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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Arguments and Citations of Authority

1) Does an indigent defendant have a due process right to publicly funded experts if he chooses to be represented by private, pro bono counsel?

The Due Process 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); 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 (emphasis added); Ross v. Moffit, 417 U.S. 600 (1974). 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). Ake explicitly left to the states the mechanism by which to implement the ancillary services that are required to protect an indigent defendant's constitutional rights. 470 U.S. at 77. Ake plainly gave each state the authority to decide how to satisfy the indigent defendant's right to these "basic tools." Id. [1]

The Georgia General Assembly enacted the Indigent Defense Act of 2003 (IDA) for the affirmative protections of due process under the U.S. Constitution

[1]Under Ake, the "fundamental fairness" analysis consists of a three part test (see State's prior brief) regarding 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. 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.").

and Georgia Constitution for indigent defendants and bundled the services of representation and public funding for experts and investigators. Specifically, this appellant's due process rights for fundamental fairness to include the basic tools for a complete defense were afforded to him under the IDA when he was represented by the Tifton Circuit Public Defender's Office. Subsequently, the appellant selected private counsel, thereby exercising his constitutional right to the representation of his own choosing. Gideon v. Wainwright, 372 U.S. 335 (1963); Art. I, Sec. I, Par. XIV of the Ga. Const. of 1983; Walker v. State, 194 Ga. 727 (1942).

The U.S. Constitution does not bar the appellant's arguably difficult choice of preferred attorney and the expert services associated therewith.[2] The appellant's constitutional right to select and choose his own

[2]"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. 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.

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 (emphasis added).

> 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 appellant has a constitutional right to choose his attorney and follow his desired course; however, nothing in the constitution forbids him from having to make that choice. When the appellant selected private counsel, he exercised his constitutional right to choose the attorneys of his preference; and, accordingly, under the IDA of 2003, he must forego indigent funding for defense resources.

When an indigent defendant is represented outside of the IDA by private counsel, as the appellant is presently, the Georgia legislature via the requisite statutes, and the Public Defender Council do not provide for any services. The appellant must utilize the full package of bundled services or forego them entirely. Those requirements of the IDA of 2003, do not impair to an appreciable extent, the appellant's due process right to fundamental fairness in that he has not been denied an opportunity, due to his indigence, to meaningfully participate in his criminal proceeding.

The constitutional requirements set forth in Gideon and Ake were provided to the appellant under the IDA, and thereafter through Gideon, he chose his present private attorneys. The State of Georgia must offer the appellant 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. After voluntarily opting for private counsel, the appellant desires to return to the State for public funding of experts.

Based upon the plain text of the IDA, the appellant does not retain the choice to continue to receive expert services under some other scheme that is foreign to

the legislature. Nothing is fundamentally unfair about a defendant voluntarily surrendering his constitutional rights, as the appellant did here. Choosing private counsel and steering his defense in an alternate direction for representation does not create a separate path to public funded defense experts. When the appellant declined those expert services in exchange for the counsel he prefers, he lost the right to a publicly funded defense. The appellant continues to enjoy full discretion in choosing whether to be represented by the public defender's office and thereby ensuring the IDA of 2003 will fund his "raw materials" and "basic tools" he purports to need for a complete defense.

As the State argued in its prior brief, Ake v. Oklahoma, 470 U.S. at 77, does not require the state to pay for investigators and experts when a defendant is privately represented, even when that defendant is indigent. Nor does Ake stand for the premise that every expert or investigator is a "basic tool" for the defense of the appellant's case. Ake permits states to constitutionally condition receipt of publicly funded defense resources on the acceptance of representation by the public defender. States have a legitimate interest in ensuring that these funds are not abused or wasted and that they are dedicated to indigent legal defense and effectively and efficiently utilized. Thus, in order to ensure government oversight, control and efficiency, states may offer indigent services in bundles rather than utilizing a piecemeal approach.

In Moore v. Wolfe, 2014 U.S. Dist. LEXIS 7877 (Dt. Ct. Md. Jan. 17, 2014), cert. of appeal denied, appeal dismissed by, 2014 U.S. App. LEXIS 15294 (4th Cir. Md., Aug. 8, 2014), the appellant paid for private counsel with funds from a lawsuit and hired an expert. After initial testing, the expert refused to testify until additional funding was obtained. Id. Private counsel, filing an affidavit of indigency for the appellant, applied for funding from the county public defender for his DNA expert. Id. In this issue,

> The bottom line question in this case is whether the State has satisfied its constitutional obligations by establishing the Office of the Public Defender making expert services available to clients of that Office, and requiring that, in order for an indigent to receive State-funded expert services, the defendant must seek representation by [that office]. We conclude that the State has not deprived petitioner of any of his constitutional rights by requiring that he apply to the OPD for representation before he is entitled as an indigent to State funded expert witness services. The Supreme Court contemplated in *Ake* that States could place restrictions on indigent defendants' access to state-funded expert services.

Id. See also State v. Miller, 337 Md. 71 (1994)(holding private *pro bono* attorney on appeal representing indigent defendant not entitled to transcript costs when not represented by public defender); Miller v. Smith, 115 F.3d 1136 (4th Cir. 1997), cert. denied sub nom., Miller v. Corcoran, 522 U.S. 884 (1997) (upholding Maryland supreme court decision in habeas corpus review).

2) If so, then what government entity is responsible for providing the funding for such experts and investigators in this case?

Assuming, arguendo, that an indigent defendant is entitled to expert services when represented by private counsel outside of the IDA, the Georgia legislature has not designated which government entity is responsible for such funding. O.C.G.A. § 15-6-24 is entitled "Payment of court's contingent expenses." Subsection (a) provides that "[a]ny contingent expense incurred in holding any session of the superior court, including lights, fuel, stationary, rent, publication or grand jury presentments when ordered published, and similar items, such as taking down testimony in felony cases, etc., shall be paid out of the county treasury of such county upon the certificate of the judge of the superior court and without further order." O.C.G.A. 15-6-24(a). This statute continues in subsection (b) as follows, "[a]ny costs incurred in *providing defense services* pursuant to Chapter 12 of Title 17, the "Georgia Indigent Defense Act of 2003," for persons accused of crimes shall not be considered contingent expenses of the superior court for purposes of this Code section." (italics and underline added). O.C.G.A. 15-6-24(b).

Clearly, Irwin County has been exempted from costs regarding defense services. The State could find no other statutory provision mandating the counties to pay for such services. Again, the IDA statutory scheme does not provide for payment of expert services for those represented by private counsel.

In Fulton Co. v. State, 282 Ga. 570 (2007), this Court held that Fulton County could not be ordered to pay an indigent defendant's death penalty costs under this code section for the transcription of telephone conversations of the defendant while incarcerated. Additionally, this statute did not authorize county funds for demonstrative evidence presentation in a digital format, in that this was not a typical expense of trial. Id.

In Ga. Pub. Def. 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. The Court of Appeals mandated that 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. Clearly, the judiciary is not permitted to read that requirement into the statute.

As for the remaining statute in view, O.C.G.A. § 48-5-220 provides that "[c]ounty taxes may be levied and collected for the following public purposes: (5) [t]o pay the expenses of courts and the maintenance and support of inmates, to pay sheriffs and coroners, and to pay for litigation; and (9) to support indigent individuals. O.C.G.A. § 48-5-220(5) and (9). Neither of these subsections addresses the funding of experts for an indigent defendant in a criminal case who has received the private counsel of his own choosing. The only cases developing these subsections involved transcript costs and hospitalization costs for indigent persons. Nevertheless, since other specific provisions of the Georgia Code, even included in this statute as well as the IDA of 2003, specifically address court costs and defense funding, subsection (9), with its generic indigent individual support would not pertain to this expense.

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). Currently, no statute provides for private, pro bono attorneys to be paid for public expert services. A judicial creation of funding could amount to a parallel private, pro bono public defender system. Certainly, the legislature did not intend or contemplate parallel or additional remuneration systems for private and/or pro bono attorneys to have a separate system. 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 GPDC funding for third parties or county 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).

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 attorneys, private attorneys, or retained attorneys may receive public funding for 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 the scope of the IDA. Private attorneys must bear these costs pursuant to their contractual agreement to represent the appellant.

PART FIVE

CONCLUSION

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

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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:

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This 21st day of December, 2020.

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