No. S20A1522

In the

Supreme Court of Georgia

RYAN ALEXANDER DUKE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF AMICUS CURIAE
THE SOUTHERN CENTER FOR HUMAN RIGHTS
IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Southern Center for Human Rights ("SCHR") is a nonprofit law office that works for equality, dignity, justice, and fairness in the criminal legal system. As a central part of its mission, SCHR seeks to protect the rights of criminal defendants in Georgia who do not have the financial means to afford "the basic tools of an adequate defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). SCHR provides representation to many indigent criminal defendants at no cost, and it also supports private attorneys who volunteer to represent indigent criminal defendants pro bono. In light of its efforts to protect the rights of indigent defendants and encourage high quality pro bono representation, SCHR has a strong interest in ensuring that indigent defendants represented by pro bono counsel receive expert assistance where such assistance is necessary for a fair trial.

SUMMARY OF ARGUMENT

Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), a criminal defendant has a constitutional right to expert assistance at the State's expense if (1) he is indigent, and (2) the requested expert assistance is necessary to address a significant issue at trial. *Id.* at 76-83; *Bright v. State*, 265 Ga. 265, 269-70 (1995). The superior court below recognized that Ryan Duke made both of those showings when he made his request for expert assistance. R. 1211–12, 1664, 1671. Nevertheless, the court denied the request because Duke was represented by pro bono counsel, not a public

defender. The court found that because of the way Georgia structures its funding for indigent defense services, "an indigent defendant is entitled to state-funded ancillary services *only* if represented by a public defender." R. 1664 (emphasis added). This Court should reverse that ruling not only to protect Duke's rights in this case, but also to ensure that indigent defendants throughout Georgia are given fair trials in accordance with the United States and Georgia Constitutions. Three points warrant emphasis.

First, a defendant who meets *Ake*'s requirements has a due process right to expert assistance. The State cannot curtail that right by adding more requirements, thus redefining the minimum protections mandated by the Fourteenth Amendment. Yet that is what happened here. The superior court found that Duke met *Ake*'s requirements—he is indigent, and he needs expert assistance. R. 1211–12, 1664, 1671. But the court then denied expert assistance based on Duke's failure to meet an additional requirement that appears nowhere in *Ake* or any other Supreme Court case—that he be represented by a public defender.

There is no legitimate basis for requiring an indigent defendant to be represented by a public defender in order to exercise his right to expert assistance under *Ake*. The purpose of *Ake* is to protect fair trials by ensuring that indigent defendants have the "basic tools of an adequate defense." *Ake*, 470 U.S. at 77. Those "basic tools" are necessary regardless of whether the indigent defendant is

represented by a public defender, pro bono counsel, or himself. In recognition of that reality, the overwhelming majority of States ensure compliance with *Ake* by providing expert assistance to indigent defendants regardless of whether they are represented by a public defender.

Second, although *Ake* governs this issue regardless of whether the State has a dedicated source of funding for expert assistance, the 2003 Indigent Defense Act ("IDA") provides for such funding. The IDA provides funding for counsel, expert assistance, and other services to ensure that the fundamental rights of indigent defendants are protected. *See* O.C.G.A. § 17-12-1, *et seq.* Significantly, the IDA applies to all "indigent persons who are entitled to representation" under the law. O.C.G.A. § 17-12-1(c). Thus, the IDA is not limited to those who are *represented by* State-funded counsel; it covers all those who are *entitled to* State-funded counsel, regardless of whether they act on that entitlement.

Third, public policy considerations strongly support the provision of State funding for expert assistance when an indigent defendant is represented by pro bono counsel. The State Bar and the Rules of Professional Conduct encourage attorneys to represent indigent individuals pro bono, which is a significant financial sacrifice in itself. Any rule requiring pro bono attorneys in a criminal case to forego essential experts or pay for them out of pocket would discourage pro

bono representation (or promote ineffective pro bono representation), which in turn would weaken the criminal legal system.

In short, this case presents the question of whether an indigent defendant represented by pro bono counsel has a right to expert assistance at the State's expense where the expert assistance is necessary for a fair trial. The answer to that question is yes.

ARGUMENT

I. A Criminal Defendant Is Entitled to Expert Assistance If He Meets the Requirements of *Ake*, Regardless of Whether He Is Represented by a Public Defender or Pro Bono Counsel.

A criminal defendant is entitled to expert assistance under *Ake* based on two considerations alone: (1) whether he is indigent, and (2) whether the requested assistance is necessary to address a significant issue at trial. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); *Bright v. State*, 265 Ga. 265, 269-70 (1995).[1] The United States Supreme Court grounded this right on the rationale 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

[1] *Ake* involved a request for expert assistance from a psychiatrist in a capital case. However, courts across the country have concluded that the holding of *Ake* applies to non-capital cases and assistance beyond psychiatrists. *See* Aimee Kumer, *Reconsidering* Ake v. Oklahoma*: What Ancillary Defense Services Must States Provide to Indigent Defendants Represented by Private or Pro Bono Counsel?*, 18 Temp. Pol. & Civ. Rts. L. Rev. 783, 793 (2009) (collecting cases).

effective defense." *Ake*, 470 U.S. at 77 (citation omitted). The State therefore must provide the "basic tools of an adequate defense" for those defendants who cannot afford them. *Id*. The Supreme Court has never suggested that representation by a public defender is a prerequisite for expert assistance; in fact, the Court in *Ake* listed the right to counsel as another "basic tool" to which indigent defendants are entitled. *See id*. at 76.

This Court similarly has held that a trial is fundamentally unfair if an indigent defendant is denied necessary expert assistance, and it has recognized consistently that the right to such assistance applies to all indigent defendants.[2] In determining whether a defendant is entitled to expert assistance, this Court has looked only to what *Ake* requires: indigence and a particularized showing of necessity.[3]

[2] *See, e.g.*, *Thomason v. State*, 268 Ga. 298, 309 (1997) (stating that "[i]t has long been recognized that an indigent defendant has a right to seek funds necessary to his meaningful participation in the judicial proceeding where his liberty and life are at stake"); *McNeal v. State*, 263 Ga. 397, 398 (1993) (noting that "[t]he Fourteenth Amendment's due process guarantee of fundamental fairness requires that an indigent defendant be given 'meaningful access to justice,' e.g., access to a competent expert necessary to an effective defense"); *Lindsey v. State*, 254 Ga. 444, 447 (1985) (restating *Ake* as holding that "the Constitution requires that a state provide access to a psychiatrist's assistance on [the issue of the defendant's sanity] if the defendant cannot otherwise afford one").

[3] *See, e.g.*, *Lindsey*, 254 Ga. at 448; *Bright*, 265 Ga. at 270–77.

Here, the superior court found that Ryan Duke met those requirements.[4] With respect to indigence, the court stated, "By any reasonable definition whether from a dictionary or the Georgia Indigent Defense Act, [Duke] is indigent." R. 1211; *see also* R. 1664. As for necessity, the court stated, "The record developed as to Defendant's need for the experts he requests is compelling." R. 1212; *see also* R. 1671. However, the court denied Duke's request for expert assistance based on its conclusion that "an indigent defendant is entitled to state-funded ancillary services *only* if represented by a public defender." R. 1664 (emphasis added).

The superior court's conclusion undermines *Ake* and the right to expert assistance. *Ake* provides the "constitutional floor" for entitlement to expert services under the Due Process Clause, and a State cannot redefine the right to lessen its scope of protection. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982) (holding that a State cannot restrict a capital defendant's constitutional right to present mitigating evidence by limiting the right to certain types of mitigating evidence); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889–90 (2009) (explaining that while States may provide *greater* protections than the Due Process Clause requires, they cannot provide *lesser* protections). Thus, if a

[4] Duke, who is charged with murder, sought expert assistance in three different fields, as well as investigative assistance.

defendant meets *Ake*'s requirements, he has a constitutional right to expert assistance. The State cannot nullify or restrict that right by adding other requirements. *See Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right . . . they believe is inconsistent with their local policies.").

There is no legitimate basis for limiting the *Ake* right to those who are represented by a public defender. The Supreme Court recognized in *Ake* that the only State interest in favor of a limitation on the right to expert assistance is financial, and the Court held explicitly that financial concerns do not outweigh the need for fairness in criminal trials. *See Ake*, 470 U.S. at 79. More recently, the Court underscored this point in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), by rejecting Alabama's attempt to limit the provision of expert assistance. In *McWilliams*, Alabama provided the defendant with a mental health examination by a State expert but refused to provide an expert to assist the defense. *Id.* at 1794–97. This was a lesser, cheaper form of assistance than *Ake* requires, and the Supreme Court rejected it. *Id.* at 1799–1801. *McWilliams* confirms that a State cannot undermine the right of an indigent defendant to necessary, meaningful expert assistance. This Court has similarly recognized that financial concerns cannot trump a constitutional right. *See Garland v. State*, 283 Ga. 201, 205 n.5

(2008) ("In light of the constitutional rights involved, we find no merit in the Council's . . . budgetary concerns that it raises as warranting a different holding.").

The superior court's rationale for denying Duke necessary assistance manufactures an artificial and intolerable choice between constitutional rights. Duke has a constitutional right to be represented by an attorney who is willing to represent him pro bono,[5] and he also has a constitutional right to necessary expert assistance. This Court has recognized that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Cowards v. State*, 266 Ga. 191, 193 (1996) (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968)). While there are some limited situations in which two constitutional rights cannot possibly be exercised simultaneously—such as the right to remain silent and the right to testify—there is no such inherent contradiction between the rights at issue here. The State is perfectly able to provide necessary expert assistance to an indigent defendant who is exercising his right to representation by pro bono counsel. The State's refusal to do so is based on a manufactured conflict that arbitrarily punishes indigent defendants for exercising their constitutional rights.[6]

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[5] *See Caplin & Drysdale v. United States*, 491 U.S. 617, 624–25 (1989) (recognizing that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds").

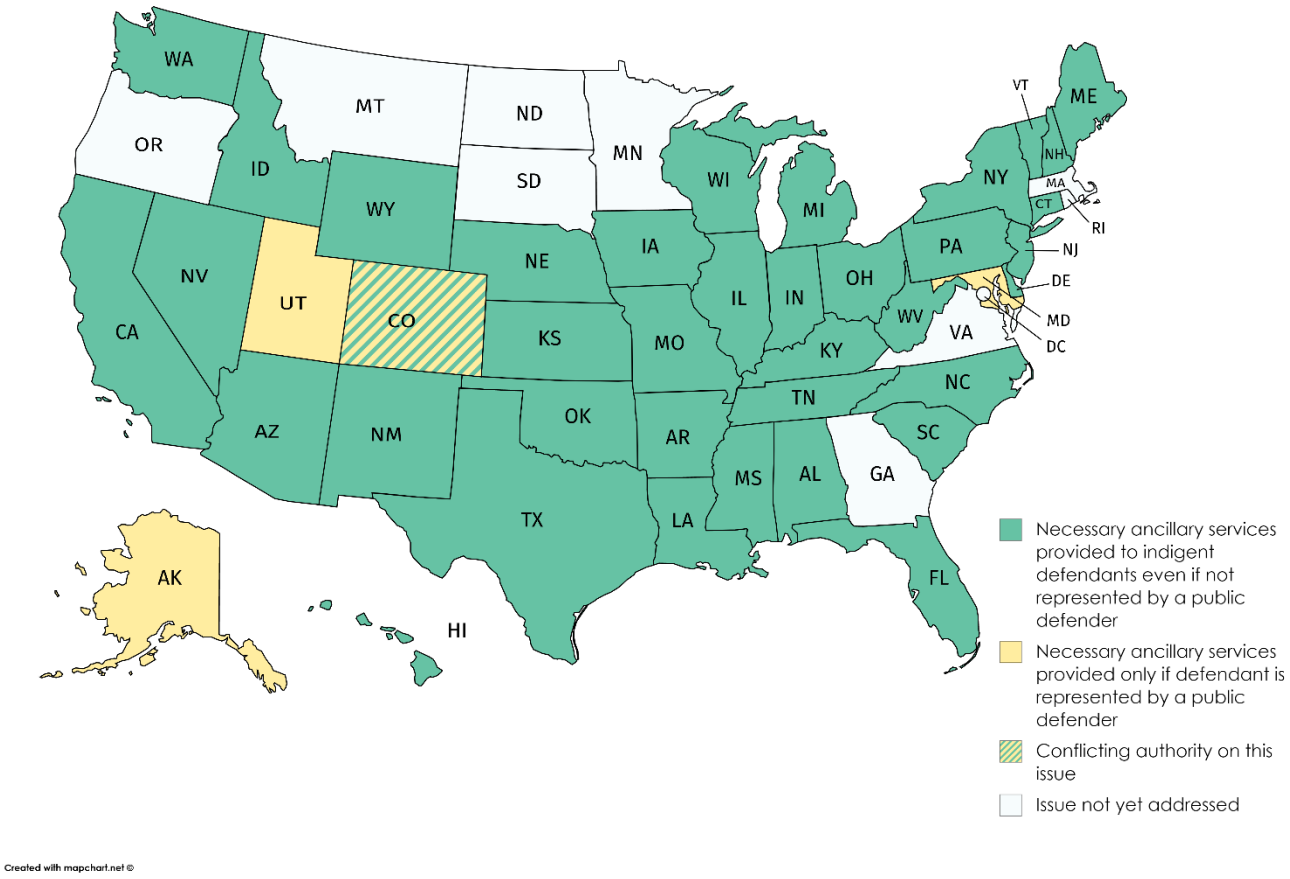
[6] The practical effect of the superior court's ruling highlights the artificial nature of the conflict. Under the superior court's ruling, the Constitution would force the

Consistent with these constitutional considerations, the vast majority of jurisdictions in the United States recognize an indigent defendant's right to public provision of necessary ancillary services, including expert assistance, regardless of whether the defendant's counsel is publicly funded. Of the 41 States that have confronted the issue, 37 provide publicly funded ancillary services to an indigent defendant even when he is not represented by a public defender.[7] Just three States limit public provision of ancillary services exclusively to indigent defendants represented by a public defender, while one has conflicting authority on the subject.[8] This decisive consensus in favor of State provision of necessary ancillary services is illustrated by the map below:

State to pay for an indigent defendant's counsel even when the defendant requires only expert assistance. This is illogical. *See English v. Missildine*, 311 N.W.2d 292, 294 (Iowa 1981) ("It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services.").

[7] *See* Appendices A and B for opinions from each jurisdiction providing funding. Thirty of the States have addressed the issue directly, while in seven States, courts have engaged in the *Ake* analysis despite recognizing in the opinion that the defendant was not represented by a public defender.

[8] *See* Appendices C and D for opinions from these four jurisdictions. Colorado has conflicting authority. In 2002, the Colorado Supreme Court held that the State was not required to appoint an interpreter as a private translator for out-of-court discussions between the defendant and his pro bono attorney, *see People v. Cardenas*, 62 P.3d 621, 623 (Colo. 2002), but in 2008, Chief Justice Directive 04-04 authorized the Judicial Department to pay for expert assistance for indigent defendants with pro bono counsel. *See People v. Stroud*, 356 P.3d 903, 907–08 (Colo. Ct. App. 2014).



Many of the state courts that have required funding for ancillary services regardless of a public defender's appointment based their decisions on constitutional principles. For example, the Supreme Court of New Mexico explained, "Th[e] right [to expert assistance] is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions." *State v. Brown*, 134 P.3d 753, 759 (N.M. 2006). Similarly, the Louisiana Supreme Court held:

> [T]he retention of private counsel from a collateral source at no cost to defendant does not rob the defendant of his right to a fair trial and thus defendant may be entitled to State funding for auxiliary services. The presence of retained counsel, be it from a collateral source or pro bono,

> should not work a hardship against an indigent accused who otherwise would be entitled to State funded auxiliary services. The determinative question is the defendant's indigency, not whether he has derived any assistance from collateral sources.

State v. Jones, 707 So. 2d 975, 977 (La. 1998). In short, an indigent defendant having private counsel at no cost to him "is not relevant to the defendant's right to have expert assistance provided at public expense." *State ex rel. Rojas v. Wilkes*, 455 S.E.2d 575, 578 (W. Va. 1995).

II. The Indigent Defense Act Provides Funding for Expert Assistance in All Cases in Which the Requirements of *Ake* Are Met, Including Those in Which the Defendant Is Represented by Pro Bono Counsel.

Although *Ake* governs this issue regardless of whether the State has a dedicated source of funding for expert assistance in place, the General Assembly has authorized funding for cases like that of Ryan Duke. The Indigent Defense Act ("IDA"), O.C.G.A. § 17-12-1, *et seq.*, is the vehicle for the provision of constitutionally guaranteed services to indigent defendants in Georgia. Under the IDA, the Georgia Public Defender Council ("GPDC") oversees the statewide public defense system, including the provision of ancillary services. A key provision of the statute authorizes the GPDC to provide ancillary services to *all* defendants who meet *Ake*'s requirements, regardless of whether they also receive representation under the statute.

The GPDC's fundamental responsibility is "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) (emphasis added). When courts consider the meaning of a statute, they "must presume that the General Assembly meant what it said and said what it meant." *Plummer v. Plummer*, 305 Ga. 23, 26 (2019) (citations omitted). Here, the IDA assigns the GPDC responsibility for "indigent persons who are *entitled* to representation." Rather than limiting the GPDC'S responsibility to those who are "receiving" or "accepting" representation under the statute, the provision's plain language includes all indigent persons who are "entitled to" publicly funded counsel. This language indicates that as long as the defendant is eligible for representation under the IDA—*regardless of whether he acts on his entitlement*—the GPDC has an obligation to assure that he receives necessary defense services.

The funding sought by Duke is precisely the kind of service that the GPDC is required to provide. The GPDC itself interprets the provision of expert assistance as part of its responsibility, as it regularly funds expert services for defendants represented by public defenders. *See* R. 1621–22. Those same services are necessary for "adequate and effective representation" where a defendant is represented by pro bono counsel. Because the IDA covers all indigent defendants

"entitled to representation," the GPDC must provide for necessary expert services where an indigent defendant is eligible for but has not exercised his right to a public defender.

The breadth of the GPDC's responsibility under O.C.G.A. § 17-12-1(c) clarifies the statutory definition of an "indigent person," confirming that having pro bono counsel does not disqualify a defendant from being found indigent. Receiving legal services *at no cost* does not evince possession of "other resources that might be reasonably used to employ a lawyer without undue hardship." O.C.G.A. § 17-12-2(6)(C). Indeed, paying nothing cannot demonstrate having something with which to pay. Because Duke met the indigence standard and demonstrated his need for assistance, he is entitled to expert funding from the State.

Interpreting the IDA to permit funding in Duke's case also aligns with the legislative intent behind the statute: to safeguard the constitutional rights of all indigent defendants in the State. According to then-Senator Chuck Clay, a chief sponsor of the bill, the General Assembly was "standing up and giving meaning to the Constitution" through the Indigent Defense Act.[9] Chief among the General Assembly's concerns was the replacement of the inadequate defense system then in

[9] Bill Rankin, *Legislature 2003: Reform of Indigent Defense Approved*, Atlanta Journal-Constitution (Apr. 26, 2003), 2003 WLNR 6243296.

place, as reflected in the bill's focus on creating a statewide public defense system. However, the IDA's broader purpose was to provide indigent defendants with the constitutionally adequate defense services to which they are entitled. Excluding necessary defense tools from an entire class of indigent defendants would frustrate that policy. Thus, both the language and the purpose of the IDA support the provision of necessary ancillary services to all indigent defendants, regardless of whether their counsel is publicly funded.

Many other States similarly construe their indigent defense statutes to provide for expert assistance to indigent defendants not represented by public defenders. The Supreme Court of Arkansas considered an "indigent person" standard similar to that of the IDA—a person "without sufficient funds or assets to employ an attorney or afford other necessary expenses"—and held that the defendant met the standard despite having retained counsel with outside help. *Arkansas Pub. Def. Comm'n v. Pulaski Cty. Circuit Court, Fourth Div.*, 365 S.W.3d 193, 197–98 (Ark. 2010). Other States have relied on the lack of limiting language in provisions authorizing funding and the legislature's intent to ensure that indigent defendants receive the ancillary services to which they are constitutionally entitled. For example, the Supreme Court of New Hampshire held that because the express purpose of its state statute was "to provide adequate representation for indigent defendants in criminal cases," a provision authorizing

public funding where "counsel has been appointed to represent" a defendant who could not afford necessary ancillary services was, in the absence of directly prohibitive language, not confined to defendants with appointed counsel. *State v. Brouillette*, 98 A.3d 1131, 1134–35 (N.H. 2014). The Supreme Court of Hawaii similarly looked to the absence of limiting language, coupled with legislative history, to find a right to investigative aid for an indigent defendant with private counsel, even though certain statutory provisions related solely to those with publicly funded counsel. *See Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979).

Here, the IDA provides a clear indigence standard, applies expressly to all defendants who meet the indigence standard, and lacks any prohibitive limiting language with respect to who represents the defendant. Therefore, the IDA's funding for expert services should not be limited to cases in which the defendant is represented by a public defender.[10]

[10] To be clear, even if this Court were to determine that the IDA does not apply here, that would not relieve the State of its obligation to provide expert assistance when the requirements of *Ake* are met. There are other ways the State could follow *Ake*'s mandate in Duke's case. For example, the State could appoint public defenders to co-counsel the case, as Duke requested. *See Roberts v. State*, 263 Ga. 764 (1994) (holding that a defendant has a right to continue to be represented by his current pro bono counsel without waiving his right to appointment of counsel); *Brown*, 134 P.3d at 758 (holding that "courts 'retain the ultimate authority to determine indigence and the discretionary ability to order the appointment of a public defender when . . . necessary to protect the defendant's constitutional or statutory rights'") (citations omitted). But providing no expert assistance at all is not a constitutionally permissible option.

III. Public Policy Considerations Strongly Support the Provision of Expert Assistance for Indigent Defendants Represented by Pro Bono Counsel.

In addition to the clear constitutional and legislative mandates in this case, public policy weighs firmly in favor of providing expert assistance to indigent defendants with pro bono counsel. Placing the burden of expert costs on private attorneys representing indigent defendants would discourage pro bono representation, with negative impacts on the criminal legal system and the legal profession. By contrast, providing public funding would encourage pro bono work, easing the public defender caseload and conserving State funds while promoting the competent representation of all indigent defendants.

In Georgia as elsewhere, pro bono representation is recognized as necessary for the legal system's promise of equal access to justice. The Georgia Rules of Professional Conduct require attorneys to engage in pro bono work because they "recognize the critical need for legal services that exists among persons of limited means." Ga. R. Prof. Conduct 6.1, cmt.2. The Georgia State Bar similarly calls on lawyers to provide "the pro bono representation that is necessary to make our system of justice available to all." Ga. State Bar Aspirational Statement on Professionalism.

However, burdening pro bono counsel with the potentially high costs of expert services in indigent defense cases would discourage attorneys from taking on this critical responsibility. While professional standards encourage and even

require pro bono work, they recognize that attorneys cannot take on cases when doing so would lead to unreasonable financial hardship. *See* Ga. R. Prof. Conduct 6.2 (explaining that an "unreasonably burdensome" financial sacrifice constitutes good cause for an attorney to decline an appointment). Because taking a case pro bono is already a financial sacrifice, additional costs can impose too great a burden on a private attorney.

This Court has long recognized the need to prevent costs from discouraging pro bono practice. For example, a 1993 formal advisory opinion concluded that it is unethical for a prosecutor to condition a plea agreement on appointed or pro bono counsel's waiver of claims for attorneys' fees in part because defense attorneys may stop taking cases pro bono.[11] Here, the costs at issue are often substantial; according to one analysis, the average rate of initial case reviews by experts across disciplines is $356 per hour, and the average rate for trial testimony is $478 per hour.[12] For attorneys considering taking cases pro bono, the denial of State funding for expert aid would present an untenable choice: absorbing these considerable costs and taking on a significant financial sacrifice, or shirking their

[11] *See* State Bar of Georgia, Supreme Court of Georgia, *Formal Advisory Opinion No. 93-3* (Sept. 17, 1993), *available at* https://www.gabar.org/Handbook/index.cfm#handbook/rule524.

[12] Expert Institute, *Resources: Average Rates*, *available at* https://www.expertinstitute.com/resources/expert-witness-fees/ (last visited August 30, 2020).

duty to provide competent representation by forgoing necessary assistance, resulting in unfair trials with unreliable outcomes. The reality is that many lawyers would be forced to forego taking cases pro bono in the face of these options. *See Brown*, 134 P.3d at 760 ("[M]ost volunteer lawyers cannot afford and should not be required to fund the investigators, expert witnesses and other costs involved in preparing an adequate defense.") (citation omitted).

The resulting chill on pro bono representation would needlessly increase the burden on both public defender workloads and the public treasury. Whereas the State would have had to fund only necessary ancillary services, it instead would need to foot the larger bill for counsel in addition to those services. Other courts considering this question have recognized that discouraging pro bono practice by withholding public funds makes for poor fiscal policy. As the Supreme Court of New Mexico noted, "Given the heavy workload of the [state public defender agency] and the emphasis on *pro bono* service throughout the legal community, it would seem that any lawyer who wishes to take on *pro bono* cases should not be discouraged solely because of lack of access to needed defense funds, such as expert witness fees." *Brown*, 134 P.3d at 760; *see also Widdis v. Second Jud. Dist. Ct.*, 968 P.2d 1165, 1168 (Nev. 1998) ("[W]e feel that a contrary rule would have a greater negative impact on scarce public resources by creating disincentives for defendants to seek private representation at their own expense."); *English v.*

Missildine, 311 N.W.2d 292, 294 (Iowa 1981) ("The State's theory would impose an unreasonable and unnecessary additional burden on the public treasury.").

Therefore, providing public funding to defendants like Duke meets a range of State interests: it conserves public funds by encouraging pro bono practice while also ensuring fair trials, constitutionally adequate representation, and reliable, accurate case outcomes.

CONCLUSION

There is no dispute in this case that Duke is indigent and in need of the requested expert assistance to receive a fair trial. He therefore meets the *Ake* standard, regardless of his representation by pro bono counsel. This Court should join the overwhelming majority of States in ensuring compliance with *Ake* by recognizing that Duke is entitled to expert assistance at the State's expense.

Respectfully submitted this 31st day of August, 2020.

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APPENDIX

APPENDIX A

States That Have Held Directly That an Indigent Defendant Has a Right to Expert Assistance Regardless of Whether He Is Represented by a Public Defender

State	Opinion Addressing the Right to Ancillary Services
Alabama	"The simple fact that the defendant's family, with no legal duty to do so, retained counsel for the defendant, does not bar the defendant from obtaining funds for expert assistance when the defendant shows that the expert assistance is necessary. . . . This is consistent with the purpose of establishing the indigent defense system in Alabama, which is to provide indigent defendants with their constitutionally guaranteed right to adequate representation." *Ex Parte Sanders*, 612 So. 2d 1199, 1201 (Ala. 1993).
Arizona	"Although Jacobson's parents had retained counsel to represent her, she has been declared by the trial court to be indigent. . . . Because Jacobson was declared by the trial court to be indigent, she is entitled to have the opportunity to demonstrate to that court that her proposed expert witnesses are reasonably necessary for her defense." *Jacobson v. Anderson*, 57 P.3d 733, 734–35 (Ariz. Ct. App. 2002) (citations omitted).
Arkansas	"Clearly, the language of section 16–87–212 does not limit the use of APDC funds for the defense of only those indigent defendants represented by the APDC. . . . Our Public Defender Act defines an indigent person as a person 'who, at the time his or her need is determined, is without sufficient funds or assets *to employ an attorney or afford other necessary expenses incidental thereto.*' While Muhammad, with outside help, was able to retain counsel, he was still found indigent by the circuit court because he could not afford the necessary expenses of an adequate defense." *Ark. Pub. Def. Comm'n v. Pulaski Cty. Circuit Ct., Fourth Div.*, 365 S.W.3d 193, 197–98 (Ark. 2010) (citation omitted).

California	"Although the Legislature has not provided for the precise situation presented here (undoubtedly not having anticipated it), the court has inherent power to guarantee to criminal defendants a fair trial. . . . We conclude, therefore, that, upon a proper showing of necessity, the trial court must provide to an indigent defendant expert defense services, without regard to whether his counsel is appointed or selected pro bono counsel." *People v. Worthy*, 167 Cal. Rptr. 402, 406 (Cal. Ct. App. 1980) (citations omitted).
Connecticut	"To summarize our holding in this case, we conclude that an indigent self-represented defendant has a fourteenth amendment due process right to be provided public funds to obtain expert or investigative assistance, provided that he makes a threshold showing that such assistance is reasonably necessary for the preparation and presentation of an adequate defense." *State v. Wang*, 92 A.3d 220, 247 (Conn. 2014).
Delaware	"[A]n indigent defendant represented by private counsel may be eligible in the circumstances described below to receive public funding for expert services. . . . This procedure ensures that, in strictly limited circumstances, indigent defendants may obtain expert 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." *Chao v. State*, 780 A.2d 1060, 1063 (Del. 2001), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002).
Florida	"[W]e hold that indigent defendants represented by private counsel pro bono are entitled to file motions pertaining to the appointment and costs of experts, mitigation specialists, and investigators ex parte and under seal, with service to the Justice Administrative Commission and notice to the State Attorney's Office, and to have any hearing on such motion ex parte, with only the defendant and the Commission present." *Andrews v. State*, 243 So. 3d 899, 902 (Fla. 2018).
Hawaii	"To receive court-paid litigation expenses, HRS s 802-7 requires that a defendant be unable to pay for requested investigative or other expert services and that those services be necessary for an adequate defense. While the statute contains certain provisions relating solely to a defendant represented by

	the public defender or certain court-appointed counsel, the statutory language does not in any way limit the court's authority to approve funds for investigatory services for a defendant with private counsel." *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979).
Illinois	"[A]n entitlement to funds under section 113–3(d) occurs regardless of whether the indigent defendant receives assistance of counsel from a court-appointed attorney. It is the indigency of the defendant that matters under section 113–3(d) of the Code, not who represents the defendant at trial. Accordingly, we find the trial court abused its discretion in denying the indigent respondent's motion for funds for a necessary DNA expert witness based on the fact that he was represented by *pro bono* counsel." *In re T.W.*, 932 N.E.2d 125, 134 (Ill. Ct. App. 2010) (citations omitted).
Iowa	"We believe authority for the services requested by plaintiff exists under his sixth amendment right to effective representation of counsel. 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." *English v. Missildine*, 311 N.W.2d 292, 293–94 (Iowa 1981).
Kansas	"We, therefore, conclude that the plain and unambiguous language of K.S.A. 22-4508 considers the financial inability of the defendant to pay for defense services and the necessity of the requested services, not the status of his or her attorney, except in cases involving a public defender. Therefore, a district court has a duty under K.S.A. 22-4508 to conduct an ex parte hearing when an attorney other than a public defender, including an attorney employed by the defendant, asks the court to consider a defendant's request for investigative, expert, or other services." *Landrum v. Goering*, 397 P.3d 1181, 1187 (Kan. 2017).
Kentucky	"Nothing in the statute prohibits a trial judge from approving the payment of expenses incurred by an attorney in the defense of an indigent, regardless of whether the attorney is 'truly' *pro bono* or an appointed public defender. . . . The payment of the

	expenses by the local fiscal court would be in furtherance of its duty to provide legal representation to indigents, as is their constitutional right." *Kenton-Gallatin-Boone Pub. Def., Inc. v. Stephens*, 819 S.W.2d 37, 38 (Ky. 1991).
Louisiana	"[W]e find that the retention of private counsel from a collateral source at no cost to defendant does not rob the defendant of his right to a fair trial and thus defendant may be entitled to State funding for auxiliary services. The presence of retained counsel, be it from a collateral source or pro bono, should not work a hardship against an indigent accused who otherwise would be entitled to State funded auxiliary services. The determinative question is the defendant's indigency, not whether he has derived any assistance from collateral sources." *State v. Jones*, 707 So. 2d 975, 977 (La. 1998).
Michigan	"We are confident that the mere retention of counsel by an indigent defendant does not deprive that defendant of the ability to seek the funding of an expert at state expense." *People v. Propp*, No. 343255, 2019 WL 4891762, at *2 n.2 (Mich. Ct. App. Oct. 3, 2019).
Mississippi	"In sum, we find that the trial judge erred when he denied Brown's request for expert assistance without conducting a hearing to determine whether Brown was indigent. Brown was 'entitled to a hearing for a determination of whether [he] was indigent regardless of who was paying [his] attorney fees.' We also find that an expert is necessary here in order to make the trial 'fundamentally fair.'" *Brown v. State*, 152 So.3d 1146, 1169 (Miss. 2014) (citations omitted).
Missouri	"The fact that Williams had available private counsel for his defense did not automatically preclude him from seeking state funds for an expert witness." *Williams v. State*, 254 S.W.3d 70, 75 (Mo. Ct. App. 2008).
Nebraska	"Quezada's financial affidavit shows that he would be considered indigent, despite having 'bartered' for his retained counsel's services, and we operate on the premise that at the time of the motion under discussion, Quezada would be considered indigent. Thus, the issue is simply whether the trial court abused its discretion in denying the § 27–706 motion to have Vasiliades as a court-appointed expert under that statute,

	given Quezada's indigent status." *State v. Quezada*, 834 N.W.2d 258, 265 (Neb. Ct. App. 2013).
Nevada	"Accordingly, we hold that a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense based on the defendant's showing of indigency and need for the services." *Widdis v. Second Jud. Dist. Ct.*, 968 P.2d 1165, 1168 (Nev. 1998).
New Hampshire	"If the defendant is indigent—despite the lack of appointed counsel—and the services are necessary, the defendant falls within the statute's guarantee of an adequate defense, and the court should act accordingly. . . . RSA 604–A:6 cannot be read as prohibiting a court from authorizing necessary services to indigent criminal defendants who are self-represented, or who have *pro bono*, reduced fee, or retained counsel." *State v. Brouillette*, 98 A.3d 1131, 1135 (N.H. 2014) (citation omitted).
New Jersey	"Nowhere in the Act is there a requirement that a defendant obtain legal services from the OPD before he or she may obtain ancillary services from it. The Legislature intended that a defendant's right to obtain necessary ancillary services for his or her defense depends on the defendant's indigence and not on whether the defendant is represented by outside counsel." *In re Cannady*, 600 A.2d 459, 462 (N.J. 1991).
New Mexico	"Therefore, we agree that Brown, an indigent defendant represented by *pro bono* counsel, is entitled both to the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. . . . That right is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions." *State v. Brown*, 134 P.3d 753, 759 (N.M. 2006).
New York	"To prevail, he was required to show that he was indigent, that the [expert] was necessary to his defense and, if the compensation he sought exceeded the statutory limit of $1,000, that extraordinary circumstances justified the expenditure. As defendant contends, the fact that a relative was paying his counsel fees did not defeat his claim of indigency." *People v. Clarke*, 110 A.D.3d 1341, 1342 (N.Y. App. Div. 2013) (citations omitted).

North Carolina	"That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation—including expert witnesses—if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises." *State v. Boyd*, 418 S.E.2d 471, 475–76 (N.C. 1992).
Ohio	"We agree with the Eleventh District that a person cannot be found not indigent for purposes of obtaining expert assistance based solely on the fact that the person is represented by private counsel, although representation by retained counsel is an important factor in evaluating indigency when a request for expert assistance is made." *State v. Mansfield*, 69 N.E.3d 767, 771 (Ohio Ct. App. 2016).
South Carolina	"If Reeves [who was represented by private counsel] was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness." *Reeves v. State*, 782 S.E.2d 747, 751, 753 n.5 (S.C. Ct. App. 2015).
Tennessee	"A defendant's status as an indigent is not automatically lost because a private attorney is retained. . . . [I]t was error for the trial court to tacitly find that the Defendant was no longer indigent because his family was able to hire a private attorney to represent him. Before concluding the Defendant was no longer indigent, and therefore revoking the previously authorized funds to hire a psychiatric expert, the trial court should have held an indigency hearing." *State v. Vaughn*, 279 S.W.3d 584, 600–01 (Tenn. Crim. App. 2008) (citations omitted).
Texas	"When it became clear that applicant could not 'come up with' the remainder of the fee or additional money for medical experts, a reasonably competent attorney would have several options. . . . Given both the State's and applicant's interest in maintaining 'the accuracy of the proceeding,' the trial court undoubtedly would have permitted state-funded appointment of expert assistance under *Ake* had applicant's attorney put on

	proof of his client's present indigency." *Ex parte Briggs*, 187 S.W.3d 458, 468 (Tex. Crim. App. 2005).
Vermont	"In summary, we hold that a defendant who qualifies as a needy person under Vermont's Public Defender Act has a distinct right '[t]o be provided with the necessary services and facilities of representation as authorized or later approved by the court.' 13 V.S.A. § 5231(2). Exercise of that right cannot be conditioned on acceptance of the services of an attorney appointed under 13 V.S.A. § 5231(1)." *State v. Wool*, 648 A.2d 655, 660 (Vt. 1994).
Washington	"Indigent criminal defendants represented by private counsel are entitled to expert assistance necessary to an adequate defense under CrR 3.1(f)." *State v. Punsalan*, 133 P.3d 934, 936 (Wash. 2006).
West Virginia	"[O]nce a defendant is qualified as an indigent person, and so long as he truly remains indigent, he is entitled to public funds for expenses associated with his defense. We conclude that financial assistance provided by a third party which enables an indigent criminal defendant to have the benefit of private counsel is not relevant to the defendant's right to have expert assistance provided at public expense." *State ex rel. Rojas v. Wilkes*, 455 S.E.2d 575, 578 (W. Va. 1995).

APPENDIX B

States That Have Engaged in the *Ake* Analysis Regarding Expert Assistance Even Where the Defendant Was Not Represented by a Public Defender

State	Opinion Addressing the Right to Ancillary Services
Idaho	"The Ada County Public Defender initially represented Abdullah, but, on June 19, 2003, private counsel Kim and Mitchell (Mitch) Toryanski (collectively 'the Toryanskis') filed a notice of appearance. . . . [T]he district court did not abuse its discretion by denying Abdullah's request for funds for a forensic and DNA expert. There were no allegations that the DNA evidence was improper or tainted or that the testing methods or conclusions were flawed. The DNA evidence was mostly exculpatory. . . ." *State v. Abdullah*, 348 P.3d 1, 21, 34 (Idaho 2015) (citations omitted).
Indiana	"[T]he Firm told the trial court that it would be willing to represent Schuck on a pro bono basis, so long as the costs associated with investigating the case would be covered. . . . Having found that hiring the investigator was necessary in this case, we believe the trial court should now determine what would be the reasonable cost of such an investigation." *Schuck v. State*, 53 N.E.3d 571, 572, 576 (Ind. Ct. App. 2016).
Maine	"In the case at bar, defendant was examined by four different psychiatrists or psychologists, two appointed by the court to conduct a mental examination, and two private psychologists selected by defendant for which the court provided funds. . . . The record also reveals that the trial justice did not err in finding that defendant voluntarily waived his right to counsel." *State v. Barrett*, 577 A.2d 1167, 1169, 1171 (Me. 1990).
Oklahoma	"Fitzgerald was represented by appointed counsel until a month before trial, when he exercised his right to proceed *pro se*. . . . We determine the trial court abused its discretion in denying Fitzgerald funds for experts." *Fitzgerald v. State*, 972 P.2d 1157, 1161, 1164–65 (Okla. 1998).

Pennsylvania	"We observe, '[t]he Commonwealth is not obligated to pay for the services of an expert simply because a defendant requests one.' We agree with Appellant that merely retaining private counsel does not, in itself, establish he was not indigent. However, Appellant's failure to supply the trial court with, at a minimum, any financial information substantiating his inability to pay, is fatal to his argument." *Com. v. Konias*, 136 A.3d 1014, 1020–21 (Pa. Super. Ct. 2016) (citation omitted).
Wisconsin	"The Mitchell firm initially sought permission of the trial court to withdraw as counsel of record because of the outstanding balance due for legal fees and expenses that Dressler could not pay. . . . [T]he court has, upon a showing of a particularized need, the discretion to provide [expert] assistance to a defendant. The Mitchell firm and Dressler failed to make this necessary showing." *State ex rel. Dressler v. Circuit Court for Racine Cty., Branch 1*, 472 N.W.2d 532, 536, 540 (Wis. Ct. App. 1991).
Wyoming	"When the proceedings in this case were initiated, Lemus was represented by a public defender. Later in the proceedings, he undertook to represent himself at the pretrial proceedings and during his jury trial. . . . We conclude that the district court did not err in not ordering Lemus to have access to expert witnesses because of Lemus's failure to establish *any* foundational facts that would have justified expert testimony." *Lemus v. State*, 162 P.3d 497, 500, 507 (Wyo. 2007) (emphasis in original).

APPENDIX C

States That Have Limited the Right to Expert Assistance to Defendants Represented by a Public Defender

State	Opinion Addressing the Right to Ancillary Services
Alaska	"[W]e conclude that AS 18.85.100(a)—the statute that guarantees legal counsel for indigent criminal defendants—does not authorize public funding of clerical support, investigative services, and expert consultations for indigent criminal defendants who have waived their right to be represented by an attorney under the auspices of either the Public Defender Agency or the Office of Public Advocacy." *Crawford v. State*, 404 P.3d 204, 216 (Alaska Ct. App. 2017).
Maryland	"We agree with the Court of Special Appeals and hold that the O.P.D. is not required to pay for expert assistance or other ancillary services if the defendant is not represented by the O.P.D. (or a panel attorney assigned by the O.P.D.)." *Moore v. State*, 889 A.2d 325, 343 (Md. 2006).
Utah	"The amended provisions override this court's construction of the prior version of the statute in *State v. Parduhn*, 283 P.3d 488 (Utah 2011), by foreclosing an indigent defendant in a criminal action from retaining private counsel while requesting public defense resources from the government." *State v. Earl*, 345 P.3d 1153, 1154–55 (Utah 2015).

APPENDIX D

States With Conflicting Authority as to Whether an Indigent Defendant Has a Right to Expert Assistance Where He Is Not Represented by a Public Defender

State	Opinion Addressing the Right to Ancillary Services
Colorado	"If Defendant wants the state to pay the costs of his attorney and supporting services, his only choice is to be represented by the public defender, or in the case of a conflict, a state-appointed alternate defense counsel. *See* § 21-2-101 to -106, 6 C.R.S. (2002). While he certainly has a right to be represented by Ms. Zimmerman, the state is not obliged to pay the costs of that representation." *See People v. Cardenas*, 62 P.3d 621, 623 (Colo. 2002). *But see People v. Stroud*, 356 P.3d 903, 907–08 (Colo. Ct. App. 2014) ("As relevant here, CJD 04–04 § IV(D)(1) allows the Judicial Department to pay for a defendant's expert witness fees if: a) The defendant is indigent and proceed[s] pro se; b) The defendant is indigent and receive[s] pro bono, private counsel. . . . Here, Stroud's evidence of his indigence satisfied two of the three ways for obtaining a court-funded expert—he was indigent and represented by a private attorney who began representing him pro bono. Thus, the trial court should have provided him expert witness funding without an initial determination of indigency by the Public Defender's Office."); *see also People v. Thompson*, 413 P.3d 306, 322 (Colo. Ct. App. 2017) ("If the trial court had applied the Directive, it *could* have authorized state funds to pay for ancillary services for defendant while Mr. Lane continued to represent him.") (emphasis in original).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of this brief by United States mail with adequate postage affixed thereon and addressed to the following counsel of record:

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This 31st day of August, 2020.

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