

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
Plaintiff,)
v.) SUPREME COURT No. 20-1346
RODRIGO AMAYA,) Polk County FECR333390
Defendant/Appellee,)
STATE PUBLIC DEFENDER)
Appellant)

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

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

/s/ William Bushell
WILIAM BUSHELL
Assistant Public Defender
bbushell@spd.state.ia.us
STATE PUBLIC DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 725-2228 / (515) 281-72891 FAX
Attorney for the Appellant

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Final Brief was filed with the Clerk of the Supreme Court VIA EDMS on November 29, 2021, and on the following others in the manner indicated:

Benjamin Bergman and Alex Smith
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com
ATTORNEYS FOR DEFENDANT
VIA EDMS

/s/ William Bushell
WILIAM BUSHELL
Assistant Public Defender
bbushell@spd.state.ia.us
STATE PUBLIC DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 725-2228 / (515) 281-72891 FAX
Attorney for the Appellant

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because this is a case presenting a substantial constitutional question as to the validity of a statute and the case also involves an issue of first impression. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(a)&(c).

STATEMENT OF THE CASE

This case arises out of Defendant's constitutional challenge to Iowa Code § 815.1 (the statute). Defense counsel in this matter is privately retained. Counsel requested public funds for an investigator and funds to conduct depositions. In his motion Defendant did not provide any of the information required by the statute and argued that the statute was unconstitutional under both the U.S. and Iowa Constitutions. The matter was set for hearing and briefed by both parties. The court granted the motion finding that the hourly rate portion of the statute was unconstitutional as applied under the Sixth Amendment of the U.S. Constitution. The court reasoned that using the court appointed hourly rate from Iowa Code § 815.7 in the statute's calculation forced counsel to work at the court appointed

hourly rate instead of the agreed upon higher hourly rate. The trial court rewrote the statute and used counsel's agreed upon hourly rate in performing the calculation required Iowa Code 815.1 (4)(c)(1). The State Public Defender filed Notice of Appeal from this final order.

STATEMENT OF FACTS

On December 27, 2019 the State filed at Trial Information charging the Defendant with felony and misdemeanor sex abuse offenses.¹ Appx. p. 9. On March 26, 2020 Defendant filed an appearance on behalf of the Defendant as privately retained counsel.² Appx. p. 12. On 6/14/2020, defense counsel filed a motion for private investigator and depositions at State expense.³ Appx. p. 13. The Court previously found Defendant to be indigent.⁴ Appx. p. 6. On 6/24/2020, the State Public Defender (hereinafter SPD) filed a resistance to the motion for auxiliary services at state expense.⁵ Appx. p. 37. The SPD does not contest Amaya's indigency, nor does the SPD contest the

¹ Trial Information Approved by the Honorable John Lloyd, S.J. Fifth Judicial District,

² Appearance Filed by Benjamin Bergmann.

³ Motion for Services at state expense and Motion to Declare 815.1 Unconstitutional, Filed by Benjamin Bergmann.

⁴ Order of Initial Appearance, filed on November 16, 2019 by Kimberly Ayotte, D.A.J. Fifth Judicial District.

⁵ SPD's Resistance, p. 2, filed by William Bushell, Assistant State Public Defender.

reasonableness of the requested services.⁶ Appx. p. 62. The SPD first argued that the Defense had not provided any information required by Iowa Code § 815.1 and the request should be denied.⁷ Appx. p. 62. The Court ordered defense counsel to provide the information required by section 815.1 regarding the attorneys' fees and expected hours to litigate this case.⁸ Appx. p. 58. Counsel provided that, defendant or third parties have provided defense counsel with a retainer of \$15,000.⁹ Appx. p. 62. At the time of filings, Defense Counsel Ben Bergmann had performed 16.1 hours and estimated that it would require an additional 70 hours to finish the case.¹⁰ Appx. p. 62. Bergmann's agreed upon hourly rate is \$300 in this case.¹¹ Appx. p. 62. Judge Crane, rewriting the statute took the \$300 hourly rate times the total hours of 86.1 which resulted in a calculated product of \$25,830.¹² Appx. p. 62. Since this product exceeded the \$15,000 retainer the

⁶ Court's Order Granting the Request, p. 2, filed on September 22, 2020 by the honorable Sarah Crane, District Court Judge, Fifth Judicial District.

⁷ Court's Order Granting the Request, p. 2, filed on September 22, 2020 by the honorable Sarah Crane, District Court Judge, Fifth Judicial District.

⁸ Order Requiring Additional Defense Information p. 1, filed on August 13, 2020 by the honorable Sarah Crane, District Court Judge, Fifth Judicial District.

⁹ Final Order, p 2.

¹⁰ Id.

¹¹ Exhibit 1C, Attorney Fee Agreement.

¹² Id.

court opined that the retainer was insufficient to cover the cost of the requested service and that the requested service should be provided at public expense.¹³ Appx. p. 68. In early October the SPD received a copy of the Final Order, attached to a similar application in Dubuque County. On October 19, 2020 the SPD filed its timely Notice of Appeal. Appx. p. 70.

ARGUMENT

1. FORM OF APPEAL

The correct form for this appeal is an appeal as a matter of right, for the state public defender. Pursuant to Iowa R. App. P. 6.103(1)¹⁴ and Iowa Code § 13B.4(4)(d)(7)¹⁵, this is an appeal as a matter of right for the state public defender. (See also Greewood v. SPD),¹⁶ “the legislature amended section 13B.4(4) in 2006 to permit either a fee claimant or the State Public

¹³ Final Order p. 2.

¹⁴ 6.103(1) Final order and judgment defined. All final orders and judgments of the district court involving the merits or materially affecting the final decision may be appealed to the Supreme Court, except as provided in this rule, rule 6.105, and Iowa Code sections 814.5 and 814.6. An order granting or denying a new trial is a final order. An order setting aside a default judgment in an action for dissolution of marriage or annulment is a final order. An order setting aside a default judgment in any other action is not a final order.

¹⁵ The decision of the court following a hearing on the motion is a final judgment appealable by the state public defender or the claimant.

¹⁶ 901 N.W.2d 529, 531 (Iowa App. 2017).

Defender to appeal a final judgment following judicial review of a fee claim denial.”). While this situation is not identical to Greenwood, absent other authority on the matter for the SPD in an 815.1 case, in which the SPD is the aggrieved party, appeal as a matter of right is the appropriate form of review. For the SPD, other forms of review don’t fit this situation well.

For example, Writ of Certiorari pursuant to Iowa R. App. P. 6.107¹⁷ does not apply to this situation because it cannot be alleged that the district court acted unlawfully. While the court’s order is contrary to the legislation in question, the court found the statute unconstitutional first.¹⁸

Also, for the SPD, interlocutory review pursuant to Iowa R. App. P. 6.104¹⁹ does not fit well. As far as the SPD is concerned the court’s order on the 815.1 issue is the final order. The SPD is not indexed to the case and would not know when a final order is entered in the underlying criminal case.

Further, it could be argued that this is a final order but review would

¹⁷ Any party claiming a district court judge, an associate district court judge, an associate juvenile judge, or an associate probate judge exceeded the judge’s jurisdiction or otherwise acted illegally may commence an original certiorari action in the Supreme Court by filing a petition for writ of certiorari as provided in these rules.

¹⁸ Final Order p. 2.

¹⁹ Any party aggrieved by an interlocutory ruling or order of the district court may apply to the supreme court for permission to appeal in advance of final judgment.

be discretionary review pursuant to Iowa. R. App. P. 6.106²⁰ Discretionary review does not fit this situation very well because there is no statute specifying that an 815.1 order is discretionarily reviewable.

Lastly, if the court's order in this case is not a final order, reviewable as a matter of right, similar to a final order in a fee claim hearing, pursuant to Iowa Code § 13B.4(4)(d)(7); the SPD need only wait for a fee claim to be presented, deny the fee claim, have a hearing on fee claim, and then appeal, if unsuccessful, as a matter of right at that stage. That doesn't seem fair to the vendor who has performed a service with the expectation of payment, only to have the fees attacked collaterally, after the work is already done.

Direct appeal as a matter of right is the proper form of review, when the SPD is the aggrieved party, in a hearing pursuant to Iowa Code § 815.1.

The question might arise, what is the proper form of appeal, if the client is the aggrieved party? There are possible answers. First, the court could treat the SPD and the client the same. A client who wishes to appeal the denial of ancillary service or otherwise disagrees with the 815.1 order could have the right to direct appeal, just like the SPD. The other choices are the

²⁰ An application for discretionary review may be filed with the clerk of the Supreme Court to review certain orders specified by statute which are not subject to appeal as a matter of right.

aggrieved client could appeal interlocutory or wait until there is a final disposition in the underlying criminal case (sentencing), and appeal the 815.1 order along with any other alleged error in the case.

For the aggrieved client in an 815.1 application the proper form of review should be to wait until there is a disposition in the case and appeal pursuant to Iowa Code § 814.6²¹ like a suppression issue. In a suppression issue the aggrieved client could appeal interlocutory pursuant to Iowa R. App. P. 6.104. This Court could choose whether or not to review the 815.1 issue interlocutory.

The proper form of review for the SPD, aggrieved in an 815.1 issue, is appeal as a matter of right, from a final order. If, however this court does not

²¹ 1. Right of appeal is granted the defendant from:

a. A final judgment of sentence, except in the following cases:

(1) A simple misdemeanor conviction.

(2) An ordinance violation.

(3) A conviction where the defendant has pled guilty. This subparagraph does not apply to a guilty plea for a class "A" felony or in a case where the defendant establishes good cause.

b. An order for the commitment of the defendant for insanity or drug addiction.

2. Discretionary review may be available in the following cases:

a. An order suppressing or admitting evidence.

b. An order granting or denying a motion for a change of venue.

c. An order denying probation.

d. Simple misdemeanor and ordinance violation convictions.

e. An order raising a question of law important to the judiciary and the profession.

f. An order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim. Iowa Code Ann. § 814.6 (2019).

agree, pursuant to rule 6.108, it is requested this court proceed as if the correct form of review had been requested.

2. THE MECHANICS OF THE IOWA CODE § 815.1

Iowa Code § 815.1 does very reasonable things. First, the statute allows the court to look at the finances of the representation. Second, the statute requires counsel to use up the retainer before accessing public funds. Third, the statute makes the client and the prospective private attorney consider ancillary costs when contemplating private representation. Lastly, the statute helps avoid fraud and abuse of public funds.

3. ENGLISH V. MISSILDINE²²

In 1981 the Iowa Supreme Court held that an indigent Defendant represented by privately retained counsel was entitled to reasonable and necessary funds for an expert and depositions at state expense.²³ I realize that this brief refers to the English v. Missildine case by Missildine and that it might be more appropriate to refer to the case as English, but the case has been referred to as Missildine for so long in common parlance that I chose to

²² 311 N.W.2d 294 (Iowa 1981).

²³ Id. at 294.

stay with that nomenclature. In Missildine, the Court reasoned that because there were no statutes, rules, or procedures in place at the time, the right to investigative services, by an indigent person represented by a privately retained attorney, could be found in the Sixth Amendment of the Constitution.²⁴

4. IOWA CODE § 815.1

Iowa Code § 815.1 allows the payment of auxiliary services in cases with a privately retained attorney if the following criteria are met: The Defendant must make a showing to the court that the requested service is reasonable and necessary for the representation.²⁵ The Defendant must also provide a copy of the attorney's fee agreement, the agreed upon hourly rate, the amount of the retainer, the number of hours worked in the case to date, and the expected or anticipated hours needed to finish the case.²⁶ The Defendant must also provide an accounting of all compensation paid to the attorney, how much of the retainer has been earned, and any information about

²⁴ Id at 293.

²⁵ 815.1 (2)(b)(2019).

²⁶ Id. § (2)(a).

additional costs to be paid or owed by the client.²⁷ The Defendant must provide a financial affidavit signed by the client.²⁸ The Defendant must also submit a copy of the documents to the SPD.²⁹ The reviewing court shall not grant the application unless all the following conditions are met: the client must be indigent and unable to pay for the requested service, the requested service must be reasonable and necessary in the case, and the retainer paid by the client or on behalf of the client must be insufficient to pay for all or some of the requested service.³⁰ At this point the court must do some simple math. Using the information provided by the Defendant the court determines the total hours for the case by adding the hours worked to date to the anticipated hours to finish the case. The total hours is multiplied by the court appointed hourly rate from Iowa Code § 815.7, for the level of offense charged, which results in the ‘calculated product’.³¹ If the ‘calculated product’ is greater than the retainer received or to be received the court may authorize the requested service at state expense.³² If the ‘calculated product

²⁷ Id. §§ (c)-(e).

²⁸ Id. § (f).

²⁹ Id. § 3.

³⁰ Id. § (4)(a)-(c).

³¹ Id. § (4)(c)(1).

³² Id. § (4)(c)(2).

is less than the retainer received or to be received then the retainer is considered sufficient to pay for the requested service. In short the statute does very reasonable things. First, the statute allows the court to look at or review the finances of the representation. Second, the statute requires that the retainer be used up before the expenditure of public funds. Next, the statute makes the client and the prospective private attorney consider and account for ancillary services as part of the retainer. Lastly, the statute helps avoid fraud and abuse of public funds. When a client is deciding to hire a private attorney or be represented by court appointed counsel they must factor in the costs of the representation, including ancillary services.

5. THE STANDARD OF REVIEW IN A CONSTITUTIONAL CHALLENGE TO A STATUTE

Since this is a constitutional challenge to a statute it is important to note the standard of review and presumptions for a challenge to the constitutionality of a statute. Our supreme court summarized it best in State v. Thompson.³³ Appellate Courts review constitutional challenges to a statute de novo.³⁴ In doing so, courts must remember that statutes are

³³ 836 N.W.2d 470, 483 (Iowa 2013)(internal citations omitted).

³⁴ Id.

cloaked with a presumption of constitutionality.³⁵ The challenger bears a heavy burden, because they must show that the statute is unconstitutional beyond a reasonable doubt.³⁶ Moreover, ‘the challenger must refute every reasonable basis upon which the statute could be found to be constitutional.’³⁷ Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, reviewing courts must adopt that construction.³⁸

6. THE STATUTE DOES NOT DENY THE DEFENDANT THE RIGHT TO COUNSEL, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, OR THE RIGHT TO HIRE PRIVATE COUNSEL OF CHOICE

Iowa has a long history of protecting the rights of the accused. Long before the landmark case Gideon v. Wainwright³⁹ the Iowa Supreme Court held in Hall v. Washington that “[C]itizens have rights guaranteed by the U.S. Constitution and the Sixth Amendment, Defendant was entitled to the assistance of counsel for his defense. Attorneys appointed in and who provide legal representation under obedience to statute are entitled to

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ 372 U.S. 335 (1963).

payment for such defense...”.⁴⁰ The statute does not change that. Nor is the right to counsel under the sixth amendment treated any differently than the right to counsel under the Iowa Constitution Art. I, § 10.

In 1981 the Iowa Supreme Court held that absent a statute or rule authorizing expenses in a case where an indigent client was able to hire private counsel, the client was entitled to those expenses under the Sixth Amendment of the United States Constitution.⁴¹ Under Missildine the relevant factors were the client’s indigence and that the requested service was reasonable and necessary in the representation.⁴² The statute does not take away from Missildine, the statute still requires a showing of indigence and that the requested service be reasonable and necessary.⁴³ The statute uses more of Missildine. Like Missildine the statute allows the court to look at the finances of the case.⁴⁴ Like the concurrence in Missildine the statute requires a showing that the retainer has been used up before the client is entitled to public funds.⁴⁵ Lastly, like Missildine, the statute requires the

⁴⁰ 2 Greene 473 (Iowa 1850).

⁴¹ *Missildine* at 293.

⁴² *Id.* at 294.

⁴³ *Id.*

⁴⁴ *Id.* at 293-294.

⁴⁵ *Id.* at 295.

Defendant to follow rules enacted by the people's branch of government, the legislature; (...if the Defendant desires public funds he must play according to the rules ... provided by the general assembly).⁴⁶ As noted above, the requirements are common sense for reimbursement from public funds. The State has limited funds available, and to require an analysis of the finances of the representation is a common sense requirement of fiscal responsibility.

Moreover, the second aspect that has been called into question in this case, is that hired attorney does work for less or forgo necessary services for their client (i.e. depositions, investigations, hiring experts, etc.). Again, this is an inaccurate portrayal of 815.1. This Statute does not, in any way, limit what a privately retained attorney may charge their client as an hourly rate.

7. THE STATUTE DOES NOT DENY THE DEFENDANT DUE PROCESS OF LAW

The 5th and 14th Amendments of the United States Constitution provides, no State shall “deprive any person of life, liberty, or property,

⁴⁶ *Id.*

without due process of law.”⁴⁷ The Iowa Constitution is relatively similar, stating, “The right of trial by jury shall remain inviolate ...but no person shall be deprived of life, liberty, or property, without due process of law.”⁴⁸ The Fifth Amendment is likely not implicated here, there is not Federal Government action in this case, but the Defendant argues the statute violates the fifth and fourteenth amendments so this response will include the fifth and fourteenth amendments. Under State v. Fleming, both the federal and state provisions have the same “scope, import, and purpose.”⁴⁹ The analysis is the same for the Iowa Constitution Art. 1 §§ 1, 6, & 9.

A substantive due process analysis requires two steps. First, “... analyzing a substantive due process challenge is to identify the nature of the individual right involved.”⁵⁰ The second step is to determine whether the right is fundamental or not.⁵¹ If the individual right is deemed to be a fundamental right, the court shall use a strict scrutiny analysis.⁵² However, if the right is not determined to be a fundamental right, the statute itself must

⁴⁷ U.S. Const. amends. XIV.

⁴⁸ Iowa Const. Art. I § 9.

⁴⁹ 790 N.W.2d 560, 564 (Iowa 2010).

⁵⁰ Reno v. Flores, 507 U.S. 292, 302 (1993).

⁵¹ See State v. Klawonn, 609 N.W.2d 515, 519 (Iowa 2000).

⁵² Id.

only pass a rational basis test.⁵³

Under a strict scrutiny analysis, a determination must be made of, “whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest.”⁵⁴ If, however, a fundamental right has not been implicated, the rational basis test requires only that the statute has, “a reasonable fit between the government interest and the means utilized to advance that interest.”⁵⁵

The right that has been articulated in this case is that the Defendant is having to make a, “...Hobson’s choice of accepting a randomly assigned attorney or hire an attorney that will either work for a pittance or forgo necessary services to effectively represent [the Defendant].”⁵⁶ Appx. p. 14.

However, this is an incorrect analysis of the Statute, and the right that has been articulated is not a fundamental right. Under the 6th Amendment, all persons have a right to counsel and a right to hire private counsel.⁵⁷ Here, the Defendant did choose private counsel, and his fundamental right was not infringed. As such, this is not a right that requires strict scrutiny analysis.

⁵³ Id.

⁵⁴ State v. Hernandez-Lopez, 639 N.W.2d 226, 238 (Iowa 2002).

⁵⁵ Id.

⁵⁶ Defendant’s Motion, Filed June 14, 2020, p. 2.

⁵⁷ United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006).

Since the statute has nothing to do with the right to counsel or the right to hire counsel of choice the correct analysis is a rational basis analysis.

Under a rational basis analysis, there must be a reasonable fit between the government interest and the means utilized to advance that interest. As shown by the legislative history, the legislative purpose behind the Statute is threefold; to create a comprehensive procedure for paying funds under Missildine, to make the best use of resources, and to save money⁵⁸

With the above government interest's, the Statute is a reasonable fit to meet those stated goals. As noted by the Fiscal Note for SF590, in FY2018, "...the State Public Defender paid out \$179,793 from the Indigent Defense fund for Missildine cases."⁵⁹ The Fiscal note goes on to add that, "Senate File 590 is estimated to result in savings to the indigent Defense Fund of approximately \$150,000 per year. As such, this is a reasonable fit between the government interests and the means utilized, and this court should find

⁵⁸As seen from footage of the Iowa House of Representatives and Iowa Senate debate on SF590.

<https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190415054800016&dt=2019-04-15&offset=685&bill=SF%20590&status=i>

<https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190326084831569&dt=2019-03-26&offset=12905&bill=SF%20590&status=i>

⁵⁹ <https://www.legis.iowa.gov/docs/publications/FN/1040595.pdf>

that the statute passes a rational basis analysis and that 815.1 is not a violation of Due Process under the United States nor Iowa Constitutions.

However, even if this Court applies strict scrutiny, the Statute still survives a strict scrutiny analysis. Under strict scrutiny, a determination is required, “...whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest.”⁶⁰ Here too, the governmental interests of creating a comprehensive procedure for paying funds under Missildine, is as narrowly tailored as possible with the Statute in question. 815.1 only applies to Missildine cases and it merely provides a framework for computing the fees requested. As such, 815.1 also passes under strict scrutiny and must be upheld.

The Defendant spent a considerable amount of time discussing how the statute forced the attorney to work for a lower hourly rate than what was bargained for with the client. The Defendant’s argument misses the mark. The statute does not force the statutory hourly rate on the privately retained attorney it is used only in the calculation. The attorney is still able to charge whatever hourly rate has been agreed upon. If some other, variable rate were

⁶⁰ Hernandez-Lopez, at 240.

used in the calculation, the statute would not be applied equally from case to case and the Defendant or the state could argue some other arbitrary rate. Using the statutory hourly rate for the purposes of the calculation ensures all cases and clients are treated the same and ensures equal application of the law.

8. THE STATUTE DOES NOT OFFEND EQUAL PROTECTION BY TREATING THE DEFENDANT DIFFERENTLY THAN OTHER SIMILARLY SITUATED DEFENDANTS

Similarly, the Statute does not offend Equal protection under the 5th and 14th Amendments to the United States Constitution or Article I, Sections 1, 6, or 9 of the Iowa Constitution. As stated in Varnum v. Brien, “Even in the zealous protection of the constitution’s mandate of equal protection, courts must give respect to the legislative process and presume its enactments are constitutional.”⁶¹

Since the statute has nothing to do with the right to counsel or the right to hire counsel of choice, a rational basis analysis should continue through the Equal Protection evaluation. With the rational basis standard, “... [t]he plaintiff has the heavy burden of showing the statute unconstitutional and

⁶¹ 763 N.W.2d 862, 879 (Iowa 2009).

must negate every reasonable basis upon which the classification may be sustained.”⁶² The deference given to the legislature requires that there be a “plausible policy justification” for the statute to pass muster under the rational basis analysis.⁶³

The Statute does not treat the Defendant differently than similarly situated Defendants, nor does it “undo” Missildine. Missildine did not set out criteria for which ancillary services could be reimbursed, how they were reimbursed, or have any type of requirements which allowed the court to look at the finances of the representation. The Statute is a companion to Missildine, rather than an antagonist. Under the Statute, there is now an easily applied framework for the court and for the Public Defender’s office to reimburse privately hired attorney’s for auxiliary services for their indigent clients.

Again, the Legislature determined that the to this Statute would serve the purpose of being fiscally responsible with public funds, as well as stopping those who would attempt to gamify and profit on the Missildine precedent. A privately hired attorney is able to set their rate at any level they

⁶² Bierkamp v. Rogers, 293 N.W.2d 577, 579-80 (Iowa 1980).

⁶³ Id. at 581.

choose. This statute lays out the framework for determining whether the attorney’s client has the means to pay for the requested services based on the amount they have paid the attorney. If the funds paid the attorney are insufficient to cover the cost of the requested service, the client will receive the requested service from public funds. This determination is made by, “...add[ing] the hours previously worked to the hours expected to be worked to finish the case and multiply that sum by the hourly rate of compensation specified under section 815.7.”⁶⁴

The Defendant correctly states that, “The only difference [between public defenders and private attorneys asking for funds] is that private counsel is subject to the court’s approval to see if these expenses are necessary.”⁶⁵ This analysis is correct, and should be upheld, because when there is a request for public funds, there should be a checks and balances in place to ensure the funds are being used responsibly.

The Defendant asks the court to announce the statute unconstitutional and relies heavily on Ake v. Oklahoma.⁶⁶ In Ake, the Supreme Court held that

⁶⁴ The Statute § (1)(c)1(2019).

⁶⁵ Motion p. 13.

⁶⁶ 470 U.S. 68 (1985).

the state must provide a psychiatric expert for the Defendant if the mental condition of the Defendant is an important element of the case and the Defendant could not afford the expert.⁶⁷ This case is easily distinguishable from Ake. First, nowhere in Ake does the Supreme Court acknowledge that Ake hired a private attorney. It appears Ake had a court appointed attorney. This statute does not apply to cases with a court appointed attorney. The Defendant in this case does not have a court appointed attorney. Therefore, Ake does not apply to this case. Even in Ake, the Supreme Court held, “when a Defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue **if the Defendant cannot otherwise afford one.**”⁶⁸

Based upon the policy justifications presented by the Iowa Legislature, the Statute creates a plausible nexus to meet this rational relationship. As such, the Statute does not treat the Defendant differently than similarly situated Defendants and does not violate the Defendant’s Equal Protection rights under the United States and Iowa Constitutions.

⁶⁷ *Id.* at 74.

⁶⁸ Ake at 74 (emphasis added).

9. POLICY CONSIDERATIONS

Counsel argues that the Defendant is facing a Hobson's choice of either working for a reduced hourly rate or forgoing ancillary services, potentially rendering ineffective assistance of counsel. This argument ignores the other obvious choice. That third, common sense choice, is for counsel and the client to factor in ancillary expenses when deciding how much the retainer should be or whether to hire private counsel. Nothing in the statute prevents the exercise of the constitutional right to hire private counsel, the statute only encourages sound financial decisions by the client and hired defense counsel. Put another way, nothing in the statute prevents the exercise of the constitutional right to hire private counsel, but nothing in the constitution requires someone else to pay for it. The key is to plan for the costs of litigation as one might plan for any other private litigation.

The rule established in Missildine, and Iowa Code § 815.1 has two parts. If a client is indigent **and** financially unable obtain ancillary services those services should be provided at state expense. That's a two part inquiry: First the client must be indigent. That is a set standard that measures the client's income against the published Federal Income Eligibility Guidelines. The

second half of that rule is whether the client is financially able to pay for ancillary services. The statute addresses this second half of the rule, whether the Defendant can afford the costs of the ancillary service.

The statute in question does very reasonable things. First, when public funds are requested, the statute allows the court to look at the finances of the representation, and second the statute requires counsel to exhaust the retainer before public funds are used. The statute requires the client and the prospective private attorney to consider the cost of the representation including ancillary expenses. Lastly, the statute helps avoid fraud and abuse of public funds. The Defendant argues that the sole test for eligibility for ancillary services in a case like this is indigence. The statute requires indigence and a showing that the Defendant cannot afford the cost of the services. To choose Defendant's argument could result in an absurd outcome. An example of an absurd outcome can be seen in the California case Tran v. Superior Court.⁶⁹ In Tran, the Defendant's family pooled together a \$300,000 retainer to hire an attorney to represent him in his capital case.⁷⁰ The client applied for ancillary services at state expense.⁷¹ The

⁶⁹ 112 Cal.Rptr.2d 506 (Cal. App. 2001).

⁷⁰ Id. at 507.

⁷¹ Id.

trial court denied the request because counsel had \$300,000 sitting in trust.⁷² Tran argued the trial court abused its discretion by denying him funding to pay for ancillary services. *Id* at 507. The court reasoned that because Tran was indigent he was entitled to the ancillary services regardless of the retainer paid. *Id* at 512.

Another example of an absurd outcome, if indigence is the only test, can be illustrated by a well-known Iowa case heard in Mahaska County. In that case a Defendant was found to be legally indigent and the court granted ancillary services at state expense. This was before the effective date of the statute, but the abuse is quite apparent. After the trial a popular reality TV show⁷³ did a piece on the case. When the Defendant and his spouse were interviewed the journalist asked for a response to the allegation that the Defendant was broke and the crime was committed to collect a large insurance policy. The spouse responded that the allegation was false, they were not broke. She stated, “they had plenty of money.” They had grain in a large grain bin. They have hundreds of acres of prime farm land. They have cash on hand and they have tens of thousands of dollars of credit available if

⁷² *Id.*

⁷³ Murder on the Farm, Dateline NBC, Ep. 83, February 5, 2018.

needed. The tax payers of the State of Iowa were billed approximately \$110,000 in that case. It is unknown what the attorney's retainer was. This is an absurd result. The statute is intended to avoid absurd results and the abuse of public funds. These examples are in no way an allegation that there is abuse in this case.

CONCLUSION

The Defendant has not met their burden of showing that the statute is constitutional beyond a reasonable doubt. The statute is procedural in nature. The statute does not affect the rule articulated in Missildine. The statute survives rational basis scrutiny because it serves the important government purpose. The important purposes of the statute are: establishing a procedure to implement Missildine, allows the court to look at the finances of the representation, and requires that the retainer be used up before making public funds available. The statute also helps prevent fraud or abuse of the Indigent Defense System.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$0.00, and that amount has been paid in full by the Office of the Public Defender.

/s/ William Bushell
WILIAM BUSHELL
Assistant Public Defender
bbushell@spd.state.ia.us
STATE PUBLIC DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 725-2228 / (515) 281-72891 FAX
Attorney for the Appellant

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/s/ William Bushell

WILIAM BUSHELL

Assistant Public Defender

bbushell@spd.state.ia.us

STATE PUBLIC DEFENDER'S OFFICE

Fourth Floor Lucas Building

Des Moines, Iowa 50319

(515) 725-2228 / (515) 281-72891 FAX

Attorney for the Appellant