THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2013-0251

State of New Hampshire

v.

Heidi Brouillette

Appeal Pursuant to Rule 8

BRIEF FOR THE AMICUS CURIAE NEW HAMPSHIRE CIVIL LIBERTIES UNION

Respectfully Submitted,

NEW HAMPSHIRE CIVIL LIBERTIES UNION

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ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED BY THE COURT

In a case in which an indigent defendant qualified for representation by the public defender program, but instead retained other counsel, does the trial court's presumption of an ability to pay and denial of court-provided expert services pursuant to RSA 604-A:6 violate the defendant's federal and state constitutional rights to counsel and to present an adequate defense?

TEXT OF RELEVANT AUTHORITY

N.H. Const. pt. I, art. 15 (emphasis added):

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. *Every subject shall have a right to produce all proofs that may be favorable to himself*; to meet the witnesses against him face to face, *and to be fully heard in his defense, by himself, and counsel.* No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. *Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown*; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

U.S. Const. amend. VI (emphasis added):

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence* [sic].

U.S. Const. amend. XIV, § 1 (emphasis added):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

RSA 604-A:6 Services Other Than Counsel (emphasis added):

In any criminal case in which counsel has been appointed to represent a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in his case, counsel may apply therefor to the court, and, upon finding that such services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the necessary services on behalf of the defendant. The court may, in the interests of justice and upon finding that timely procurement of necessary services could not await prior authorization, ratify and approve such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment upon the filing of a claim for compensation supported by an affidavit specifying the time expended, the

nature of the services rendered, the expenses incurred on behalf of the defendant, and the compensation, if any, received in the same case for the same services from any other source. The compensation to be paid to any person or association for such services shall not exceed $300 unless the court determines that the nature or quantity of such services reasonably merits greater compensation. The $300 limit for compensation shall not include or apply to reimbursement for expenses reasonably incurred. In any case in which appointed counsel seeks funds for services other than counsel under this section, the application for such funds may be filed with the court on an ex parte basis and may, upon the request of appointed counsel, be sealed until the conclusion of the representation.

RSA 604-A:1 Representation of Defendants (emphasis added):

The purpose of this chapter is to provide adequate representation *for indigent defendants* in criminal cases, as a precondition of imprisonment, and indigent juveniles charged with being delinquent in any court of this state. Representation of juveniles shall include all court ordered representation and shall be paid from funds appropriated for indigent defense pursuant to this chapter. *Representation shall include counsel and investigative, expert and other services and expenses, including process to compel the attendance of witnesses, as may be necessary for an adequate defense before the courts of this state.*

INTEREST OF THE AMICUS CURIAE

The New Hampshire Civil Liberties Union ("NHCLU") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonpartisan, public interest organization with approximately 500,000 members (including over 3,000 New Hampshire members). The NHCLU and ACLU engage in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions, including the rights of those with less means who require access to the court system. The NHCLU and ACLU have frequently represented clients and authored *amicus* briefs seeking to advance the constitutional rights of indigent individuals to obtain an adequate defense in criminal proceedings, including in *Powell v. Alabama*, 287 U.S. 45 (1932) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

This case implicates an issue of extreme importance to some of society's most vulnerable litigants: indigent defendants who require investigative, expert, or other defense-related services necessary for an adequate defense. The question before the Court is whether defendants who are found to be indigent but have access to private counsel—including *pro bono* counsel—are constitutionally required to have these defense-related services paid for by the state if such services are necessary for an adequate defense. The majority of states that have addressed this issue have concluded that the provision of such funds is constitutionally required, regardless of whether the defendant is represented by a court-appointed or private lawyer. The NHCLU's interest in protecting the rights of indigent defendants to due process and a fair trial—without conditioning these rights on the status of counsel—led to its involvement in this case.

STATEMENT OF THE CASE AND THE FACTS

On November 11, 2012, Heidi Brouillette allegedly went to her sister's apartment in Manchester to confront her for having had sexual relations with her former boyfriend. *See* Defendant's Appendix to Interlocutory Appeal Statement (hereinafter, "App.") at 33 (Police Report). Ms. Brouillette allegedly kicked open her sister's apartment door, entered the apartment, began arguing with her, and punched her in the head, causing bodily injury. *Id.* at 33, 29. Ms. Brouillette allegedly reported to police who arrived at the scene that she "blacked out" and that, aside from arguing with her sister, she had no recollection of the physical confrontation inside her sister's apartment. *Id.* at 33. However, according to the Manchester Police Department Incident Report, Ms. Brouillette did remember taking her sister's vacuum cleaner out of the apartment and smashing the windshield of her sister's car twice. *Id.* at 31, 33. The State charged Ms. Brouillette with one count of burglary (a class A felony), one count of second degree assault (a class B felony), and one misdemeanor count of criminal mischief (stemming from her conduct outside her sister's apartment). *Id.* at 29-31 (Indictment and Information).

When Ms. Brouillette was arraigned, she applied for court-appointed counsel. *See* Defendant's Interlocutory Appeal Statement at 3. The Court, in reviewing her financial affidavit, determined that she was indigent and qualified for court-appointed counsel. *Id.* However, on November 14, 2012, Ms. Brouillette opted to retain private counsel, attorney Olivier Sakellarios, who accepted representation for a reduced rate, allowing her to pay $250.00 per month for a total fee of $2,500.00. *Id.*

On February 5, 2013, Ms. Brouillette, through her private counsel, filed a notice of defense indicating her intent to plead not guilty by reason of insanity. App. at 42 (Defendant's Notice of Defenses). Contemporaneously, she also filed a motion for a bifurcated trial to have

the issue of her sanity be heard separately from the guilt phase of the trial. *Id.* at 46 (Defendant's Motion for Bifurcated Trial on Insanity Defense).

The next day, Ms. Brouillette filed an "Ex Parte Motion for Services Other than Counsel." *Id.* at 1-3. In her Motion, Ms. Brouillette explains that she "has an extensive history of mental health conditions" and that she has been determined by the Social Security Administration to be 100% disabled as a result of her mental health condition. *Id.* The Motion states that, since "[t]here are no allegations that [Ms. Brouillette] was under the influence of alcohol or drugs at the time of the incident," her "black out" appears to have been "induced by a combination of her mental health condition and either stress, anxiety or both." *Id.* Ms. Brouillette's Motion also states that insanity is an affirmative defense and, as such, she is required to prove the defense by clear and convincing evidence. *Id.* Accordingly, Ms. Brouillette concludes that expert testimony is necessary to establish the defense and therefore requests funds in the amount of $2,000 to secure an expert to conduct a psychological evaluation. *Id.* Ms. Brouillette attached to her Motion a financial affidavit to demonstrate her ongoing indigence. *Id.*

On March 8, 2013, the trial court (Brown, J.) denied Ms. Brouillette's Motion. *Id.* at 5-6 (Mar. 8, 2013 Order). The trial court acknowledged that Ms. Brouillette "initially ... qualified for and was appointed a Public Defender." *Id.* at 6. However, the trial court concluded that, because "Attorney Sakellarios is a retained counsel, not court-appointed," Mr. Brouillette's "ability to pay is presumed" and, thus, the trial court "cannot order the expenditure of funds." *Id.* The trial court further explained: "The defendant may proceed with current counsel at her expense or, if she continues to qualify for court appointed counsel, the Public Defender's office

will be reassigned and then it can determine whether services other than counsel are warranted." *Id.*

On March 21, 2013, Ms. Brouillette filed an *Ex Parte* Motion to Reconsider. *Id.* at 8-15. She contended that the trial court's ruling was "forcing her to make [an] impermissible election between two fundamental constitutionally protected rights." *Id.* at 10. On March 25, 2013, the trial court denied the motion to reconsider without comment. *Id.* at 17 (Mar. 25, 2013 Order). Ms. Brouillette filed the present interlocutory appeal from the trial court's order on April 17, 2013, along with a new financial affidavit dated April 3, 2013. *Id.* at 35-37. This Court accepted this case on May 10, 2013.

SUMMARY OF THE ARGUMENT

There are two critical constitutional rights at stake in this case. The first constitutional right emanates from the U.S. Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that due process requires the state to provide the "basic tools of an adequate defense" to those defendants who cannot afford to pay for them. Years before *Ake*, the U.S. Supreme Court recognized that indigent defendants facing the potential loss of liberty need lawyers because of "the obvious truth that the average defendant does not have the professional legal skills to protect himself." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). But, as explained in *Ake*, the right to be represented by counsel—without the investigative, expert, or other defense-related services (hereinafter, "ancillary defense services") that are necessary to provide an adequate defense—is simply not enough to ensure due process. The second constitutional right at issue here is of equal importance. As the U.S. Supreme Court held in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006), all defendants, which includes those who are indigent, have a Sixth Amendment right to retain private counsel who are willing to represent them. A court's failure to respect this right creates a structural error that undermines the entire framework of a criminal proceeding.

In refusing to provide a state-funded expert to defendant Heidi Brouillette simply because she was represented by private counsel, the trial court effectively held that the due process principles in *Ake* apply <u>only</u> when indigent defendants are appointed a state-funded attorney and therefore forgo their Sixth Amendment right to retain willing private counsel. Under the trial court's holding, indigent defendants who have secured private counsel would be faced with the "Hobson's Choice" of either (i) defending against a well-resourced prosecution without

obtaining expert witnesses that are necessary to provide due process (and are provided to the indigent clients of state-funded attorneys), or (ii) retaining a court-appointed attorney and giving up the private lawyer whom they have a Sixth Amendment right to hire. Only indigent defendants are forced to make this choice. However, this Court has concluded that "there are some choices which the State cannot require a defendant to make, and a choice between constitutional rights is one of them." *Opinion of the Justices*, 121 N.H. 531, 539 (1981) (internal citations omitted). This Court should reassert what its precedents and a majority of other jurisdictions have acknowledged: our legal system's commitment to fairness and equal justice requires that indigent individuals have a right to necessary ancillary defense services regardless of whether they have a court-appointed attorney, and it is fundamentally unfair to require indigent defendants—simply because they lack financial means—to choose between their right to receive these services and their right to retain willing private counsel.

Significantly, the State in its brief articulates no governmental interest—let alone a compelling one—requiring indigent defendants to sacrifice their constitutional rights under *Ake* if they exercise their Sixth Amendment right to secure a private attorney of their choice. In fact, any rule that incentivizes private attorneys to take on the criminal cases of indigent defendants will only lessen the financial impact on public funds. Just as significant, should the trial court's rule be adopted by this Court, the effect will be the discouragement of *pro bono* criminal representation in New Hampshire. New Hampshire should welcome rather than exclude involvement by the private bar in the quality of criminal justice dispensed to the least fortunate members of our society. Accordingly, the trial court erred as a matter of law, and this case should be remanded for a determination as to whether, under *Ake*, (i) Ms. Brouillette is indigent, and (ii) the expert she is requesting is necessary for an adequate defense.

ARGUMENT

I. The New Hampshire And United States Constitutions Require That An Indigent Defendant Be Provided With State-Funded Ancillary Defense Services That Are Necessary For An Adequate Defense, Regardless Of Whether The Defendant Is Represented By A Court-Appointed Or Private Attorney.

The trial court erred as a matter of law in concluding that indigent defendants are entitled to ancillary defense services necessary for an adequate defense only when they receive a court-appointed attorney and forgo their Sixth Amendment right to retain private counsel. Ancillary defense services are constitutionally required to be provided when the defendant is indigent and the services are necessary for an adequate defense. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *In re Allen R.*, 127 N.H. 718, 720 (1986) (Souter, J.). The trial court, however, failed to analyze these criteria, and rejected the ancillary defense services requested by Ms. Brouillette simply because she was represented by private counsel. Because the Court did not engage in the analysis required by *Ake* and this Court's precedents, this case should be remanded to the trial court for a reexamination of Ms. Brouillette's request.

a. The Trial Court's Decision Infringes Upon An Indigent Defendant's Constitutional Right To Obtain The Basic Tools Of An Adequate Defense Under *Ake v. Oklahoma* And This Court's Decisions By Conditioning This Right On The Status Of Defense Counsel.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution commands that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* N.H. Const. pt. I, art. 15 ("[E]very subject shall have a right to produce all proofs that may be favorable to himself; ... and to be fully heard in his defense, by himself, and counsel.").

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the U.S. Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment requires the state to provide funds for experts that

are necessary for an indigent defendant's defense. There, the defendant was convicted of murder after the trial court rejected the defendant's request for appointment of an expert psychiatrist to assist in the preparation and presentation of an insanity defense. *Id.* at 72-73. Guided by fundamental fairness, the Court concluded that, where an indigent defendant is not provided with the "basic tools of an adequate defense," the state has denied the defendant due process of law. *Id.* at 177 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). The New Hampshire Supreme Court has similarly concluded that, under both the federal and state constitutions, "an indigent is entitled to the services necessary for an adequate defense, at reasonable cost to the public." *In re Allen R.*, 127 N.H. at 720; *see also State v. Robinson*, 123 N.H. 665, 669 (1983) ("The right to counsel, as guaranteed by the sixth amendment and part I, article 15 of our own constitution, would be meaningless if counsel for an indigent defendant is denied the use of the working tools essential to the establishment of a tenable defense because there are no funds to pay for these items."); *State v. Campbell*, 127 N.H. 112, 115 (1985) (Souter, J.).

The constitutional right guaranteed under *Ake* is not, as the trial court held and the State contends, dependent upon the status of counsel. Neither *Ake* nor the cases upon which it relies suggest that the right to ancillary defense services applies only where an indigent defendant is represented by a state-funded attorney. *See, e.g.*, *Britt*, 404 U.S. at 227 ("[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."); *see also Campbell*, 127 N.H. at 115 ("Whether a defendant has invoked equal protection, fundamental fairness necessary for due process, or the right to services to enable his counsel to assist him effectively, an indigent defendant's access to experts has been said to lie within the sound discretion of the court."). In a case addressing this identical issue, the Iowa Supreme Court agreed, holding that "the

Constitution does not limit this right [to public payment for reasonably necessary investigative services] to defendants represented by appointed or assigned counsel." *English v. Missildine*, 311 N.W.2d 292, 293-94 (Iowa 1981).

Here, the trial court's analysis—by conditioning necessary ancillary defenses services on the appointment of state-funded counsel—deviated sharply from the constitutional criteria under *Ake* for determining whether such services must be provided. If the services are necessary for an adequate defense, the only remaining question to be asked is whether the defendant is indigent—not whether the defendant is represented by state-funded counsel. *See id.* ("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.") (internal quotations omitted); *see also State v. Brown*, 134 P.3d 753, 759 (N.M. 2006) ("[The defendant] is also constitutionally entitled to be provided with the basic tools of an adequate defense. That right is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions."); *People v. Worthy*, 167 Cal. Rptr. 402, 405 (Cal. Ct. App. 1980) (holding that, to survive constitutional scrutiny, "[t]he test of entitlement to county assistance in defense preparation must be indigency"). An indigent defendant with private counsel is no less entitled to due process and fundamental fairness than one with appointed counsel. Yet the result of the trial court's decision is to preclude indigent defendants from securing their rights under *Ake* simply because they have chosen willing private counsel to take their case. Because *Ake* does not create such an arbitrary condition on the enforcement of this fundamental right, the trial court erred as a matter of law.[1]

[1] Any desire for the State to save money by not paying for ancillary defense services—a justification the State has not proffered in its brief—would not constitute a basis to condition or otherwise limit an indigent defendant's right to such services. *See Ake*, 470 U.S. at 79 ("[T]he governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate

b. The Trial Court's Decision Infringes Upon A Defendant's Constitutional Right To Counsel By Limiting The Ability To Retain Chosen Counsel.

The Sixth Amendment of the U.S. Constitution, which applies to the states through the Fourteenth Amendment, guarantees 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. The New Hampshire Constitution similarly states that "[e]very person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown ...." N.H. Const. pt. I, art. 15.

The Sixth Amendment right at stake here is not, as the State suggests, the right to simply obtain competent representation; rather, it includes the right of every defendant *who does not require court-appointed counsel*—like Ms. Brouillette—to choose her own lawyer. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) ("We have previously held that an element of this right is *the right of a defendant who does not require appointed counsel to choose who will represent him.*") (emphasis added) (internal citations omitted); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 716, 624-625 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds."); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("[I]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

The U.S. Supreme Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (Scalia, J.) is instructive. In *Gonzalez-Lopez*, the defendant had retained private counsel

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dispositions."); *see also State v. Stow*, 136 N.H. 598, 605 (1993) ("[T]he fact that RSA 604-A:6 funds are in limited supply is not an appropriate reason for denying access and reliance upon it, without more, would constitute an abuse of discretion."). Indeed, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *See Ake*, 470 U.S. at 78.

who was present and prepared to try the case. The trial court nevertheless erroneously denied counsel admission *pro hac vice*. Instead, the defendant was represented by local counsel, also privately retained. On appeal, the Eighth Circuit Court of Appeals reversed the defendant's conviction and rejected the government's argument that the trial court's violation of his Sixth Amendment right was subject to harmless error review. *Id.* at 142-44. The Supreme Court affirmed, stating that "the Sixth Amendment right to counsel of choice ... commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. This Sixth Amendment right cannot be "disregarded so long as the trial is, on the whole, fair." *Id.* at 145. In so holding, the Court explained that an erroneous deprivation of the right to counsel of choice would inherently cause a "structural" defect that undermines the entire framework within which a trial proceeds:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds,"—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all.

Id. at 150 (internal citations omitted). As in *Gonzalez-Lopez*, Ms. Brouillette is seeking only to enforce the axiomatic principle that a defendant, like herself, who does not require court-appointed counsel because a willing private attorney is available has a clear and unambiguous Sixth Amendment right to retain this attorney.[2]

[2] The State courts holding that a defendant does not have an absolute Sixth Amendment right to choose private counsel have premised their analysis, as the State does here, on one sentence from the U.S. Supreme Court in *Wheat v. United States*, 486 U.S. 153, 159 (1988). In *Wheat*, the Supreme Court noted that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant

Critically, nothing in the Sixth Amendment or in *Gonzalez-Lopez* suggests that the right to choose one's own lawyer is limited to persons with means and does not apply equally to indigent defendants who have the ability to retain willing private counsel. Yet the trial court's decision will, in practice, place a significant burden on this personal choice for indigent defendants that the U.S. Supreme Court has held is fundamental to the entire structure of a criminal proceeding. This Court should reject any temptation to impose such a burden simply because the defendants impacted are without means and require some degree of state-funded services to ensure due process. As the Iowa Supreme Court has concluded, "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). Simply put, the fact that a defendant is indigent and qualifies for court-appointed counsel does not mean that she loses her Sixth Amendment right to choose and retain private counsel should such counsel be available. An indigent defendant's right to choose is only limited if the defendant elects to go forward with court-appointed counsel.[3]

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will inexorably be represented by the lawyer whom he prefers." *See also, e.g., Moore v. State*, 889 A.2d 325, 345 (Md. 2005) (relying on this sentence in *Wheat* to conclude that "although an indigent criminal defendant enjoys the right to assistance of counsel, this entitlement does not translate into an absolute right to counsel of the defendant's choosing"); *State v. Brown*, 87 P.3d 1073, 1082 (N.M. Ct. App. 2004) ("None of the cases relied on by the dissent for the proposition that indigent defendants have a constitutional right to counsel of choice actually decided such a proposition."), *rev'd*, 134 P.3d 753 (N.M. 2006). These cases incorrectly minimize the Sixth Amendment right at stake, and the U.S. Supreme Court has since made clear that an element of the Sixth Amendment "is the right of a defendant who does not require appointed counsel to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144.

[3] It goes without saying that an indigent defendant *who receives a court-appointed attorney* through the state-funded indigent defense system only has a Sixth Amendment right to adequate representation, not the counsel of her choice. *Gonzalez-Lopez*, 548 U.S. at 151 (noting that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"). But this is not the Sixth Amendment principle at issue in this case. Ms. Brouillette does not have court-appointed counsel, but instead wishes to retain her private attorney—a wish that is entitled and has repeatedly received constitutional protection. *See also Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 511 (Cal. Ct. App. 2002) ("An indigent defendant does not have the right to insist upon the appointment of a particular attorney. It does not follow, however, that the court's discretion to interfere with counsel already serving is the same as the court's discretion to choose an attorney when requested by an indigent defendant to appoint counsel") (quoting *Taylor v. Superior Court*, 215 Cal. Rptr. 73, 74 (Cal. Ct. App. 1985)).

There are, of course, specific exceptions to the Sixth Amendment right to counsel of one's choice. As the U.S. Supreme Court has explained:

> Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.

Wheat v. United States, 486 U.S. 153, 159 (1988). A defendant may also not insist on the attorney of her choice when the retention of such counsel would compromise the orderly administration of justice. *See State v. Moussa*, 164 N.H. 108, 114 (2012) ("The right of an accused to counsel of his choice ... is not absolute. ... Thus, a trial court has discretion to limit the exercise of the right, and, in doing so, should balance the defendant's interest in retaining counsel of his choice against the public's interest in the prompt, fair and ethical administration of justice.") (quoting *United States v. Richardson*, 894 F.2d 492, 496 (1st Cir. 1990)). But the State has not raised any of these enumerated exceptions, none of which are relevant here. *See Gonzalez-Lopez*, 548 U.S. at 152 ("None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel."). The trial court's decision would, if affirmed, impose a new, and currently unrecognized, exception to this Sixth Amendment right to counsel of choice—namely that such a right does not exist for indigent defendants who cannot afford, but need, ancillary defense services under *Ake*. Because no such exception exists under the state or federal constitutions, the trial court's decision must be reversed.

c. The Trial Court's Decision Impermissibly Compels An Indigent Defendant Who Is Able To Retain Private Counsel To Choose Between Constitutional Rights.

Under the trial court's decision, an indigent defendant who has retained or wishes to retain willing private counsel faces an impossible choice: either give up the constitutional right under *Ake* to receive ancillary defense services necessary for an adequate defense, or give up the constitutional right to retain chosen private counsel. This Court, however, has long recognized that it is constitutionally intolerable to predicate the exercise of one constitutional right on the forced relinquishment of another.

In *Opinion of the Justices*, 121 N.H. 531 (1981), the General Court asked for this Court's opinion on a proposed amendment to RSA 604-A-9(I) requiring an indigent defendant who is unable to satisfy his repayment obligation for defense costs to "satisfy his debt ... by performing uncompensated work" for the government. *Id.* at 539. The Court explained that "a statute requiring a convicted defendant who is unable to reimburse the State for such expenses to satisfy his debt by performing uncompensated labor for the State would be proscribed by the thirteenth amendment." *Id.* The Court rejected the notion that such servitude was voluntary "because the defendant is free to waive his right to counsel and thereby not incur that expense." *Id.* The Court concluded:

> To espouse this position would be to condition an indigent defendant's enjoyment of his thirteenth amendment rights upon his relinquishment of his sixth amendment right to counsel. *To require a person to surrender one constitutional right in order to gain the benefit of another is simply intolerable.* We recognize that the federal constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. *Nevertheless, there are some choices which the State cannot require a defendant to make, and a choice between constitutional rights is one of them.*

Id. (internal quotations and citations omitted) (emphasis added).

The U.S. Supreme Court has similarly rejected the notion that the exercise of one constitutional right may be conditioned on the substantial impairment of another. In *Simmons v. United States*, 390 U.S. 377 (1968), the Court held that a criminal defendant cannot be compelled to give up his Fifth Amendment privilege against self-incrimination in order to assert his Fourth Amendment right against illegal searches and seizures. 390 U.S. at 390-394. There, the defendant moved to suppress a suitcase that he contended had been illegally seized—a piece of evidence that, if shown to have been in his possession, would have tied him to the crime. *Id.* at 391. To establish standing for his suppression motion, however, the defendant was required to testify that the suitcase was his. *Id.* Once his suppression motion was denied, the prosecution used that testimony against the defendant at trial, and he was convicted. The *Simmons* Court held that the defendant's testimony from the suppression hearing should not have been admissible at trial to establish guilt. *Id.* at 392-393. The Court's analysis rested on the concern that allowing a defendant's suppression-hearing testimony to be used against him at trial would chill the defendant's exercise of his Fourth Amendment rights:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim .... In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

Id. at 393. In addition to this deterrence concern, the *Simmons* Court recognized that a rule allowing the admission of suppression-hearing testimony "imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to [assert his Fourth Amendment rights] must do so at the risk that the words which he utters may later be

used to incriminate him." *Id.* at 393. For those reasons, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

Similarly, in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the U.S. Supreme Court invalidated a New York law that required holders of public office to waive their privilege against self-incrimination if subpoenaed by a grand jury. Under the law, an officeholder who refused to waive that immunity would be immediately removed from office and barred from holding any other office for five years. *Id.* at 802. The *Lefkowitz* Court held that the New York law violated the Fifth Amendment by coercing a waiver through imposition of substantial penalties. *Id.* at 806. That coercion was achieved in part by requiring the officeholder "to forfeit one constitutionally protected right"—i.e., the "[First Amendment] right to participate in private, voluntary political associations"—as the price for exercising another. *Id.* at 807-808; *see also Hunt v. Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001) (trial court impermissibly imposed "element of coerced choice decried ... in *Simmons*" when it forced defendant to choose between his Sixth Amendment right to counsel and his state statutory right to a speedy trial); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977) ("A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.").

The decisions of this Court and the U.S. Supreme Court are consistent with the broader principle that the government may not "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2565 (2013). That principle can apply even where those benefits are wholly discretionary, rather than constitutionally mandated. *See, e.g., Agency for Int'l Dev.*

v. Alliance for Open Soc'y Int'l, 133 S. Ct. 2321, 2328 (2013); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-675 (1996). Where, as here, the "benefit" that is threatened is not a discretionary act of legislative grace but instead a benefit "afforded by another provision of the Bill of Rights"—namely, due process rights under *Ake*—the prohibition on unconstitutional conditions should apply with even greater force. *See Simmons*, 390 U.S. at 394; *see also State v. Brown*, 134 P.3d 753, 756 (N.M. 2006) ("[I]t is well settled that forcing a criminal defendant to surrender one constitutional right in order to assert another is intolerable.") (internal quotations omitted).

The State does not address this Court's holding in *Opinion of the Justices* or the U.S. Supreme Court's holding in *Simmons*. Instead, citing *State v. Ayer*, 154 N.H. 500 (2006) and *State v. Towle*, 162 N.H. 799 (2011), the State contends that, although "an indigent defendant has the right to constitutionally effective representation by court-appointed counsel, he has no right to insist on the appointment of any particular attorney." State's Br. at 16 (quoting *Towle*, 162 N.H. at 805 (concurring, Lynn, J.)). Thus, according to the State, just as an indigent defendant who seeks a state-funded attorney may have her choices limited insofar as she may not choose who that specific state-funded attorney is, the choices of an indigent defendant who similarly seeks ancillary defense services under *Ake* too "may properly be limited." *Id.* Where the State's argument fails, however, is its logical leap from this legal principle to the far-reaching conclusion that one of these limiting "choices" can include conditioning the provision of constitutionally-required ancillary defense services under *Ake* on the indigent defendant "choosing" to forego her Sixth Amendment right to retain private counsel. *Opinion of the Justices* expressly rejects the State's rationale. The principle articulated in *Ayer* is only applicable here to the extent it leads to the unremarkable conclusion that, just as an indigent

defendant seeking court-appointed counsel is only entitled to effective court-appointed representation (not the specific attorney of the defendant's choice), an indigent defendant similarly is only entitled to ancillary defense services necessary to provide an adequate defense (not the specific ancillary defense services of the defendant's choice). This well-settled principle was memorialized in *Ake* itself. *See Ake*, 470 U.S. at 83 ("This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed ...."). It cannot be disputed that Ms. Brouillette, like indigent defendants represented by court-appointed counsel, is only constitutionally entitled to ancillary defense services necessary for an adequate defense, not the specific ancillary defense services of her own choosing. But the fact that certain reasonable limitations exist on an indigent defendant's ability to obtain state-funded ancillary defense services does not mean that a trial court can decline to provide these services *in toto* unless the defendant gives up her Sixth Amendment right to retain willing private counsel. Because the trial court improperly required Ms. Brouillette to choose between these two constitutional rights, its decision must be reversed.

II. A Majority Of State Courts Have Required The State To Pay For An Indigdent Defendant's Necsssary Ancillary Defense Services, Regardless Of Whether The Defendant Is Represented By A Court-Appointed Or Private Attorney.

A decision by this Court precluding the use of state funds for necessary ancillary defense services where an indigent defendant is represented by private counsel would place New Hampshire with a shrinking minority of states that make public funding for such services contingent upon an indigent defendant's acceptance of representation by a court-appointed attorney. In decisions spanning more than two decades, state courts in at least twenty-six (26)

states have now considered whether an indigent defendant with private counsel can be eligible for public funding of ancillary defense services.[4] In at least sixteen of those states, the decisions appear to be based largely or entirely on state law.[5] In the remaining ten jurisdictions that have addressed this question with reference to federal constitutional principles, the state courts have divided approximately seven to three in favor of an indigent defendant's entitlement to defense costs in this situation:

Constitutional Right Exists:

- *State v. Brown*, 134 P.3d 753, 761 (N.M. 2006) (holding that defendant was entitled to funding for expert witness fees even though defendant was represented by pro bono attorney).

- *State v. Frank*, 803 So.2d 1, 8 (La. 2001) (in relying on Louisiana case law applying federal principles, concluding that defendant represented by private counsel should have been entitled to make a factual showing that she needed expert assistance to present mitigating evidence).

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[4] These opinions include the following: *Dubose v. State*, 662 So.2d 1189, 1192 (Ala. 1995); *Jacobson v. Anderson*, 57 P.3d 733, 734 (Ariz. Ct. App. 2002); *Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 508 (Cal. Ct. App. 2002); *People v. Worthy*, 167 Cal. Rptr. 402, 405 (Cal. Ct. App. 1980); *People v. Cardenas*, 62 P.3d 621, 622-23 (Colo. 2002); *Chao v. State*, 780 A.2d 1060, 1070-71 (Del. 2001), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002); *Office of the Public Defender v. Thompson*, 451 A.2d 835, 837 (Del. 1982); *Cain v. State*, 758 So. 2d 1257, 1258-59 (Fla. Dist. Ct. App. 2000); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979); *People v. Evans*, 648 N.E.2d 964, 968-69 (Ill. App. Ct. 1995); *In re T.W.*, 932 N.E. 2d 125, 132 (Ill. App. 2010); *Beauchamp v. State*, 788 N.E.2d 881, 890 (Ind. Ct. App. 2003); *English v. Missildine*, 311 N.W.2d 292, 294 (Iowa 1981); *Morton v. Commonwealth*, 817 S.W.2d 218, 219-20 (Ky. 1991); *State v. Frank*, 803 So.2d 1, 8 (La. 2001); *Moore v. State*, 889 A.2d 325, 345-46 (Md. 2005); *People v. Arquette*, 507 N.W.2d 824, 826 (Mich. App. 1993); *State v. Pederson*, 600 N.W.2d 451, 454 (Minn. 1999); *State v. Huchting*, 927 S.W.2d 411 (Mo. Ct. App. 1996); *Widdis v. State*, 968 P.2d 1165, 1167 (Nev. 1998); *In re Cannady*, 600 A.2d 459, 461 (N.J. 1991); *State v. Manning*, 560 A.2d 693, 698 (N.J. Super. App. Div. 1989); *State v. Brown*, 134 P.3d 753, 756 (N.M. 2006); *People v. Ulloa*, 766 N.Y.S.2d 699, 700 (N.Y. App. Div. 2003); *State v. Boyd*, 418 S.E.2d 471, 475 (N.C. 1992); *State v. Pasqualone*, No. 97-A-0034, 1999 Ohio App. LEXIS 1429, *12 (Ohio Ct. App. Mar. 31, 1999); *Spain v. Dist. Court*, 882 P.2d 79, 81 (Okla. Crim. App. 1994); *State v. Burns*, 4 P.3d 795, 801-02 (Utah 2000); *State v. Wool*, 648 A.2d 655, 660 (Vt. 1994); *State ex rel. Rojas v. Wilkes*, 455 S.E.2d 575, 578 (W. Va. 1995).

[5] In all but one of these jurisdictions, courts have found that defendants with private counsel were entitled to state-funded assistance. *See Dubose*, 662 So.2d at 1192; *Jacobson*, 57 P.3d at 734; *Cain*, 758 So. 2d at 1258-59; *Arnold*, 600 P.2d at 1385; *Evans*, 648 N.E.2d at 968-69; *Beauchamp*, 788 N.E.2d at 890; *Arquette*, 507 N.W.2d at 826; *Pederson*, 600 N.W.2d at 454; *In re Cannady*, 600 A.2d at 461; *Manning*, 560 A.2d at 698; *Boyd*, 418 S.E.2d at 475; *Spain*, 882 P.2d at 81; *Pasqualone*, 1999 Ohio App. LEXIS 1429, *12; *Burns*, 4 P.3d at 801-02; *Wool*, 648 A.2d at 660; *Rojas*, 455 S.E.2d at 578. Only one court reached the opposite conclusion. *Cardenas*, 62 P.3d at 622-23. All of these cases involve requests for expert assistance except *Cardenas* (request for translator), *Arquette* (request for transcripts), *Pederson* (same), and *Spain* (same).

- *English v. Missildine*, 311 N.W.2d 292, 293-94 (Iowa 1981) ("[T]he Constitution does not limit [the Sixth Amendment right to effective representation of counsel] to defendants represented by appointed or assigned counsel.").

- *Widdis v. State*, 968 P.2d 1165, 1167-68 (Nev. 1998) (approving of *English*, and holding that the state has a duty "to provide reasonable and necessary defense services at public expense to indigent criminal defendants who have nonetheless retained private counsel").

- *People v. Ulloa*, 766 N.Y.S.2d 699, 700 (N.Y. App. Div. 2003) ("A defendant's status as an indigent is not altered merely because his or her family and friends retain private counsel to represent him or her at trial.").

- *Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 508 (Cal. Ct. App. 2002) ("The test of entitlement to county assistance in defense preparation must be indigency. A test based upon the status of defense counsel would be constitutionally infirm.") (quoting *People v. Worthy*, 167 Cal. Rptr. 402, 405 (Cal. Ct. App. 1980)).

- *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. Ct. App. 2002) (finding "merit" to the rule that "a defendant who spends down his resources in the middle of his defense or who relies on the largesse of friends and family for initial defense expenses is no less entitled to due process and fundamental fairness than is a defendant who enters the judicial system penniless").[6]

Constitutional Right Does Not Exist:

- *Moore v. State*, 889 A.2d 325, 345-46 (Md. 2005) ("Indigent defendants may utilize the O.P.D.'s complete 'package' of services, or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the O.P.D.").

- *Morton v. Commonwealth*, 817 S.W.2d 218, 221 (Ky. 1991) (declaring that defendant had decided that receiving ancillary defense services "outweighed his desire to be represented by a particular attorney" and, therefore that the defendant was "afforded his Sixth Amendment ... rights").

- *Office of the Public Defender v. Thompson*, 451 A.2d 835, 837 (Del. 1982) (rejecting constitutional challenge by an indigent defendant represented by private counsel of a regime whereby, when an indigent defendant represented by private counsel asks for public funds for an expert, the request is deemed to be an application by the private counsel to withdraw and a motion for public defender representation); *see also Chao v.*

[6] One court in New Jersey similarly opined that such a constitutional right exists, but only in *dicta*. *See Manning*, 560 A.2d at 698 ("Judge Antell in his concurring opinion persuasively argues that the result we reach [that, under New Jersey law, a defendant does not have to be represented by a public defender to receive ancillary defense services] is also supported on constitutional grounds. We fully subscribe to his analysis on this point. But we are enjoined not to reach a constitutional issue when a matter can be otherwise determined.").

State, 780 A.2d 1060, 1070-71 (Del. 2001) ("Although indigent defendants may be required to give up their chosen private counsel, in some circumstances, it is well established that the Sixth Amendment guarantees only an effective advocate for defendants in criminal cases and does not require that defendants be represented by their lawyer of choice."), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002).

As this survey reflects, the vast majority of states that have addressed this issue have concluded that the provision of such funds, when necessary to provide an indigent defendant with an adequate defense, is required, regardless of whether the defendant is represented by a court-appointed or private lawyer. *See, e.g., In re T.W.*, 932 N.E. 2d 125, 132 (Ill. App. 2010) ("[T]he majority of other jurisdictions that have addressed the issue in detail have concluded that under the United States Constitution and their respective state statutes, indigent defendants represented by *pro bono* or retained counsel are entitled to state funding for expert witness fees."); *Brown*, 134 P.3d at 756 ("It appears that the majority of state courts that have examined this issue have concluded that under the U.S. constitution and their respective state statutes, indigent defendants represented by *pro bono* or retained counsel are entitled to state funding for various costs, including expert witness fees."). This is fully consistent with the rule applied in federal courts under the Criminal Justice Act of 1964 ("CJA") and the American Bar Association Standards for Criminal Justice ("ABA CJS"), which make clear that ancillary defense services are available to all indigent defendants, without regard to who represents them. *See* 18 U.S.C. § 3006A(e)(1) (authorizing "[c]ounsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation" to request such funds in an *ex parte* application); ABA CJS 5-1.4 (3d ed. 1992), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html ("…. In addition, supporting services necessary for providing quality legal

representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.").

III. The Trial Court's Decision, If Affirmed, Would Discourage Private Representation Of Indigent Defendants.

Limiting the application of *Ake* to only those situations where an indigent defendant is represented by a state-funded attorney would substantially diminish, if not outright eliminate, the private representation of indigent criminal defendants for little or no fee, thereby resulting in a higher client base for public defenders and contract attorneys. As the New Mexico Supreme Court held:

> We believe that pro bono representation should be encouraged and furthered wherever possible. Given the heavy workload of the [public defenders' office] and the emphasis on pro bono service throughout the legal community, it would seem that any lawyer who wishes to take on pro bono cases should not be discouraged solely because of lack of access to needed defense funds, such as expert witness fees.

See State v. Brown, 134 P.3d 753, 760 (N.M. 2006); *see also Widdis v. State*, 968 P.2d 1165, 1168 (Nev. 1998) ("[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.").

Under the trial court's holding, a *pro bono* attorney representing an indigent defendant would not only forego his or her normal fee, but also would be required to pay for the ancillary defense services necessary to provide an adequate defense. Private attorneys are not required to incur such expenses, and it is difficult to envision a scenario where a private attorney would agree to such a financially-onerous undertaking. *See State v. Robinson*, 123 N.H. 665, 669 (1983) ("[L]awyers have no more obligation to pay the needed expenses of a criminal defense ... than any other class of citizens, and that to require them to do so would raise serious due process issues."). If indigent defendants are not entitled to *Ake* services unless they retain court-

appointed counsel, the likely result will be private attorneys declining to represent indigent defendants because such representation would actually hinder the attorney's ability to provide the defendant with an adequate defense. *See* N.H. Rule of Professional Responsibility 1.16(a)(1) ("a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ... the representation will result in violation of the rules of professional conduct or other law"); *Id.* at 1.1, 1.3 (directing that a lawyer shall provide competent, diligent representation to a client).

This Court should be encouraging, not discouraging, the involvement of private counsel in the representation of indigent defendants, especially where such representation is for little or no fee. As this Court has noted, New Hampshire has a strong policy of encouraging private attorneys to represent indigent defendants for little or no fee: "Many of those representing the accused do so on a *pro bono* or reduced fee basis. We agree with the Supreme Judicial Court of Massachusetts that 'the public has a strong interest in encouraging the representation of criminal defendants, particularly those who are ruled to be indigent.'" *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.*, 143 N.H. 491, 498 (1999) (Broderick, J.) (quoting *Glenn v. Aiken*, 569 N.E.2d 783, 788 (Mass. 1991)); *see also* Dalianis, C.J., *Addressing Unmet Legal Needs in N.H.: The Role of Pro Bono*, Remarks at U.N.H. School of Law's Justice, Leadership & Public Policy Speaker Series (Oct. 16, 2012), *available at* http://www.nhbar.org/uploads/pdf/PB-Dalianis-FriedmanSpeech-101612.pdf ("There is, as we all know, a justice gap in our country, and in our state. When I look at the numbers, it seems far more than a gap to me. It is a crisis of injustice that we, as lawyers, have a professional obligation to continually recognize and attempt to address."). This policy is reflected in Rule 6.1 of the New Hampshire Rules of Professional Conduct, requiring attorneys to aspire to render at least 30 hours of *pro bono* services per year.

See N.H. Rule of Professional Responsibility 6.1. The constitutional right to necessary ancillary defense services regardless of counsel status will only expand the pool of lawyers who will be willing to address the criminal defense needs of the least fortunate in New Hampshire.[7]

IV. The Trial Court's Decision, If Affirmed, Would Cause The Unnecessary Expenditure Of Public Funds.

Relatedly, to limit *Ake*'s holding to those indigent defendants with state-funded counsel would likely ensure the unnecessary expenditure of public funds. Instead of allowing the State to pay only the limited expenses of an indigent defendant's defense where the defendant retains private counsel, the trial court's rule forces indigent defendants to forego the counsel of their choice and be appointed state-funded counsel, thus obligating the State to pay for both these services *and* the state-funded counsel in such cases. Requiring indigent defendants to abandon private legal services and compelling them to accept representation by public defenders as a condition of receiving *Ake* services will only further increase the burdens on New Hampshire's Indigent Defense Fund. As the Nevada Supreme Court concluded in a case addressing this issue:

> [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 be born [sic] by public funds.

[7] Encouraging private representation is especially important given the paucity of indigent defense resources. For example, the General Court, through the Indigent Defense Fund, continues to pay relatively low flat fees to contract and assigned attorneys, and reimbursement of actual and reasonable out-of-pocket expenses is not guaranteed. *See* N.H. Supreme Court Rule 47(2)(c) (expenses reimbursed "only upon a finding of necessity and reasonableness"). Had Ms. Brouillette retained a contract attorney, the contract attorney would have received a fee of $756.25, even if the case went to trial. *See* Judicial Council, "Information for Those Interested in an Indigent Defense Contract," *available at* http://www.nh.gov/judicialcouncil/documents/contractattorneyinformation.pdf. Assigned counsel would have received a maximum fee of only $4,100 (at a rate of $60 per hour). *See* N.H. Supreme Court Rule 47(2)(c). This system is in contrast to the American Bar Association Criminal Justice Section's Standards concerning compensation and expenses, which states that "[a]ssigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation." *See* ABA CJS 5-2.4 (3d ed. 1992), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

Widdis v. State, 968 P.2d 1165, 1167-68 (Nev. 1998). Tellingly, the State's brief does not articulate a governmental interest in conditioning *Ake* services on the acceptance of court-appointed counsel, let alone contend that such a system will actually save the State money. This is because such a regime likely will do the opposite.

New Hampshire has all the tools necessary to curtail any abuses that may arise if private counsel are permitted to seek state-funded ancillary defense services on behalf of their indigent clients. At the outset, to receive such funds, a determination of indigency must be made. In determining whether a person is "financially unable to obtain counsel" within the meaning of RSA 604-A:2, a trial court compares the "net value of real estate and total funds available for representation with the minimum cost of representation, contribution threshold and contribution limit for the type of case being tried." *See* N.H. Code Admin. R. Ann. 1003.02(a); *see also* RSA 604-A:2-c. A defendant must provide this information under oath and has an obligation to supplement this information at each court hearing. New Hampshire does not limit its indigency inquiry to the defendant's assets. A spouse's income and assets may also be considered insofar as they may reduce the defendant's other expenses and free more of the defendant's income to pay for counsel. *See State v. Atkins*, 143 N.H. 242, 242 (1998).

Significantly, should this Court apply *Ake*'s holding to indigent defendants represented by private counsel, the trial court would also continue to act as a gatekeeper to funds for ancillary defense services, thereby ensuring that public funds are not wasted. The standard to receive these funds is not a low one. As this Court has noted:

> To warrant a favorable exercise of [the trial court's discretion to authorize the payment of expert fees], it is not enough merely to allege in general or conclusory terms that expert services would be helpful. Rather, a defendant must demonstrate by reference to the facts and circumstances of his particular case that the assistance he seeks is necessary to insure effective preparation of [his] defense by [his] attorneys.

State v. Campbell, 127 N.H. 112, 115 (1985) (quoting *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975)) (internal quotations and citations omitted); *see also State v. Wellington*, 150 N.H. 782, 787 (2004) ("[I]t is reasonable to require the defendant to articulate some basis beyond general hope that an expert might be helpful in trial preparation."). This approach requires the trial court to assess the necessity for the defense service requested by weighing its probable value against the risk of an erroneous deprivation of life or liberty if the service is not provided—an analysis which "must necessarily focus on the relationship between the [defense-related service] and the issues in the case." *See Campbell*, 127 N.H. at 115. This "is not a blank check on the public fisc, to be drawn in whatever amount the zeal or caution of counsel may dictate." *See In re Allen R.*, 127 N.H. 718, 723 (1986). This Court should be confident that trial courts will take seriously their responsibility to ensure that private attorneys only obtain state funds when the services requested are necessary to provide the defendant with a fair trial, especially where trial courts already play this important gatekeeping role under RSA 604-A:6 for indigent defendants represented by court-appointed counsel. *See Widdis*, 968 P.2d at 1168 ("[W]e are confident that a sufficient safeguard against 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.").

Finally, once a determination is made that a defendant is indigent and that certain ancillary defense services are necessary to provide an adequate defense, the trial court may examine the fee arrangement between the indigent defendant and the private attorney to ensure that the State is not spending money that would be more appropriately spent by the private attorney from any fee derived in the case. As one California court has held:

> If counsel's fee is so high it exceeds the bounds of reason or shocks the conscience, given the nature of the case involved, the court may reasonably conclude the amount paid was

> not solely for lawyering services .... In such circumstances, the court may conclude that some of the money was not intended as compensation, but was money held for the benefit of the defendant's defense expenses.

See Tran v. Superior Court, 112 Cal. Rptr. 2d 506, 512 (Cal. Ct. App. 2002); *see also* Widdis, 968 P.2d at 1168 n.2 ("In cases where the private funds committed to fees seem excessive, the district court has the discretion to refuse applications for public assistance."). Such a system is similar to that which exists under the CJA, where the federal courts are vested with the authority to scrutinize the fee agreement between the needy defendant and privately-retained counsel. *See* CJA Guidelines, Part A, Chapter III, § 310.10.20, *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter3.aspx#310_10 ("If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the retained attorney to pay out of such fees all or such part of the costs and expenses as the court may direct.").[8]

V. Advances In Modern Science Often Make The Funding Of Defense Experts Necessary For An Adequate Defense.

It has long been understood that the "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if the defense requires ... the services of a[n] expert and no such services are available." *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (quoting *ABA Standards, Providing Defense Service*, 22-23 (App. Draft 1968)). Consequently, courts have not hesitated to find constitutional error when a state refuses an indigent defendant

[8] However, this Court should be mindful not to compel private defense counsel to pay for an ancillary defense service if the fee simply appears to be in the upper range of fees upon which private parties dealing at arm's length might agree. To do so would run the risk of intruding in the relationship between the attorney and the client, rewriting the fee agreement, and forcing counsel to underwrite defense expenses or face at least a potential conflict with his client. *See Tran*, 112 Cal. Rptr. 2d at 512.

an expert needed for preparation and presentation of her defense. *Id.*; *Ake v. Oklahoma*, 470 U.S. 68, 86 (1985) (due process required that the state provide petitioner with access to a psychiatrist both to assist in the preparation of his insanity defense to the charges and in any sentencing proceedings); *see also In re Allen R.*, 127 N.H. 718, 721-22 (1986) (holding that it was unreasonable for a trial court to deny any reimbursement to counsel for an indigent criminal defendant for the fee of a psychologist where there was no question that such services were needed).

The need for experts is greater now than ever before in our criminal justice system. Dramatic advances in the social, forensic and physical sciences have resulted in a parallel growth in the use of science and scientific experts in the courtroom. As Professor Paul C. Giannelli has observed, "[t]he use of experts is costly, and prosecutors have an overwhelming advantage on this score." Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 Cornell L. Rev. 1305, 1306 (2004); *see also* Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need For Expert Aid*, 60 S.C. L. Rev. 493, 494-495 (2008) ("Expert witnesses' development and analysis of those facts are crucial, whether for issues of mental competence; psychological syndromes in domestic violence, rape, and child abuse cases; ... forensic evidence and techniques; ... or a party's knowledge or intent."). Prosecutors in New Hampshire have significant access to facilities and experts not readily available to lawyers who represent defendants in our state courts. State prosecutors routinely utilize the services and expertise of government crime laboratories, the N.H. Department of Justice's Office of the Chief Medical Examiner, state hospitals, as well as the expertise and services of local polices agencies. Prosecuting agencies often receive federal funding to hire

experts and attorneys to aid in the prosecution of target populations, including, for example, drug abusers and sex offenders.

The critical influence of expert testimony on the outcome of criminal proceedings can hardly be disputed, especially in cases implicating the scientific complexities of DNA evidence. As Professor Paul Giannelli has aptly observed:

> .... [T]he advent of DNA evidence dramatically changed the legal landscape. Indeed, one judge called it the "single greatest advance in the search for truth ... since the advent of cross examination." [] The initial DNA skirmishes over laboratory protocols [] quickly metamorphosed into fights over statistical interpretation and population genetics. [] No other technique had been as complex or so subject to rapid change. New DNA technologies were introduced at the trial level as cases litigating the older procedures worked their way through the appellate court system .... Few defense attorneys can deal with this type of sophisticated evidence—which raises issues, as one prosecutor remarked, "at the cutting edge of modern law and science" []—without expert assistance.

Giannelli, 89 Cornell L. Rev. at 1313-14 (footnotes omitted); *see also* Wiseman, 60 S.C. L. Rev. at 495 (an initial study of the 221 individuals who, as of 2008, were exonerated post-conviction using DNA evidence reveals that a majority involved "improper testimony" by the prosecutions' forensic experts, including "exaggeration of the probative significance of the evidence" and erroneous scientific conclusions).

In the past twenty years, the United States Supreme Court's landmark decision in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has revolutionized the admissibility of evidence based on forensic science. *See also Baker Valley Lumber v. Ingersoll-Rand Co.*, 148 N.H. 609, 614 (2002) (concluding that the *Daubert* standard should be used to interpret N.H. R. Evid. 702). The *Daubert* decision and its progeny have forced defense attorneys to frequently reexamine the admissibility of scientific evidence, including expert opinion testimony and physical evidence based upon scientific techniques that have long been regarded as "generally accepted." The duty to examine, where appropriate, the lack of empirical

support for many commonly-employed forensic techniques has forced defense attorneys to "cope with a changing landscape of scientific proof" necessitating the help of experts. *See* Giannelli, 89 Cornell L. Rev. at 1318. Against the backdrop of ever more complex scientific evidence, a defense attorney's use (or failure to employ the services) of an expert has come under increased scrutiny in cases involving claims of ineffective assistance of counsel. *See, e.g.*, *State v. Whittaker*, 158 N.H. 762, 774 (2009) ("Based upon all of these factors, even with the presumption that his performance was constitutionally sufficient, we conclude that the decision of the defendant's trial counsel not to consult with an accident reconstruction expert was constitutionally defective performance."); *Mayfield v. Woodford*, 270 F.3d 915, 932-33 (9th Cir. 2001) (ineffective assistance of counsel finding based on counsel's failure to offer expert testimony by an endocrinologist or toxicologist regarding the defendant's diabetes and substance abuse).

This Court should carefully consider the growing need for experts in criminal cases in rendering its decision in this case.

VI. This Court Need Not Deem RSA 604-A:6 Unconstitutional.

Finally, though Ms. Brouillette asks this Court to conclude that RSA 604-A:6 is unconstitutional, such a conclusion need not be reached in this case.

"In determining the statute's constitutionality, we must bear in mind that '[i]t is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible.'" *State v. Howard*, 121 N.H. 53, 57 (1981) (quoting *State v. Smagula*, 117 N.H. 663, 666 (1977)). As explained above, the state and federal constitutions require that indigent defendants with private counsel be provided with funds for ancillary defense services that are necessary for an adequate defense. However, RSA 604-

A:6 can reasonably be construed as not expressly depriving a trial court of the ability to authorize the payment for ancillary defense services that are necessary for the defense of an indigent defendant represented by private counsel, as such a construction is necessary to avoid a conflict with the state and federal constitutions that require such authority.[9] While RSA 604-A:6 allows the payment of such expenses "*[i]n any criminal case in which counsel has been appointed to represent a defendant* who is financially unable to obtain" these defense-related services, the statute is silent on whether a court has the authority to order the payment of such expenses when the indigent defendant secures a private attorney that has not been appointed by the court. Put another way, RSA 604-A:6 neither provides the authority for *nor expressly prohibits a court from ordering the payment of such fees where constitutionally appropriate*. Thus, because RSA 604-A:6 can reasonably be interpreted as not depriving the trial court of the authority to order the payment for "investigative, expert or other services necessary" to the defense of an indigent defendant represented by private counsel, this statute can be interpreted as such in order to harmonize it with state and federal constitutional requirements.[10]

[9] RSA 604-A:1 itself does not condition the disbursement of necessary ancillary defense services on whether defense counsel is court-appointed. See RSA-A:1 ("Representation shall include counsel and investigative, expert and other services and expenses, including process to compel the attendance of witnesses, as may be necessary for an adequate defense before the courts of this state.").

[10] Even to the extent this Court interprets RSA 604-A:6 as expressly precluding a trial court from issuing state funds for necessary ancillary defense services in this situation, this Court can, as it did in *Howard,* read in such authority in the statute as an exception to its language that is required by the state and federal constitutions. *See Howard*, 121 N.H. at 58-59 (holding that, in order to uphold the constitutionality of New Hampshire's rape shield statute, a defendant charged with statutory rape must, upon motion, be given an opportunity to demonstrate that due process requires the admission of evidence concerning the victim's prior consensual sexual activity because the probative value in the context of that particular case outweighs its prejudicial effect on the victim).

CONCLUSION

For the foregoing reasons, the NHCLU respectfully urges the Court to rule that indigent defendants have the right under the state and federal constitutions to ancillary defense services that are necessary to present an adequate defense regardless of whether the defendant is represented by court-appointed or private counsel. If the Court reaches this conclusion, this case should be remanded to the trial court for a reexamination of Ms. Brouillette's request for a psychological expert consistent with these constitutional principles.

REQUEST FOR ORAL ARGUMENT

The NHCLU respectfully requests oral argument to be presented by Gilles R. Bissonnette, Esq. in accordance with its Motion filed this day pursuant to Supreme Court Rule 30(4).

Respectfully Submitted,

NEW HAMPSHIRE CIVIL LIBERTIES UNION

By Its Attorneys,

Date: November 15, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae New Hampshire Civil Liberties Union* was served this 15th day of November, 2013 by first class mail, postage prepaid, and by electronic mail on counsel for the defendant, Olivier Sakellarios, Esq., Sakellarios & Associates, 195 Elm Street, Manchester, NH 03101-2706, and counsel for the State, Stephen D. Fuller, Esq., New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397.

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