IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S20A1522

RYAN ALEXANDER DUKE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

ASHLEIGH B. MERCHANT
Georgia Bar No. 040474
JOHN B. MERCHANT, III
Georgia Bar No. 533511
THE MERCHANT LAW FIRM, P.C.
701 Whitlock Avenue, S.W., Suite J-43
Marietta, Georgia 30064
Tel: (404) 510-9936

JOHN S. GIBBS, III
Georgia Bar No. 250154
TROUTMAN PEPPER
HAMILTON SANDERS LLP
600 Peachtree Street, N.E.
Suite 3000
Atlanta, Georgia 30308
Tel: (404) 885-3000

Counsel for Appellant, Ryan Duke

IN THE SUPREME COURT
STATE OF GEORGIA

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

SUPPLEMENTAL BRIEF OF APPELLANT

Appellant, Ryan Alexander Duke ("Mr. Duke"), pursuant to this Court's November 16, 2020 Order, hereby timely files his supplemental brief to address the two questions posed by the Court, and respectfully requests that this Court reverse the decision below, showing the Court further as follows:

ARGUMENT AND CITATION OF AUTHORITY

I. AN INDIGENT DEFENDANT WHO IS REPRESENTED BY PRIVATE, *PRO BONO* COUNSEL DOES HAVE A DUE PROCESS RIGHT TO PUBLICLY-FUNDED EXPERT ASSISTANCE.

A. Mr. Duke Has Made the Requisite Showing of Indigency and Necessity Under *Ake* and Its Progeny.

In its landmark criminal due process cases, the United States Supreme Court has recognized that "[m]eaningful access to justice has been the consistent theme . . ." *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S. Ct. 1087, 1093, 84 L. Ed. 2d 53

(1985). "[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and [] 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*. "[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Id.* (internal quotations and citation omitted).

To implement this principle, the Supreme Court has focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina,* 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), and has "required that such tools be provided to those defendants who cannot afford to pay for them." *Ake*, 470 U.S. at 77, 105 S. Ct. at 1093. Without a necessary expert's assistance, a defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof. *See id*. at 84.

To this end, federal and state precedent are clear that due process is violated when an indigent defendant, like Mr. Duke, is denied necessary expert assistance. In *Ake*, the United States Supreme Court determined that due process requires the government to provide the assistance of a psychiatrist if (1) the defendant is indigent, and (2) the assistance is necessary for a fair trial. The Court considered

whether Ake could not afford to pay for the assistance, *see id*. at 72, and whether expert assistance was "crucial to [his] ability to marshal his defense," *id*. at 80—not whether he was represented at public expense. Because (1) Ake was indigent, and (2) the requested assistance was necessary because Ake's sanity would be "a significant factor at trial," *id*. at 83, the Court held that the State of Oklahoma had "deprived [Ake] of due process" by denying him that assistance. *Id*. at 87.

Recently, the Supreme Court reinforced the due process requirement in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). The Court found that "the conditions that trigger application of *Ake*" were present because: (1) McWilliams was indigent, and (2) his mental condition was relevant to his punishment and "seriously in question." *Id*. at 1798 (internal quotations and citation omitted). Because the State of Alabama failed to provide McWilliams with funding for a mental health expert to assist the defense, the Court found that the State had denied McWilliams due process. *See id*. at 1801.

This Court has recognized the demands of due process in Georgia, finding constitutional violations where a defendant who met the indigence and necessity standard was denied expert assistance. Shortly after *Ake* was decided, this Court reversed a capital conviction on *Ake* grounds, stating unequivocally that when a trial court determines that an indigent defendant's sanity is likely to be a significant factor, "the defense *must* be provided with a psychiatrist to assist in his defense."

Lindsey v. State, 254 Ga. 444, 448 (1985) (Addendum) (emphasis added). In the years following *Ake* and *Lindsey*, this Court made clear that a defendant's due process right to experts extends to non-psychiatric experts so long as the defendant makes a proper showing of necessity in a particular case. *See Thornton v. State*, 255 Ga. 434, 435, 339 S.E.2d 240, 241 (1986) (noting that the defendant's request for a forensic dental expert "undoubtedly involves critical evidence, which, in light of its novelty, is likely to be the subject of varying expert opinions") (internal quotations omitted); *Roseboro v. State*, 258 Ga. 39, 40, 365 S.E.2d 115, 117 (1988) (recognizing right to non-psychiatric expert but finding the defendant failed to make a proper showing); *Bright v. State*, 265 Ga. 265, 270, 455 S.E.2d 37, 46–47 (1995) (recognizing right for funds for expert toxicologist or equivalent expert during sentencing).

In *Bright*, this Court found that the defendant made "the required threshold showing" to obtain expert assistance but was denied funding by the trial court. *Id*. at 266. The decision focused on "whether expert assistance [was] required," *id*. at 274, and found that Bright was entitled to the assistance of a psychiatrist and toxicologist at the trial's sentencing phase. *See id*. at 277. This denial of necessary expert assistance deprived Bright of his right to due process, and this Court reversed his death sentence as a result. *See id*. at 266.

In sum, *Ake* and its progeny establish that due process entitles a defendant to expert assistance at public cost when two requirements are met: indigence and necessity. If those criteria are present and the defendant is denied assistance, it is a violation of due process. Here, Mr. Duke has satisfied his burden: he 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), and the trial court specifically found that Mr. Duke had sufficiently demonstrated a "compelling" need for the experts to aid in his defense. (R. 1212.) Thus, the trial court's denial of Mr. Duke's requests violated his due process right to a fundamentally fair trial.

As demonstrated in Mr. Duke's initial brief as well as the amicus brief of Southern Center for Human Rights, a clear majority of courts around the country have recognized the due process implications of denying expert funding and have avoided constitutional violations by providing necessary expert assistance to indigent defendants represented by private, *pro bono* counsel. This Court should likewise follow precedent and afford all indigent defendants in Georgia their due process right to expert assistance, regardless of whether they also seek representation at the State's expense.

B. Mr. Duke Did Not Forfeit His Due Process Right to Ancillary Services, Including Experts, When He Exercised His Right to Retain *Pro Bono* Counsel of His Choice.

Although the Sixth Amendment primarily guarantees the right to effective counsel, it also includes the right to select and be represented by counsel of choice. *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 1696, 100 L.Ed.2d 140 (1988); *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) (stating unequivocally, "[i]t is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Supreme Court has found structural error requiring reversal, and a violation of the Sixth Amendment, where a criminal defendant has been denied his right to retained counsel of choice, or where a criminal defendant has been denied the representation of counsel of choice willing to donate his services. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 2564, 165 L.Ed. 2d 409 (2006). Where the right to be assisted by counsel of one's choice is wrongly denied, no harmless-error analysis which inquires into counsel's effectiveness, or prejudice to the defendant, is required:

> Deprivation of the right 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 148, 126 S.Ct. at 2563.

Thus, under the United States Constitution, a defendant who has hired his own counsel, who has counsel retained on his behalf, or like Mr. Duke, whose counsel has volunteered their services, has a right to *both* effective representation and to counsel of his choice. Mr. Duke has the benefit of *pro bono* counsel at no cost to himself. Thus, he has the ability to retain *pro bono* counsel. The retention of private *pro bono* counsel does not, however, rob Mr. Duke of his right to a fair trial and state funding for auxiliary services. The presence of free, retained counsel should not work a hardship against Mr. Duke, an indigent accused, who otherwise would be entitled to state-funded auxiliary services. The determinative question is Mr. Duke's indigency, not whether he has derived any assistance from free or collateral sources.

This Court has made clear that an indigent defendant does not forfeit his due process right to counsel when he requests appointment of counsel through his *pro bono* counsel. *See Roberts v. State*, 263 Ga. 764, 765, 438 S.E.2d 905, 906 (1994); *Speight v. State*, 279 Ga. 87, 88, 610 S.E.2d 42, 43–44 (2005). Extending this principle, it follows that an indigent defendant does not forfeit his due process right to experts even if the request is made through his pro bono counsel. To hold otherwise would be give two equally necessary due process protections unequal protection and force a defendant to choose between two constitutional rights. To

force Mr. Duke to make that Hobson's choice would deny Mr. Duke due process and render any trial of Mr. Duke fundamentally unfair. Accordingly, Mr. Duke respectfully requests that this Court reverse the decision of the trial court denying Mr. Duke's due process right to expert funding.

II. THE GEORGIA PUBLIC DEFENDER COUNCIL IS RESPONSIBLE FOR PROVIDING THE FUNDING FOR EXPERTS AND INVESTIGATORS IN THIS CASE.

At the outset, Mr. Duke asserts that depriving indigent defendants with private, *pro bono* counsel of necessary expert assistance would violate due process, regardless of whether the Georgia General Assembly has designated a source of funding. This Court has held that whether the General Assembly has failed to allocate adequate funding is not a proper consideration for either of these issues. *See Georgia Pub. Def. Standards Council v. State*, 285 Ga. 169, 173, 675 S.E.2d 25, 28 (2009) (stating 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 Council was responsible for the defense costs of a capital retrial after the IDA became effective).

Fortunately, the General Assembly has authorized funding in the instant case through the Indigent Defense Act ("IDA"). As shown in Mr. Duke's initial and reply briefs as well as the amicus brief of Southern Center for Human Rights, the language of the IDA requires the Georgia Public Defender Council ("GPDC") to

provide necessary defense services to indigent defendants with private, *pro bono* counsel. The definition of an "indigent person" includes defendants like Mr. Duke because having free counsel does not demonstrate possession of any resources. *See* O.C.G.A. § 17-12-2(6)(c).

Moreover, the statute affirmatively mandates the provision of services for defendants who meet the indigence standard and who exercise their constitutional right to choose representation other than a public defender. *See* O.C.G.A. § 17-12-1(c) (including all "indigent persons who are entitled to representation under this chapter" in the ambit of the GPDC's responsibilities, without requiring those persons to have accepted such representation); § 17-12-5(b)(1) (mandating that the director of the GPDC "shall . . . provide support services" for "circuit public defender offices and other attorneys representing indigent persons in criminal or juvenile cases" without limiting those "other attorneys" to appointed conflict counsel). These provisions direct the GPDC to provide necessary services like expert assistance to indigent defendants who choose to be represented by private, *pro bono* counsel.

This Court's precedent further supports a finding that the GPDC is financially responsible for expert assistance in this case. In *Fulton Cty. v. State*, 282 Ga. 570, 571, 651 S.E.2d 679, 680–81 (2007), this Court held that a trial court erred in ordering the county rather than the GPDC to cover the defense costs of

transcribing telephone conversations and presenting demonstrative evidence digitally. It found that the expenses were neither expressly authorized nor similar to the "contingent expenses incurred in holding any session of the superior court," like lights, rent, and transcribing testimony, that counties are statutorily obligated to fund. *Id.* (O.C.G.A. § 15-6-24(a)). Because the costs in this case are similarly "costs incurred in providing defense services," O.C.G.A. § 15-6-24(b), rather than contingent court expenses, funding for Duke's necessary expert assistance in this case must come from the GPDC, rather than Irwin County.

However, even if this Court finds that no statute authorizes funding from the GPDC or the county[1], due process still demands that indigent defendants with private, *pro bono* counsel receive the expert assistance necessary for a fair trial at public cost.

[1] If this Court does not agree that these costs fall to the GPDC, the broad language of a county funding statute could be interpreted to apply. *See* O.C.G.A. § 48-5-220(9) (one purpose of the county tax is "to support indigent individuals"); *see also* § 48-5-220(5) (another purpose of the county tax is "to pay the expenses of courts . . . and to pay for litigation"). However, there is no case law supporting such an interpretation. By contrast, both the statutory language and precedent support an interpretation of the IDA that places responsibility on GPDC and reject an interpretation that would lay these costs on the county under O.C.G.A. § 15-6-24(a).

CONCLUSION

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

Respectfully submitted this 18th day of December, 2020.

THE MERCHANT LAW FIRM, P.C.

/s/ John B. Merchant, III
ASHLEIGH B. MERCHANT
Georgia Bar No. 040474
JOHN B. MERCHANT, III
Georgia Bar No. 533511
701 Whitlock Avenue, S.W., Suite J-43
Marietta, Georgia 30064
Telephone: (404) 510-9936
Facsimile: (404) 592-4614

TROUTMAN PEPPER HAMILTON SANDERS LLP

/s/ John S. Gibbs III
JOHN S. GIBBS III
Georgia Bar No. 150254
600 Peachtree Street, N.E., Suite 3000
Atlanta, Georgia 30308
Telephone: (404) 885-3093
Facsimile: (404) 885-3900

Attorneys for Appellant, Ryan Duke

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 ***SUPPLEMENTAL BRIEF OF APPELLANT*** via U.S. Mail with adequate postage affixed thereon and addressed to the following:

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

Patrick Mulvaney
Southern Center For Human Rights
60 Walton Street, N.W.
Atlanta, GA 30303

Robert W. Smith, Jr.
General Counsel
Prosecuting Attys. Council of Georgia
1590 Adamson Parkway, 4th Floor
Morrow, GA 30260-1755

This 18th day of December, 2020.

/s/ John B. Merchant, III
JOHN B. MERCHANT, III
Georgia Bar No. 533511

Counsel for Appellant, Ryan Duke