IN THE SUPREME COURT

FOR THE STATE OF GEORGIA

RYAN ALEXANDER DUKE,
Appellant

V. Docket No. S20A1522

STATE OF GEORGIA,
Appellee

BRIEF OF THE APPELLEE

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PART ONE

STATEMENT OF THE CASE

The appellant was indicted in Irwin County Superior Court on April 12, 2017, for malice murder, felony murder, aggravated assault, burglary, and concealing a death in connection with the death Tara Faye Grinstead. (R. 134). Beginning February 23, 2017, at his first appearance, the Tifton Judicial Circuit Public Defender's office represented the appellant. (R. 11, 13). On August 29, 2018, Ashleigh Merchant and John Merchant filed their entry of appearance on behalf of the appellant. (R. 652). In addition to the motions previously filed by the Public

Defender's office, on November 13, 2018, the Merchants filed an *ex parte* motion requesting funding from Irwin County to hire Dr. Brian Cutler regarding false confessions and a motion for county funding for an investigator. (R. 675). These motions were later denied by the trial court on December 7, 2018.[1] (R. 718; 720).

Then, the appellant filed on December 14, 2018, motions for funding to be paid by the State of Georgia to hire an expert[2] regarding false confessions and an investigator. (R. 726; 732). On February 20, 2019, the trial court denied the motion for an investigator and motion for experts at State expense. (R. 849; 851).

On February 5, 2019, the appellant signed[3] another *ex parte* motion for funding by the State of Georgia to hire Dr. Christopher Tillitski for a psychological evaluation.[4] (R. 1480-83, "State's Exhibit 1"). On February 8, 2019, the appellant signed[5] another *ex parte* motion to hire Dr. Daniel Krane as an expert in "True

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[1]Although the appellant's brief claims both of these motions were denied on December 8, 2018, the clerk's record reflects the motion for investigator funding was denied on December 7, 2018. The only sealed order filed during this time period was filed on November 26 and December 7, 2019.

[2]This publicly filed motion did not designate Dr. Brian Cutler as their witness regarding false confessions. This publicly filed motion was on the filed heels of the leak of the GBI summary outlining Appellant's confession.

[3]The State is not aware of the date of filing for this motion as it was filed *ex parte* and the copies included by the appellant are not stamp-filed copies.

[4]On March 8, 2019, the appellant served upon the State a copy of a psychological report to include an opinion on false confessions, completed by Dr. Christopher J. Tillitski, based upon an interview conducted with the appellant on February 28, 2019.

[5]The State is not aware of the date of filing for this motion as it was filed *ex parte* and the copies included by the appellant are not filed copies.

Allele" and "touch" DNA. (R. 1484-89, "State's Exhibit 2"). Apparently, the appellant jointly withdrew these motions signing as of February 28, 2019. (R. 1490-91, "State's Exhibit 3"). On March 11, 2019, the trial court conducted an *ex parte* hearing with testimony from the circuit public defender, John Mobley, and Georgia Public Defender Council's (GPDC) chief legal officer, Brandon Bullard. (R. 1215-74).

Thereafter, the defense filed an *ex parte* consolidated motion for state funding for defense experts and investigator on February 28, 2019. (R. 1113-92). The trial court denied the consolidated motion for funding of experts and investigator on March 14, 2019. (R. 1210-14). The appellant requested a certificate of immediate review from the trial court on the March 14 order on March 15, 2019. The trial court did not grant a certificate of immediate review; consequently, the appellant, filed an emergency motion for appeal pursuant to Waldrip v. Head, 272 Ga. 572 (2000), as an "exceptional case." (R. 1335, 1352). This Court overruled Waldrip, finding that without a certificate of immediate review, this Court had no jurisdiction over an "exceptional case." See Duke v. State, 306 Ga. 171, 186-187 (2019).

Following the appellant's renewed motion for state funding, the trial court entered the "Order Overruling Defendant's Renewed Motion for State Funding for Defense Experts and Investigator" on January 3, 2020. (R. 1433, 1662). From this order, Appellant obtained a certificate of immediate review from the trial court and

this Court granted an interlocutory appeal regarding this order from the trial court.

PART TWO

STATEMENT OF JURISDICTION

Pursuant to GA. CONST. 1983, Art. VI, Sec. V, Para. III, the Supreme Court has jurisdiction of this case on appeal in that this case involves charges of malice murder and felony murder and, pursuant to order upon application for interlocutory appeal, this "Court is particularly concerned with the following:

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

PART THREE

STATEMENT OF FACTS

On Monday, October 24, 2005, Tara Faye Grinstead was reported missing from her Ocilla, Georgia, Irwin County home. The investigation into Tara Grinstead's disappearance would span more than eleven years. The Ocilla Police Department immediately acted and requested the assistance of the Georgia Bureau of Investigation (GBI). Tara Grinstead's home and property were secured and processed.

During the initial search, the police department recovered a latex glove just outside Grinstead's residence. In 2005, the glove was tested at the GBI crime

laboratory for the presence of DNA. The analyst determined that it contained the DNA of two distinct individuals: the victim, Tara Grinstead, and an unidentified male. (Motion Hearing Transcript September 13, 2019, hereinafter MHT. 41-42). The unidentified male DNA was CODIS eligible.

In 2015, analysts re-swabbed the glove to obtain a genetic profile of the male DNA. Due to improved technology of amplification procedures, a third, minute profile of DNA was identified on the "outer" portion of the glove. At this stage, the two primary profiles from the glove were confirmed as that of the victim, Tara Grinstead, and the same unidentified male. Id. Contemporaneous to the appellant's arrest in February of 2017, the GBI obtained the appellant's buccal swabs by means of a search warrant and submitted the appellant's swabs to the lab for DNA comparison. The appellant was a match for the primary profile of the unidentified male from the "inner" glove sample. (MHT. 44-45). The DNA profiles from the three individuals on the "outer" glove were not further analyzed at that time because it was a complex mixture.

In 2018, the GBI Crime Lab completed their validation process to utilize True Allele technology to separate complex DNA mixtures. In a meeting on October 26, 2018, the State and defense counsel agreed that the complex mixture of the "outer" glove should be further analyzed to identify the third profile. Once the GBI agreed to utilize the True Allele technology upon the complex mixture, known samples of

DNA from the appellant, Bo Dukes, and Tara Grinstead[6] were compared to the separated DNA mixtures from the "outer" glove. The results were consistent with the pre-True Allele DNA analysis as the DNA of the two primary profiles were contributed by Tara Grinstead and the appellant. A comparison to Bo Dukes' DNA and the third, minute DNA located on the "outer" glove was inconclusive. MHT. 49. From a separate testing of the glove, a GBI examiner identified the appellant's palm prints at two separate locations on the glove. (Bond Hearing Transcript, hereinafter BHT. 92.

On February 21, 2017, Bo Dukes, along with his attorney, met with GBI Agent Jason Shoudel. During this interview, Bo Dukes confessed to assisting the appellant, who was his former roommate and best friend, burn the body of Tara Grinstead in a pine grove adjacent to a large pecan orchard in Ben Hill County, Georgia. Bo Dukes told the GBI that on October 26, 2005, the appellant took him to a location in the pecan orchard. It was there, the appellant showed him the naked body of Tara Grinstead; Bo Dukes noted apparent strangulation marks on her neck. The appellant confessed to Bo Dukes that he had broken into Grinstead's home, jumped on her, and strangled her. The appellant further confessed to Dukes that he had transported Grinstead's body to the pecan orchard. Bo Dukes admitted to assisting the appellant with relocating her body from the orchard into the adjacent

[6] True Allele requires a known sample of DNA for comparison purposes.

grove. Then, both the appellant and Dukes set her body afire. Over the next several days, the two frequently returned to the orchard to add wood to the flames, until they felt confident that Grinstead's remains would never be found.

On February 22, 2017, the appellant gave a statement to GBI Agents Jason Shoudel and Madison Holland. Spontaneously and unsolicited, the appellant confessed to being solely responsible for the murder of Tara Grinstead. During the interview, the appellant confessed to having entered Grinstead's home using a type of plastic card; he claimed he entered her home to steal from her. According to the appellant, Grinstead surprised him while he was rifling through her purse, and he struck her, thereby causing her death. Although the appellant was extremely clear on the details before and after Grinstead's murder, the appellant alleged he could not clearly recall the details of the murder itself. The appellant claimed he did not recall strangling her and did not believe her body was nude when he took her to the pecan orchard. In addition to his verbal confession, the appellant wrote an inculpatory statement. The appellant's entire interview, including when he gave his written statement, was either audio or video recorded and lasted over two hours hours.

Comparatively, the statements of Bo Dukes and the appellant are nearly identical; the only major discrepancy was the manner how the appellant murdered Tara Grinstead. The appellant also gave details to agents about a phone call he made the morning of Sunday, October 23, 2005, which was the day before Grinstead was

reported missing, from a pay phone at a local convenience store. Bo Dukes never offered information about this phone call during his confession to law enforcement, and this detail was never released to the public or press. Law enforcement considered this phone call "guilty knowledge" that only the murderer would know.

Following the appellant's interview and arrest, the appellant agreed to voluntarily accompany GBI agents to the location in Ben Hill County where Bo Dukes and he incinerated the remains of Tara Grinstead. The appellant pointed out the original where he originally dumped Grinstead's body, which was the same location identified by Bo Dukes. The appellant also attempted to direct agents to the location of Grinstead's final resting place.

Although Bo Dukes and the appellant noted a general area where they burned Grinstead's body, they were not certain of the exact location. During an interview with the GBI, Randy Hudson, uncle of Bo Dukes and owner of the pecan orchard, directed the agents to a location in the pine grove where he recalled Bo Dukes had a "bonfire" years before. Hudson directed officers to the same general area identified as the cremation site by Bo Dukes and the appellant. Upon lawful search, agents recovered numerous human bone fragments.

When the Merchants filed their entry on August 29, 2018, the trial court permitted them additional time to file motions, above and beyond those previously filed by the Tifton Judicial Circuit Public Defender's Office. On November 9, 2018,

the appellant filed several motions, including a motion for the trial court to appoint an investigator or to order Irwin County to provide funds for an investigator. (R.672-695). The appellant also filed an *ex parte* motion requesting the trial court order Irwin County to provide funds to hire an expert in false confessions, Dr. Brian Cutler.

On November 29, 2018, the trial court convened to hear motions to include a Jackson-Denno hearing. Although the appellant requested a continuance of the Jackson-Denno hearing, the trial court denied the continuance. Then, the appellant orally withdrew his motion to suppress his statement.[7]

The trial court also heard arguments on the appellant's motion for an investigator at the expense of Irwin County. Following arguments by the State and the appellant, the court verbally denied this request finding the statutory scheme in

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[7]In pertinent part, the transcript of the issues related to the Jackson-Denno hearing provides:
And, Judge, we would be withdrawing the Jackson-Denno hearing and not challenging the voluntariness of the statement, then, based on that ruling.
ASSISTANT D.A. HART: Just to be clear, in addition to the voluntariness, they are indicating there's no *Miranda* violation and also that there was no hope of benefit or remote injury -- fear of remotest injury?
Later on the following exchange occurred between the trial court, Appellant's counsel, and the State:
MS. MERCHANT: Yes, Judge.
THE COURT: On all issues then?
MS. MERCHANT: Jackson-Denno issues.
THE COURT: All Jackson-Denno issues.
MS. MERCHANT: Yes, correct.
THE COURT: All right. MT-31.

Georgia no longer requires the counties to provide funding for indigent defendants; its written order was filed December 7, 2018. (R-718). The trial court issued an *ex parte* order denying the appellant's motion for funds for Brian Cutler.

On December 14, 2018, the appellant filed a second motion for the trial court to appoint an investigator or for the State to provide funds for an investigator and another *ex parte* motion for an expert regarding false confessions to be paid at the State's expense. Upon filing, the trial court suggested that appellant's counsel reach out to the director of the GPDC to inquire as to their posture regarding the matter. Due to conversations with the GPDC, the appellant's attorneys indicated their intention to amend the December 14, 2018, funding motions. Notwithstanding the Merchants' stated intentions, they failed to amend their motions. However, at a hearing on the change of venue motion on February 12, 2019, the Merchants laid blame on the trial court for their error and requested a continuance of the motion hearing. (See Exhibit 10). Resultantly, the trial court entered orders denying the funding requests matters on February 20, 2019.

On March 8, 2019, the appellant served upon the State a copy of a psychological report completed by Dr. Christopher J. Tillitski, a licensed psychologist. In his report, Dr. Tillistki stated he interviewed the appellant on February 28, 2019. Dr. Tillitski opined that the appellant's murder confession to the GBI agents on February 22, 2017 was consistent with a false confession.

Additionally, Dr. Tillistki speculated that the appellant's alleged mental state prior to the GBI interview may have contributed to a possible false confession.

As part of his Motion for Certification for Interlocutory Appeal of the trial court's Order filed on, the appellant served upon the State copies of the previously filed *ex parte* consolidated motion for state funding for defense experts and investigator and supporting memorandum. This *ex parte* motion, again requested state funding for an investigator, a false confession "expert," a psychologist for a mental health evaluation, and, additionally, an expert in the field of "touch" DNA and probabilistic genotyping software programs. The trial court issued an order denying the appellant's *ex parte* motion on March 14, 2019.

The appellant appealed this order from the trial court in the second appeal for this case. See Duke v. State, 306 Ga. 171 (2019). Upon the case's return to the trial court, the appellant filed a renewed motion for experts and investigator funding. Subsequently, the trial court entered the "Order Overruling Defendant's Renewed Motion for State Funding for Defense Experts and Investigator" on January 3, 2020. (R. 1662). From this order, the appellant obtained a certificate of immediate review from the trial court and this Court granted an interlocutory appeal regarding the trial court's January 3, 2020 order. (R. 1673, 1682).

PART FOUR

ARGUMENT AND CITATION OF AUTHORITIES

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

A. The appellant does not have a statutory right under the IDA of 2003 to state-funded experts and investigators.

The Georgia General Assembly enacted the Georgia Indigent Defense Act of 2003 (IDA) as embodied in O.C.G.A. § 17-12-1 et seq.[8] The IDA created the GPDC as an independent agency within the executive branch of state government. O.C.G.A. § 17-12-1(b). Pursuant to O.C.G.A. § 17-12-1(c),

> the council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, *to indigent persons who are entitled*[9] *to representation under this chapter.*

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[8]Although this legislation passed in 2003, it did not become effective until January 1, 2005.

[9]"Entitle" is defined as "to grant a legal right to or *qualify for*." Black's Law Dictionary, 480. Although the amicus brief, singles out this word "entitled" as dispositive of the issue, the context continues as follows "*to indigent persons who are entitled to representation under this chapter*" and is further explained through other statutes in this title.

(emphasis added). Within the IDA of 2003, an "indigent person" or "indigent defendant" is, thereafter, defined, in relevant part, as:

> A person charged with a felony who earns … 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 . . .*"

O.C.G.A. § 17-12-2(6)(C) (emphasis added). In that regard, O.C.G.A. § 17-12-5(b)(1)(emphasis added) provides,

> [t]he director shall work with and provide support services and programs for circuit public defender offices and *other attorneys representing indigent persons in criminal or juvenile cases* in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such *services* and programs *shall include, but shall not be limited to*, technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.

Clearly, the IDA intended to bundle the services of attorneys, investigators, and experts to provide the basic tools for an adequate defense for those represented by the GPDC. See also O.C.G.A. §§§ 17-12-1(c); 17-12-28(a); 17-12-29(a). Bundled services provide the investigative and ancillary support, i.e., expert services, for those represented through the circuit public defender's offices, capital defender, or appointed conflict public defender with whom the GPDC has a contractual relationship.

When interpreting statutes this Court conducts a *de novo* review and presumes,

> [t]he General Assembly meant what is said and said what it meant. To that end, we must afford the statutory text its "plain and ordinary meaning," we must view the statutory text in the context in which it appears, and must read the statutory text in its most natural and reasonable way, as the ordinary speaker of the English language would.

Plummer v. Plummer, 305 Ga. 23, 26 (2019); Williams v. State, 299 Ga. 632, 633 (2016); Deal v. Coleman, 294 Ga. 170, 172-173 (2013).

Moreover, when examining the statutes herein, the text is considered in its context and not in isolation. Plummer, 305 Ga. at 26-27. In that regard, this Court "looks to the other provisions of the same statute, the structure and history of the whole statute, and the other law – constitutional, statutory, and common law alike – that forms the legal background of the statutory provision in question." Id.

From the plain language of the statutes, the IDA of 2003 clearly authorizes the director and the GPDC to provide ancillary services, such as investigators and expert services, for those represented by the GPDC, capital defenders, and conflict appointed counsel with whom the GPDC has a contractual relationship. In that regard, Brandon Bullard, chief legal officer for the GPDC, testified at the *ex parte* hearing that he is responsible for requests for expert assistance for cases represented by the public defender's offices. (R.1218-19). When in need of expert assistance, the circuit public defender offices submit standardized forms with the GPDC internal

case number and corresponding information, and Bullard decides to approve them. (R.1219-20;1260).

Bullard testified that their funding for experts is provided through their negotiations with the counties that determine operating budgets for the individual Circuit Public Defender's offices. (R.1221-22; 1259). He further provided that the GPDC decision to hire or fund experts within the agency is not reviewable because there is no statutory scheme. (R.1241-42). Thus, the question this Court has asked is whether an indigent defendant represented by private, pro bono counsel has a statutory right to ancillary services to include investigators and experts.

I. **The appellant does not qualify as indigent under the IDA because of the evidence of his "other resources."**

Although the appellant's and amicus' briefs assert the appellant's indigent status as an established fact and finding by the trial court, the order from the trial court on appeal does not make this neither a fact nor a finding. (R-1662).[10] The IDA defines an "indigent person" or "indigent defendant" as:

[10] Following *ex parte* hearings, a prior order from the trial court made a finding regarding indigence and his need for experts "compelling;" however, after testimony from the GPDC and a subsequent hearing *including the State of Georgia* wherein the court heard evidence on the motion, the trial court did not making the finding that the appellant was indigent. (R. 1662).

> A person charged with a felony who earns ... less than 150 percent of the federal poverty guidelines *unless there is evidence that the person has other resources*[11] *that might reasonably be used to employ a lawyer without undue hardship on the person, his or her dependents . . .*

O.C.G.A. §17-12-2(6)(C) (emphasis added).[12]

Additionally, O.C.G.A. § 17-12-24(a) entitled as "[f]inancial eligibility for indigent defense services representation; operation of public defender's office" provides as follows,

> [t]he circuit public defender, any other person or entity providing indigent defense services, or the system established pursuant to Code Section 17-8-20 *shall determine if a person* or juvenile arrested, detained, or charged in any manner *is an indigent person entitled to representation under this chapter.*

(emphasis added). The State does not dispute that that appellant has been charged with a felony; further, there is currently no evidence in the record the appellant does not meet the federal poverty guidelines. However, the State does contend that the appellant has "*other resources . . . reasonably . . . used to employ a lawyer.*"

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[11] "[O]ther resources" is not defined by the statute.

[12] Justice Goldberg defined indigence as follows, "[i]ndigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. An accused must be deemed indigent when at any stage of the proceedings his lack of means... substantially inhibits or prevents the proper assertion of a particular right or a claim of right. Indigence must be defined with reference to the particular right asserted." Hardy v. United States, 375 U.S. 277, 289 (1964).

a. "Other resources" evidenced by employed private counsel.

From the appellant's first appearance in February of 2017 until August 28, 2018, he was represented by the Tifton Public Defender's Office (GPDC), which employs six full-time attorneys and three full-time investigators. Prior to being relieved of their representation on September 13, 2018, three of the six attorneys filed entries of appearance on behalf of the appellant. (R. 13, 440, 669, 670, 1262).[13] At an *ex parte* hearing, John Mobley, the Tifton Circuit Public Defender, testified that his office determines whether to provide services to a defendant upon application based upon their indigent status. (R. 1256-57). Initially, at the time of his arrest and first appearance hearing, Mobley determined the appellant was indigent. (R. 1265-66). Then, present counsel assumed representation of the appellant. Present counsel reapplied on behalf of the appellant to receive services of the public defender. Resultantly, both the director for GPDC, Jimmonique Rogers, and Tifton Public Defender's Office denied the application for representation of the appellant due to his choice of employment of private counsel. (R. 1215-17; 1274). In the GPDC letter[14], the director provided, "[the funds appropriated to defray those [expert] costs cannot, however, be used for the benefit of clients who fall outside of the Act's definition of indigency." (R. 1215-17).

Furthermore, the GPDC letter added that pursuant to O.C.G.A. §17-2-2(6)(A) the retention of private counsel was evidence of the appellant's "other resources."

(R. 1215-17). Rogers stated these "changed circumstances" now preclude the appellant from GPDC representation and the GPDC would not intrude upon his constitutional right to choose his own counsel. (R. 1215-17). Moreover, the director explained that the GPDC could not evaluate private attorneys' contractual relationship with their clients/the appellant to determine the pro bono nature of the representation or necessity of support through funding. (R. 1215-17). Thus, Rogers determined that the appellant was not indigent nor did he fall within the persons to receive funding or resources from the GPDC under the IDA. (R. 1215-18).

At the *ex parte* hearing, Bullard testified that the appellant was not indigent under the IDA because "he has demonstrated that he has the resources to retain private counsel; and even if he was originally determined to be indigent, [private counsels' representation] in the case changes those circumstances." (R. 1226-27). He further explained, "[t]he presence of counsel that's not appointed by some arm of the [GPDC] or public defender's office is going to take them out of the ambient of the [IDA]." (R. 1234). Likewise, Mobley reiterated in his testimony that the appellant's "changed circumstances" in retaining private counsel precludes his

[13] Three different attorneys (John Mobley, Burt Baker and Mike Gowen) with the Tifton Public Defender's Office made entry of appearances on the appellant's behalf (one of which argued before this Court in the first appeal, WXIA-TV v. State, 303 Ga. 428 (2018)).

[14] The appellant introduced this letter from the GPDC as an exhibit in the *ex parte* hearing. (R. 1215-17, 1221-22).

office from representation under the statute to include joint representation with privately employed counsel. (R. 1267-68). In other words, the "free gift" of private pro bono representation was determined to be a valuable "other resource."

Therefore, the GPDC and the Tifton Public Defender's Office (GPDC) determined the appellant was not indigent based upon his acquired "other resources," as evidenced by his current representation by three attorneys, two of whom jointly operate a private law firm and the other a private attorney employed by a prestigious law firm with an entire section dedicated to pro bono work.[15] The trial court found the appellant's indigency determination "debatable," and the GPDC statutory determination of qualification "should not be disturbed by the judiciary" unless the same involves some constitutional infringement. (R. 1662).

b. *Case law regarding indigent status*

In Roberson v. State, 300 Ga. 632 (2017), this Court held that Roberson, who was represented by the Public Defender's office at trial, was not entitled to transcripts at public expense for her appeal because of the trial court's determination of indigency under the "costs statute" (O.C.G.A. § 9-15-2(a)). Importantly, this Court also held that determination of indigency by the trial court was not subject to appellate review. Id. at 633. Roberson argued her prior determination of indigency by the GPDC under the IDA of 2003 was binding upon the trial court. Id. at 634.

[15] See https://www.troutman.com/pro-bono/index.html

However, this Court stated, "[t]he IDA sets out a definition for "indigent person" for the purposes of securing representation from a public defender, and makes the circuit public defender responsible for determining who meets that definition." Id.; see also O.C.G.A. § 17-12-24(a). In its holding, this Court stated,

> the IDA and the costs statute each require a determination of indigence, but the two laws are directed at determining indigence for different purposes – representation and costs, respectively. *Whether that is the best way to allocate determinations of indigence is not for us to consider or decide.*
>
> ....
>
> neither the costs statute nor the IDA reveals any intent to make *the circuit public defender's determination of indigence* for the purpose of representation similarly conclusive for the purpose of determining the ability to pay costs. ***Simply put, the costs statute controls one facet of the indigence inquiry, and the IDA controls the other.***

Id. at 634-635. (italics and emphasis added).

In the case at bar, the circuit public defender determined that the appellant's private representation removed the appellant from representation by the public defender in that the appellant was no longer indigent. The IDA provided no mechanism for the determination to be reviewed by the trial court; additionally, the IDA contained no express provision regarding appellate review of the circuit public defender's indigency determination.

In Rabon v. State, 301 Ga. 200, 203-205 (2017), this Court reviewed the trial court's denial of Rabon's request for indigent status and public funds

for investigators and experts when Rabon was represented by hired counsel. Rabon held a denial of indigent status was within the sound discretion of the trial court and not subject to appellate review.[16] Id. (citing O.C.G.A. § 9-15-2(a)(2)).

Further, this Court affirmed the trial court's denial of public funds for experts and investigators, for an indigent defendant because his family paid for private "other sources" representation to include two experts. Id. This Court held that the trial court did not abuse its discretion refusing to provide him funding for an investigator and experts. Id. In its findings, this Court did not suggest the source for the funding of those experts and investigators. But see O.C.G.A. § 15-6-24(b) ("any costs incurred in providing defense services pursuant to [the IDA], for persons accused of crimes shall not be considered contingent expenses of the superior court for purposes of this Code section.").[17]

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[16] The analysis for the "costs statute" for indigence is left for the trial court while indigence for representation is for the GPDC. See Roberson, 300 Ga. at 634.

[17] In a similar holding, the Court of Appeals in Bynum v. State, 289 Ga. App. 636 (2008), held that the trial court lacked authority to grant Bynum's *pro se* motion to appoint appellate counsel in that the IDA had removed that responsibility from the trial court and now statutorily is the authority of the GPDC. But see Odum v. State, 283 Ga. App. 291, 292 (2007)(holding trial court had ability to determine conflict of interest upon motion to withdraw by public defender based upon USCR 4.3 and was not divested of authority under the IDA's provisions for the circuit public defenders to determine conflicts of interest).

c. The "other resources" of the appellant's "story"

Additionally, the State contends the appellant's "other resources" include his "story" as a means to employ attorneys. The appellant's "story" has drawn national and international media attention. His codefendant's trial was livestreamed by multiple media outlets, and his "story" has inspired two seasons of the Up and Vanished podcast[18] that has outlined his "story" by an "independent journalist" and his own counsel. Prior her formal representation of the appellant, Ashleigh Merchant was a guest and legal commentator on the podcast; she has continued to contribute to the podcast since joining the appellant's legal team. Notably, the appellant's attorneys announced their representation of the appellant during a television special joining the podcast with the Oxygen Network in which the appellant appeared on the telephone.

Thereafter, counsel has appeared on a Dateline special regarding the appellant's "story" as recently as July of 2020 and has made multiple other media appearances on his behalf. Hundreds of south Georgia murders go unnoticed by the media and pro bono attorneys, yet these indigent defendants are dutifully, adequately and efficiently represented by the GPDC. Without the media attention and a podcast dedicated to the appellant's "story," this appellant would undoubtedly still be represented by the GPDC. While the appellant may not have paid his present

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[18] https://season1.upandvanished.com and https://season2.upandvanished.com

attorneys with money[19], the attorneys are still profiting and benefiting from their employment through notoriety, publicity, and, perhaps, tax deductions. Regardless, this appellant has utilized his "story" as "other resources" to secure the attorneys of his choosing. The appellant opted to exercise his constitutional right to the representation of his choosing. Based upon the foregoing, this appellant's arguments fail.

II. The IDA does not provide a statutory mechanism for ancillary services for pro bono or privately employed/retained attorneys.

Even if, assuming *arguendo*, the appellant does still qualify as indigent, the IDA does not contemplate payment for ancillary services, such as investigators and expert services, for indigent defendants opting to secure private attorneys[20]. O.C.G.A. § 17-12-5(b)(1) provides,

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[19] In the transcript hearing, counsel states, "[a]ssuming for argument's sake that all three of us [appellant's current attorneys] have not received a cent in legal fees and we are truly pro bono counsel, is there any functional difference between what we're doing and what the public defender does?" (R. 1235).

[20] "Pro bono" is defined as "being or involving uncompensated legal services performed especially for the public good." Black's Law Dictionary, 1039 (9th Ed. West 2005). "Retainer" is defined as: (1) *"a client's authorization for a lawyer to act in a case;"* (2) "a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter;" (3) "a lump-sum fee paid by the client to engage a lawyer at the outset of a matter;" and (4) "an advance payment of fees for work that the lawyer will perform in the future." Black's Law Dictionary, 1121 (9th Ed. West 2005)(emphasis added).

> the director shall work with and provide support services and programs for circuit public defender offices and *other attorneys representing indigent persons in criminal or juvenile cases* in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such *services* and programs *shall include, but shall not be limited to,* technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.

(emphasis added).

Further O.C.G.A. § 17-12-5(b)(3) states, "the director may hire and supervise such staff employees and may contract with outside consultants on behalf of the office as may be necessary to provide the services contemplated by this chapter." The IDA states that "other attorneys representing indigent persons in criminal cases" can be provided support services to legal representation. The term "other attorneys" is not defined by O.C.G.A. § 17-2-2.

However, the IDA in O.C.G.A. § 17-12-1, et seq. contemplates "other attorneys" as set forth in O.C.G.A. § 17-12-12 as the Georgia capital defenders and conflict appointed counsel. <u>See</u> O.C.G.A. § 17-12-12(d). Additionally, O.C.G.A. § 17-12-12.1 defines "other attorneys" as appoint[ed] counsel" to represent indigent defendants wherein the capital defender is unable to represent due to a conflict of interest. In those circumstances, the statute permits a contractual agreement with the

appointed counsel for payment. O.C.G.A. § 17-12-12.1. Within those parameters, the GPDC established expense guidelines in death penalty cases, which included expert witness and investigative fees. O.C.G.A. § 17-12-12.1(c). Additionally, the statute provides that a county may supplement appointed counsel's compensation in death penalty cases; nowhere else does the IDA require a county to supplement the representation of specific indigent defendants. O.C.G.A. § 17-12-12.1(d).

For cases not involving the death penalty, the IDA also provides a mechanism for "other attorneys" to represent indigent defendants and receive services where the circuit public defender has a conflict, thereby ***having a contractual relationship with the council to represent indigent defendants***. O.C.G.A. § 17-12-22(a) and (b)(emphasis added). Likewise, O.C.G.A. § 17-12-24(c) provides "other attorneys" as those "including cases assigned to other counsel on basis of conflict of interest."

Thus, the IDA does not include any provision for pro bono or private attorneys to receive state-funded, ancillary services unless they are a conflict appointed counsel having a contractual relationship with the GPDC. Further, the IDA provides no statutory mechanism for him to apply for funding or for the trial court to order the GPDC or the counties to pay for ancillary services to private representation. The appellant has failed to identify any provision of any statute, which supports his position that the appellant should receive state-funded ancillary services when represented by private counsel.

In the GPDC letter introduced at the *ex parte* hearing, the director explained that the GPDC has "no process for reviewing a request for expert services from private counsel, and its decision contrary to [the appellant's] interest would not be reviewable on appeal in the normal course of a criminal prosecution." (R. 1215-17). Rogers stated as follows, "[t]he Council will not – indeed cannot – disburse any funds in response to your request. The [IDA of 2003], which establishes and governs the [GPDC], does not authorize the Council to spend its appropriations in the manner or for the purpose you have requested." (R. 1215-17).

The GPDC concluded, as the State, there is no such available statutory mechanism. At the *ex parte* hearing, Bullard also testified there was no such mechanism for the GPDC to engage in a contractual relationship with a private attorney *after* the private attorney has already assumed representation in that case. (R. 1222-23). Bullard further explained that the IDA of 2003 authorized the GPDC to contract with other attorneys to provide services in a conflict case to contracted attorneys. (R. 1222-23). The GPDC had no such contractual relationship with the appellant's attorneys because they were not in a circuit public defender's office or an independent contractor as a conflict public defender in the Tifton Judicial Circuit. (R. 1222-23). He stated that the GPDC was not statutorily authorized to support private counsel as the General Assembly did not appropriate funding to them for that purpose. (R. 1222-23). Bullard testified, "[t]here's no mechanism for providing

expert funding for private counsel." (R. 1223). Finally, Bullard testified that "sufficient funds have never been appropriated" to provide ancillary services to pro bono or private counsel; expert funds come through their negotiations with counties that provide operating budgets. (R. 1221-22).

In Ga. Public Defender Stds. Council v. State, 284 Ga. App. 660, 662-665 (2007), when interpreting the IDA of 2003, the Court of Appeals stated that, although the act created the uniform state-wide system of public defender offices, it did not provide for its funding. Like the Rabon case, *supra*, the Court of Appeals mandated the counties pay for transcripts for indigent defendants represented by the public defender's offices because the legislature authorized the payment of that cost through other statutes (O.C.G.A. §§§15-6-24; 48-5-220(5); 15-6-79) other than the IDA. Ga. Pub. Def. Stds. Council, 284 Ga. App. at 664.

Although counties argued the IDA of 2003 made the GPDC responsible for indigent legal representation and all costs associated with that representation, the Court of Appeals held otherwise. The Court of Appeals reasoned that since these statutes, which placed the responsibilities for costs upon the counties, were in place at the time of the creation of the IDA of 2003, the General Assembly knew of those existing laws yet did not repeal them. Id. at 664-665. As such, the General Assembly, by implication, intended for these types of costs to remain with the counties. The Court of Appeals further outlined, "the legislature has not authorized

the Council to pay for the costs of transcripts." Id. at 665. By analogy, the legislature has not authorized the GPDC to pay ancillary services to private counsel, who are not under contract with them, and thus the judiciary is not permitted to read that requirement into the statute.

The Ga. Const. of 1983, Art. III, Sec. VI, Par. I provides,

> ***[t]he General Assembly shall have the power to make all laws*** not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.

(emphasis added). The Georgia General Assembly enacted the IDA of 2003 for the affirmative protection of the Constitutional rights of indigent defendants and bundled the resources of appointed counsel, investigators, and expert services. To hold that pro bono attorneys are included in the IDA is to judicially create and fund a parallel pro bono public defender system.[21] If pro bono representation is read into the statute by this Court, nothing precludes a private attorney from also obtaining state funding for investigators, experts, and ancillary services as well. Certainly, the

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[21]The State also notes the amicus curiae brief written by the Southern Center of Human Right purports to "provide representation to many indigent criminal defendants at no cost, and it also supports private attorneys who volunteer to represent indigent criminal defendants pro bono." They have 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." The State contends these types of organizations should be the sources for the appellant to fund his experts.

legislature did not intend or contemplate parallel or additional public defender systems. If this Court expands the language and coverage of the IDA, it would broaden the State budget beyond the legislative intent. It is the duty of the legislature to decide, at least knowingly, the impact and consequences to the State's budget. A decision by this Court to mandate the GPDC funding for third parties would amount to "blatant judicial usurpation of the legislative function, and cannot be considered to be the legitimate exercise of inherent judicial authority." See Waldrip v. Head, 272 Ga. 572 (2000), overruled by, Duke v. State, 306 Ga. 171 (2019)(Carley dissent "[n]o court is at liberty 'to ignore jurisdictional and procedural statutes and rules, and to change its role from disinterested decision-maker to appellate advocate reviewing a trial record for error."); see Collier v. State, 307 Ga. 363, 381 (2019)(special concurrence by Justice Peterson where he states, "where the federal or state constitution requires a particular procedural vehicle or safeguard, the cost of satisfying that requirement is of little moment. But things are different when we create a rule not required by constitution or statute that has the effect of expanding the State's obligation to provide counsel. When we do that, we are making public policy. But that's not how public policy is supposed to be made; that's what the General Assembly is for.").

As Justice Nahmias provided in his concurrence in Smith v. State, 290 Ga. 768, 775 (2012)(joined by Carley and Hines), "[u]nder our Constitution and legal

tradition, judges are supposed to apply the law enacted by the legislature based on what a statute says, not based on whether the judges believe it 'makes sense' to apply the statute to the case at hand or instead feel it would be 'unfair' to do so." Thus, regardless of any perceived "defect" or "limitations" in the statute omitting pro bono or the legislature's "failure" to include it, this Court is bound by otherwise legal legislation.

Our General Assembly developed a single source approach to indigent defense resources, which includes representation by the GPDC, capital defender, or an appointed conflict attorney, who maintains a contractual relationship with the GPDC. Nowhere does the IDA (or any other statute) provide a mechanism by which pro bono, private attorneys or retained attorneys may receive support and ancillary services from the GPDC, the State, or local counties, which is precisely what the appellant has requested. Statutorily, an indigent defendant who opts out of public representation has also opted out of public defense resources for ancillary services. There is no ground for establishing a new constitutional right to unbounded defense resources for those who agree to represent indigent defendants outside of the IDA of 2003.

The State is compelled to note that the attorneys have already provided the State with an expert report regarding false confessions[22] and mental health. The

[22] On March 8, 2019, the appellant served upon the State a copy of a psychological

State presumes someone paid for this expert evaluation and report. If pro bono or retained attorneys are read into the statute, at what stage do the resources of pro bono attorneys and their respective firms become part of the evaluation when they contractually agree to represent an indigent defendant? Inherent in undertaking any representation, pro bono or otherwise, is the analysis of the cost of litigation, which would include costs for ancillary services. The appellant's current attorneys have represented to the trial court an inability to adequately represent the appellant without a state-funded investigator. Is this not an analysis the attorneys should have considered prior to accepting the appellant's case? Do we want pro bono attorneys taking cases they admit they are not adequately prepared to handle without funds provided by the State or the counties? Further, is this evaluation only appropriate when the pro bono attorney is a solo practitioner with a single administrative assistant? Does the analysis change for a private attorney employed by a large firm with undetermined resources, such as Troutman Pepper? Does the GPDC undertake this determination to subsidize pro bono or private representation, or is it left to the

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report completed by Dr. Christopher J. Tillitski, a licensed psychologist. From the report, Dr. Tillistki interviewed the Appellant on February 28, 2019, wherein he opines on the Appellant's mental state as well as the probability that the Appellant gave a false confession on February 22, 2019. The State further notes According to current case law in the State of Georgia, false confessions do not arise to the level of admissible evidence and prior to admission of any expert and testimony in this regard another *Harper* hearing would be required.

trial court? Is the decision reviewable upon appeal? None of these questions can be answered by the IDA of 2003. These are all legislative questions.

Currently, the IDA of 2003 permits the GPDC to determine that an indigent defendant with outside representation does not qualify for representation or ancillary services. Unless the constitution is violated, this Court currently has no authority to undo that determination. See Duke v. State, 306 Ga. 171, 178 (quoting Scruggs v. State, 261 Ga. at 588) (in holding trial courts have unfettered discretion to grant certificate of immediate review, this Court provided, "there are no clearly delineated specifications or ascertainable standards [of that exercise of discretion and authority] for appellate review."). In repealing the prior multicounty public defender system, the General Assembly vested the determination of indigency, the representation of indigent defendants, the appointment of conflict counsel, and the approval of ancillary services firmly with the GPDC.[23] Accordingly, this Court should find the trial court did not abuse its discretion in finding the IDA does not provide a statutory mechanism for the GPDC to pay for ancillary services for private attorneys.

B. The IDA of 2003 provides the protections required by the U.S. Constitution and Georgia Constitution.

The Sixth Amendment to the U.S. Constitution guarantees the appellant a

[23]The Georgia Public Defender Standards Council shall be an independent agency within the executive branch of state government. O.C.G.A. §17-12-1(b).

right to the effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). Likewise, the Georgia Constitution does the same to provide counsel at public expense. Art. I, Sec. I, Par. XIV of the Ga. Const. of 1983; Walker v. State, 194 Ga. 727 (1942). However, the appellant's constitutional right to select and choose their own counsel is qualified and not without limitation and consequences. Wheat v. U.S., 486 U.S. 153, 159 (1988)(representation may not occur where: not member of Bar for pending case; attorney declines to represent; or conflicts exist between the attorney and client for representation). In U.S. v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006), the Supreme Court determined that an indigent defendant is only guaranteed a qualified attorney, whom he can afford to hire or will represent him though he cannot afford them; however, *he cannot insist on representation he cannot afford*. Id. at 159.

> Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will be inexorably represented by the lawyer whom he prefers.

Wheat, 486 U.S. at 159.

The Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution gives protections to the indigent defendant for a fair opportunity to have materials whereby he can build and present an effective

defense. Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985)[24]; Britt v. North Carolina, 404 U.S. 226 (1971). Nevertheless, these "basic tools of an adequate defense" do not require the State to provide everything that private attorneys can provide. Ake, 470 U.S. at 77; Ross v. Moffit, 417 U.S. 600 (1974)[25]. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages" nor does it require the State to "equalize economic conditions." Ross, 417 U.S. at 611 (inner citations omitted).

Thus, even constitutionally guaranteed rights are not without their limitations, qualifications, and consequences. In that regard, the indigent defendant may be entitled to a *competent* expert addressing a significant factor at trial (such as a psychiatrist for a sanity determination) but not to demand an expert of his own selection for any foreseeable defense. Ake, 470 U.S. at 83. Ake explicitly left to the States the mechanism by which to implement the ancillary services, which are required to protect an indigent defendant's constitutional rights. Id.

The amicus brief incorrectly and misleadingly argues the trial court's denial

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[24]The specific holding in Ake is as follows, "we hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Ake, 470 U.S. at 74.

[25] The Supreme Court held the Fourteenth Amendment left decisions to the States to implement appellate rights in discretionary appeals and North Carolina's decision not to provide counsel for a discretionary appeal did not violate the constitution. Ross, 417 at 617.

added an additional requirement to Ake[26] that a defendant be represented by the public defender. Ake plainly gave each state the authority to decide how to satisfy the indigent defendant's right to these "basic tools." Georgia chose to implement these constitutional rights within the confines of the IDA of 2003. The amicus brief even acknowledges Georgia has a "dedicated source of funding for expert assistance" provided within the IDA, which passes constitutional muster.

I. Ake Constitutional Analysis

In that vein, the Supreme Court provided a three-part test to determine "fundamental fairness" in providing the "basic tools" to present a defense: (1) "the private interest that will be affected by the action of the State;" (2) "the governmental interest that will be affected if the safeguard is to be provided;" and, (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." Ake, 470 U.S. at 77.

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

Obviously, the private interest in the fairness of a criminal proceeding where the appellant faces a life sentence is paramount. Likewise, the State concedes the appellant has paramount personal interest invested as the State possesses the burden

[26] The Ake opinion does not state whether the attorney representing him was a state appointed attorney or private counsel in this death penalty case.

to prove his guilt. This factor would weigh in favor of the appellant, if he is determined to be indigent and entitled to ancillary services at the State's expense.

b. *What governmental interest that will be affected if the safeguard is to be provided?*

Here, the State asserts that the Georgia General Assembly has bundled its services to include attorney representation, investigators, and expert services for indigent defendants, who are represented by the GPDC pursuant to the IDA of 2003. Adding ancillary services to those defendants who, as their constitutional right, choose to employ by other means a pro bono or private attorney, outside the services of the GPDC, poses a significant and seemingly exponential financial burden upon the State. It mean that indigent defendants could hire private counsel from other sources of funding, i.e., parents, grandparents, GoFundMe benefactors, selling their "story," and exclusive media interviews, and then obtain ancillary services at state expense. Moreover, this finding would also not preclude one, at the beginning of his criminal proceedings, hiring private counsel and, when funds are depleted for representation, thereafter claiming indigency and procuring State funds to complete the trial and appellate representation. As in Ake, the State possesses the same interest in fundamental fairness of the proceedings and accurate dispositions of cases. Id. The State also maintains an interest in getting the most out of their money. Consequently, the State of Georgia has provided indigent defense representation by

State paid public defenders through the IDA of 20013 and the GPDC.[27] The State governs the salaries of those state-paid attorneys, just as it does the salaries of the state-paid prosecutors. Simultaneously, under the 14th Amendment, Georgia provides funding for investigative services and experts through the IDA of 2003. The GPDC is responsible for its own budget, which includes the salaries of investigators and the costs for necessary expert services. As previously discussed *supra*, the IDA does not, however, provide for funding for those requested ancillary services when the indigent defendant is not represented by the GPDC or an appointed conflict attorney. Nor does the IDA provide a process for pro bono or private counsel to receive additional resources for representation. Any decision to judicially include such mechanism would further deplete the resources of the GPDC, which is necessary to adequately represent other indigent defendants around the state, thus impeding upon the constitutional rights of those other indigent defendants.

[27] Under prior law with the multicounty public defender system, now repealed with the enactment of the IDA of 2003, trial courts had the statutory authority to appoint the public defender or to designate other counsel. See O.C.G.A. § 17-12-60(a) and O.C.G.A. § 17-12-97(a); Roberts v. State, 263 Ga. 764 (1994)(holding trial court had authority to appoint counsel to represent indigent defendant under statute even when pro bono counsel made request). Now, pursuant to the IDA of 2003, the GPDC determines who qualifies for their services and their appointment of counsel and not the trial court.

c. *What is the probable value of the additional or substitute procedural safeguards that are sought, and what is the risk of an erroneous deprivation of the affected interest if those safeguards are not provided?*

Here, the question turns to the value of the ancillary services the appellant seeks and to consider the risk of error if those services are not offered. First, the appellant's brief references the trial court's findings following *ex parte* hearings for the need of the experts from a prior order not at issue before the court. Second, following the motion hearing that included the State, no such finding has been made. Unlike Ake and Bright[28], insanity and competency are not issues in the present case. If they were, the appellant could request an evaluation at the State's expense pursuant to O.C.G.A. § 17-7-130 and 17-7-131. The Ake Court understood "a defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not." Id. at 82-83. Thus, the risk of error and probable value are less when the defendant's mental condition is not in question. Id.

Apparently, the appellant seeks a psychiatrist in the present case to opine

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[28] In Bright v. State, 265 Ga. 265 (1995), this Court held that death penalty defendant with defense of insanity was not entitled to psychiatrist, neurologist or toxicologist for that purpose in the guilt phase; however, he was entitled to those

about the confession he gave and the effects of illegal drugs and medications he now claims he imbibed prior to making said confession.[29] Notably, the appellant has already been evaluated by Dr. Tillitski, the psychologist for which he still seeks funding; presumably, these services were obtained by other funding or "other resources." In light of his stipulations at the *Jackson-Denno* hearing, the appellant has not demonstrated the need for this expert as a "significant trial factor."

The appellant seeks further funding for a designated false confession expert; however, testimony regarding false confessions has previously been held inadmissible by this Court.[30] In Tatum v. State, 259 Ga. 284, 286 (1989), this Court affirmed the trial court's denial of an indigent defendant's request for "hangfire" gun expert wherein request for funding must "create a reasonable probability that expert assistance is necessary to the defense and that without such assistance the defendant's trial would be fundamentally unfair." The *Tatum* Court reviewed the trial court's denial of those funds for expert assistance under an abuse of discretion

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experts or funding for experts that court chose in the sentencing phase because different factors considered pursuant to Ake. In Brooks v. State, 259 Ga. 562, 565-566 (1989), a death penalty case, this Court determined a procedure for the application of those funds which accounts for the interest of the State and the defendant, and "the burden and benefit of the procedural safeguards chosen."

[29] The State notes the appellant waived his *Jackson-Denno* hearing in that the statement was freely and voluntarily made and made without threat and undue coercion and without hope of benefit following his *Miranda* Rights. (MT. 31).

[30] See Woodall v. State, 294 Ga. 624, 629-630 (2014); Wright v. State, 285 Ga. 428 (2009); Lyons v. State, 282 Ga. 588 (2007), overruled on other grounds, by Garza v. State, 284 Ga. 696 (2008); Riley v. State, 278 Ga. 677, 681-683 (2004).

standard. Id. at 286. See Edwards v. State, 282 Ga. 359, 260 (2007) (holding pre-IDA trial court's denial for expert funds for expert in eyewitness identification was not abuse of discretion where eyewitness identification was not his sole defense); McNeal v. State, 263 Ga. 397, 398 (1993)(holding pre-IDA trial court's authorization of expert in forensic pathology for less funds than requested was not abuse of discretion).

Third, the appellant seeks a True Allele DNA expert. In 2005, the GBI Crime Lab retrieved DNA from the glove found at the murder scene. The process used to retrieve and analyze this DNA has been held admissible and scientifically reliable forensics for over a decade. In 2005, the GBI was able to identify one of the DNA profiles from the glove as having been contributed by Tara Grinstead. If the State had access to Appellant's DNA in 2005, the exact same process could have been used to identify him as the unknown male contributor. In 2017 when the appellant's DNA was obtained, the forensic biologists did, in fact, identify him as the formerly unknown male contributor. These analyses did not involve True Allele in any manner. While the appellant's attorneys have repeatedly referred to these analyses as novel science both in their filings and in the media, the facts clearly establish the process used to obtain the appellant's DNA from the glove was in use in 2005; the State simply lacked a known sample to which it could be compared.

A third, minute DNA profile was not found on the glove until 2015 when the it was re-swabbed and analyzed using more sensitive equipment. In late 2018, the True Allele analysis was performed at the request of the appellant's attorney, specifically to identify the third contributor identified in 2015. The only evidence the True Allele analysis provided was confirmation the appellant's and Tara Grinstead's DNA were part of the complex mixture identified in 2015. The third unknown contributor[31] of DNA has not been identified; comparison of Bo Dukes' DNA to the third profile failed to exclude him as the contributor of the minute amount of DNA found on the outside of the glove.

During their numerous media appearances, the appellant's attorneys have repeatedly advanced their theory of the case; they have asserted the appellant's confession was false and claim Bo Dukes, not Ryan Duke, murdered Tara Grinstead. With the True Allele evidence, the appellant can argue by inference that Bo Dukes' DNA is on the glove found at the murder scene, thus supporting their theory of the case. Funding an expert to attack the True Allele computer system would harm their own version of events. See Williams v. State, 284 Ga. 849, 850 (2009) (holding counsel not ineffective for failure to seek funding for and produce DNA expert at trial especially where DNA not the sole link for the defendant to the crime at issue.);

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[31] Although persons have been excluded as the unknown contributor, Bo Dukes cannot be excluded as the contributor.

Thornton v. State, 255 Ga. 434, 435 (1986) (holding in interlocutory appeal that trial court erred by denying funding for dental impression expert where sole link of defendant to crime). The request for a DNA True Allele expert provides no "significant trial factor" requiring funding; the defense gains nothing with additional, separate DNA experts.

The Appellant's attorneys purport not to have an investigator at their disposal. Although the State does not dispute an investigator could be useful to the appellant's defense team, or to any attorney on any case, useful or desiring is not the standard.[32] As argued previously, the IDA of 2003 does not statutorily authorize this situation; nor does the Constitution require an investigator as a right. See Ross v. Moffitt, 417 U.S. 600, 612 (1974) ("The fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.").

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[32] The U.S. Supreme Court has previously held a trial court did not deprive a capital defendant of his Due Process rights by denying his request for a criminal investigator, a fingerprint expert, and a ballistics expert when the defendant offered "little more than undeveloped assertions that the requested assistance would be beneficial." Caldwell v. Mississippi, 472 U.S. 320, footnote 1 (1985).

The appellant asserts his conscious, constitutional selection to employ his present attorneys, instead of utilizing the bundled services of three attorneys, multiple investigators, and state-paid experts, presented him an "unconscionable" or "untenable" constitutional dilemma. Although he couches this as "intolerable" and a "Hobson's choice," the constitution does not prohibit requiring the appellant to choose. "Defendants in criminal cases will sometimes have to make hard choices concerning constitutional rights." McGautha v. California, 402 U.S. 183, 213 (1971), vacated in part on other grounds, Crampton v. Ohio, 408 U.S. 941 (1972). Therein, the proper question for the courts is "whether the election impairs to an appreciable extent any of the policies behind the rights involved." Id. The appellant cannot have his cake and eat it too; he must make choices and live with the consequences. The constitution does not require giving everything the appellant wants but only what the appellant needs under the constitution. Here, under the 6th Amendment, the appellant had the choice to select the high-profile media attorneys without state-funded experts over the bundled services provided by the GPDC. Whether the appellant chose poorly with his current counsel is not for this Court to decide.

What is important is that the constitutional requirements of Gideon and Ake were provided to the appellant under the IDA. The State of Georgia can afford him his constitutional rights and protections; however, the State cannot force him to

utilize them. A defendant can voluntarily waive his constitutional rights as he did here by his own choice (as defendants do routinely in court), as long as those services were made available to him. The State of Georgia made it available to him, and he even utilized them for an appreciable period of time, which included hearings and even an appeal before this Court; however, he later voluntarily opted for door number two.

To be clear, the appellant's choice neither impaired his constitutional rights to an appreciable extent nor the policies behind them. Both choices provided him the basic tools to build and present an effective defense as required by the constitution. Due Process is not violated when an indigent defendant lacks funds to pursue a defense as thoroughly as he would like. Here, the same is true for the appellant.

The appellant further argued the trial's court exclusion of funding for ancillary services for private, pro bono attorney would discourage and deter such representation. Their argument is based upon the supposition the public defender's offices are already overburdened and would gain a larger caseload as a result. Although the State does not agree with the premise or conclusion of this argument, the General Assembly would need to remedy this ethereal issue and provide additional public defenders unless the burden deprived indigent defendants of some constitutionally protected right. As there is no constitutional violation, the judiciary's assumption of legislative duties is not appropriate.

II. Trial court's findings

In the order under consideration, the trial court found a 2017 decision by the Colorado Appeals Court persuasive regarding these constitutional concerns. People v. Thompson, 413 P.3d 306 (Colo. App. 2017). Thompson, who was represented by pro bono counsel, requested state funding for experts, which was denied by the trial court. Id. Upon pro bono counsel's withdrawal, the public defender represented Thompson and received those ancillary services. Id. Following his conviction, he appealed asserting that his constitutional rights were violated when he was forced to choose between his pro bono attorney of choice and his right to necessary ancillary services at State expense. Id. The Colorado Appeals Court held that Thompson was not denied the counsel of his choice nor was he denied his right ancillary expert services. He was given provided both these rights and chose ancillary services over his counsel of choice. Id. Otherwise, the court recognized a defendant could use public funds to obtain counsel of his choice. Id.

Likewise, Utah's statute limits state funding for ancillary services upon the retention of publicly funded counsel. State v. Earl, 345 P.3d 1153 (2015). The Utah court recognized the constitutional right to counsel of choice and the constitutional right to funding for ancillary services for an adequate defense were qualified and not without limitation based upon the defendant's choice. Id. The Court held that its legislature combined its ancillary services with government-funded counsel. Id.

Thus, the defendant's choice to seek counsel outside of those parameters forfeits the right for the defense to thereafter be publicly funded. Id.

Although the appellant's brief urges this Court to follow a majority of the States that provide funding for pro bono counsel to represent indigent defendants, their analysis fails to examine their statutes to determine if it was authorized therein. The U.S. Supreme Court in Ake recognized that there was not one correct way to implement these rights and left it to the States to implement. Simply because the majority of States may have statutes that include pro bono attorneys or operate their systems differently, does not mean that Georgia's preferred method is unconstitutional.

The Georgia General Assembly chose not to include such representation in its IDA. Thus, the Supreme Court does not have the power to unbundle the services; only the legislature can. To hold otherwise would be judicial lawmaking. Even if this Court believes the legislature should have included pro bono attorneys in the IDA, as the constitution does not demand it, this Court must uphold the decision of the General Assembly.

III. The appellant's authority

The appellant argues that Roberts v. State, 263 Ga. 764 (1994) demands a different result by the trial court. In Roberts, a pre-IDA case, the indigent defendant, while represented by pro bono counsel, requested appointed counsel. Id. This Court

held that the trial court did have authority to appoint him an attorney regardless of his current representation. Id. However, that decision by this court predated the IDA of 2003 and was decided under the multi-county defender system. The trial court believed, under those former statutes, it did not have the authority to appoint counsel; this Court held differently. Id. The statutes that permitted the trial court to appoint counsel to represent indigent defendants, however, have been repealed. See O.C.G.A. §§ 17-12-60(a) and 17-12-97(a).

Citing Roberts, this Court held in Speight v. State, 279 Ga. 87, 88 (2005), that an indigent defendant is entitled to appointed counsel on appeal even if he had pro bono counsel currently representing her. First, the State is compelled to note that Speight was decided in March of 2005 by this Court, purportedly under the former statutes of the multi-county public defender system, in that her case originated in 1993 and the trial court's hearing on the motion for new trial occurred in 2004 prior to the effective date of IDA. Id.

Additionally, both Roberts and Speight provide a different procedural footing than the present case. Both pro bono lawyers were attempting to withdraw from the case and to have appointed counsel to represent their clients. Speight had a chaotic time of representation from her pro bono attorneys; in frustration, this Court appointed a public defender to represent her after the four pro bono attorneys utterly failed at the task. Under the holdings of Roberts and Speight, the trial court was

authorized under the *former* statutory scheme of the multi-county defender system to appoint counsel; however, under the IDA of 2003 the GPDC now appoints counsel.

Nothing in the Constitution requires a different result. The appellant was afforded his constitutional rights and waived them for his present counsels' representation. This Court should affirm the decision of the trial court finding the IDA of 2003 constitutional and that it does not authorize ancillary services for private attorneys.

PART FIVE

CONCLUSION

For the foregoing reasons shown and authorities cited, this Honorable Court should deny the relief sought by the Appellant.

Brief prepared by:
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the following, with a true and correct copy of the foregoing "Brief of the Appellee" by United States mail by mailing said brief to the following address with sufficient postage:

Ashleigh and John Merchant, III
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and

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This 28th day of September, 2020.

/s/ Bradford L. Rigby
BRADFORD L. RIGBY
Special Assistant District Attorney
Tifton Judicial Circuit
State Bar No.:605450

SUPREME COURT OF GEORGIA
Case No. S20A1522

September 01, 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 appellee in the above case is granted until September 28, 2020.

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

[signature], Clerk