IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S20A1522

RYAN ALEXANDER DUKE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

REPLY BRIEF OF APPELLANT

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Appellant,	)	
	)	
vs.	)	CASE NO. S20A1522
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REPLY BRIEF OF APPELLANT

Appellant, Ryan Alexander Duke ("Mr. Duke"), pursuant to Rule 10(3), hereby timely files his brief in reply to the State's response brief, and respectfully requests that this Court reverse the decision below, showing the Court further as follows:

ARGUMENT AND CITATION OF AUTHORITY

I. THIS COURT SHOULD REJECT THE STATE'S ATTEMPT TO RE-WRITE *AKE* TO CIRCUMSCRIBE MR. DUKE'S CLEAR CONSTITUTIONAL RIGHT TO EXPERT ASSISTANCE.

A. The United States Supreme Court Completed The Three-Step *Ake* Analysis In A Binding Decision, And The State Cannot Reweigh The Balances To Reach A Different Conclusion.

In *Ake v. Oklahoma*, the United States Supreme Court analyzed the balance of interests and determined that an indigent defendant must be provided expert assistance where necessary for a fair trial. 470 U.S. 68 (1985).

The State here attempts to redo this analysis to reach a different conclusion in the interest of "getting the most out of their money."[1] The Supreme Court in *Ake* was clear, however, that the State's financial interest does not outweigh the private and governmental interests in fundamental fairness and accurate dispositions. *See Ake*, 470 U.S. at 79. More importantly, the Supreme Court's conclusion is binding. The analysis does not change depending on who represents the indigent defendant, and the State cannot redo the analysis because it does not like the outcome.[2] The Supreme Court's analysis in *Ake*

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[1] In redoing the *Ake* analysis, the State claims that the public provision of ancillary services to defendants like Mr. Duke will require "unbounded defense resources" and pose a "seemingly exponential financial burden." While any financial impact is not the concern of this Court, it is necessary to correct the State's claims. The provision of ancillary services will be limited to cases of proven necessity, bounded by the procedural and substantive requirements of *Ake*, as interpreted by this Court. Also, as explained in the amicus brief filed by the Southern Center for Human Rights, the State still would be paying for these services were Mr. Duke represented by a public defender, so it is the State's interpretation that "would further deplete the resources of the GPDC" by requiring the public treasury to unnecessarily bear the cost of counsel.

[2] The State also attempts to reframe the third prong of the analysis to relitigate the necessity of the requested experts. That is not the question before this Court, and the trial court has already found Duke's need for experts to be "compelling." While the State also claims that the trial court did not make a finding of indigency and necessity in its latest order, the trial court did find Mr. Duke's need "compelling", (R. 1212), and later reaffirmed that finding in its January 3 Order, (R. 1671).

remains good law, and Mr. Duke has a right to expert assistance as long as he meets the indigence and necessity standards.

B. "Bundling" The Provisions Of Ancillary Services With The Provision Of Counsel Is Not Sufficient To Provide Indigent Defendants With Their Entitlement Under *Ake*.

Ake left it to the States to implement a mechanism to provide the right it recognized. However, it did not leave States the option to deny requested necessary expert services to a defendant who cannot afford them. If the Georgia Indigent Defense Act ("IDA") does not authorize the provision of services for all indigent defendants who meet the *Ake* standard, the State still must provide those services or else be in violation of the Constitution. Requiring indigent defendants to accept a public defender to receive their due under *Ake* adds a requirement beyond those laid out by the Supreme Court and clarified by this Court. *Ake* mandates government provision of assistance where the defendant is (1) indigent, and (2) needs the services for a fair trial. A State system that refuses to provide assistance to defendants that meet these requirements—and only these requirements—is unconstitutional.

C. It Is A Constitutional Violation To Force Mr. Duke To Choose Between His Fourteenth Amendment Right Under *Ake* And His Right To Counsel Of Choice.

Even if the IDA did not authorize the provision of ancillary services to indigent defendants represented by *pro bono* counsel (though it does), it

would be a constitutional violation to deny defendants necessary ancillary services because they exercise their right to counsel of choice. The State contends that Mr. Duke must choose between his right to counsel of choice and his right to expert assistance under *Ake*, but the State is perfectly able to provide Mr. Duke his *Ake* right without forcing him to forfeit his right to counsel of choice. Mr. Duke is seeking no more than his constitutional entitlement. He is not insisting on representation he cannot afford; the Constitution guarantees him the ability to choose *pro bono* private counsel, and this representation is within his means because it is at no cost to him. He is not asking for "everything that private attorneys can provide," but rather requesting a basic defense tool that he would receive if he were represented by a public defender.

While defendants may sometimes have to make hard choices concerning constitutional rights, the choice the State is demanding here "impairs to an appreciable extent . . . the policies behind the rights involved." *McGautha v. California*, 402 U.S. 183, 213 (1971), *vacated in part on other grounds by Crampton v. Ohio*, 408 U.S. 941 (1972). Forcing Mr. Duke to forfeit his *Ake* right if he exercises his right to counsel of choice impairs *Ake*'s policy of guaranteeing fundamental fairness by refusing—without

necessity—to provide the basic tools of an adequate defense to a defendant who cannot afford them.[3]

The State attempts to distance this case from *Roberts v. State* and *Speight v. State*, contending that they have no application because they addressed pre-IDA law and differ procedurally from Mr. Duke's case. *Roberts* applies here, however, because it was articulating a constitutional guarantee that must be met, regardless of what statutory mechanism is currently in place. It noted the pre-IDA statutory authority for the provision of this constitutional guarantee at the time, but the Georgia Constitution's mandate remains in place even under a new statutory system, and the trial court remains responsible for ensuring that a defendant's federal and state

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[3] The State raises several other arguments that already have been addressed clearly. For instance, the State contends that not providing funding would not discourage *pro bono* practice or lead to an increase in the public defender caseload. As noted in the Southern Center's amicus brief, however, the State's interpretation requires defendants to accept a public defender in order to receive their *Ake* right, and the clear deterrent effect of a lack of funding on *pro bono* practice will ensure that more defendants will be added to the public defender caseload. Regardless of the current burden on the public defender system and its budget, the caseload will rise accordingly, as will the burden on the state treasury as a result of the additional cost of counsel. In addition, the State suggests that other states that have found a right all clearly authorized funding in their statutes. However, the amicus brief lays out which states have found a constitutional right regardless of statutory authorization as well as which other state courts have looked to statutes with no clearer authorization than the IDA and found a statutory right.

constitutional rights are enforced. Indeed, the trial court retains inherent authority to ensure these constitutional guarantees, including the right to a fair trial, are protected.

II. THE STATE'S INTERPRETATION OF THE IDA IS LIKEWISE FLAWED AND WOULD RENDER THE IDA UNCONSTITUTIONALLY VAGUE AND ARBITRARY.

A. The IDA Does Not Manifest An Intent To Bundle The Provision Of Ancillary Services With Counsel And Instead Mandates The Provision Of Necessary Ancillary Services To Indigent Defendants Represented By Pro Bono Counsel.

The State's response repeatedly cites O.C.G.A. § 17-12-5(b)(1) in support of its argument that the IDA intended to bundle the provision of ancillary services with accepting publicly-funded counsel. However, the language of this provision in fact confirms that the General Assembly intended to provide any attorney representing an indigent defendant with necessary services from the Georgia Public Defender Council ("GPDC"). If the legislature had wanted to include only attorneys with a contractual relationship to the GPDC in the ambit of that mandate, it would have used specific, limiting language (such as "appointed attorneys"). The legislature instead used the broad phrase "other attorneys representing indigent persons in criminal or juvenile cases"—the plain meaning of which clearly encompasses pro bono private attorneys. Rather than manifesting an intent to bundle services with representation at public cost, this language establishes

that the legislature intended such services to be provided to any attorney representing a defendant who met the indigence standard.

The State cites other provisions to back up its misreading, but none in fact support such a constrained interpretation. As indicated in the Southern Center's amicus brief, O.C.G.A. § 17-12-1(c) extends the GPDC's responsibility to indigent defendants who are "entitled to representation" under the IDA—not those who choose or accept that representation, but, as the State acknowledges, those who qualify for it, regardless of whether they accept it. Because Mr. Duke meets the indigence standard for representation (as will be discussed below), this provision encompasses him.

The other provisions cited only reflect the General Assembly's goal of building a statewide public defender system and shed no light on this issue. The fact that the IDA authorized the employment of administrative personnel and investigators by circuit public defender offices, §§ 17-12-28 and 29, has no bearing on whether investigative and expert aid can be provided in cases where an eligible defendant chooses counsel other than the public defender. And contrary to the State's contention, § 17-12-12.1 does not define "other attorneys" as capital defenders and conflict appointed counsel. The phrase "other attorneys" does not appear in that provision, because the provision is simply setting forth a procedure for a specific circumstance: capital cases in

which the public defender has a conflict of interest. Section 17-12-22 similarly addresses conflicts of interest in non-capital cases. These provisions are intended to clarify what happens where an indigent defendant chooses to be represented by the public defender, but representation is not possible due to a conflict of interest. It has no relevance for those eligible indigent defendants who instead exercise their constitutional right to choose "other attorneys."

By contrast, §§ 17-12-1(c) and 5(b)(1) make clear that an indigent defendant who is eligible for representation—meaning he meets the statutory definition of an "indigent person"—must be provided necessary services by the GPDC. The State contends that there is no mechanism for the provision of services, but § 17-12-5(b) provides that authority, placing responsibility on the director of the GPDC. The fact that the GPDC does not currently have a process to provide services here is a result of its misinterpretation of the statute and is not dispositive of whether it could or should have such a process. The statutory language of that key provision not only authorizes but demands that the director "shall" provide these services. On a practical level, the director has a clear process in place to provide services here: the same process used to fund services where the defendant has appointed counsel due to a conflict of interest.

The practical concern of which process the director should use, however, is not the responsibility of this court. Nor is it appropriate for this Court to take into consideration whether the GPDC's budget is sufficient to provide the requisite funding at this time. *See Ga. Pub. Def. Standards Council v. State*, 285 Ga. 169, 173 (2009) (finding that "[t]he indigent defense budgetary considerations raised by the Council do not constitute a proper policy matter for this Court" in holding that the GPDC was responsible for attorney fees and costs in a capital retrial after the Indigent Defense Act became effective); *see also Fulton Cty. v. State*, 282 Ga. 570, 571 (2007) (holding that the GPDC was responsible for paying certain defense costs in spite of budgetary constraints that had led the trial court to reevaluate whether the county was instead responsible for the costs).

B. Mr. Duke Is Indigent Under The Definition Of The IDA Because Representation By *Pro Bono* Counsel Does Not Evince Possession Of "other resources that might reasonably be used to employ a lawyer."

As the State acknowledges, "other resources" is not defined in the IDA. However, the rest of the phrase clarifies the plain meaning of the term: "used to employ a lawyer." *See* § 17-12-2. Particularly because it follows a discussion of the defendant's earnings, this phrase clearly refers to *financial* resources. The General Assembly was addressing those instances in which a

person may earn little but still possess other means and property that could be sold to pay for an attorney.

The State argues that "the 'free gift' of private *pro bono* representation was determined to be a valuable 'other resource.'" Looking at the full definition, the circular nature of this explanation becomes clear. The "free gift" of *pro bono* representation cannot be the other resource because free representation itself cannot "reasonably be used to employ a lawyer." Having something for free does not constitute having "resources" to pay for that thing.

The State's contention that Duke's "story" constitutes "other resources . . . reasonably . . . used to employ a lawyer" is even more illogical. A person's "story" is an abstract concept—for the State is not referring to the concrete monetization of a story, like granting rights to a future book or movie—and such an interpretation would be impermissibly vague. The question of how compelling a person's experiences must be, or how much and what kind of media attention is too much, is unclear. What is clear is the most troubling implication of this interpretation: that every defendant in a high-profile case, or who could otherwise be expected to or does attract a certain level of media attention, is therefore not indigent and can be denied a public defender. Such an outcome would clearly violate the Constitution, and that cannot have been the intent of the General Assembly.

C. This Court Has Authority To Review The GPDC's Interpretation Of The IDA.

The State treats the GPDC's interpretation as the final word on this issue. It asserts that this Court has no authority to review the agency's interpretation of the IDA as denying funding to any indigent defendant represented by pro bono counsel. The State cites cases finding no authority for appellate review on indigence determinations, but those cases refer to review of *factual* findings. *See Rabon v. State*, 301 Ga. 200, 204 (2017) ("[T]his *purely factual finding* lies within the sound discretion of the trial court and is not subject to appellate review.") (emphasis added); *Roberson v. State*, 300 Ga. 632, 635 (2017) ("The costs statute does not permit an appellate court to disturb that *factual conclusion*.") (emphasis added). However, this is not a question of discretion on a finding of fact; it is a matter of statutory interpretation. As an agency of the executive branch, the GPDC's interpretation of the statute is subject to judicial review, and this Court has clear authority to determine its validity. Following the plain meaning of the statutory language to find a right to ancillary services here would not be judicial lawmaking. To the contrary, it would be a key judicial function, ensuring that legislative and constitutional mandates are met.[4]

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[4] It should be noted that the IDA mandates the GPDC to pay for experts and provides a mechanism for doing so. Nonetheless, precedent makes clear that

In considering the roles of the various branches and institutions, it should also be noted that the State's suggestion that organizations like amicus Southern Center for Human Rights "should be the sources for the appellant to fund his experts" would constitute a grievous abdication of the State's duties. The State cannot ignore a legislative directive and demand the private sector take on its constitutional obligation. Indeed, it is the State's strong interest in ensuring that indigent defendants represented by pro bono counsel receive expert assistance where such assistance is necessary for a fair trial that matters, not that of private sector organizations, for it is the State's duty to meet these statutory and constitutional mandates.

D. The State's Interpretation Would Render The IDA Unconstitutionally Vague and Arbitrary.

The State's interpretation of the IDA arbitrarily distinguishes between private *pro bono* counsel and appointed counsel even though there is no constitutionally significant difference between the two and there is no

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ancillary defense services should fall to the GPDC, not the counties. Transcript fees are not deemed "internal costs associated with actually providing for the defense of indigents," *Ga. Pub. Def. Standards Council v. State*, 284 Ga. App. 660, 665 (2007), but are rather court expenses that fall to the county, while the cost of transcribing phone calls and presenting evidence digitally has been found to fall to the GPDC, *see Fulton Cty. v. State*, 282 Ga. 570, 571 (2007).

compelling state interest to justify such a distinction. If the State's position is adopted, it will create different standards for expert funding for otherwise similarly-situated indigent defendants. As a result, the trial court's interpretation of the statutory scheme under the IDA would render it unconstitutional as applied to Mr. Duke. This Court should avoid interpreting the IDA in such a way to render it unconstitutional. *See City of Calhoun v. N. Georgia Elec. Membership Corp.*, 233 Ga. 759, 761, 213 S.E.2d 596, 599 (1975)(noting that if a statute is "equally susceptible of two constructions, one of which will harmonize it with the constitution and the other of which will render it unconstitutional, the former construction is generally to be preferred.")(internal quotations omitted).

CONCLUSION

For each of the foregoing reasons, Appellant, Ryan Duke, respectfully requests that this Court reverse the decision below and determine that Mr. Duke has a right to expert assistance to aid in his defense at the State's expense.

Respectfully submitted this 8th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of Appellant's ***REPLY 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
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This 8th day of October, 2020.

/s/ John B. Merchant, III
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