that in fact is provided by the studied legislative judgment reflected in the Act and the GPDC.[1] The Act vests sole authority with the GPDC to determine indigency and who qualifies for its services.

While counties are solely responsible for the zealous, adequate, effective, timely and ethical representation of indigents charged with violations of county ordinances or state laws in the magistrate, probate, and state courts,[2] see, O.C.G.A. § 17-12-23(f), for indigent cases in superior courts, county financial responsibility is limited to the obligations to: (1) "provide appropriate offices, utilities, telephone expenses, materials, and supplies as may be necessary to equip, maintain, and furnish the office or offices of the circuit public defender in an orderly and efficient manner" (O.C.G.A. § 17-12-34); and (2)

[1] More information regarding the history and rationale for the system created by the Act is discussed below in Section 3(A).

[2] In fact, according to at least one report, Georgia local governments provide 50% or more of indigent defense. See, Texas Indigent Defense Commission as cited in "Indigent Defense." Texas Association of Counties, Aug. 2020, www.county.org/TAC/media/TACMedia/Legislative/Legislative-Brief/Indigent-Defense-Brief-Nov2020.pdf (last accessed December 19, 2020).

pay for contingent expenses relating to facility needs incurred in "holding any session of the superior court, including lights, fuel, stationery, rent, publication of grand jury presentments when ordered published, and similar items, such as taking down testimony in felony cases, etc. shall be paid out of the county treasury…upon the certificate of the judge of superior court and without further order." O.C.G.A. § 15-6-24. Counties have a strong governmental and fiscal interest in maintaining the demarcation between the obligations of county taxpayers and those of other parties (whether the state or criminal defendants themselves) and, as discussed in Section 3(C) below, none of the expenditures requested by Defendant fall within the above areas of county responsibility.

The state funds experts and investigators that are provided to qualified indigents under the Act in accordance with the Sixth and Fourteenth Amendments and Art. I, Sec. I, Par. XIV of the Georgia Constitution. Notably, the Act does not require or even contemplate funding for ancillary services where the indigent defendant is not represented by the GPDC or an appointed conflict counsel. The Act does not set forth any process for pro bono or private counsel to receive additional resources for representation such as ancillary services. Were this Court to impose such requirements on the Act, this would impair the GPDC by draining

its funds. This would then impair the GPDC's mission to adequately represent qualified indigents defendants and impair the constitutional rights of those persons. These governmental interests are reflected in the legislative choices made by the General Assembly in the Act – creating a system that is available to fully protect the constitutional rights of criminal defendants according to the processes and rules set forth in the Act and implementing procedures of the GPDC.

c. What is the probable value of the additional or substitute procedural safeguards sought and is the risk of erroneous deprivation of affected interests if safeguards are not provided?

Under this third prong of the analysis, the focus becomes the value of the ancillary services the Defendant seeks and the risk of error if those services are not offered. In *Ake,* the Court noted that the mental condition of a defendant does not arise in each criminal proceeding and that the risk of error and probable value are less when the defendant's mental condition is not in question. *Id.* at 82-83. Here, the Defendant seeks government-paid expert services in the form of a psychiatrist. It is presumed that this is for an opinion about the confession supplied by the Defendant and effects of illegal drugs and medicines on that confession. The Defendant also seeks funding for a psychologist evaluation. The

Defendant has not demonstrated the need for this expert as a "significant trial factor." The Defendant seeks further funding for a false confession expert even though the Court has held testimony regarding false confessions to be inadmissible. See *Woodall v State*, 294 Ga. 624, 629-630 (2014); *Wright v. State*, 285 Ga. 428 (2009); *Lyons v. State*, 282 Ga. 588 (2007), overruled on other grounds by *Garza v. State*, 284 Ga. 696 (2008); *Riley v. State*, 278 Ga. 677, 681-683 (2004).

In *Tatum v. State*, 259 Ga. 284, 286 (1989), this Court affirmed the trial court's denial of an indigent defendant's request for a gun expert. In ruling that the trial court had not abused its discretion, the Court stated that there must be a reasonable probability that expert assistance is necessary to the defense and that without such assistance the defendant's trial would be fundamentally unfair. In *Edwards v. State*, 282 Ga. 359, 260 (2007), decided under the former and now repealed county public defender system, this Court upheld a trial judge's decision to deny funds for expert witness identification as being within the trial court's discretion if eyewitness identification was not the sole defense. In *McNeal v. State*, 263 Ga. 397, 398 (1993) also decided under the former and now repealed county public defender system, this Court upheld a trial court's authorization for an

expert in forensic pathology (albeit for a lower amount than had requested) ruling that limitation was not an abuse of discretion.

The Defendant's attorneys allege they do not have an investigator. An investigator might be useful to the Defendant, or to any lawyer in the case. Merely being useful is not sufficient. The U.S. Supreme Court has previously held denial of investigator and other experts by a trial judge did not deprive a capital defendant of his due process rights when the defendant offered undeveloped assertions that the experts would be beneficial. *Caldwell v. Mississippi*, 472 U.S. 320, FN 1 (1985). Neither the federal or state constitutions nor any provision of the Act authorize experts or investigators as a matter of right. Simply because a service might be useful to an indigent defendant does not equate to a constitutional requirement. State and local governments are not required to duplicate all the advantages of private or pro bono counsel. They need only provide a defendant an adequate opportunity to present his or her claims fairly. *State v. Moffitt*, 417 U.S. 600, 612 (1974).

The key point here, however, is that the Defendant chose not to operate within the constitutional system set forth in the Act – a system designed to provide a constitutional defense, inclusive of such ancillary services as the state public defender's office

and their clients determine necessary. The Defendant made a clear and deliberate choice in this case to discontinue his GPDC representation, which included the bundled ancillary services of investigators and experts. It was his constitutional right to make this choice under the Sixth Amendment. Having made that choice, the Defendant has no legal right to now further pick and choose, seeking to operate partially within the state indigent defense system and partially without.

The Defendant has also argued that the trial court's exclusion of funding for ancillary services for private, pro bono counsel would discourage and deter such representation, apparently because he believes public defenders are too busy to handle more cases. In striking contrast, while this Defendant was represented by GPDC, he had three lawyers assisting his defense. Even if one were to agree with this proposition, and counties certainly do not, in the absence of constitutional problems as in this case, it is not a matter for courts to remedy. The General Assembly established the bundled system under the Act and only the General Assembly, in its determination, can change it.

Finally, allowing defendants the ability to pick and choose which services are provided at the expense of the taxpayers undermines the Act. As will be discussed in more detail below, the

reports of the Chief Justice's Commission on Indigent Defense ("Commission") and the Spangenberg Group ("TSG") to the Georgia Administrative Office of the Court looked at various models of delivering indigent defense services to defendants in superior court. After studying the issue for years, the Commission, TSG and the Georgia General Assembly determined that the statewide public defender model with minimum standards was the model that would be used in Georgia – not a client choice model.[3]

(3) If an indigent defendant has a constitutional right to publicly funded experts if he chooses to be represented by private, pro bono counsel, then what government entity is responsible for providing the funding for such experts and investigators?

As explained above, an indigent defendant does not have a due process or other constitutional right to publicly funded ancillary services where the defendant has voluntarily chosen to discontinue GPDC representation. Consequently, neither the state, nor a county such as Irwin County in this case, is responsible for providing the funding for experts and investigators which are ancillary

[3] For more information on the client choice model of indigent defense, see Nugent-Borakove, M. Elaine, et al. "The Power of Choice: The Implications of a System Where Indigent Defendants Choose Their Own Counsel." The Justice Management Institute, Texas Indigent Defense Commission, Mar. 2017, www.jmijustice.org/wp-content/uploads/2017/04/The-Power-of-Choice_29-MAR-2017.pdfe.pdf (last accessed on December 19, 2020).

services provided only to indigent defendants being represented by the GPDC and its circuit public defender's office. Particularly in superior court cases, the county or counties making up the judicial circuit have no obligation for funding indigent defense.[4] Because this question, as posed by the Court, assumes such a public obligation exists, however, the discussion below demonstrates that any such responsibility does not lie with Irwin County (or the collective counties of the Tifton Judicial Circuit) in this case, or with other Georgia counties in general.[5] In short, since enactment of the Act in 2003, counties are no longer responsible for these types of expenses in superior court. Rather, the state is responsible for the costs and expenses of indigent criminal defendants provided with representation under the Act.

A. Relevant History of Indigent Defense in Georgia.

It is well documented that the General Assembly passed the Act in 2003 to rectify complaints with the widely divergent and ad

[4] See, O.C.G.A. § 17-12-23.

[5] The following discussion applies to the facts of the present case, as well as other similar cases that might arise in most other Georgia counties and judicial circuits. As authorized by the Act, there are a few single-county judicial circuits that opted out of the state public defender system and continue to operate county-funded public defender systems for superior court cases consistent with state standards and some state financial support. See O.C.G.A. § 17-12-36. According to the GPDC, those counties are Cobb, Douglas, Houston, Gwinnett, Forsyth, and Cherokee.

hoc methods by which indigent defense was then provided throughout the state. Prior to adoption of the Act, the indigent defense system

> was actually not a system at all, but rather three very different approaches employed haphazardly and almost entirely independently by the state's 159 counties…. Because the state provided only nominal support, the counties were largely on their own, which led to wide variations between counties in operation and quality of service. Each county handled indigent defense either through (1) a contract system, (2) an appointed attorney system, or (3) a county public defender's office. The lack of state-imposed standards resulted in these inconsistent methods and prevented adequate representation of indigent defendants.[6]

This lack of uniformity resulted from the broad authority delegated to superior courts and counties under the 1968 Georgia Criminal Justice Act,[7] which left in the hands of each superior court the discretion to create indigent defense rules within very broad parameters.[8] While the resulting delivery of indigent defense

---

[6] Note, *Legal Defense of Indigents: Create the Georgia Public Defender Standards Council, etc.* 20 Ga. St. Univ. Law Review 105, 107-108(2003).

[7] 1968 Ga. Laws, p. 999 (former O.C.G.A. §§ 17-12-1, *et seq.*, as amended and replaced by the 2003 Act).

[8] See former O.C.G.A. § 17-12-5(a) (2001):

> All courts of this state having jurisdiction of proceedings of a criminal nature shall, by rule of court, provide for the representation of indigent persons in criminal proceedings in such court. After ascertaining that the defendant is in fact indigent, each court shall provide this representation by:

services ran along a wide spectrum from judge-appointed attorneys on a case-by-case basis to actual county public defenders' offices, the prior law clearly made counties assume the financial burden for those services.[9] As might be expected, the vastly different resources of Georgia's 159 counties resulted in very uneven indigent defense services. For small counties, even one major

---

(1) An arrangement whereby a judge of the court concerned will assign attorneys on an equitable basis through a systematic, coordinated defender plan under delegation to and supervision of the clerk or deputy clerk of the superior court, the clerk or deputy clerk of the court concerned, or of an administrator appointed by the superior court for such purpose;

(2) An arrangement whereby a nonprofit legal aid agency or agencies will be assigned to provide the representation; or

(3) An arrangement whereby a combination of the arrangements indicated in paragraphs (1) and (2) of this subsection will provide the representation.

[9] "(a) When a superior court prescribes an arrangement under Code Section 17-12-4 which involves the assignment of attorneys, it shall prescribe the compensation of the defending attorneys whom it assigns as provided for in this article and approve the expenses necessarily incurred by them in the defense of indigents under this article. The county governing authority shall recommend the limits for attorney fees for the several courts in the county that may be prescribed by the courts for the defense of indigents and such investigation expenses as may be necessary and approved by the court.

…

(c) The county governing authority shall pay assigned attorneys the amounts prescribed in this Code section from public funds available for the operation of the courts in the county."(former O.C.G.A § 17-12-5(a) (2002), as amended and replaced by the 2003 Act).

criminal case with an indigent defendant could cause dramatic budgetary problems for the county taxpayers, with the associated difficulty in providing a constitutional legal defense for the accused – one of many problems noted in the TSG Report referenced below. As an example, the cost to Lincoln County for the trial and re-trial of an indigent death-penalty defendant in the early 1990s twice required the county board of commissioners to raise the property tax rate – and be held in contempt and jailed overnight for delaying payment of some of the defendant's attorney's fees.[10]

On December 27, 2000, this Court created the Chief Justice's Commission on Indigent Defense. Over the next two years, the Commission's work included site visits and 17 sessions of public input, along with extensive data collection and analysis by TSG, a criminal justice reform organization. Among the Commission's conclusions in its Final Report[11] were the following:

---

[10] "County Commissioners Jailed for Refusing to Pay Legal Bill." Associated Press (October 31, 1991). https://apnews.com/article/eaf07fc17f0f39aad6379f4195719b81 (last accessed December 18, 2020).

[11] The Commission's Final Report is available at https://www.schr.org/files/post/media/Blue%20Ribbon%20Commission%20Report.pdf. The Spangenberg Report referenced in the Commission Report is available at http://www.sado.org/fees/georgia_part_1.pdf.

- The constitutional obligation to provide adequate legal services for indigents charged with violating state criminal law is imposed on the State of Georgia and this duty should be funded adequately by the state;
- Georgia's then-current fragmented system of county-operated and largely county-financed indigent defense services was failing the state's mandate under the federal and state constitutions to protect the right of indigents accused of violation of the state criminal code; and
- A public defender system is the delivery system most likely to afford effective representation to those entitled to it under legal and constitutional mandates (Final Report, Executive Summary, pp. 3-4).

Accordingly, the Commission issued a series of recommendations to replace the varied county-by-county indigent defense programs with a unified public defender system under state control. Some of those recommendations were:

- Adequate funding of indigent criminal defense in cases alleging a violation of state law should be provided by appropriations by the Georgia General Assembly;

- The delivery of indigent defense services should be reorganized to insure accountability, uniformity of quality, enforceability of standards and constitutionally adequate representation. Such a system would: 1) deliver indigent legal services at the circuit level, rather than the county level; 2) presumptively deliver services through a full-time public defender with appropriate support staff; 3) be operated by a statewide board charged with the responsibility and power to operate the entire system. This board should be given: the power to hire and fire circuit public defenders, the power to define the guidelines under which public defender, panel and contract systems will operate and the responsibility to provide meaningful review of the operation of local systems and the responsibility to conduct training programs for attorneys involved in indigent defense; and
- The state should adopt principles to govern the system of providing legal services to indigent criminal defendants (Final Report, Executive Summary, pp. 5-6).

B. The Indigent Defense Act of 2003.

The General Assembly responded to the Commission's Report in 2003 via the Act, which required the State to bear the entire burden of indigent defense expense in superior and juvenile courts,

except that counties would continue to bear the cost of providing facilities for these state operations. In interpreting the Act, the Court presumes that "[t]he General Assembly meant what it said and said what it meant. To the end, we must afford the statutory text its 'plain and ordinary meaning,' we must view the statutory text in the context in which it appears, and must read the statutory text in its most natural and reasonable way, as the ordinary speaker of the English language would." *Plummer v. Plummer*, 305 Ga. 23, 26 (2019); *Williams v. State*, 299 Ga. 632, 633 (2016); and *Deal v. Coleman*, 294 Ga. 170, 172-173 (2013).

The Act must be considered in overall context and not in cherry-picked isolation. A court must look to other provisions of the same law, the structure, and history of that whole law, and other law, including constitutional, statutory, and common law, that forms the legal background of the law in question. *Plummer*, 305 Ga. at 26-27. When applying this method of examination to the plain language of the Act, it clearly authorizes the GPDC to provide investigators and experts, for indigent persons who are represented by the GPDC, for capital defenders, and for conflict appointed counsel who have a contract with GPDC. It does not provide any such authorization of requirement for defendants who

choose to be represented by private counsel,[12] nor does it impose on Georgia counties the obligation to fund the services requested by Defendant.

Since adoption of the Act and pursuant to O.C.G.A § 17-12-1(c), the GPDC is "responsible for assuring that adequate and effective legal representation is provided, independently of political consideration or private interests, to indigent persons who are entitled to representation under [the Act]."The GPDC is also responsible for establishing a budget for all public defenders, offices, and entities providing indigent defense representation. O.C.G.A. § 17-12-26. The Act requires the GPDC to pay the salaries of assistant public defenders, investigators, administrative personnel, and paraprofessionals. O.C.G.A. §§ 17-12-27 through 17-12-30. By way of contrast, the Act does contemplate counties sharing in costs over a certain threshold in death penalty cases only. See O.C.G.A. § 17-12-12.1. Thus, if the Defendant was still represented by GPDC, the expenses at issue in this case, if determined necessary, would be required to be paid by the state and not Irwin County or any other county.

[12] Even under the diverse indigent defense mechanisms that existed under the 1968 Act, indigent defendants were not allowed to simply choose their own taxpayer-funded counsel. All appointments were made by a judge, a tripartite committee, or a county public defender's office.

In the process of enacting the Act and in addition to other prior provisions of law described above, the General Assembly repealed the former version of O.C.G.A. § 17-12-44, which had "expressly [recognized] the inherent power of *the court*[13] to appoint counsel to represent the indigent defendants and to order compensation and reimbursement from county funds in individual cases as the proper administration of justice may require."[14] (emphasis added). To further ensure State funding of indigent defense, as opposed to county funding, the General Assembly also repealed the prior version of O.C.G.A. § 17-12-13(a), which previously required counties to fund local indigent defense programs.

As the above history shows, the General Assembly deliberately removed counties from the funding equation for indigent defense in superior court under the revised provisions of the Act and replaced counties with the General Assembly, a wholly different branch of government. The trial court's order in the present case upholds the separation of powers doctrine and does not encroach upon the General Assembly's power to appropriate funds. The expenses at

---

[13] Not the client or an attorney who desires to become a self-appointed public defender.

[14] Former O.C.G.A. § 17-12-44 (enacted by 1979 Ga. Laws, p. 367, § 15).

issue in this case are a part of the Defendant's legal representation. If the Defendant had continued with GPDC representation, Georgia law would require that the state, not counties, should pay necessary expenses. However, since the Defendant opted for private counsel, neither the state nor Irwin County bears responsibility.

C. Contingent Expenses Under O.C.G.A. § 15-6-24 and Courts' Inherent Authority.

State law has long provided that the responsibility for paying contingent expenses relating to facility needs incurred in "holding any session of the superior court, including lights, fuel, stationery, rent, publication of grand jury presentments when ordered published, and similar items, such as taking down testimony in felony cases, etc. shall be paid out of the county treasury…upon the certificate of the judge of superior court and without further order." O.C.G.A. § 15-6-24. These expenses for facilities, however, bear no relationship to the expenses sought by Defendant. The General Assembly clearly did not intend the contingent expenses referred to in O.C.G.A. § 15-6-24 to include the cost of presenting an indigent defendant's case, as demonstrated by a 2007 amendment to that Code section to clarify that "any costs incurred in providing defense services" pursuant to the Act are not a

contingent expense that the county is obligated to pay. (See Ga. L. 2007, p. 183.) See, *e.g.*, *Freeney v. Geoghegan*, 177 Ga. 142, 147 (1933) (holding that payment of expert accountant witnesses needed by prosecution in criminal trial were not expenses of court because expenses of court did not include expenses of the solicitor-general to make his case).

In *Fulton County v. State*, 282 Ga. 570 (2007), this Court reversed the trial court's order requiring Fulton County to pay costs to assist the indigent defendant in preparing for trial. Citing *Freeney, supra,* this Court held that the expenses did not fall under O.C.G.A. § 15-6-24 and that the trial court lacked the inherent authority to order otherwise following the Act's repeal of former O.C.G.A. § 17-12-44. *Id.*, 282 Ga. at 571-572. See also *Cramer v. Spalding County*, 261 Ga. 570, 574 (1991) ("The inherent power does not give the judicial branch the right to invade the province of another branch of government; as a principle flowing from the separation of powers doctrine, it arms the judicial branch with authority to prevent another branch from invading its province. This inherent power is not a sword but a shield.").

Indeed, even prior to the repeal of O.C.G.A. § 17-12-44, this Court has long held that courts possess no inherent authority to force state or local governments to pay for expenses absent clear

constitutional or statutory authority. See *DeKalb County v. Adams*, 272 Ga. 401, 402-403 (2000) (Court has no inherent authority to make state or local government pay for counsel in a civil case absent clear state constitutional or statutory authority providing for payment out of state or county funds); *Willis v. Price*, 256 Ga. 767 (1987) (Court could not require state to pay attorney's fees for habeas corpus petitioner absent clear state constitutional or statutory authority providing for the expenditure of state funds); *Freeney v. Geoghegan*, 177 Ga. 142, 147 (1933) (holding that a county could not be made responsible for payment of expert accountant witnesses needed by prosecution in criminal trial unless some statutory or constitutional provision clearly required county to pay); *Justices of Inferior Court v. State*, 24 Ga. 82, 84 (1858) (court was without authority to require county to pay for jury meals because there was no statute or other authority requiring the county to do so).

IV. CONCLUSION

Under the facts of this case, the trial court did not commit error in the ruling under appeal. With respect to the role of Irwin County in this case, as well as counties generally under Georgia public defender system following its complete overhaul in 2003, there is no legal basis for imposing expenses of the type sought

by Defendant upon the county. A holding that counties can be required to fund indigent defense expenses on a case-by-case basis would return the state to the uneven landscape that existed prior to the 2003 Act, with no unified system designed to ensure equal treatment of indigent defendants throughout the state.

From the county perspective, such a ruling would inject tremendous uncertainty, with county boards of commissioners never knowing when any given prosecution of an indigent defendant might result in substantial and unexpected financial demands on their counties and taxpayers. Based upon the U.S. Census's 2019 population estimate, there are 33 Georgia counties with a population under 10,000, including Irwin County. In 2018, the average poverty rate of these 33 counties was 26%, with a range from 17.2% to 39.4% (the latter being the highest rate of any Georgia county) according to the United States Department of Agriculture Economic Research Services. Meanwhile, the overall poverty rate of the entire state was only 14.5%; only 39 counties have a poverty rate equal to or lower than the state's overall poverty rate.[15] Shifting the cost of indigent defense in superior courts back to counties in a state where 75% of the counties have

[15] "Percent of Total Population in Poverty, 2018: Georgia." USDA, United States Department of Agriculture Economic Research Service, 13 May 2020, data.ers.usda.gov/reports.aspx?ID=17826 (last accessed on December 19, 2020).

a higher poverty rate than the state as a whole would again create an unworkable indigent defense system. It would place the burden on the citizens who could least afford it and would destroy the benefit of uniformity established by the Act – uniformity designed, first and foremost, to benefit indigent defendants themselves.

The trial court's order in this case correctly followed the law as established by the General Assembly and prior decisions of this Court. A different outcome would require action of the General Assembly as a policy matter in discharging the state's obligation to provide for indigent defense and would not properly be accomplished by action of the courts of this state.

Respectfully submitted, this 21st day of December, 2020.

ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA

/s/ Kelly J. Long Pridgen
Kelly J. Long Pridgen
General Counsel
State Bar No. 587945
kpridgen@accg.org

/s/ Larry W. Ramsey, Jr.
Larry W. Ramsey, Jr.
Deputy General Counsel
State Bar No. 593613
lramsey@accg.org

/s/ G. Joseph Scheuer
G. Joseph Scheuer
Assistant General Counsel
State Bar No. 629179
jscheuer@accg.org

191 Peachtree St., NE, Suite 700
Atlanta, Georgia 30303
(404) 522-5022
Attorneys for *Amicus Curiae*
Association County Commissioners of Georgia

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AS *AMICUS CURIAE*** with the Clerk of Court using the SCED online system and served all counsel of record by depositing copies of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

Ashleigh and John Merchant, III
701 Whitlock Avenue, SW
Suite J-43
Marietta, Georgia 30064
Counsel for Appellant

John S. Gibbs, III
600 Peachtree Street, NE
Atlanta, Georgia 30308
Counsel for Appellant

Bradford L. Rigby
Special Assistant District Attorney
Tifton Judicial Circuit
P.O. Box 1252
Tifton, Georgia 31793
Counsel for Appellee

This 21st day of December,2020.

/s/ Larry W. Ramsey Jr.
Larry W. Ramsey Jr.
Georgia Bar No. 593613

Counsel for *Amicus Curiae*
Association County Commissioners
of Georgia