IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S20A1522

RYAN ALEXANDER DUKE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF APPELLANT

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INTRODUCTION

The important issue of first impression presented in this pre-trial murder appeal is whether Georgia's Indigent Defense Act, O.C.G.A. § 17-12-1, *et seq*. ("IDA") authorizes state-sourced funding from the Georgia Public Defender Council ("GPDC") for expert witnesses and an investigator for a criminal defendant when the defendant is represented by private *pro bono* counsel. The answer to this question is "yes." The United States Constitution, the Georgia Constitution and the IDA all demand that Mr. Duke receive such funding in order to protect his Sixth Amendment rights to counsel and a fair trial.[1] While this is a matter of first impression in Georgia, this Court should follow the overwhelming majority of states across the country that have decided that a defendant is entitled to such funding regardless of whether he has the assistance of *pro bono* counsel.

There is no dispute in this case that Mr. Duke cannot afford to hire private counsel. Indeed, the Public Defender for the Tifton Judicial Circuit, John Mobley ("Mobley"), initially accepted Mr. Duke's indigency application and represented him in this matter. In addition, the trial court, per the Honorable Bill Reinhardt, Superior Court of Irwin County, made an express finding that Mr. Duke is indigent

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[1] This is the third time this case has been before this Court since Mr. Duke was arrested in early 2017. *See WXIA-TV v. State*, 303 Ga. 428 (2018), *reconsideration denied* (Mar. 29, 2018); *Duke v. State*, 306 Ga. 171, 829 S.E.2d 348 (2019).

and that his need for experts in this case is "compelling"; therefore, Mr. Duke has satisfied the requirement that he make a showing of indigency and necessity.

Despite demonstrating his indigency and need, Mr. Duke has been denied funding solely because his lawyers have agreed to represent him for free. The trial court found that Mr. Duke's rights under the Georgia Constitution were violated, but then held it was powerless to remedy the violation because only public defenders are entitled to funding under the IDA. This interpretation would render the IDA unconstitutional as applied to Mr. Duke because it harms Mr. Duke, who is situated in all other respects similarly to other indigent defendants in Georgia.

The trial court's ruling below will also have significant ramifications for defendants in Georgia and for counsel who seek to provide *pro bono* legal services in Georgia. Indigent defendants throughout Georgia will always face an unconstitutional Hobson's choice: (1) do I choose to be represented by a lawyer having sufficient time, knowledge and skill to properly defend my case (but without the benefit of necessary experts), or (2) do I choose to be represented by a potentially overworked attorney with little time to devote to my case (but with the benefit of necessary experts). A person of meager means should not be forced to choose between counsel of his choice and the benefit of trial experts under the Sixth Amendment when there is no rational reason for distinguishing between a free private lawyer and a public defender.

The trial court's ruling will not only deprive Mr. Duke of his right to experts and, in turn, his right to a fair trial, but it also will have a devastating ripple effect throughout Georgia. It is well documented that public defenders in Georgia and elsewhere in the United States are chronically overburdened with unmanageable caseloads, impeding their ability to effectively represent their clients.[2] Many attorneys volunteer their time to represent indigent criminal defendants but may not wish, and should not be expected, to pay for experts, investigators and other costs in *pro bono* cases. *Pro bono* service, for which the State Bar of Georgia and this Court have consistently and strongly advocated, helps relieve the burden on public defender offices throughout the state while still ensuring that those with little or no economic resources receive competent representation. To deny Mr. Duke funds in this case is to deny him effective *pro bono* counsel, which will only serve to deter counsel from volunteering to assist on this case and will deter other lawyers from handling such cases on a *pro bono* basis. The decision below, if copied and pasted into subsequent orders around the state, will shift back to the public defender office's complex cases that will necessarily consume more attorneys' time and resources in these already-strained offices.

[2] *See, e.g.*, Arielle Kass, *Some Fulton public defenders given 1,000 cases a year, group complains*, Atlanta Journal-Constitution (July 13, 2018) (available online at: https://tinyurl.com/y2th9aug); Alexa Van Brunt, *Poor people rely on public defenders who are too overworked to defend them*, The Guardian (June 17, 2015) (available online at: https://tinyurl.com/huc54k3).

The trial court's interpretation of the IDA represents the minority view among other states that have considered similar issues. Accordingly, and for each of the reasons set forth below, Mr. Duke respectfully requests that this Court reverse the decision below.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction over this case because this is an appeal from an Order of a Superior Court in a capital felony and, therefore, comes within one of the areas designated to be heard exclusively before the Supreme Court under Article VI, Section VI, Paragraph II, Georgia Constitution of 1983. *See WXIA-TV v. State*, 303 Ga. 428, 432 n.5 (2018), *reconsideration denied* (Mar. 29, 2018) ("[W]e are satisfied that this Court has jurisdiction of the subject matter of this appeal. We have jurisdiction of appeals in murder cases . . . including appeals from collateral orders in murder cases.") (internal citations omitted).

STATEMENT OF THE CASE AND FACTUAL AND PROCEDURAL BACKGROUND

Sometime between October 22 and October 24 of 2005, Tara Grinstead, a high school teacher in Ocilla, Georgia, went missing. Following her disappearance, the Georgia Bureau of Investigation ("GBI"), along with local law enforcement agencies, began an investigation into her disappearance. That investigation would span more than a decade, and Ms. Grinstead's body was never recovered. In February of 2017, Bo Dukes, who is now serving a sentence for lying to police about Ms. Grinstead's death, and who faces charges for the attempted rape of two women in Houston County, made statements to the police, and following those statements, police arrested Mr. Duke and charged Mr. Duke with Ms. Grinstead's murder and the subsequent concealment of her death.

Following his arrest, Mr. Duke applied for appointment of counsel to represent him based on his indigency (*see* Record on Appeal ("R"), 1208–09). In his indigency application, Mr. Duke submitted his affidavit of indigency to Mobley attesting that Mr. Duke had no income and no assets (R. 13). Mobley accepted Mr. Duke as an indigent client and entered his appearance as counsel on behalf of Mr. Duke (R. 13). Mobley represented Mr. Duke throughout all of the trial court and appellate proceedings between February 27, 2017, and August 29, 2018 (R. 13, 668–70). Mobley also filed several motions on behalf of Mr. Duke (*see, e.g.*, R. 150, 447–595, 616–39, 652). On August 29, 2018, Ashleigh and John Merchant entered

their appearance as counsel for Mr. Duke (R. 652). Mobley requested permission to withdraw as counsel for Mr. Duke, and on September 13, 2018, the trial court allowed Mobley to withdraw as counsel for Mr. Duke (R. 668–70). On February 13, 2019, Evan Gibbs entered his appearance as counsel for Mr. Duke. (R.843).

On November 9, 2018, Mr. Duke filed under seal an *ex parte* motion seeking funds from Irwin County to hire a false confessions expert, Dr. Brian Cutler, and for the appointment of an investigator (R. 625–78, 726–31).[3] On December 7, 2018, the trial court denied Mr. Duke's requests, ruling that the State of Georgia, not Irwin County, was responsible for such funding (R. 718–20). Based on that ruling, on December 11, 2018, Mr. Duke filed under seal his *ex parte* motion requesting funding for Dr. Cutler and for an investigator (R. 726–36). On February 5, 2019, Mr. Duke filed under seal his *ex parte* motion seeking state funding for a psychological evaluation by a forensic psychologist, Dr. Christopher Tillitski (R. 1480–83).

After being informed that the State intended to introduce in Mr. Duke's case "touch DNA" evidence analyzed by the TrueAllele software in early 2019, on February 8, 2019, Mr. Duke filed under seal an *ex parte* motion seeking state funding to retain Dr. Daniel Krane, an expert related to TrueAllele and statistical methods

[3] Mr. Duke initially filed his Motions under seal but later filed these motions as part of the court's public record. The record citations refer to the later-filed motions.

associated with TrueAllele (R. 1113–34, 1484–89). On February 19, 2019, the trial court denied all of Mr. Duke's requests for funding for expert witness funds and for an investigator on the basis that GPDC had not been served with a copy of Mr. Duke's funding motions (R. 849–52).

In response to that ruling, on February 21, 2019, undersigned counsel sent a detailed letter to GPDC's Chief Legal Officer, Brandon Bullard ("Bullard"), directly requesting the funding for Drs. Krane, Butler, Tillitski and an investigator, explaining that Mr. Duke was entitled to such funding under the IDA by virtue of his statutory indigency (R. 1528–30). In a letter dated February 27, 2019, GPDC, through its Interim Director, Jimmonique Rodgers, formally denied Mr. Duke's requests for funding for experts and an investigator (*see* Transcript of February 28, 2019 *Ex Parte* Hearing ("EPT"), 4, Ex. D-1, R.1215–17).[4]

At the *ex parte* hearing on Mr. Duke's Funding Motion, Bullard testified that when an indigent defendant seeks expert funds, the public defender submits a request on a standardized form and, if there is sufficient information, the request is granted (EPT, 2–3). Bullard does not believe he has ever denied any request for expert funds

[4] At the start of the February 28, 2019 hearing, Mr. Duke filed his *Ex Parte* Consolidated Motion for State Funding for Defense Experts and Investigator and Supporting Memorandum, otherwise referred to as the "Funding Motion," which provided additional information concerning Mr. Duke's need for his experts (*see* R. 860–61, 1113–34).

(*id*., 2), and Mr. Duke's February 21 request for expert funds contained more information than what Bullard typically receives (*id*., 3). Bullard explained that GPDC denied Mr. Duke's expert funding request because GPDC has no relationship to Mr. Duke's *pro bono* counsel, and GPDC doesn't support private counsel (*id*., 5). Bullard explained that Mr. Duke was no longer "indigent" for purposes of the IDA because he "has the resources to retain private counsel . . ." (*id*., 10). Bullard testified that "[t]here's no mechanism [under the IDA] for providing expert funding for private counsel" (*id*., 6). In Bullard's view, there is also no way for *pro bono* counsel to establish an employment relationship with GPDC so as to trigger the protections of the IDA (*id*., 36–37). Bullard also testified that there was no scenario where Mr. Duke's *pro bono* counsel could continue on the case and have a public defender appointed to co-counsel the case (*id*., 11). He applied this reasoning to *pro se* defendants as well; *pro se* defendants would not be afforded the protections under the IDA and would need to seek money for experts from the trial court (*see id.*, 23, 33). Bullard testified that the Court would not have authority to appoint counsel to serve as co-counsel for Mr. Duke (*id*., 12).

According to Bullard, where an indigent defendant has retained private *pro bono* counsel, the county of venue for the prosecution is the authority that provides the funds (*id*., 7). Where GPDC believes the defendant is outside the confines of the IDA, and the Court cannot appoint a public defender to co-counsel, the Court is

required to compel the county to pay for the defendant's experts (*see id.*, 13, 22). Bullard also testified that it was his belief that the trial court has inherent authority to ensure that Mr. Duke's Sixth Amendment rights are protected (*see id.*, 16). Bullard also explained that the IDA implements a portion of the State's responsibilities under the Sixth Amendment (*id.*, 13-14).

During the *ex parte* hearing, Mobley testified that the purpose of the public defender's office is to provide representation to indigent persons (*id.*, 38–39). As a public defender, Mobley generally uses the definition of indigent person under O.C.G.A. § 17-12-2 to determine if a person qualifies for a public defender. (EPT, 39–40). Mobley makes the decision whether someone qualifies for public defender services, and he generally considers the defendant's financial picture in determining if the defendant qualifies for a public defender (*id.*, 40). GPDC is not involved in this decision (*id.*, 40–41).

Mobley explained that experts are an important component for lawyers because the experts have a realm of knowledge greater than the attorney and expertise is often needed that the attorney just does not have (*id.*, 48). For cases handled by the public defender, GPDC pays the expenses for experts regardless of the expense (*id.*, 41–42).[5] Mobley has been the public defender since 2004, and

[5] On the other hand, the county provides funding for the public defender's day-to-day operating expenses such as office supplies, utilities, and maintenance (*see* EPT, 42–43).

since that time GPDC has never denied a request for expert funding on the basis that the expert was not critical or relevant (*see id*., 38, 43–44), and since that time GPDC has only denied a request for an expert based on the amount of the fees "a handful of times" (*id*., 44). GPDC has never denied Mobley's request for funding for a DNA expert (*id*., 46). Mobley has requested funding for psychologist for a mental health evaluation of a defendant and a false confession expert and numerous other types of experts (*id*., 47). GPDC is not involved in the determination of whether an expert is needed in a particular case; Mobley's office makes that determination (*id*., 45).

In Mr. Duke's case, Mobley determined that Mr. Duke was an indigent person for purposes of the IDA (*id*., 49), and if Mobley's office was still representing Mr. Duke, Mobley would be able to make a funding request to GPDC for any expert witnesses that might be needed and his office's investigator would be available as a resource to assist in Mr. Duke's defense (*id*., 49–50). According to Mobley, however, once Mr. Duke retained private counsel, he was no longer covered under the IDA (*see id*., 50–51). Mobley conceded that undersigned *pro bono* counsel's representation of Mr. Duke has relieved the burden on Mobley's office (*see id*., 53).[6]

Following the hearing, the trial court then requested supplemental letter briefing as to the Georgia Supreme Court's decision in *Roberts v. State*, 263 Ga. 764

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[6] Mobley has never encountered a situation where *pro bono* counsel representing an indigent defendant requested assistance from Mobley's office in obtaining expert funding (EPT, 53).

(1994) (R. 1193–1205), and on March 11, 2019, the trial court informed the undersigned counsel *via* e-mail that it would be denying Mr. Duke's Funding Motion, but stated as follows:

> [I]t is the opinion of the Court that the [Council] cannot decline to provide counsel to Mr. Duke because he has *pro bono* counsel or that is paid by a third party. **So, if Mr. Duke reapplies to Mr. Mobley's office for services, declining such an application [on] that ground would violate Mr. Duke's right under the Georgia Constitution.**

(R. 1205.) Based on the trial court's e-mail, later that same day, Mr. Duke re-applied to the Public Defender for representation (R. 1206–07), and March 14, 2019, the trial court entered its "Order Overruling Defendant's Ex Parte Consolidated Motion For State Funding For Defense Experts and Investigator." ("March 14 Order") (R. 1210–14). On March 15, 2019, Mobley declined Mr. Duke's request that Mobley represent him because "Mr. Duke is currently represented by counsel . . . " (R. 1274).

Mr. Duke sought certification for an interlocutory appeal of the March 14 Order (R. 1106), and when the trial court did not certify the issue, on March 26, 2019, Mr. Duke filed with this Court his Emergency Application for Leave to Appeal Interlocutory Order pursuant to *Waldrip v. Head*, 272 Ga. 572 (2000), along with an Emergency Motion for Supersedeas (R. 1359–88). On March 28, 2019, this Court issued an order staying the case and agreeing to review the procedural propriety of the emergency appeal request under *Waldrip*. On June 10, 2019 the Court denied

Mr. Duke's appeal, overruling *Waldrip*. On June 28, 2019, this Court issued its Remittitur and remanded the case back to the trial court (R. 1394–1432).

Following remand, on July 2, 2019 Mr. Duke filed his Renewed Motion for State Funding for Defense Experts and Investigator and Supporting Memorandum seeking the same relief as his initial February 28, 2019 Funding Motion—state funding to hire three expert witnesses and an investigator (R. 1433–57, 1461–74). In an order dated January 3, 2020, the trial court denied all of Mr. Duke's requests in its "Order Overruling Defendant's Renewed Motion For State Funding For Defense Experts and Investigator" ("January 3 Order") (R. 1662–72).

On January 6, 2020, pursuant to O.C.G.A. § 5-6-34(b), Mr. Duke moved the trial court to certify its January 3 Order for interlocutory appeal (R. 1673–81), and on January 13, 2020, the trial court timely granted Mr. Duke's request for certification (R. 1682). On January 21, 2020, Mr. Duke filed his application for interlocutory appeal, and on February 13, 2020, this Court granted review.

On July 21, 2020, this Court docketed the instant case, and now Mr. Duke hereby timely files his brief and respectfully requests that this Court reverse the trial court's January 3 Order and remand this case with instruction to the trial court to grant Mr. Duke's requests for funds and order that Mr. Duke receive requested funding.

DECISION APPEALED

Mr. Duke seeks review of the trial court's January 3, 2020 Order. The trial court incorrectly held that because Mr. Duke chose to be retained by private *pro bono* counsel, he no longer had any right to public assistance for expert funding under the IDA because "state-funded ancillary services are authorized solely through the circuit public defender and are not severable from representation by the GPDC (R. 1673–74). The trial court incorrectly ruled that the IDA "does not authorize state funds for an indigent defendant's necessary, ancillary services of his choice" (R. 1674). The trial court also incorrectly found that the IDA "does not contemplate a method whereby an indigent criminal defendant represented by private or *pro bono* counsel could obtain state-funds for ancillary defense services[,]" and based on this finding, ruled that, "an indigent defendant is entitled to state-funded ancillary services only if represented by a public defender" (R. 1675). As shown further below, the trial court erred in so ruling, and the decision below should be reversed.

ENUMERATION OF ERROR

THE TRIAL COURT ERRED IN HOLDING IN ITS JANUARY 3 ORDER THAT MR. DUKE 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.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE TRIAL COURT ERRED IN HOLDING IN ITS JANUARY 3 ORDER THAT MR. DUKE DOES NOT HAVE A CONSTITUTIONAL RIGHT AND A STATUTORY RIGHT UNDER THE INDIGENT DEFENSE ACT, OCGA § 17-12-1 ET SEQ., TO STATE-FUNDED EXPERTS AND INVESTIGATORS.

A. Mr. Duke Has A Right Under Both The United States Constitution And The Georgia Constitution To State-Funded Experts And Investigators.

1. *The Sixth Amendment Right To Counsel Under Gideon v. Wainwright, 372 U.S. 335 (1963), and Right To Necessary Experts Under Ake v. Oklahoma, 470 U.S. 68 (1985).*

Amendment VI to the United States Constitution guarantees that, "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. AM. VI. The Sixth Amendment to the United States Constitution also makes clear that the fairness of an individual's trial cannot be limited by how much money he has. *See Griffin v Illinois*, 351 U.S. 12, 19 (1956) (There "can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). In the landmark decision of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that indigent criminal defendants are entitled to representation by counsel under the Sixth and Fourteenth

Amendments. *Gideon* observed that the government can marshal considerable resources to prosecute crimes and that certain defendants will similarly expend their resources in furtherance of their defense. *Id.* at 344. But with respect to the poorest of defendants, those indigent among us, the Court explained that the founding fathers' "noble ideal" that every defendant stand equal before an impartial tribunal cannot be attained if the poorest defendants are not represented by counsel. *Id.* The Court thus held that every layman needs "the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.*; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

The United States Supreme Court has "held that an element of [the Sixth Amendment right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." *Id.* Further,

> [d]eprivation of the right [to counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id. at 147.

The right to an effective defense is comprised of two essential elements: the right to effective assistance of counsel and the right to produce and present evidence

on one's behalf. *Ake v. Oklahoma*, 470 U.S. 68 (1985). These rights are not separate and distinct as neither right is sufficient without the other. *Free for All A Free For All: The Supreme Court's Abdication of Duty In Failing To Establish Standards For Indigent Defense,* Allen, Jennifer,27 La & Ineq. 365, 369 (2009). A defendant may have experts who can offer evidence in their defense but their conclusions are useless if the defendant lacks the assistance of a lawyer to ensure that the evidence is properly put forth. *Id.* And the best defense attorneys still cannot present a sufficient defense without necessary expert assistance necessary to their case. *Id.*

In addition to the right to counsel, the United States Supreme Court has construed the Sixth and Fourteenth Amendments to require the State, upon request of an indigent defendant, to provide the "basic tools of an adequate defense . . . when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). To that end, in *Ake* the Supreme Court addressed an indigent defendant's claim for funds to obtain an examination by a psychiatrist in order to prepare a defense based on the defendant's mental condition. The Court identified the source of the right at stake, stating:

> This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76. Then, after discussing its decisions entitling indigent defendants to copies of trial transcripts, waiver of appellate filing fees, counsel, and effective assistance thereof, the Court stated:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Id. at 77. The Court also explained that fundamental fairness entitles indigent defendants to more than just representation by counsel in certain cases, and that "an adequate opportunity to present their claims fairly within the adversary system" requires the court to identify the tools of an adequate defense and to provide them to indigent defendants. *Id.*

The Court, therefore, developed a three-factor test to determine whether a court can constitutionally deny a defendant access to an independent expert: (1) the private interest in the accuracy of criminal proceedings; (2) the State's interest in conserving resources; and (3) the probable value of the assistance sought as compared to the risk of error in proceeding without that assistance. *Id.* at 78–79.

The Court characterized the private interest in accurate convictions as "almost uniquely compelling," and rejected the government's claim that it would be overwhelmed by what it characterized as the "staggering burden" of providing funds for the defense to have access to an independent psychiatric expert. *Id.* In other

words, the governmental interest in denying expert assistance was "not substantial" under the second prong of the analysis. The Court observed:

> Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great...At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial...is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.

Id.

When considering the final factor, the *Ake* Court noted the "pivotal role that psychiatry has come to play in criminal proceedings." *Id.* at 79. The Court expressly recognized that "when the State has made the defendant's mental condition relevant to his criminal culpability . . . the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. "Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Id.* at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

The Supreme Court recently reaffirmed *Ake* and clarified the full scope of the potential assistance a psychiatric expert can offer the defense in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). The *McWilliams* court clarified:

> *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense."

Id. at 1800.

The rights recognized by *Ake* and its progeny have been extended beyond the right to psychological expert witnesses. For example, this Court has recognized that the rights of indigent defendants under *Ake* extend not only to a psychiatrist, but also to a toxicologist. *See Bright v. State*, 265 Ga. 265, 274 (1995).[7] Interpreting *Ake*,

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[7] Other courts around the United States have also recognized an indigent criminal defendant's constitutional right to the appointment of experts witnesses at the State's expense. *See e.g*., *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *Mason v. State of Arizona*, 504 F.2d 1345 (9th Cir. 1974); *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980)*; English v. Missildine*, 311 N.W.2d 292 (Iowa 1981); *State v. Van Scoyoc*, 511 N.W.2d 628, 630 (Iowa Ct. App. 1993); *Lowe v. State*, 127 So. 3d 178 (Miss. 2013); *People v. Lawson*, 644 N.E.2d 1172, 1192 (Ill. 1994). Indeed, the cases are truly legion finding that indigent defendants are entitled to publicly-funded expert assistance with the appropriate showing of need under the United States Constitution. *See, e.g.*, *Prater v. State*, 820 S.W.2d 429, 439 (Ark. 1991) (concluding that trial court erred when it declined to appoint a defense expert "because of a shortage of county funds"); *State v. Ballard*, 428 S.E.2d 178, 180 (N.C. 1993) (listing cases applying *Ake* to requests for pathologists, medical experts, fingerprint examiners, and investigators); *Sommers v. Commonwealth*, 843 S.W.2d 879, 882–85 (Ky. 1992) (holding that failure to appoint defense pathologist violated state statute designed to implement due process right "to present an effective defense"). These cases include those finding a right to the types of resources sought here, including DNA experts and investigators. *Ex parte Dubose*, 662 So. 2d 1189, 1194 (Ala. 1995) (affirming reversal of verdict against defendant on the grounds that he was denied DNA expert); *Cade v. State*, 658 So.2d 550, 555 (Fla. 5th DCA 1995) ("Nevertheless, given the central importance of the DNA evidence to the state's case (and hence the defendant's defense), the likely benefit of accurate DNA testing to the truth-seeking function of the trial, the diligence of the defense in seeking appointment of the expert and the specificity of

this Court held that "[w]here a sufficient showing of need is made, a defendant is entitled to expert assistance so that he may have "a fair opportunity to present his defense" and "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Brooks v. State*, 259 Ga. 562 (1989). In *Thornton v. State*, 255 Ga. 434 (1986), this Court established an indigent defendant's right to funds for expert witnesses, holding that an indigent defendant is entitled to funds from the state where a request for funds to hire an expert relates to "critical evidence," which is likely to be the subject of varying expert opinions. *Id.* at 435. As long as the request is made in a timely pre-trial motion, the trial court "shall" approve the payment of reasonable compensation for such services for the appropriate expert witness(es) "to be provided from public funds." *Id.*; *see also Roseboro v. State*, 258 Ga. 39, 40 (1988); *Tatum v. State*, 259 Ga. 284, 286 (1989).

Applying these principles here, Mr. Duke has satisfied his burden of showing he is entitled to the state funding he seeks. First, answering the threshold question under *Gideon* and *Ake* whether Mr. Duke is indigent, Mr. Duke has shown he does not have the financial resources to retain counsel or hire experts. Following his

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the request, we conclude the lower court abused its discretion in denying the expert's appointment. There is no basis on which we could find the absence of expert assistance to the defendant on the issue of DNA identification was harmless error."); *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980) ("The present rule is that an indigent defendant has a constitutional right to investigative services, but that such right comes into existence only when some need is demonstrated by the defendant.").

arrest, Mr. Duke applied for appointment of counsel to represent him based on his indigency (*see* R. 13, 1208–09), Mr. Duke submitted his affidavit of indigency to Mobley attesting that Mr. Duke had no income and no assets (R. 13, 1208–09), and Mobley accepted Mr. Duke as an indigent client (R. 13). Mobley thereafter represented Mr. Duke at all of the trial court and appellate proceedings between February 27, 2017, and August 29, 2018 (R. 13, 668–70), and filed several motions on behalf of Mr. Duke (*see e.g*., R.150, 447–595, 616–39, 652). Thus, Mobley found that Mr. Duke was indigent for purposes of the IDA.

Second, the trial court made a specific finding that Mr. Duke was indigent. The trial court posed the question, "Is Defendant Indigent?" and answered the question as follows: "Yes. The Defendant is indigent. By any reasonable definition whether from a dictionary or the Georgia Indigent Defense Act, he is indigent." (R. 1211). Mr. Duke, therefore, has made the requisite showing that he cannot afford to retain counsel and cannot afford to hire experts to assist in his defense.

Finally, Mr. Duke has shown why the evidence at issue here is critical; what type of scientific testimony is needed; what the experts will do regarding the evidence; and the anticipated costs for the services (R. 1433–74). Following Mr. Duke's *ex parte* requests for funding for experts in the fields of True Allele DNA analysis, forensic psychiatry, and false confessions, the trial court found that Mr. Duke had sufficiently demonstrated a need for the experts to aid in his defense. The

trial court posed the question, "Does Defendant Need the Experts He Requests?" and the trial court answered the question as follows: "Yes. The record developed as to Defendant's need for the experts he requests is compelling." (R. 1212).[8] Thus, Mr. Duke has satisfied his burden under *Ake* and its progeny of demonstrating a sufficient need for his experts.

2. *Under The Georgia Constitution and Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994)*, Whether Mr. Duke Has Pro Bono Counsel Has No Bearing On His Right To Have Counsel Appointed Or His Right To Funding For Expert Assistance.*

The trial court found that Mobley's denial of Mr. Duke's request to have the public defender appointed to represent him violated Mr. Duke's rights under the Georgia Constitution (R. 1670). The trial court, however, determined that it was without authority or jurisdiction to enforce Mr. Duke's rights (*id.*). The court suggested the only way Mr. Duke could challenge Mobley's denial of Mr. Duke's request was to "join GPDC" as a party in the criminal case or "sue GPDC civilly for injunctive relief." (*id.*, n.9). That finding has no support in this Court's precedent.

In *Roberts v. State*, 263 Ga. 764 (1994), this Court explained that a defendant has a right to continue with his current *pro bono* counsel without waiving his right to appointment of counsel. Analyzing the issue through the lens of the Georgia

[8] In its January 3 Order, the trial court reaffirmed this finding that "just because [Mr. Duke] needs experts does not mean Defendant is constitutionally entitled to state funds when he is represented by *pro bono* counsel of this choice. He had investigators and experts. He chose another avenue" (R. 1671).

Constitution, this Court noted that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel." *Id*. at 765 (citing Art. I, Sec. I, Para. XIV of the Ga. Const. of 1983). This constitutional provision "guarantees such person who is unable to employ counsel the right to have counsel appointed for him by the court." *Roberts*, 263 Ga. at 765 (citing *Walker v. State,* 194 Ga. 727(1), 22 S.E.2d 462 (1942)). *Roberts* noted that "***[u]nder current law***, this constitutional guarantee is enforceable through the trial court's statutory authority to appoint the office of the multicounty public defender pursuant to O.C.G.A. § 17–12–97(a) or through the trial court's statutory authority to designate particular counsel pursuant to OCGA § 17–12–60(a)." *Id.* at 765 (emphasis added). In *Roberts*, the trial court, like the trial court here, believed it was "without legal authority" to appoint counsel to represent appellant pursuant to O.C.G.A. § 17–12–60(a) or § 17–12–97(a) because the defendant, like Mr. Duke, had *pro bono* representation. *Id.*

Rejecting that idea, *Roberts* noted that the defendant had asserted his indigence and requested the appointment of counsel to represent him, and, thus, he had denied that he had the financial ability to make his own arrangements for representation at trial. *Id*. Notably, the Court explained that because the defendant had "asserted his constitutional guarantee to counsel, [he had] invoked the trial court's legal authority to address the issue of appointment of counsel to represent

him." *Id*. The Court went further to explain that it is "***immaterial that appellant may presently be represented by [pro bono counsel] or that [pro bono counsel] receives compensation from sources other than [defendant]***." *Id*. (emphasis added). "The focus is not upon the current state of [defendant's] legal representation or how that representation may be funded, but upon [defendant's] constitutional right to legal representation." *Id*. If a defendant is indigent, "he is constitutionally entitled to appointment of counsel." *Id.* A defendant "does not forfeit that constitutional right simply because he has asserted it through his current legal representative." *Id*. Based on this analysis, this Court held that the trial court erred in concluding that it was "without legal authority" to appoint counsel for appellant. *Id*.

While *Roberts* was decided under a statutory scheme that pre-dates the IDA, its principles apply with equal force here. First, two years after the enactment of the IDA, this Court in *Speight v. State*, 279 Ga. 87, 88, 610 S.E.2d 42, 43–44 (2005) noted that an indigent defendant had been denied the right to appointed counsel on appeal and remanded the case for appointment of counsel. In so doing, this Court reaffirmed the rule from *Roberts* that an "an indigent defendant is entitled to appointed counsel even if he has counsel representing him *pro bono*." *Id*. Thus, since the enactment of the IDA, this Court has specifically rejected the idea that an indigent defendant waives the right to appointment of counsel when the defendant has *pro bono* counsel. While *Speight* did not address the issue of expert funding, it

made clear that the right to appointed counsel cannot be circumscribed because the defendant has *pro bono* counsel. Based on the testimony of Messrs. Bullard and Mobley, and as the trial court recognized (*see* R. 1670), once Mobley's office is appointed to represent Mr. Duke, Mr. Duke would then be entitled to state funding for experts that he has sought.

Second, *Roberts* made clear that Georgia's statutory scheme for appointment of counsel is simply the mechanism by which Mr. Duke's constitutional rights are enforced. Thus, "under current law," that right is enforced through the IDA. Just as the trial court in *Roberts* had a right under the previous statutory scheme to ensure the defendant's constitutional right to counsel was enforced—and, thus, his constitutional right to necessary experts was enforced—the trial court here had the same obligation when Mobley refused to represent Mr. Duke.

Finally, *Roberts* reinforces the important principle that the trial court is ultimately responsible for ensuring that Mr. Duke's federal and state constitutional rights are enforced. Although the IDA gives the Public Defender the statutory power to determine indigency for purposes of appointment of counsel, the trial court has the non-delegable constitutional duty to insure that the defendant's constitutional right to counsel is protected; thus, where a defendant is denied appointed counsel by the Public Defender but appeals to the trial court for counsel, the court should give the defendant an opportunity to be heard. *See Ford v. State*, 254 Ga. App. 413, 414,

563 S.E.2d 170 (2002) (decided prior to the Indigent Defense Act of 2003; "While it is not error to have the public defender interview applicants for appointment of counsel, it is the trial court's responsibility to make a determination of indigence based upon evidence and to establish a record of such finding."); *see also* Uniform Superior Court Rule 30.2 (discussing the trial court's obligation to inquire into the defendant's desires and financial circumstances, and noting that if the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel).

More generally, a trial court has a duty to protect a defendant's right to a fair trial. *Chapman v. State*, 318 Ga. App. 514, 733 S.E.2d 848 (2012); *Georgia Gazette Pub. Co. v. Ramsey*, 248 Ga. 528, 533, 284 S.E.2d 386, 389 (1981); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 2904, 61 L. Ed. 2d 608 (1979)(noting that the trial judge has "an affirmative constitutional duty" to safeguard the due process rights of the accused); *Glasser v. United States*, 315 U.S. 60, 71, 62 S. Ct. 457, 465, 86 L. Ed. 680 (1942)(superseded by statute on other grounds)(trial court has an obligation to determine if the right to counsel has been waived); *Smith v. State*, 231 Ga. App. 68, 68–69, 498 S.E.2d 561, 563 (1998)(overruled on other grounds by *Mullins v. State*, 270 Ga. 450, 511 S.E.2d 165 (1999)) (same).

Based on the foregoing authorities, the trial court retains the inherent authority as the arm of the judicial branch to ensure Mr. Duke's right to counsel and right to a fair trial are protected, notwithstanding that the initial determination of indigency is made by the Public Defender. To view the trial court's duty any differently is to impermissibly delegate judicial power to the executive branch of government in violation of the separation of powers.

3. *The Overwhelming Majority Of States That Have Considered This Issue Have Held That An Indigent Defendant Is Entitled To The Assistance Of Experts Regardless Of Whether The Defendant Has Pro Bono Counsel.*

The specific question presented here, i.e., whether Mr. Duke is entitled to state funding under the IDA when he has *pro bono* counsel, has not been addressed in Georgia. However, many other states have considered this question under similar statutes, and the vast majority of these states have held that an indigent defendant has a statutory or constitutional right to funds for ancillary defense services when represented by private or *pro bono* counsel.

For example, in *State v. Brown*, 134 P.3d 753, 759 (N.M. 2006), the New Mexico Supreme Court held that an indigent defendant represented by *pro bono* counsel is entitled to both, the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. Accordingly, indigent defendants represented by *pro bono* counsel have equal access to expert

witness funding, provided that the expert witness meets all of the standards promulgated by the state public defender. *Id.*

Similarly, in *State ex rel. Rojas v. Wilkes*, 193 W.Va. 206 (W. Va. 1995), the West Virginia Supreme Court held that funds the defendant's family used to retain private counsel were irrelevant to the personally indigent defendant's right to have necessary expert assistance provided at the State's expense. In *State v. Burns*, 4 P.3d 795 (Utah 2000), the Utah Supreme Court held that the statutory right to publicly-funded expert assistance under the relevant statute could not be conditioned upon a defendant's accepting court-appointed counsel in lieu of private counsel retained at the defendant's father's expense. Similarly, in *Widdis v. Second Jud. Dist. Ct.*, 968 P.2d 1165 (Nev. 1998), the Nevada Supreme Court held that a criminal defendant with private counsel was constitutionally entitled to reasonable defense services at public expense based on defendant's personal showing of indigency and need for the services.

Likewise, in *Spain v. District Court of Tulsa County*, 882 P.2d 79 (Okla. Crim. App. 1994), the defendant asked that the court vacate the lower court's order which denied him a copy of a transcript of the preliminary hearing at public expense. The defendant was personally indigent, but his parents retained two attorneys for $15,000 and obligated themselves to pay additional attorney's fees ranging from $10,000 to $40,000. Although the parents hoped to raise the money by mortgaging their house,

they were uncertain about whether they could pay the attorneys in full, and they were unwilling to pay other expenses associated with their son's defense. The court held:

> [T]he fact that Spain's parents were willing and able to retain counsel on his behalf has no bearing on Spain's status as an indigent, given his parents' unwillingness to provide any further financial assistance. Moreover, the District Judge indicated that Spain is personally indigent. Once the District Judge exercised his discretion and found that Spain was personally indigent, Spain became legally entitled to receive a copy of his preliminary hearing transcript at public expense.

In denying Mr. Duke's funding requests, the trial court relied on *People v. Thompson*, 413 P.3d 306, *cert. denied*, 2017 WL 5477378 (Colo. 2017), but *Thompson* and cases like it, *see e.g*., *Moore v. State*, 889 A.2d 325, 345-46 (Md. 2005) and *Crawford v. State,* 404 P.3d 204 (Alaska 2017), represent the minority view. The vast majority of authority supports Mr. Duke's position in the instant case. *See e.g*., *State v. Manning*, 560 A.2d 693 (N.J. Super. 1989) (holding indigent defendant could not be denied state-funded expert services because he was represented by private counsel, whether counsel was *pro bono* or paid by third party); *People v. Worthy*, 167 Cal. Rptr. 402 (Cal. App. 3d 1980) (concluding that, upon a proper showing of necessity, trial court must provide an indigent defendant expert services, without regard to whether his counsel is appointed or *pro bono*); *People v. Evans*, 648 N.E.2d 964 (Ill. App. 3d 1995) (concluding that indigent defendant entitled to expert witness funding although represented by private law firm where services provided on *pro bono* basis); *English v. Missildine*, 311 N.W.2d

292 (Iowa 1981) (holding Sixth Amendment authority for furnishing investigative services at public expense without regard to whether indigent represented by private counsel); *State v. Jones*, 707 So. 2d 975 (La. 1998) (holding that although indigent defendant was represented by counsel retained by the defendant's father, he was eligible for state-funded necessary services); *State v. Seifert*, 423 N.W.2d 368 (Minn. 1988) (holding that an indigent *pro se* criminal appellant must be given access to a trial transcript on a limited basis for the purpose of perfecting his appeal, even though the public defender is not acting as his appellate counsel); *State v. Huchting*, 927 S.W.2d 411 (Mo. Ct. App. 1996) (noting retention of private counsel does not cause a defendant to forfeit his eligibility for state assistance in paying for expert witness or investigative expenses); *Jacobson v. Anderson*, 57 P.3d 733, 734–35 (Ariz. Ct. App. 2002) (granting expert witness funds to an indigent defendant represented by private counsel retained by a third party, if defense is able to make the necessary showing, and reasoning that, if an indigent defendant has a right to expert assistance in capital cases, the same right also extends to non-capital cases); *Arkansas Public Defender Com'n v. Pulaski Cty. Cir. Court, Fourth Div.*, 2010 Ark. 224, 365 S.W.3d 193, 197–98 (2010) (holding that under Arkansas's Public Defender Act, trial court was authorized to order the public defender commission to pay portion of fees incurred by indigent capital murder defendant who was represented by retained counsel); *State v. Wang*, 312 Conn. 222 (Connecticut 2014)(indigent self-

represented criminal defendant had a Fourteenth Amendment due process right to publicly funded expert or investigative services); *Chao v. State*, 780 A.2d 1060 (Del. 2001), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002) (court clarified that an indigent defendant represented by private counsel was eligible for public funds for expert services and private counsel was not required to withdraw in order to receive the funds because "indigent defendants may obtain services to which they are constitutionally entitled without being required to place the entire burden of their representation on the Office of the Public Defender"); *Saintil v. Snyder*, 417 So.2d 784, 785 (Fla. 3d DCA 1982) (holding that the "fact that an indigent defendant is represented by a private attorney retained by his family or friends rather than the public defender or other counsel appointed by the court provides no basis for departing from the requirements that the county pay the reasonable costs of defense"), *see also Leon Cty. v. Harmon*, 589 So. 2d 429, 430 (Fla. 1st DCA 1991) (trial court granted defendant's motion to be declared partially indigent for purposes of costs, including depositions, even though defendant was represented by private counsel, and appeals court holding, based on strong policy reasons, that costs be funded by the public); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (providing expert witness funds to an indigent defendant represented by private counsel retained by third parties if he could show indigence and necessity of the funds for an "adequate defense"); *State v. Olin*, 103 Idaho 391, 648 P.2d 203

(1982) (noting that pursuant to statute and constitutional guarantees, the trial court must determine whether an adequate defense will be available to the defendant without requested expert or investigative aid. If the answer is no, the services must be provided by the State); *Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct. App. 2006) (I.C. § 19-4904 authorizes state funding of an expert witness to assist a defendant in a post-conviction proceeding when necessary to properly test the accuracy of an expert witness for the state); *State v. Djurdjulov*, 86 N.E.3d 1139, 1150 (Ill. Ct. App. 2017) ("when a defendant shows indigence and the need for an expert, he has a right to fees regardless of whether the indigent defendant receives assistance of counsel from a court appointed attorney. It is the indigency of the defendant that matters, not who represents the defendant at trial."); *Schuck v. State*, 53 N.E.3d 571, 576 (Ind. Ct. App. 2016) (finding that indigent defendant represented by *pro bono* counsel was entitled to investigative services reimbursed from the public fund); *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981) ("For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services. The Constitution does not limit this right to defendants represented by appointed or assigned counsel. The determinative question is the defendant's indigency."); *Landrum v. Goering*, 306 Kan. 867 (Kansas 2017) (when an attorney other than the public defender, including a privately retained attorney, asks the court to consider a request for investigative, expert, or

other services, the court must determine whether the defendant is indigent and the series are necessary to an adequate defense and, if so, it must authorize counsel to obtain the services for the defendant and approve State Board of Indigents' Defense Services compensation and payment.); *Morton v. Com.*, 817 S.W.2d 218 (Kentucky 1991) (where an indigent defendant can obtain *pro bono* counsel, the defendant would be indigent for purposes of necessary services and the statute would require those be provided for him); *Brown v. State*, 152 So.3d 1146 (Miss. 2014) (Brown was "entitled to a hearing for a determination of whether [he] was indigent regardless of who was paying [his] attorney fees. An expert was necessary to make the trial "fundamentally fair"); *State v. Pederson*, 600 N.W. 2d 451, 454 (Minn. 1999) (holding that an indigent defendant represented by private appellate counsel was entitled to a trial transcript at public expense); *State v. Hardaway*, 290 Mont. 516, 966 P.2d 125, 131-32 (1998) (interpreting state indigency statute to find that defendant's "entitlement to reimbursement for deposition costs . . . does not hinge on whether the defendant's counsel is court appointed or retained; rather, the determining factor is whether the defendant is indigent and thus unable to bear the expense"); *State v. Turco*, 6 Neb. App. 725 (Nebraska 1998) ("In order to ensure that the right to effective assistance of counsel does not become a hollow right, it is the duty of the State not only to provide an indigent defendant with an attorney, but also to provide the lawyer with the appropriate tools and services necessary to

provide a proper competent and complete defense."); *State v. Brouillette*, 166 N.H. 487, 492 (2014) (indigent defendant represented by private counsel was entitled to expert witness funding due to her indigency whether she was represented by retained counsel, *pro bono* counsel, or even self-represented); *People v. Clarke*, 975 N.Y.S.2d 194, 197 (N.Y. 2013) (defendant had a right to state funded expert witness and his indigent status was not impacted by the fact that he was represented by retained counsel paid for by his family); *Commonwealth v. Curnette*, 871 A.2d 839, 842–44 (Pa. Super. Ct. 2005) (holding that an indigent defendant with private counsel was entitled to a state-funded expert for his sexually violent predator hearing); *Reeves v. State*, 415 S.C. 366 (S.C. 2015) (upon a finding that investigative, expert or other services are reasonably necessary for the representation of the defendant, "the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense"); *State v. Mann*, 959 S.W.2d 503, 523–26 (Tenn. 1997) (holding that an indigent defendant represented by private counsel was properly provided with public defender co-counsel and funds for experts while allowed to keep his private counsel, but denying private counsel compensation by the court); *Ex Parte* Briggs, 187 S.W.3d 458, 468–69 (Tex. Crim. App. 2005) (granting an appeal based on an ineffective assistance of counsel claim that counsel could and should have requested a state-funded expert under *Ake*); *State v. Burns*, 4 P.3d 795,

801–02 (Utah 2000) (Utah's Indigent Defense Act provides a statutory right to funded expert assistance and that right could not be conditioned upon defendant's accepting court-appointed counsel in lieu of private counsel retained at her father's expense.); *State v. Wool*, 648 A.2d 655, 660 (Vt. 1994) (holding that indigent defendants represented by a private attorney or proceeding pro se may be entitled to funds for necessary ancillary defense services); *State ex rel Dressler v. Cir. Ct. for Racine Cty.*, 472 N.W.2d 532, 540–41 (Wis. Ct. App. 1991) (trial court can order state funding for expert witness upon particularized showing of need); *State ex rel. Rojas v. Wilkes*, 193 W.Va. 206, 455 S.E.2d 575, 577 (1995) (funds with which family retained private counsel were irrelevant to defendant's right to have necessary expert assistance provided at the state's expense).

Given this abundance of authority supporting Mr. Duke's right to publicly-funded defense resources despite his representation by *pro bono* counsel, Mr. Duke urges this Court to adopt the majority, prevailing view and hold that the trial court erred in failing to appoint counsel for him and for failing to order that the state provide him with his requested funding.

B. Mr. Duke Qualifies For Appointment Of Counsel And State Funding Under The IDA Because He Is Indigent.

The IDA created GPDC as an independent agency "responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, ***to indigent persons who are entitled to***

representation under this chapter." O.C.G.A § 17-12-1(c); *Georgia Pub. Def. Standards Council v. State*, 284 Ga. App. 660, 663–64 (2007) (emphasis added). "All members of the council shall at all times act in the best interest of indigent defendants who are receiving legal representation under the provisions of [the IDA.]" O.C.G.A § 17-12-7(a).

In order to qualify for counsel under the IDA, a defendant must be deemed an "indigent person." There is no other qualifying requirement in the IDA. The IDA defines "Indigent person" as:

> A person charged with a felony who earns or, in the case of a juvenile, whose parents earn, less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person, his or her dependents, or, in the case of a juvenile, his or her parents or the parent's dependents.

O.C.G.A. § 17-12-2(6)(c).

1. *Mr. Duke Is An Adult Charged With A Felony And Earns Less Than 150 Percent Of The Federal Poverty Guidelines.*

Here, as noted *supra*, the record evidence shows that: (1) Mr. Duke has no income or assets; (2) Mobley deemed Mr. Duke to be indigent under the IDA since Mobley approved his initial indigency application and represented him; and (3) the trial court specifically found that Mr. Duke was indigent. Thus, there is no dispute in this case that Mr. Duke qualifies as indigent under this portion of the IDA.

2. Mr. Duke Also Does Not Have Any "Other Resources That Might Reasonably Be Used To Employ A Lawyer Without Undue Hardship" On Mr. Duke.

As an initial matter, a plain reading of the definition of "Indigent person" suggests on its face that "other resources" means ***financial*** resources or assets of the person, beyond income, that may be used to pay for a lawyer. For example, it contemplates a defendant's property, stocks or other financial assets that could be used to "employ" a lawyer. The definition also contemplates that the defendant, in addition to having resources to pay an attorney's fee, also would be able to pay for experts and other case costs. There is no dispute that Mr. Duke has no such resources, and, thus, no ability to pay any attorneys' fees or case costs.

The only alleged "other resource" the trial court has identified for Mr. Duke is undersigned *pro bono* counsel. In the absence of Mr. Duke's financial ability to retain experts, which he undoubtedly cannot do, having free counsel does nothing for his ability to alleviate the "undue hardship" of having to go to trial in a complex murder trial without the benefit of experts. Thus, unless *pro bono* counsel agree to pay the expert fees, Mr. Duke will be forced to face trial without experts, even though the trial court has made a specific finding that Mr. Duke needs these experts.

The trial court stated it was "debatable" whether having *pro bono* counsel constituted "other resources" enabling Mr. Duke to have counsel "without undue

hardship," but that the Public Defender believed so (R. 1665).[9] The trial court recognized that Mobley's determination of Mr. Duke's right to counsel was "certainly reviewable by the judiciary," but then deferred to executive branch, and appeared to establish a bright-line rule that the public defender's determination "should not be disturbed by the judiciary absent such conduct arising to a clear and intolerable violation of constitutionally guaranteed right(s)" (*id.*) Thus, the trial court, in error, adopted and incorporated Mobley's determination that Mr. Duke was no longer an "Indigent person" under the IDA, and its decision should be reversed.

C. The Trial Court's Finding That Mr. Duke Is Not Covered As An Indigent Person Under The IDA Simply Because He Has *Pro Bono* Counsel Would Render The IDA Unconstitutional.

1. *The Legal Framework*

Before a statute can be attacked on the ground of its unconstitutionality, a defendant "must show that its enforcement is an infringement upon his right of person or property, and that such infringement results from the unconstitutional feature of the statute upon which he bases his attack." *Bryant v. Prior Tire Co.,* 230 Ga. 137, 138, 196 S.E.2d 14, 15 (1973) (quotations and citations omitted). A defendant "must show that the alleged unconstitutional feature of the

[9] It is noteworthy that Mobley did not raise this specific justification; Bullard did (EPT, 10), but the trial court nonetheless attributed this view to Mobley (R. 1665). The only testimony Mobley gave to justify denying Mr. Duke's request was that he had private counsel (R. 1274).

statute injures him, and so operates as to deprive him of rights protected by the Constitution of this State or by the Constitution of the United States, or by both." *Id*. A facial challenge to the constitutionality of a statute requires "that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *State v. Jefferson*, 302 Ga. 435, 438, 807 S.E.2d 387, 390 (2017) (citing *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 118 (3), 702 S.E.2d 145 (2010); *Bello v. State*, 300 Ga. 682, 685–86 (1), 797 S.E.2d 882 (2017)).

An as-applied challenge addresses "whether a statute is unconstitutional on the facts of a particular case or to a particular party." *Major v. State*, 301 Ga. 147, 152, 800 S.E.2d 348, 352 (2017) (citations and quotations omitted). As shown below, the trial court's interpretation of the IDA would render the IDA unconstitutional as applied to Mr. Duke because it deprives him and other indigent defendants who choose to retain *pro bono* counsel their constitutional right to counsel and experts under both the United States and Georgia Constitutions.

1. The Trial Court's Interpretation Of The IDA Violates Mr. Duke's Due Process Rights Under the Fifth And Fourteenth Amendments and His Right To Counsel and Right To Have Experts To Assist Him Under the Sixth Amendment To The United States Constitution.

The United States Supreme Court has long recognized that when "a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his

defense." *Ake*, 470 U.S. at 76, 105 S. Ct. at 1092. "This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id*. The U.S. Court of Appeals for the Second Circuit in *United States v. Johnson*, 238 F.2d 565 (2d Cir. 1956), *vacated on other grounds*, 352 U.S. 565 (1957), aptly explained:

> Furnishing [a defendant] with a lawyer is not enough: the best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, *e.g.*, if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or a mining engineer or chemist. It might indeed be argued that for the government to defray such expenses which the indigent accused cannot meet, is essential to that assistance of counsel which the Sixth Amendment guarantees .... In such circumstances, if the government does not supply the funds, justice is denied the poor—and represents but a upper-bracket privilege.

Id. at 572.

Here, the IDA, as interpreted by the trial court and applied to Mr. Duke, forces Mr. Duke to choose between his Sixth Amendment right to counsel of his choice and his Sixth Amendment rights under *Ake* and its progeny to have experts to assist in martialing his defense. If interpreted in accordance with the trial court's view, the IDA does not expressly specify whether GPDC or Irwin County has the obligation to provide Mr. Duke with counsel or the attendant funding for experts. As such, it

is unconstitutionally vague. More importantly, however, it creates a situation, as here, where despite having demonstrated indigency and a need for expert assistance, Mr. Duke has been denied access to those funds simply because his lawyers have agreed to work for free.

Furthermore, the distinction between *pro bono* counsel and appointed counsel under the IDA is arbitrary and not tied to any compelling state interest. As evidenced by Mr. Bullard's testimony, GPDC believes it lacks statutory authority under the Act to provide funds to Mr. Duke now that he has *pro bono* counsel. This view is directly contrary to *Roberts* and *Ake*, because the IDA deprives a similarly-situated indigent defendant, Mr. Duke, of his right to counsel, and, thus, his right to expert funds to assist in his defense. For these reasons, the trial court's interpretation of the statutory scheme under the IDA would render it unconstitutional as applied to Mr. Duke, and this Court should reject such an interpretation and reverse the decision below.

CONCLUSION

For each of the foregoing reasons, Mr. Duke respectfully requests that this Honorable Court reverse the decision below and remand this case with instruction that Mr. Duke be provided the funding he has requested.

Respectfully submitted this 19th day of August, 2020.

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IN THE SUPREME COURT
STATE OF GEORGIA

RYAN ALEXANDER DUKE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. S20A1522
	)	
STATE OF GEORGIA,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of Appellant's ***BRIEF OF APPELLANT*** via U.S. Mail with adequate postage affixed thereon and addressed to the following counsel of record:

Paul Bowden
District Attorney for Irwin County
301 S Irwin Ave
Ocilla, GA 31774

This 19th day of August, 2020.

/s/ John B. Merchant, III
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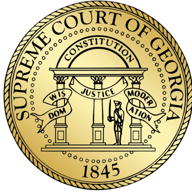

SUPREME COURT OF GEORGIA
Case No. S20A1522

August 04, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

RYAN ALEXANDER DUKE v. THE STATE.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until August 20, 2020.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 50(3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk