IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 20-1346

STATE OF IOWA,
Plaintiff

vs.

RODRIGO AMAYA,
Defendant-Appellee

STATE PUBLIC DEFENDER.
Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SARAH CRANE

DEFENDANT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellee's Final Brief with the Electronic Document Management System with the Appellate Court on the 30th day of November 2021.

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I hereby certify that on the 10th day of November 2021, I did serve the Defendant-Appellee's Final Brief on Appellee, listed below, by mailing one copy thereof to the following Defendant-Appellee:

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ROUTING STATEMENT

This appeal should be retained by the Iowa Court of Appeals because it is a case presenting the application of existing legal principles in accordance with 6.1101(3)(a). English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981) has already been decided. The court only need follow it.

CASE STATEMENT

The legislature has enacted amendments to Iowa Code § 815.1 that threaten the right to effective assistance of counsel. The amendments to § 815.1 (SF 590) were discussed briefly by the Iowa House and the Iowa Senate before both chambers of the Iowa Legislature approved the amendments. In the House, Representative McKean explained that the bill "boils down to the best use of scarce resources" in the State Public Defender's Office, because "private defenders charge three to four times what public defenders are charging but are still asking for money for experts." Representative Konfrst also spoke out in favor of the bill. No representative discussed the possible constitutional implications of SF 590. House Video Apr. 15, 2019, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190415054800016&dt=2019-04-15&offset=685&bill=SF%20590&status=i.

In the Senate, Senator Garret stated that the "main point of the bill is . . . state funds may only be approved if the retainer is insufficient if paid at the

same statutory rate as contract defenders," and described an estimated savings to state taxpayers of nearly $200,000. Senator Garret went on to state that "[i]f the attorney and client want the taxpayer to [pay for services], they must follow the rules set out by the public defender system." He then referred to (unnamed) attorneys that "game the system and earn higher fees than they'd get if they participated in the public defender system from the beginning." Although Senator Hogg spoke out against the bill, his concern was that complying with the amendments to § 815.1 would require attorneys to lower their rates for services they had already performed and billed. No senator spoke about the constitutional implications of SF 590. Senate Video March 26, 2019, https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190326084831569&dt=2019-03-26&offset=12905&bill=SF%20590&status=i

FACTUAL BACKGROUND and COURSE OF PROCEEDINGS

The State filed a Trial Information charging Rodrigo Amaya with Count I: Sexual Abuse in the Third Degree in violation of Iowa Code §§ 709.1(1), 709.4(1)(b)(1)(3)(d), and/or 709.4(1)(a) (Class C felony); Count II: Sexual Exploitation of a Minor-Manufacturing Child Pornography in violation of Iowa Code § 728.12(1) (Class C felony); Count III: Enticing

Away A Minor Under the Age of Sixteen to Commit an Illegal Sex Act or Sexploitation of a Minor in violation of Iowa Code § 710.10(2) (Class D felony); Count IV: Eluding in violation of Iowa Code § 321.279(3) (Class D Felony); and Count V: Sexual Exploitation of a Minor-Possession of Child Pornography in violation of Iowa Code § 728.12(3) (Aggravated Misdemeanor). (App. 009).

Mr. Amaya had private counsel appear on his behalf. Mr. Amaya filed a motion for private investigator and depositions at State expense based on his indigency, pursuant to English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981), and asked that the court find Iowa Code § 815.1 to be unconstitutional. (App. 013). The State Public Defender (hereinafter SPD) filed a resistance to the motion. (App. 037). The court ordered additional briefing from SPD and Mr. Amaya and Mr. Amaya's counsel provided additional requested information required information for in camera review. (App. 056/061).

The district court granted public funding. (App. 061). The court found that third parties had paid Mr. Amaya's private counsel a $15,000 retainer, that defense counsel's hourly rate is $300, and that defense counsel's firm had performed 75 hours of work and anticipated 70 more to complete the case. (App. 061). The court found that Iowa Code § 815.1 "ultimately conditions a defendant's constitutional right on the actions of a third party, resulting in

either a denial of the right to hire private counsel of choice through use of a third party's funds or the right to auxiliary defense services." (App. 061). The court found that while

> the Iowa legislature may determine appropriate procedures to implement a constitutional right, those procedures cannot serve to deny access to the constitutional right. Through section 815.1, the Defendant's right to auxiliary services at State expense is conditioned on whether the private attorney will accept payment at a rate far below the customary private market. If the defense attorney will not accept lower rates and the Defendant (or family member) cannot afford to pay the private attorney their rate and also pay for auxiliary services, the defendant has two choices: 1) abandon the privately retained counsel and accept court-appointed counsel, at which point the defendant could obtain auxiliary services at state expense or 2) forego the additional auxiliary services.

(App. 061).

The court rejected the argument that Iowa Code § 815.1 does not force the statutory hourly rate on the privately retained attorney, stating this is untrue "if the retainer will not cover both the attorney's private rate and the costs of auxiliary services. In this particular case, by applying the Court-appointed rate, defendant is denied State funds for the investigator services that were requested and the retainer must be put toward the services. The retainer funds would then not be available to pay the attorney's market rate, thereby forcing the private attorney to accept the statutory hourly rate (or force the Defendant to forego the services." (App. 061). The court therefore held

that "815.1 violates the Sixth Amendment right to effective assistance of counsel" and struck the portion of the statute that required the use of the statutory rate, instead applying the attorney's contractual rate. (App. 061). SPD filed a notice of appeal.

ISSUES

I. The Proper Form of Review

Mr. Amaya takes no position on the proper form of review for this case. The court should allow the case to "proceed as though the proper form of review had been requested," Iowa R. App. P. 6.108,

II. Error Preservation

Iowa R. App. P. 6.903(2)(g)(1) requires that the appellant's brief should include a "statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided." Neither the State Public Defender's Brief nor the State's Amicus brief contain this section and do not contain any reference to how their arguments were raised in the district court or how they were decided below. It is not the responsibility of the appellate court to comb the record to find support for an issue. Hyler v. Garner, 548 N.W.2d 864, 876 (Iowa 1996). Therefore, Mr. Amaya does not agree with the appellant's statements on error preservation.

The State's amicus brief, in particular, makes several arguments not made by the State or the State Public Defender at the district court, including that English v. Missildine should be overturned, that the right to expert services comes from the right to due process and not the right to counsel, that the statute can be severed, and that portions of the statute can be saved and should not be severed.

An argument not made before the district court is waived. State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010). "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." Taft v. Iowa Dist. Ct., 828 N.W.2d 309, 322 (Iowa 2013). The appellate courts may affirm on an alternate ground than the one the district court did, but the alternate ground must first be urged in the district court. Jensen v. Sattler, 696 N.W.2d 582, 588 (Iowa 2005) (citing DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002)) ("[The] supreme court may affirm on an alternate ground so long as it was urged in the district court."). The State waives argument if they do not present it to the district court in a manner that allows the court to fully and properly address it. State v. Baldon, 829 N.W.2d 785, 789 (Iowa 2013).

The court does not recognize a "plain error" rule which allows appellate review of challenges not preserved at the district court level in a proper and

timely manner. State v. Hutchison, 341 N.W.2d 33, 38-40 (Iowa 1983). “We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.” State v. Rutledge, 600 NW 2d 324, 325 (Iowa 1999).

Rather, Iowa requires error preservation . “Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.” Rutledge, 600 N.W.2d at 325. The error preservation rule requires parties to alert the district court "to an issue at a time when corrective action can be taken." Top of Iowa Co-op. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000).

Two things must happen at the district court for the issue to be preserved for appeal: a party must raise it, and the court must rule on it. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Failure to preserve error typically arises in two ways: first, there are cases where a party raised an issue, but failed to secure a ruling from the trial court. See Meier, 641 N.W.2d 532; State v. Krogmann, 804 N.W.2d 518 (Iowa 2011). Second, there are cases where a party failed to raise the issue at the district court level at all. See State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002); Rutledge, 600

N.W.2d 324. The State failed to raise its arguments at all. The State Public Defender did not make these arguments for the State.

There are three main justifications for the error preservation rule. First, it gives notice to opposing counsel. State v. McCright, 569 N.W.2d 605, 608 (Iowa 1997). Second, it gives notice to the district court, so the court can "take any necessary corrective action at a time when correction is still possible." Id. The third is that allowing parties to raise issues on appeal that they did not raise at the district court seriously undermines the district court's original jurisdiction. Kinkead, 570 N.W.2d at 102.

The requirement to raise an issue in the district court is an essential part of the rule. Otherwise, litigants can sit on an issue at the trial level, and then complain later if the argument they relied on was not a winning one. The Iowa Supreme Court explains:

> On closer reflection we think simple justice demands rigid adherence to the rule. The rule does not proceed, as cynics would have it, from some vague fear of blindsiding a trial judge, but rather from the very real fear of blindsiding the trial process. Long experience has taught us that the bulk of mistakes made at trial can and will be corrected whenever the trial court is alerted to them. The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, “bet on the outcome.” After all the lawyer might be the only person in the courtroom alert to an error. It would be flagrantly unjust to allow such a lawyer to sit mute and complain only on appeal following an unfavorable outcome. Our cases are legion that hold error is waived unless preserved by a timely trial objection.

Rutledge, 600 N.W.2d at 326.

The failure to raise the argument at the district court level also failed to give notice to opposing counsel. This has resulted in the Appellee having to file a significantly longer brief than would be typical, without the opportunity to respond. The district court did not have the opportunity even to summarily reject the State's arguments. The State's arguments have not been preserved. They should be rejected outright.

III. Standard of Review

Mr. Amaya agrees with the appellant that the court's standard of review is *de novo*. However, he disagrees that the court should use the rational basis test. Instead, the court should review under strict scrutiny. Iowa Code § 815.1 violates Mr. Amaya's right to equal protection, under both the federal constitution (Amendments Five and Fourteen) and the Iowa Constitution, Article I, Sections 1 and 6. Iowa Code § 815.1 treats Mr. Amaya differently than other Iowans that do not hire their own counsel, through a third party.

Strict scrutiny is the correct constitutional analysis because Iowa Code § 815.1 involves Mr. Amaya's fundamental rights. The right to counsel is a fundamental right. The right to counsel, and therefore the right to effective counsel, is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). "If a fundamental right is infringed, the level of judicial scrutiny is

raised from a rational relationship test to one of strict scrutiny. In that case, the statute will survive a constitutional challenge only if it is shown that the statute is narrowly drawn to serve a compelling state interest." City of Panora v. Simmons, 445 N.W.2d 363, 327 (Iowa 1989).

Indigent rights to services at state expense also touch upon equal protection concerns, as an affluent defendant will be able to afford both counsel of his choice and services, which the indigent would not. See English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981). It also touches upon equal protection concerns in the opposite way – indigent defendants with no third party willing or able to assist them in hiring counsel will have services available to them that individuals like Mr. Amaya will not. There is nothing more fundamental than "the right of reasonable access to courts to protect those inalienable rights possessed by all persons and recognized by both the United States and Iowa Constitutions." Lunday v. Vogelmann, 213 N.W.2d 904, 908 (Iowa 1973) (Reynolds, J., dissenting).

To be narrowly tailored, a statute must serve the compelling government interest by the least restrictive means. See Mitchell Cty. v. Zimmerman, 810 N.W.2d 1, 3–4 (Iowa 2012).

IV. The Statute Limits Effective Assistance of Counsel as a Hobson's Choice

No case law supports forcing a choice between two constitutional

> rights that don't already have some meaningful tension between them such that they are to some extent mutually exclusive. To be sure, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." McGautha v. California, 402 U.S. 183, 213, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) (citation and punctuation omitted), vacated on other grounds sub. nom. Crampton v. Ohio, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Id. But a defendant's constitutional rights may be violated when "compelling the election impairs to an appreciable extent any of the policies behind the rights involved." Id. Here, compelling an indigent defendant to choose between his two rights — accessing state-funded ancillary defense services and retaining his chosen pro bono counsel — potentially impairs to an appreciable extent one or both of those rights. There is no clear tension between the simultaneous exercise of those two rights that naturally leads to compelling such a choice.

Duke v. State, 856 S.E.2d 250, 260–61 (Ga. 2021) (Peterson, J. concurring).

The procedure of 815.1 essentially requires a privately retained attorney to adjust their rates of compensation to the state contract attorney rate – regardless of whether the attorney has agreed to work at that rate, and regardless of whether the attorney can operate their firm at that rate – simply because their client is indigent. See Iowa Code § 815.1(4)(c)(1) (directing the Court to determine whether a client has advanced sufficient funds to pay for services based on the hourly rate established by Iowa Code § 815.7; rather than the fee agreement between the indigent defendant and the attorney).

The changes to Iowa Code § 815.1 are unconstitutional under the federal constitution, the Iowa Constitution, and English v. Missildine, 311 N.W.2d 292 (Iowa 1981). Specifically, Iowa Code § 815.1 violates rights under the Fifth Amendment (due process), Sixth Amendment (right to counsel, right to effective counsel, right to counsel of choice), and Fourteenth Amendment (due process, equal protection), of the United States Constitution and article I, section 1 (equal protection, right to enjoy and defend life in liberty, acquire possess and protect property, and pursue and obtain safety and happiness); article I, section 9 (right to trial and due process); and article I, section 10 (rights at trial including right to counsel, effective counsel, and choice of counsel) of the Iowa Constitution.

The Iowa Supreme Court has already ruled that the constitution allows for the right to services for indigent defendants at state expense. See English v. Missildine, 311 N.W.2d 292 (Iowa 1981). The current legislature does not get to change the Iowa Constitution via statute. See Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 213 (Iowa 2018) ("No law that is contrary to the constitution may stand. Iowa const. art. XII, § 1. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms."); Varnum v. Brien, 763 N.W.2d 862, 875 (Iowa 2009) ("Our

framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.").

The Iowa Supreme Court determined long ago that, based on a defendant's Sixth Amendment right to counsel, effective counsel, and choice of counsel, an indigent criminal defendant was entitled to services at state expense, even if the defendant was able to retain private counsel. English v. Missildine, 311 N.W.2d 292 (Iowa 1981). "For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services." Id. at 293-94 (discussing a criminal defendant's Sixth Amendment rights). "The fact that a third person retained private counsel for plaintiff does not by itself affect his status as an indigent." Id. at 294.

In particular, the Iowa Supreme Court noted:

> Authority for the services requested by [a defendant] exists under his sixth amendment right to effective representation of counsel. For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services…. *The Constitution does not limit this right to defendants represented by appointed or assigned counsel*. The determinative question is the defendant's indigency. When his indigent status is established the "defendant is constitutionally entitled to those defense services for which he demonstrates a need."

Id. at 293-94 (Iowa 1981) (emphasis added). The undersigned is not aware of an Iowa case interpreting the Iowa Constitution in the same manner, but the

Iowa Constitution should provide even more protection to indigent defendants.

Here, services such as depositions are necessary to defend Mr. Amaya in this case. Effective counsel requires that counsel has the opportunity and time "to prepare and present their indigent client's case." State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). Opportunity to prepare and present her client's case includes having the funds to pay necessary and essential expenses. Id. An attorney can be ineffective for failing to hire an expert. See Linn v. State, 929 N.W.2d 717 (Iowa 2019) (finding an attorney might have been ineffective for failure to hire a BWS expert); State v. Polson, 15-2104 (Iowa Ct. App. 2017) (preserving a claim of ineffective assistance of counsel for failing to hire an intoxication expert for postconviction relief to determine whether the choice was a strategic decision). Attorneys can be ineffective for not conducting investigations, although the amount needed cannot be precisely defined except it must include an independent examination of the facts and circumstances involved. Strickland v. Washington, 466 US 668, 680-81 (1984). The court should adopt a rule under Article I, Section 10 of the Iowa Constitution (and all other cited provisions) requiring public payment for necessary services for an indigent defendant, with a third-party paying attorney fees. The rule should be that failing to pay these public

expenses for an indigent defendant is a complete denial of the right to counsel at a crucial stage of the proceeding. Because it is a complete denial of counsel at a crucial stage of the proceeding, prejudice on any claims of ineffective assistance is presumed, because without necessary services, the defense is completely unable to subject the prosecution's case to meaningful adversarial testing. See State v. Feregrino, 756 N.W.2d 700, 707 (Iowa 2008) (applying the presumption of prejudice in other circumstances where there was complete denial of counsel at a crucial stage).

The court should adopt this rule because Iowa has a long history of protecting the right to counsel prior even to the United States Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963). "[T]he Iowa Territorial Supreme Court and other state supreme courts decided in early cases that if a person was entitled to representation by counsel but could not pay for it, representation should be provided at state expense. State v. Young, 863 N.W.2d 249, 259 (Iowa 2015) (citing Hall v. Washington County, 2 Greene 473, 476 (Iowa 1850)).

In addition, the language in the Iowa Constitution implicates a wider right to counsel. "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.' U.S. Const. amend. VI. Iowa Constitution Article I,

section 10 uses similar language but adds an important additional provision. Specifically, article I, section 10 provides that '[i]n all criminal prosecutions, *and in cases involving the life, or liberty of an individual,* the accused shall have a right ... to have the assistance of counsel.' Iowa Const. art. I, § 10." Young, 863 N.W.2d at 256-57 (emphasis in original). The suggested standard is similar to the standard used when reviewing the admission of hearsay testimony. See State v. McGuire, 572 N.W.2d 545, 547 (Iowa 1997). Surely, the standard for evaluating constitutional error should be at least as stringent as the standard for evaluating evidentiary error.

By forcing defense attorneys to accept the lower rate of compensation in order to provide services, § 815.1 – like the hard-fee cap invalidated by Simmons – creates perverse incentives to underperform on an indigent defendant's case. A defense attorney may have to choose between services and a paralegal's assistance in reviewing discovery, or services and mileage to visit the client in jail. The rule announced in Missildine was intended to obviate these needs, permitting defense attorneys to take on indigent clients with third party assistance, knowing that they would not need to sacrifice their attorney's fees, time, or professional skills in order to provide effective assistance of counsel where their clients require services. This Court should

not permit the legislature to undo Missildine at the expense of attorney's competent representation.

By requiring indigent defendants who have retained counsel to comply with the changes to § 815.1 in order to receive the auxiliary services they are already constitutionally entitled to, the legislature requires defendants into a Hobson's choice: (1) accept an attorney, essentially at random, on the court-appointed list, who may or may not be particularly experienced in the type of case that there is, with whom they may or may not have a good relationship, may or may not trust, and only get the assistance of that random attorney, *but with services* or (2) work with a third party to retain an attorney of their choosing, but forego auxiliary services altogether, resulting in an attorney providing ineffective assistance of counsel to keep the fee. Both options threaten the right of access to counsel and make working in this difficult field financially and ethically undesirable.

Even more shocking than that Hobson's choice is to think about whether the general public even understands this when picking their attorney. Do they know that if they pick someone who they are paying and trust and are comfortable with, that they might not be able to get the necessary services that they need, even if they are indigent? Of course, the answer is no.

The changes to Iowa Code § 815.1 violates Mr. Amaya's constitutional

right to counsel of choice, and other similarly situated as Mr. Amaya. The Sixth Amendment protects defendant's right to their counsel of choice:

> "[A]n element of [the Sixth Amendment] right is the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (citing Wheat, 486 U.S. at 159). Stated another way, "'the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or *who is willing to represent the defendant even though he is without funds.*'"

State v. Smith, 761 N.W.2d 63, 69 (Iowa 2009) (emphasis added). "In general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978) (citation omitted).

The defendant's choice of counsel gives way only in narrowly circumscribed instances: where a defendant cannot afford counsel or find counsel willing to represent him in spite of his indigency, or where disqualification is "necessary to preserve the integrity, fairness, and professionalism of trial court proceedings." Smith, 761 N.W.2d at 69 (citing State v. Vanover, 559 N.W.2d 618, 626 (Iowa 1997)). The amendments to Iowa Code § 815.1 do not advance any of these interests. The purpose of the amendments to Iowa Code § 815.1 appear to be exclusively to save the State money.

Mr. Amaya had exercised his right to his choice of counsel. He has specific reasons for hiring the undersigned. This case involves serious felony charges. The requirements for an attorney to take these same felonies under the State Public Defender's rules is that they have practiced criminal law for two years and had one jury trial. Iowa Administrative Code 493-11.3(5). In contrast, the attorney that Mr. Amaya hired has tried nearly twenty jury trials. He has tried serious Sex Abuse cases and achieved numerous not guilty verdicts on these types of cases. He has negotiated extremely favorable plea agreements in Sex Abuse cases. He is extremely experienced and qualified to handle these types of cases.

There is no difference constitutionally between an indigent defendant who has managed to engage the services of an attorney and an indigent defendant whose attorney is supplied by the State. However, by enacting the amendments to § 815.1, the Legislature is attempting to guarantee that only those defendants who must rely on the state public defender and contract attorney system receive the services necessary for effective assistance of counsel. This puts defendants in the position of having to choose between the lawyer of their choice, or whichever public defender may be available at the moment. The State has no basis to interfere with this choice under Smith.

The Court should hold that the amendments to Iowa Code § 815.1 unconstitutionally interfere in a defendant's right to counsel of his choosing and hold that Mr. Amaya need not comply with these requirements to make his application for services.

V. The Statute Only Saves Money by Mandating Ineffective Assistance of Counsel, Violating Equal Protection

The statute has no rational basis between its stated goal and how it intends to achieve the goal. The statute only "saves money" by ensuring that indigents do not receive effective assistance of counsel. An effective attorney, regardless of whether she works for State Public Defender or is court-appointed counsel, would conduct depositions, especially in a case with serious offenses charged here. The only budgetary difference to the State Public Defender is that in the case of a contract court-appointed attorney, the State Public Defender would also have to pay the hourly fees of the appointed attorney. Of course, in this case, the State Public Defender's Office is paying *none* of the attorney's fees because third parties have hired counsel. In other words, if we presume that both the undersigned counsel and a contract court-appointed attorney would seek to conduct depositions, the State Public Defender's Office would pay *more* for the contract court-appointed attorney, regardless of how much the private attorney charges, because the State Public Defender's Office will not have to pay attorney fees. In the best-case scenario,

the State pays more for a contract attorney with the services.

In the worst-case scenario, the State "saves money" because contract attorneys or State Public Defenders do not conduct depositions (either due to institutional pressure or lack of experience), or private attorneys do not get the services because they want to keep more of the fee. The only way that the State ever saves money in this scenario is if attorneys offer indigent defendants ineffective assistance of counsel.

There is no difference between private counsel asking the State for funds for services and state public defenders deciding whether or not to pay for services in a particular case. The only difference is that private counsel is subject to the court's approval to see if these expenses are necessary. The State Public Defender is constrained by their various concerns within the State Public Defender's Office. Private counsel is constrained by the court's determination of necessity for the expenses.

The State does not fulfill its obligations under Missildine, the Sixth Amendment, and Iowa Const. art. I, § 10 by crossing its fingers and hoping that third parties will open their hypothetical wallets a bit further. The interest in saving money does not outweigh the interests of indigent defendants in having competent representation. There is no evidence that the amendments to Iowa Code § 815.1 were motivated by anything other than saving cost. The

Legislature has not made findings that indigent defendants are abusing the system by requesting the State pay for auxiliary services, or that non-indigent defendants are somehow accessing State funds. In fact, because Iowa R. Crim. P. 2.20(4) still exists, it would be a significant struggle to explain that any of the requested indigent service would be unnecessary because a district court judge has to determine that they are necessary before the funds can be approved.

As the Iowa Supreme Court already ruled in Missildine, "no reason exists for depriving an indigent of the same right of choice as a person of means when the indigent is able to obtain private counsel without public expense." English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981). Regardless, the State has both protection and a remedy in place to keep non-indigent defendants from accessing state funds for their defense. Courts may only grant state funds for auxiliary services where it finds those funds are "necessary in the interest of justice." State v. Dahl, 874 N.W.2d 348, 352 (Iowa 2016). Furthermore, upon conviction and sentencing, Courts are directed to determine whether a defendant has a reasonable ability to reimburse the state for attorneys' fees and related expenses required by law to be paid to the State. See Iowa Code §§ 815.9(5), (6); see also State v. Dudley, 766 N.W.2d 606, 614-15 (Iowa 2009) (requiring defendants to reimburse the

State for attorneys' fees and related costs permissible as long as the court considers defendant's reasonable ability to pay); Hanson v. Passer, 13 F.3d 275, 279 (8th Cir. 1994) ("[W]hen court-appointed counsel is provided, it is constitutionally permissible to require the defendant to repay the expense incurred by the state in providing the representation if the defendant later becomes able to repay, so long as those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay" (cleaned up)); Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) (Under Sixth Amendment right to counsel, court may not order a defendant to repay court-appointed attorney fees "unless he is able to pay them or will be able to pay them in the future considering his financial resources,").

Iowa Code § 815.1 violates Mr. Amaya's right to equal protection, under both the federal constitution (Amendments Five and Fourteen) and the Iowa Constitution, Article I, Sections 1 and 6. Iowa Code § 815.1 treats Mr. Amaya differently than other Iowans that do not hire their own counsel, through a third party.

This court should determine that Iowa Code § 815.1 does not meet strict scrutiny and therefore violates Mr. Amaya's right to equal protection of law. Strict scrutiny is the correct constitutional analysis because Iowa Code § 815.1 involves Mr. Amaya's fundamental rights. The right to counsel is a

fundamental right. The right to counsel, and therefore the right to effective counsel, is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). "If a fundamental right is infringed, the level of judicial scrutiny is raised from a rational relationship test to one of strict scrutiny. In that case, the statute will survive a constitutional challenge only if it is shown that the statute is narrowly drawn to serve a compelling state interest." City of Panora v. Simmons, 445 N.W.2d 363, 327 (Iowa 1989).

Indigent rights to services at state expense touch upon equal protection concerns, as an affluent defendant will be able to afford both counsel of his choice and services, which the indigent will not. See English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981). It also touches upon equal protection concerns in the opposite way – indigent defendants with no third party willing or able to assist them in hiring counsel will have services available to them that individuals like Mr. Amaya will not. In essence, Iowa Code § 815.1 punishes Mr. Amaya's exercise of his right to counsel of his choice by denying him the indigent services allowed under Missildine. There is nothing more fundamental than "the right of reasonable access to courts to protect those inalienable rights possessed by all persons and recognized by both the United States and Iowa Constitutions." Lunday v. Vogelmann, 213 N.W.2d 904, 908 (Iowa 1973) (Reynolds, J., dissenting).

The statute does not meet strict scrutiny. To be narrowly tailored, a statute must serve the compelling government interest by the least restrictive means. See Mitchell Cty. v. Zimmerman, 810 N.W.2d 1, 3–4 (Iowa 2012). Iowa Code § 815.1 does not meet strict scrutiny in either regard. First, saving the State money is not a compelling government interest when the State has an obligation to provide indigent defendants services. Furthermore, this new statute will only save money through denying indigent defendants necessary services and when indigent defendants are offered ineffective assistance of counsel. Second, it is certainly not "the least restrictive means" when it does not allow for choice of counsel or have any other institutional checks to make sure indigents with private attorneys can still get services.

Not only is saving money not a compelling government interest, there is no rational purpose to the law enacting the restrictions now found in Iowa Code § 815.1. The purpose behind the law is to eliminate the payment for services to defendants represented by private counsel. The purpose is to eliminate services for indigent defendants who need it. This motive is revealed in a Fiscal Note authored on the bill by the Iowa Legislature's Fiscal Services Division. The note states that, in FY 2018, the Office of the State Public Defender paid $179,793 from the Indigent Defense Fund for Missildine cases. The Fiscal Services Division states that "private attorneys being paid by

private third parties will secure payment from the private third parties rather than accepting payment at the statutory rate for indigent defense work under the procedure established in this bill." Therefore, the Fiscal Services Division anticipates that the amendments to § 815.1 will eliminate most applications for auxiliary services, saving the State $150,000 per year.

However, those anticipated savings will only come to pass through ineffective assistance of counsel. The anticipated savings rely on appointed counsel or salaried State Public Defenders failing to seek indigent services, such as deposition transcripts, process service, investigators, and expert witnesses. These are the very sort of services that that accompany counsel that is effective. They are also the sort of services that, in their absence, show ineffective counsel. When salaried public defenders and contract attorneys do depositions and hire experts, those funds will be used anyway. There is one fact that has been danced around but needs to be brought into focus - every single dollar of the indigent defense fund's $179,793 paid in FY2018 was deemed to be reasonable and necessary by a judge in Iowa. Each and every single penny of the $179,793 went before a judge, and a judge ruled that money was reasonable and necessary to represent an indigent defendant. Competent counsel does reasonable and necessary things to represent her client, including taking depositions and hiring experts.

Iowa Code § 815.1 is not the least restrictive means to meet the alleged government interest. The least restrictive means was already in place before the amendment to 815.1 - Iowa R. Crim. P. 2.20(4). Under that rule, the district court determined whether the defendant was indigent and whether the requested services were necessary. This is the least restrictive way to meet the alleged government interest. The services will only be granted when the Defendant is indigent and when the services are necessary. This works to protect the coffers of the State of Iowa while still offering indigent defendants their right to counsel, to choice of counsel, and to indigent services.

The court should not let the SPD skirt by on this claim that the statute "saves money." The court should be asking how and why the statute saves money, especially given that the Iowa Supreme Court already saw that the indigent hiring a private attorney already saved the State the cost of a court-appointed attorney in Missildine. The State and the SPD's silence on exactly how it will "save money" speaks volumes. The State Public Defender will be unable to answer in its reply brief what compelling State interest requires family or friends who care enough to hire an attorney for an indigent person to only hire counsel that will work for $60 per hour. They will be unable to answer what compelling State interest requires indigent defendants waive their constitutional right to indigent services because they hire counsel

competent enough to require more than a pittance for a fee. They will be unable to answer what compelling State interest requires the waiver of an indigent defendant's constitutional right to indigent services when said defendant ***saves*** the State $60 per hour by hiring his own attorney through a third party. They will be unable to answer what compelling State interest would allow services for only the very poor or the very rich. They will be unable to answer what compelling State interest is there that requires generous third parties to either 1) pay "full-freight" - attorney's fees, expert witness fees, transcripts, and service of subpoenas; or, 2) nothing at all, allowing their loved one to be randomly assigned an attorney who may have only had a law license for two years and tried one simple misdemeanor jury trial. They will be unable to answer what compelling State interest allows only a court-appointed attorney or a salaried public defender to pay for indigent services from the public coffer, but only allows a privately retained attorney (costing the State absolutely nothing) to request the same, necessary services by lowering his fee to $66 per hour.

In the end, this law seeks to make sure that indigents do not have access to services. It is a systemic threat to effective assistance of counsel in Iowa. This Court must protect the right to effective counsel. For our criminal justice system to have any legitimacy, the Iowa Judicial Branch must diligently

protect the right to counsel, and especially an indigent's right to counsel.

VI. The Statute Creates Systemic Ineffective Assistance of Counsel

The State Public Defender and the State's briefs encouraging uniformity and defending the rate as reasonable also miss the point: the rate is too low and it causes systemic ineffective assistance of counsel. They are incorrect that the selection of a reasonable rate is solely a policy decision to be made by the legislature. The court and the State cannot rely on the good will of the criminal defense bar forever. Payment of inadequate fees "will have a chilling effect on qualified lawyers taking this work." Simmons v. State Public Defender, 791 N.W.2d 69, 87 (Iowa 2010). Inadequate compensation will restrict the pool of attorneys willing to represent indigent defendants. Id. Private attorneys that would previously take on indigent clients with a third-party payor will now decline to do so, because they will need to be paid SPD rates in order to get their client the services they need. Low levels of compensation threaten the quality of representation because of perverse economic incentives. Id. Low compensation pits a lawyer's economic interest against the interest of the client in effective representation. Id.

A lawyer representing an indigent defendant has standing to assert the constitutional claims of defendants' rights under article I, section 10 of the Iowa Constitution. Simmons v. State Public Defender, 791 N.W.2d 69, 84

(Iowa 2010). "[T]he issues of a defendant's right to effective assistance of counsel and an attorney's right to fair compensation are 'inextricably linked.'" Id. There is no need to show prejudice in cases involving systemic or structural challenges in the provisions relating to counsel representing indigent defense counsel. Id. at 85.

It "is the responsibility of the judicial branch to ensure that indigents receive effective assistance of counsel as required by article I, section 10." Id. at 85-86. If the State's fiscal concerns could restrain the court's duty to ensure that defendants receive effective assistance of counsel, then even Gideon v. Wainwright, 372 U.S. 335 (1963) would have been wrongly decided. Id.

Any thought that attorneys must represent criminal defendants for free or for little compensation has long passed, as criminal laws have increased in complexity and the cost of operating a law office has risen dramatically. Id. at 86. The focus is not on providing the lawyer with a reasonable fee but on showing that the system is designed to ensure that a defendant receives effective assistance of counsel. Id. at 87. Payment of poor fees "will have a chilling effect on qualified lawyers taking this work and would discourage thorough appellate preparation." Id. Inadequate compensation will restrict the pool of attorneys willing to represent indigent defendants. Id. Low level of

compensation threatens the quality of representation because of perverse economic incentives. Id.

The Iowa Supreme Court recognized over ten years ago that the fees paid to contract attorneys in Iowa are dangerously low, such that, if a hard fee-cap were imposed, Iowa contract attorneys would be at risk of providing ineffective assistance of counsel. See Simmons v. State Public Defender, 791 N.W.2d 69, 87-88 (Iowa 2010) (construing the fee-cap statute to impose a "soft-fee cap" in order to avoid constitutional infirmity, after determining that, after overhead, the contract rate amounts to a payment of about $12/hour for attorneys). The Court stated:

> The implications of the inadequate compensation framework on the provision of effective assistance of appellate counsel are multiple. First, inadequate compensation will restrict the pool of attorneys willing to represent indigent defendants. See State ex rel. Friedrich v. Circuit Ct., 531 N.W.2d 32, 42-43, 44 (1995); see also Coonrad, 362 N.W.2d at 201 (Schultz, J. concurring). Second, the low level of compensation threatens the quality of indigent representation because of the perverse economic incentives introduced into the criminal justice system. See, e.g. Makemson, 491 So.2d at 1112 (noting inextricable linkage between compensation and defendant's right to effective assistance of counsel); Stephan, 747 P.2d at 831 (observing inadequate compensation causes inherent conflicts between attorney and client); Jewell, 383 S.E.2d at 544 (stating it is unrealistic to expect appointed counsel to remain insulated from economic reality when losing money). Low compensation pits a lawyer's economic interest (recall Lincoln's metaphor that a lawyer's time is his stock in trade) against the interest of the client in effective representation. See Adele Bernhard, Take Courage: What the Courts Can Do to Improve the Delivery of

> Criminal Defense Services, 63 U. Pitt. L. Rev. 293, 321 (2002) (declaring conflict of interest between attorney and client in fixed-fee cases as "real"); see also Smith, 681 P.2d at 1381 (holding fixed-price contract to represent defendants in county unconstitutional for, among other things, failure to take into account time that the attorney is expected to spend representing defendants, failure to provide support costs, and failure to take into account the complexity of each case); Olive v. Maas, 811 So. 2d 644, 652 (Fla. 2002) (stating mandatory fee caps create "economic disincentive[s] for appointed counsel to spend more than a minimal amount of time on a case.").

Id. at 88.

By forcing defense attorneys to accept the lower rate of compensation in order to provide services, § 815.1 – like the hard-fee cap invalidated by Simmons – creates perverse incentives to underperform on an indigent defendant's case. A defense attorney may have to choose between services and a paralegal's assistance in reviewing discovery, or services and mileage to visit the client in jail. The rule announced in Missildine was intended to obviate these needs, permitting defense attorneys to take on indigent clients with third party assistance, knowing that they would not need to sacrifice their attorney's fees, time, or professional skills in order to provide effective assistance of counsel where their clients require services. This Court should not permit the legislature to undo Missildine at the expense of attorney's competent representation.

This is particularly troublesome considering that Iowa's contract attorney compensation has increased by only $13 since 1999. See Iowa Code § 815.7. The increase in contract attorney fees has not kept pace with the increases in cost of living or average wages in Iowa. One would be hard-pressed to find an attorney who charges $77 per hour for any job in Iowa, unless it is by court appointment. Many lawyers simply cannot afford to be state contract attorneys unless they also take on privately retained clients.

Nine years ago, this was a pittance:

> Simmons presented evidence including billing statements, excerpts from his fee contracts with the state public defender, commentary by past Iowa State Bar Association President Alan Fredregill on the inadequacy of fees paid to appointed counsel, a survey of the Iowa State Bar Association indicating the average overhead per lawyer for most Iowa attorneys exceeds $40 per hour, and an affidavit from a criminal law attorney offering her opinion that the fees in both cases were reasonable and necessary and stating her unwillingness to work as a contract attorney in light of the fee cap. Simmons also presented copies of various pleadings and correspondence with the state public defender. Simmons pointed out that if the decision of the state public defender stood, he would be compensated at a rate of less than $12 per hour for services that were necessary and reasonable on behalf of his client. With overhead costs of the average lawyer approaching $40 per hour, Simmons, in effect, was working for free.

Simmons v. State Public Defender, 791 N.W.2d 69, 73 (Iowa 2010).

By requiring privately retained attorneys to work at the state contract attorney hourly rate in order to obtain their client the necessary auxiliary

services to provide competent representation, the amendments to Iowa Code § 815.1 will price many attorneys out of representing indigent clients altogether, regardless of whether there is a third party available will to provide all or part of the indigent defendant's fee. This will lower the quantity and quality of attorneys willing to represent indigent clients and undermine the right to effective assistance of counsel throughout Iowa.

$66 per hour is a pittance, and everyone knows it. The literature shows that while private attorneys and public defenders perform about the same, contract attorneys or assigned counsel underperform private attorneys and public defenders. See Cohen, Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes, Criminal Justice Policy Review (2014).

Every justice of the Iowa Supreme Court approved of granting services to an indigent defendant when he was represented by a private attorney except one. See English v. Missildine, 311 N.W.2d 292, 294-95 (Iowa 1981) (Uhlenhopp, J, concurring specially). Even then, Justice Uhlenhopp did not think that an attorney should have to have worked at court-appointed rates in order for the indigent to receive services at state expense. Id. at 295. He merely thought that the private attorney should have to show that the retainer had been used up and that it was "the ordinary and customary charges for like

services in the community." Id. He did not think that the attorney should be required to work at rates as low as $60 before the indigent received public funds. See id.

VII. English Should Be Upheld

The State has placed nothing in the record that shows evidence that the court should overturn the 40-year precedent in Missildine. The State's only rationale for asking the court to adopt such long-standing precedent is that the members of the court have changed. Changing the court's approach after so long will fuel distrust of the courts and destroy predictability, stability, uniformity, and legitimacy in constitutional law. As Justice Lewis Powell once remarked, "the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is." Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 WASH. & LEE L. REV. 281, 288 (1990). Constitutional stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact" by maintaining the notion "that bedrock principles are founded in the law, rather than in the proclivities of individuals…." Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).

A. The statute is unconstitutional whether the right to auxiliary services comes from due process or from the right to counsel

The State's concern with whether Ake puts the right to auxiliary services for indigents solely on the due process clause, or whether the right to auxiliary services should come from the right to effective assistance of counsel is almost purely academic, and does not actually help the court decide whether the statute is constitutional. The answer is simple. The right to auxiliary services comes from both the right to effective assistance of counsel and the right to due process, from many different provisions of both the Iowa Constitution and the Federal Constitution, as Mr. Amaya has been arguing all along.

As Mr. Amaya argued below, the changes to Iowa Code § 815.1 are unconstitutional under the federal constitution, the Iowa Constitution, the Fifth Amendment (due process) and the Fourteenth Amendment (due process), of the United States Constitution and article I, section 1 (equal protection, right to enjoy and defend life in liberty, acquire possess and protect property, and pursue and obtain safety and happiness); article I, section 9 (right to trial and due process); and article I, section 10 (rights at trial including right to counsel, effective counsel, and choice of counsel) of the Iowa Constitution. (App. 013).

While the district court ruled that the statute violated the Sixth Amendment right to counsel, if the court decides that the right to due process is more applicable, or that a different provision of a different constitution is more applicable then the court should uphold the district court's ruling on that basis. The court may uphold the district court's order or any ground urged below. DeVoss v. State, 648 N.W.2d 56, 61-62 (Iowa 2002).

Whether the right to counsel of one's choice or the right to indigent services comes from the right to ineffective assistance of counsel or not is frankly, an academic matter. Mr. Amaya is indigent. He needs services for his case. A third party has paid for Mr. Amaya's attorney, allowing him the right to counsel of his choice. He now seeks the right to ancillary services based on his status as an indigent. Whether his right to ancillary services comes from effective assistance of counsel or from due process makes no difference to Mr. Amaya and is not the controversy before the court. What matters is that the statute either injures his right to ancillary services or his right to counsel of his choice.

B. Other States have concluded that English v. Missildine should be followed

The State mentions that "since English several other state courts have concluded it is constitutionally permissible to condition access to auxiliary services on first accepting public representation" but far more cases have

adopted Missildine, either explicitly or in their reasoning. For instance, in Widdis v. District Court, 968 P. 2d 1165, 1168 (Nevada 1998) (citing English v. Missildine, 311 N.W.2d 292 (Iowa 1981)), the Nevada Supreme Court stated:

> We conclude the English court's analytical framework is sound. Accordingly, we hold that a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense based on the defendant's showing of indigency and need for the services. Although the use of public funds in this manner may appear to be a misuse of such funds, we feel that a contrary rule would have a greater negative impact on scarce public resources by creating disincentives for defendants to seek private representation at their own expense. Such representation, at least, defrays the most costly aspect of defending a person charged with criminal misconduct; costs that otherwise would be borne by public funds. Additionally, a contrary rule disallowing the use of public funds would undoubtedly create disincentives to the defense bar from taking those cases in which defense counsel would possibly have to absorb the cost of defense services. Further, we are confident that a sufficient safeguard against the misuse of public funds is created by placing the burden squarely on the defendant to demonstrate both indigency and reasonable need for the services in question

Other courts have agreed. In Brown v. State the Mississippi Supreme Court cited English v. Missildine and found that the defendant "was entitled to a hearing for a determination of whether he was indigent regardless of who was paying his attorney fees." Brown v. State, 152 So. 3d 1146, 1168-69 (Miss 2014). In a Utah Supreme Court case citing Missildine the court found that the defendant "was entitled to a hearing for a determination of whether she

was indigent regardless of who was paying her attorney fees." State v. Burns, 4 P.3d 795, 803 (Utah 2000).

There are also many examples of jurisdictions that, without citing Missildine, still adopt its reasoning. See, e.g., State v. Wool, 648 A2d 655, 660 (Vt. 1994); Ex Parte Sanders, 612 S2d 1199, 1201 (Ala. 1993); Robinson v. Hotham, 211 Ariz. 165, 118 P.3d 1129, 1133 (Ariz. Ct. App. 2005); State v. Sims, 968 So.2d 721, 722 (La. 2007); State v. Brown, 139 N.M. 466, 134 P.3d 753, 759 (New Mex. 2006); State ex rel. Rojas v. Wilkes, 455 S.E. 2d 575 (W. Va. 1995); State v. Brouillette, 98 A. 3d 1131 (New Hampshire 2014). State v. Vaughn, 279 S.W.3d 584 (Tenn. Ct. Crim. App. 1993).

In contrast to the many other sister circuits adopting Missildine wholesale, or agreeing with the reasoning of Missildine, the three cases from sister circuits that the State cites in its brief (People v. Thompson, 413 P.3d 306, 319–20 (Colo. App. 2017); Moore v. State, 889 A.2d 325, 346 (Md. 2005); State v. Earl, 345 P.3d 1153, 1159 (Utah 2015)) have been poorly received outside of their own jurisdictions, with no other cases adopting their reasoning, but are sometimes cited in order to criticize them. As a concurring opinion in Duke v. State summarized them, “a few appellate courts in other jurisdictions have concluded that a state may constitutionally bundle together legal representation and ancillary defense services, such that an indigent

defendant must accept a state-funded attorney in order to access other state-funded defense services. But these cases either assume that the right to state-funded ancillary defense services is a subsidiary of the right to counsel, or are otherwise poorly reasoned." Duke v. State, 856 S.E.2d 250, 262 (Ga. 2021) (Peterson, J. concurring).

Criticism of Earl included

> the Utah Supreme Court framed the rights at issue as subsidiaries of the right to counsel, saying, "The constitutional right to counsel encompasses the prerogative of choosing counsel of one's choice and of receiving resources necessary to an adequate defense." Although the Utah court cited Ake for that proposition, Ake makes clear that the availability of funding for ancillary defense services involves a right independently rooted in the Due Process Clause. This makes Earl's bases for concluding that the federal constitution does not forbid denying public defense resources to an indigent defendant who opts out of public representation — that the right to choice of counsel is circumscribed, and an indigent defense is entitled to only the tools for an adequate defense, particularly unsatisfying.

Id. (cleaned up)

Thompson has received additional criticism:

> A Colorado appellate decision, People v. Thompson, 413 P3d 306 (Colo. Ct. App. 2017), does no better. It assumes that because the Sixth Amendment right to counsel of choice does not confer a right to public funding to pay the defendant's chosen attorney, the right to counsel of choice "does not extend to indigent defendants who require courts to spend public funds to pay for their ancillary services." Thompson, 413 P3d at 317-18. Having offered up this unpersuasive syllogism that examined the issue solely through the Sixth Amendment lens, the court then attempted to grapple with the due process right to experts

> recognized in Ake, focusing on language in Ake to the effect that a defendant "did not have `a constitutional right . . . to receive funds to hire his own' experts." Thompson, 413 P3d at 319 (quoting Ake, 470 U.S. at 83). The Colorado decision thus fails to recognize that, even in the absence of public representation, the trial court may control the appointment of experts.

Id. (cleaned up).

The State acknowledges that the statute will force a choice upon defendants. See State's Amicus Brief at 37. As English concluded, there is no tension between the two rights, the right to counsel of the defendant's choice and the rights to auxiliary services, unless the State forces that choice by statute. The reason that the State would want to force that choice do not speak highly of the intent of the statute, given the State has never once explained how the statute saves the State money. Both English and the district court have found the statute does not save the State money. The State has refused to explain how the State saves money. As Mr. Amaya explained earlier, the only way it does so is by forcing ineffective assistance of counsel (or in the terms that the State proscribes, the right to auxiliary services for indigents).

VIII. The State and SPD are asking for an advisory opinion

The State requests that the court not sever the statute's application of the court-appointed rate wholly and instead imply a reasonableness requirement. See State's Amicus Brief at 43. English already imposed a

reasonableness requirement on requests for services. Likewise, the State Public Defender makes an argument about the policy considerations of the statute, insisting the statute "allows the court to look at the finances of the representation, and second the statue requires counsel to exhaust the retainer before public funds are used" completely ignoring the required rate that private counsel must work at and all the attendant dangers that come with it. Both policy arguments have little use for the court in deciding the case, and neither are supported by the legislative history, which simply shows a desire for attorneys to work at the same rate as public defenders.

At the final portion of their briefing, the State and the State Public Defender are shifting their advocacy in these final to "reasonableness" because very little thought was put into whether this statute was constitutional or what effect it would systemically have on criminal defense in Iowa. They are asking the court to give the court's opinion on the reasonableness of the statute so that the legislature can have another try at the statute and make further attempts to reduce rates of private attorneys representing indigent clients. The State complains that the court's severance of the statute "permits private agreements to bind the public fisc" when the statute was already an interference into private contractual relationships and attempting to rewrite

them, and the State Public Defender insists this portion only serves to see if the indigent has an ability to pay.

This is not an actual conflict for Mr. Amaya. It is an attempt by the State and State Public Defender to ask for an advisory opinion. An advisory opinion is a question that does not need to be addressed in an appeal. See Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877, 884 (Iowa 1997). "This court has repeatedly held that it neither has a duty nor the authority to render advisory opinions." Id. The State will have to come up with their own plan to "save money" that will pass constitutional muster.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 10,250 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

/S/ Alexander Smith
Dated: November 30, 2021
Alexander Smith