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IN THE SUPREME COURT OF IOWA
No. 20–1346

STATE OF IOWA,

Plaintiff,

vs.

RODRIGO AMAYA,

Defendant–Appellee,

STATE PUBLIC DEFENDER,

Appellant.

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

STATE OF IOWA'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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QUESTION PRESENTED FOR REVIEW

May the Legislature constitutionally require a district court to measure whether a privately retained counsel's retainer should reasonably be expected to cover auxiliary criminal defense costs for an indigent defendant (such as investigators and depositions) by using a uniform statutory hourly rate before authorizing payment of those expenses at public expense?

English v. Missildine, 311 N.W.2d 292 (Iowa 1981)
Ake v. Oklahoma, 470 U.S. 68 (1985)
People v. Thompson, 413 P.3d 306 (Colo. App. 2017)
Moore v. State, 889 A.2d 325 (Md. 2005)

INTEREST AND FUNDING OF AMICUS

The Attorney General has a statutory duty to defend the constitutionality of a statute—perhaps one of the most fundamental interests of the State—in this Court. *See* Iowa Code § 13.2(1)(*a*) (imposing duty to "defend all causes in the appellate courts in which the state is . . . interested"). Here, the district court held Iowa Code section 815.1 unconstitutional under the Sixth Amendment, as interpreted by *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981). The State seeks to defend section 815.1.

No party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person contributed money to fund the preparation or submission of this brief, except to the extent all taxpayer's of Iowa fund the Office of the Attorney General.

FACTUAL AND PROCEDURAL BACKGROUND

A. Iowa Code section 815.1.

"For indigents the [Sixth Amendment] right to effective counsel includes the right to public payment for reasonably necessary investigative services." *English*, 311 N.W.2d at 293–94. "The Constitution does not limit this right to defendants represented by appointed . . . counsel. The determinative question is the defendant's indigency." *English*, 311 N.W.2d at 294. But if an indigent defendant "desires public funds he must" follow "the rules . . . provided by the General Assembly," *id.* at 295 (Uhlenhopp, J., concurring specially)—even if the defendant retains private counsel.

Enter Iowa Code section 815.1. The statute didn't exist in its current form when the Court decided *English*. But it is now part of the rules Justice Uhlenhopp mentioned. *See id.*; *see also* Iowa Code § 815.1 (2019). Section 815.1 requires retained counsel representing a defendant to apply for public funds and show that the auxiliary costs for which he or she seeks public funding "are reasonable and necessary . . . in a case for which counsel could have been

appointed." Iowa Code § 815.1(4)(*b*). Section 815.1 also requires counsel to provide other information—including a copy of any fee agreement and an itemized accounting of compensation paid to them—that enables the Court to evaluate the request for public funds. *Id.* § 815.1(2); *cf. Furey v. Crawford Cty.*, 208 N.W.2d 15, 18 (Iowa 1973) (suggesting under previous framework that attorneys seeking public compensation should submit similar information). Counsel must provide a copy of their application and documentation to the State Public Defender (SPD), and SPD "may participate in a hearing on the application." Iowa Code § 815.1(3), (5).

Most relevant here, the statute provides that a court shall not grant public funding unless "moneys paid or to be paid to the privately retained attorney by or on behalf of the indigent person are insufficient to pay all or a portion of the costs sought to be paid from state funds." *Id.* § 815.1(4)(*c*). A statutory formula measures whether private funding is insufficient. The formula takes the "number of hours of work completed by the attorney" at the time of the application for funding, *id.* § 815.1(2)(*a*); adds the "hours

expected to be worked to finish the case," *id.* § 815.1(4)(*c*)(1); and then multiplies that sum "by the hourly rate of compensation specified" for court-appointed attorneys. *Id.* § 815.1(4)(*c*)(1); *see also id.* § 815.7(5) (setting hourly rates). If the hours, multiplied by the rate, exceeds the retainer, "the moneys shall be considered insufficient to pay all or a portion of the costs," *id.* § 815.1(4)(*c*)(2), and the district court may "authorize all or a portion of the payment to be made from state funds," *id.* § 815.1(4).

B. Amaya's request for public funding.

In November 2019, the Polk County Attorney charged Appellee Rodrigo Amaya with two felonies. (11/16/19 Criminal Complaints.) The district court first appointed a series of court-appointed attorneys. (9/22/2020 Order at 1). Eventually, a private attorney appeared for Amaya (12/11/19 Appearance), and a few months later, Amaya's current counsel appeared. After this initial flurry of appearances and withdrawals, the case progressed typically—with discovery notices and bond motion practice—over the next few months.

Then came the dispute leading to this appellate proceeding. Amaya asked the court to authorize public funding for deposition and investigative expenses and to declare section 815.1 unconstitutional on several grounds. (6/14/2020 Motion for Services at State Expense at 1–2.) SPD resisted, asserting the court needn't reach the constitutional questions because Amaya hadn't even provided the information section 815.1 requires. (6/24/2020 SPD Resistance.) The court ordered additional briefing from SPD and ordered Amaya's counsel to provide the required information for in camera review. (6/30/2020 Order.) Both complied. (9/22/2020 Order at 1.)

C. The district court's ruling.

The district court granted public funding. (9/22/20 Order at 8.) The court found Amaya "or third parties" paid a $15,000 retainer; that defense counsel's "hourly rate is $300"; and that defense counsel's firm had performed approximately 75 hours of work while anticipating 70 more to complete the case. (9/22/2020 Order at 2.) *See* Iowa Code § 815.1(2)(*a*), (4)(*c*)(1) (requiring the court to take this information into account). The court then

reasoned that section 815.1 puts defendants between a rock and a hard place, resulting "in either a denial of the right to hire private counsel of choice through use of a third party's funds or the right to auxiliary defense services." (9/22/2020 Order at 4.) The court ultimately held "section 815.1 violates the Sixth Amendment right to effective assistance of counsel" and, using severance analysis, struck only the "portion of section 815.1 that would require the application of the court-appointed rate." (9/22/2020 Order at 7.) Having struck the statutory rate, the court applied counsel's *contractual* rate instead, and found the retainer insufficient to cover investigative and deposition expenses. (9/22/2020 Order at 7–8.) SPD filed a notice of appeal.

ARGUMENT

I. Certiorari best fits this case.

SPD asserts this proceeding is an appeal of right. (SPD Br. at 10–11.) Although the answer isn't dispositive because the case may "proceed as though the proper form of review had been requested," Iowa R. App. P. 6.108, in the State's view, the proper form of review under this case's specific circumstances is certiorari.

While a district court's decision after SPD takes action "denying or reducing any claim" is directly appealable, Iowa Code § 13B.4(4)(*d*)(7), this case doesn't yet involve a "claim." A fee-claim appeal under section 815.1 would occur "[f]ollowing entry of an order allowing" public funding, when a retained attorney "submit[s] a claim for payment in accordance with" SPD's rules and SPD "may deny all or a part" of that claim after reviewing it "for reasonableness." *Id.* § 815.1(6)–(8); *see also id.* § 13B.4(4)(*c*) (setting forth SPD's normal claim review process).

In other words, in the typical fee-claim appeal, SPD has already issued a final decision on specific expenses, subject to judicial review. By contrast, this case involves a threshold authorization, with no back-end review yet. It thus fits the general rule that predated 2006—which established that "the proper avenue to seek review of a trial court's allowance of fees . . . at public expense" is by certiorari. *Crowell v. State Pub. Defender*, 845 N.W.2d 676, 682 (Iowa 2014); *see also State v. Iowa Dist. Ct.*, 286 N.W.2d 22, 25 (Iowa 1979) (concluding certiorari is available either to the attorney or to the entity "suffering liability"); *Furey*, 208

N.W.2d at 19 (deeming it "necessary to indicate" that certiorari is the proper mode of review "in view of the procedural uncertainty" apparent in many cases).

Crowell shows the distinction. In *Crowell*, a juvenile court entered an order requiring SPD to pay costs of a parent's legal defense in an involuntary termination-of-parental-rights proceeding. *Crowell*, 845 N.W.2d at 680. SPD didn't immediately seek appellate review of that ruling. Rather, it waited until the attorney *submitted* the claim, and then denied it, initiating the normal review process under chapter 13B that prompted a direct appeal. *See id.* at 680–81 & n.2. By contrast, here, SPD seeks earlier appellate review—of the threshold order authorizing the costs rather than an order reviewing SPD's decision on a claim. Based on that difference, certiorari is the applicable form of review.

Additionally, certiorari has been the proper form of review in the past when a district court finds a statute unconstitutional. Determining statutes' constitutionality is within a district court judge's jurisdiction. But seeking certiorari from any such ruling is proper because a certiorari petition can assert the judge "otherwise

acted illegally." Iowa R. App. P. 6.107(1)(*a*). Illegality can occur when the district court (1) commits legal error, or (2) bypasses a statutory command that would apply if the court hadn't first found the law unconstitutional. *See Iowa Dep't of Transp. v. Iowa Dist. Ct. (DOT II)*, 592 N.W.2d 41, 42 (Iowa 1999) (adjudicating a certiorari proceeding brought after the "district court concluded the [relevant] statutes violated equal protection"); *Iowa Dep't of Transp. v. Iowa Dist. Ct. (DOT I)*, 586 N.W.2d 374, 376 (Iowa 1998) (noting a certiorari plaintiff asserted "the district court acted illegally" by refusing to take action mandated by the statute—after first finding the statute unconstitutional).

This case is particularly similar to *DOT I*, where the district court found a statute unconstitutional and then declined to impose the statute's mandatory suspension or revocation of driving privileges. *See DOT I*, 586 N.W.2d at 375–76. Section 815.1 likewise contains a mandate; it states the district court "shall not grant [an] application" for public funding unless the statute is satisfied. Iowa Code § 815.1(4). But because the district court found the statute partially unconstitutional, it didn't take the otherwise mandatory

step. Accordingly, this action involves "illegality" under the certiorari rules. *See DOT I*, 586 N.W.2d at 376.

Finally, this case procedurally presents the other side of the *English* coin—*English* itself was a certiorari action. *See English*, 311 N.W.2d at 293. In *English*, certiorari was appropriate for the defendant challenging the threshold denial of public funding. *See id*. Here, the district court *granted* public funding but the challenged order is still a threshold determination. Thus, the same form of review is proper.

II. The district court's ruling that a statutory hourly rate is unconstitutional should be reversed.

Section 815.1 doesn't violate the Sixth Amendment or *English*. Statutes "are cloaked with a strong presumption of constitutionality" and any challenger must prove unconstitutionality beyond a reasonable doubt. *State v. Biddle*, 652 N.W.2d 191, 200 (Iowa 2002). And requiring that indigent defendants have access to auxiliary services doesn't "prevent the court from guarding against expansion of services based on the assurance of payment from the public treasury." *Hulse v. Wifvat*, 306 N.W.2d 707, 713 (Iowa 1981).

Developments in the legal landscape also call *English*'s validity into question. Four years after *English*, the United States Supreme Court concluded that any right to public funding for auxiliary services stems from "the Fourteenth Amendment's due process guarantee"—not the Sixth Amendment's right to counsel. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

And since *English*, several other state courts have concluded it is constitutionally permissible to condition access to auxiliary services on first accepting public representation. *See People v. Thompson*, 413 P.3d 306, 319–20 (Colo. App. 2017); *Moore v. State*, 889 A.2d 325, 346 (Md. 2005); *State v. Earl*, 345 P.3d 1153, 1159 (Utah 2015). These decisions demonstrate a proposition this Court has endorsed in another context: a defendant may face an "unenviable" choice, but it is possible to determine the defendant's constitutional "rights were not violated based on this choice." *State v. Tompkins*, 859 N.W.2d 631, 640 (Iowa 2015).

Finally, even if the Court concludes that section 815.1 is unconstitutional, it should still reverse or vacate the district court's order (or sustain the writ of certiorari) because the district court's

severance analysis risks defeating the legislative intent behind section 815.1.

Ultimately, this case "requires plotting the intersection of cases that discuss the right to counsel of choice with cases that discuss an indigent defendant's right to obtain state-funded ancillary services." *Thompson*, 413 P.3d at 314. "[T]he question becomes harder to answer" when a previous state supreme court case (*English*) also addresses the issue—yet is potentially in conflict with other authorities. *See id.* Furthermore, the Court must not conflate counsel-of-choice analysis—"which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

A. Section 815.1 is consistent with *English* because the statute sets parameters for scenarios *English* anticipated but didn't address.

Section 815.1 is a logical outgrowth of Justice Uhlenhopp's observation "that what happened to the retainer the [private] attorney received . . . becomes the public's business when [a]

defendant asks for public funds." *English*, 311 N.W.2d at 295 (Uhlenhopp, J., concurring specially). The statute serves a rational fiscal gatekeeping function that probes two questions not present in *English*: whether a defendant "rendered himself impecunious by an unreasonable expenditure of funds to retain private counsel," and whether "counsel's fee should reasonably be expected to cover" other expenses. *Id.* at 294 (majority opinion).

1. *English* left room for different results under different facts.

English addressed "whether an indigent has the right to employ an expert and take depositions at public expense when he is represented by private counsel." *Id.* at 293. English's "mother retained private counsel for him through payments totaling $900" but "could not afford to pay for . . . a handwriting expert or [for] deposition expenses." *Id.* The district court denied an application to obtain those services at county expense. *See id.*[1] On certiorari, the Court concluded "the sixth amendment provides authority for

[1] *English* involved county funding because the SPD system hadn't yet been created. *See* 1988 Iowa Acts ch. 1161, §§ 1–10. The difference is immaterial.

furnishing investigative services to indigents at public expense without regard to whether the indigent is represented by counsel at public expense." *Id.* at 294.[2] It also concluded "the right to effective counsel includes the right to public payment for reasonably necessary investigative services." *Id.* at 293–94.

English declined to condition the right to public funding for auxiliary costs on first accepting representation at public expense. *See id.* at 294. The Court reasoned that doing so might burden the treasury by requiring the government to fund "both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services." *Id.* But the Court identified two scenarios that might mean a different result: a case where a defendant is indigent only after hiring an unreasonably expensive lawyer, or a case where the retainer was larger than the $900 English's mother paid and could therefore be expected to cover auxiliary expenses. *See id.* But Iowa cases after *English* contained little exploration of these factual distinctions.

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[2] *English* didn't address article I, section 10 of the Iowa Constitution. *See English*, 311 N.W.2d at 293.

Section 815.1 recognizes that gap and attempts to bridge it. Picking up where *English* left off, the statute sets benchmarks to measure whether a person has made themselves impecunious and whether the attorney's fee should be expected to cover other expenses. *See id.* It requires the district court to evaluate "the attorney's fee agreement," including any retainer received; "[t]he amount of compensation earned" so far; and "[i]nformation on any expected additional" payments. Iowa Code § 815.1(2)(*a*), (*d*)–(*e*). These dovetail with the notion that the definition of "indigent" inquires about an ability to "pay for the cost of an attorney." *Id.* § 815.9(1)(*a*); *see also Crawford v. State*, 404 P.3d 204, 218 (Alaska Ct. App. 2017) ("[T]he need for [ancillary] services, and their projected cost, is part of the calculation of whether the defendant is 'indigent' . . . ."). "The determinative question is the defendant's indigency," *English*, 311 N.W.2d at 294, and section 815.1 helps make that determination.

Although the defendant's indigency is the determinative question, countervailing considerations are also important. To that end, section 815.1 also serves a secondary leveling function by

ensuring that defendants with private counsel don't have greater control over publicly funded resources than defendants with appointed counsel. *See Duke v. State*, 856 S.E.2d 250, 264 (Ga. 2021) (Bethel, J., dissenting).

The Colorado Court of Appeals identified a solution for this dilemma: "Indigent defendants do not have a constitutional right to use state funds to pay for . . . ancillary services of *their* choosing." *Thompson*, 413 P.3d at 316. Here, however, the district court authorized public funding for an investigator Amaya personally selected—relegating the control-over-public-funds consideration to an afterthought. That was error.

SPD must balance financial realities with the constitutional obligation to provide indigent defense—and that balancing requires significant effort and vigilance. *See Subin v. Ulmer*, 36 P.3d 441, 444 (N.M. Ct. App. 2001) ("[T]he [public defender] must provide defense services to all clients found . . . indigent and it must do so within budgetary constraints subject only to constitutional considerations."). SPD pays indigent defense expenses from the indigent defense fund, which is "appropriated by the general

assembly." Iowa Code § 815.11. This means SPD must pay reasonable expenses to fulfill defendants' right to counsel, and estimate its own budgetary needs, while ensuring "the taxpayer will not be saddled with costs that are unnecessary . . . in each particular case." *State Pub. Defender v. Iowa Dist. Ct.*, 731 N.W.2d 680, 684 (Iowa 2007); *see* Iowa Admin. Code r. 493—12.1(3) (explaining that when SPD reviews expenses, it must demonstrate "good stewardship of public appropriations"); *Coonrad v. Van Metre*, 362 N.W.2d 197, 201 (Iowa 1985) (hoping that any system for compensating attorneys representing indigent defendants would "be fair to . . . the taxpayers who pay the fees awarded").

Section 815.1 balances those interests because it only prevents public funding for those who, under the legislative benchmarks, can pay (or whose private retainer means they reasonably *should* pay) their own expenses. There is a difference between denying public funding because a defendant has private counsel and denying public funding because a defendant can pay. *See Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979). Section 815.1 only does the latter by measuring whether a private attorney's

retainer "should reasonably be expected to cover" auxiliary costs. *English*, 311 N.W.2d at 294; *see also Earl*, 345 P.3d at 1159 (upholding the constitutionality of a Utah funding statute because the State has "a legitimate interest in maintaining the control necessary to ensure that the funds . . . dedicated to indigent legal defense are not abused or wasted").

In measuring whether a retainer should be expected to cover auxiliary costs, it is proper to consider payment from sources other than the defendant. *See Furey*, 208 N.W.2d at 18 (finding it appropriate for an attorney seeking public compensation after appointment to disclose "payment he has or may receive on behalf of"—not just *from*—his client). Further, applying the court-appointed rate ensures uniformity. "[U]niformity throughout the state of the amount of compensation paid at public expense to attorneys of like ability for . . . representing indigent defendants in criminal matters" is a desirable objective. *Parrish v. Denato*, 262 N.W.2d 281, 287 (Iowa 1978); *see also Coonrad*, 362 N.W.2d at 201 (hoping that any system of compensation for attorneys representing indigent defendants would "prevent vast disparity in fees allowed

in the various counties”). Indeed, this Court has found that the statutory rate is a useful guide when determining appropriate compensation. *See McNabb v. Osmundson*, 315 N.W.2d 9, 17 (Iowa 1982) (requiring court to set fees “using the statutory guidelines of section 815.7”). And in a case decided after *English*, this Court was “reluctant to dispute the collective judgment of the several judges of the first judicial district,” who enacted a local rule establishing “a presumptively reasonable hourly rate” for compensating attorneys representing indigent defendants, and who found that presumptive rate to be “a useful tool in dealing with . . . claims” expeditiously. *Coonrad*, 362 N.W.2d at 200.

It doesn’t matter that the statutory hourly rate may be lower than private rates. In *Coonrad*, a $40 hourly rate was reasonable even though “private-pay clients” usually paid “$50 to $75 per hour for similar work.” *Id.* Similarly here, the Court should be reluctant to dispute the collective judgment of the legislature in enacting section 815.1 to set a presumptively reasonable statutory rate as a useful tool to address requests for public funding. And it shouldn’t worry that the presumptive statutory rate may be lower than

private-sector rates. "[O]ther systems of compensation . . . may be permissible." *Id.* at 201. But they aren't necessarily constitutionally required.

At least one other state that finds a right to publicly funded auxiliary expenses for indigent defendants represented by private (albeit pro bono) attorneys does something similar; it makes applications for public funding "subject to the standard fee schedule promulgated by" the public defender. *State v. Brown*, 134 P.3d 753, 761 (N.M. 2006). A standard fee schedule ensures uniformity, treating "similarly situated indigent defendants the same." *Id.*

To the extent the district court's ruling suggests that applying a uniform rate causes ineffective assistance, there is "no basis to presume that any indigent defendant" whose attorney is compensated under established fee limitations "necessarily receives constitutionally deficient assistance." *Kerr v. Parsons*, 378 P.3d 1, 9 (N.M. 2016). Likewise, there should be no presumption that attorneys receiving the court-appointed rate—either as a contract attorney, or as a retained attorney subject to section 815.1's calculation—provide ineffective assistance either. *See Lewis*

v. Iowa Dist. Ct., 555 N.W.2d 216, 220 (Iowa 1996) (finding "no evidence . . . that indigent defendants are prejudiced by representation that is compensated at a rate less than that charged at private practice"), *questioned by Simmons v. State Pub. Defender*, 791 N.W.2d 69, 85 (Iowa 2010).

English declined to condition public funding on accepting public representation. *English*, 311 N.W.2d at 294. The Court reasoned "[i]t would be strange if the Constitution required the government to furnish" two pieces of a defense when "the indigent needs and requests public payment for only investigative services." *Id.* The financial rationale for section 815.1, however, is different; it follows *English*'s logic. Just as it would be strange for the Constitution to require the State to fund two pieces of a defense when the defendant can afford one of them, it would be strange if the Constitution required the State to fund one piece when the defendant can afford both. Section 815.1 builds on *English* rather than circumventing it.

2. The district court conflated the right to effective assistance with other rights.

The Supreme Court has warned other courts not to conflate counsel-of-choice analysis—"the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148. Here, the district court made exactly that misstep.

The district court ruled "the quality of court-appointed counsel is not at issue." (9/22/2020 Order at 7.) But it also ruled that section 815.1 violates Amaya's right to effective assistance. (9/22/20 Order at 7.) In other words, the district court implicitly concluded court-appointed counsel—an available alternative under section 815.1 if a private retainer can cover auxiliary costs using the statutory calculation—would automatically be less effective than Amaya's retained counsel.

That is problematic. First, it suggests a contract attorney may be less experienced than the counsel Amaya retained—and is therefore more likely to provide ineffective assistance despite easier access to publicly funded auxiliary services. That sentiment

contradicts the Court's observation that "inexperience do[es] not necessarily amount to ineffective assistance." *Scalf v. Bennett*, 260 Iowa 393, 399, 147 N.W.2d 860, 864 (1967).

Second, by tethering publicly funded auxiliary costs to effective assistance, the district court enabled another quandary: what about indigent defendants who represent themselves? A defendant may always waive the right to counsel. *See State v. Johnson*, 756 N.W.2d 682, 687 (Iowa 2008). But according to the district court's logic, by doing so, that defendant *also* waives the ability to access publicly funded auxiliary services. The waiver would occur because publicly funded auxiliary services are tied to effective assistance rather than some other provision, and a defendant who proceeds pro se cannot claim ineffective assistance. *See State v. Hutchison*, 341 N.W.2d 33, 42 (Iowa 1983). At least one court has rejected that proposition when a litigant asserted it. *See State v. Wang*, 92 A.3d 220, 231 (Conn. 2014).

Here, the district court's ruling creates exactly that trap. Although the district court wasn't addressing a pro se defendant, it is important to "consider fact patterns other than the one before the

court to determine" if particular logic "would have untoward consequences." *Iowa Ins. Inst. v. Core Grp.*, 867 N.W.2d 58, 75 (Iowa 2015). Although *Iowa Insurance Institute* addressed statutory interpretation and not constitutional analysis, the principle carries greater weight when the constitution is at stake—because the constitutional dimension prevents the legislature from stepping in to ameliorate any resulting untoward consequences.

B. If *English* dictates a contrary result, it should be limited or overruled because its ongoing validity is questionable.

Although the district court was bound by *English*, this Court is not. *English* deserves another look after forty intervening years of analysis on the availability of—and constitutional basis for—publicly funded auxiliary defense services. And to the extent *English required* the district court to conflate the right to publicly funded defense services with the right to effective assistance, then *English* is the problem. It should be clarified or overruled.

1. Any right to publicly funded auxiliary defense services is no longer understood to flow from the Sixth Amendment right to effective assistance.

English incorrectly identifies the source of the right. Four years after *English*, the U.S. Supreme Court explained that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must . . . assure that the defendant has a fair opportunity to present his defense." *Ake*, 470 U.S. at 76. This "elementary principle" stems from "the Fourteenth Amendment's due process guarantee of fundamental fairness"—not the Sixth Amendment's right to counsel. *Id.*; *see also Wang*, 92 A.3d at 231 ("[T]he due process right articulated in *Ake* is not tethered to the right to counsel."); *Davis*, 318 S.W.3d 618, 636 (Mo. 2010) (finding *English* "not persuasive" because "it pre-dates *Ake*" and "read a right to the resources in the Sixth Amendment" rather than the Due Process Clause). In other words, *Ake* alone called *English* into question. *Cf. State v. Smith*, 683 N.W.2d 542, 545 (Iowa 2004) (noting a U.S. Supreme Court decision seven years after an Iowa decision on the same issue "overruled [the Iowa decision] sub silentio").

In *Ake,* the Supreme Court didn't merely clarify the source of the right to publicly funded experts; it also cabined the right. First, although due process requires an opportunity to present defenses, it doesn't require the State to "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." *Ake*, 470 U.S. at 77. Second, the Court declined to hold "that the indigent defendant has a constitutional right to choose [an expert] of his personal liking *or to receive funds to hire his own*." *Id.* at 83 (emphasis added); *see Crawford*, 404 P.3d at 215 ("*Ake* does not guarantee indigent defendants an expert *of their choosing* . . . ."). Finally, the Court left "to the State the decision on how to implement this right." *Ake*, 470 U.S. at 83. In other words, rather than the open-ended Sixth Amendment right discussed in *English*, *Ake* both clarifies the source of a "right to obtain the services of experts at public expense" and demonstrates that the right is "circumscribed." *Crawford*, 404 P.3d at 208; *see Ake*, 470 U.S. at 83.

2. Since *English*, other states have concluded it is constitutionally permissible to condition public funding on accepting public representation.

Ake isn't the only post-*English* case addressing public funding for auxiliary expenses. Although other states' statutes aren't identical to section 815.1, several states conclude it is constitutionally permissible to condition public funding on accepting public representation. Three decisions demonstrate the reasoning.

First, in *Moore*, the defendant retained an attorney but sought public funding for a DNA expert. *Moore*, 889 A.2d at 328–29 & n.3. Yet it was the Office of Public Defender (O.P.D.)'s "policy not to" provide public funding for experts when defendants had private counsel. *Id.* at 330. The court denied public funding and the case proceeded to trial. *See id.* at 330–31. The jury convicted Moore and he appealed, contending the "Constitutional guarantees of effective assistance of counsel, due process of law, and equal protection of law" required a publicly funded expert. *Id.* at 333. The Maryland Court of Appeals found it "clear that *Ake* does not require handing over the State's checkbook to indigent defendants and their

attorneys." *Id.* at 339. Thus, Moore was entitled to a publicly funded expert only if a statutory or constitutional provision demanded it. *See id.* at 342.

On the statutory question, the public defender was "not required to pay for expert assistance or other ancillary services if the defendant is not represented by the O.P.D. (or a panel attorney assigned by the O.P.D.)," because the definition of indigent required an inability to provide for *full* payment of an attorney *and* all other necessary expenses. *Id.* at 343. The court concluded public funding is available only if the defendant is "without independent means to obtain counsel." *Id.*

On the constitutional question, the court concluded that establishing the O.P.D. and "making expert services available to clients of that Office" satisfied the *Ake* right. *Id.* Importantly, *Ake* contemplated state-level "restrictions on indigent defendants' access to state-funded expert services." *Id.*; *see Ake*, 470 U.S. at 83. And Maryland's restriction didn't offend the constitution; while "a State *might* provide funds enabling indigent defendants with retained counsel to hire experts of their own choosing," neither *Ake*

nor the constitution required it. *Moore*, 889 A.2d at 343 (emphasis added). Indigent defendants could "utilize the O.P.D.'s complete 'package' of services, or forgo them entirely." *Id.* at 345–46. That forced a choice, but not an *unconstitutional* choice. *See id.* at 346 ("[E]xpert assistance was available to [Moore] so long as he complied with the . . . requirement that he apply for legal representation through the O.P.D. Imposing this requirement on Moore did not violate his constitutional rights.").

Second, in *Earl*, the defendant had private counsel but "filed an affidavit of indigency" and sought "government-funded defense resources." *Earl*, 345 P.3d at 1155. She asserted that denying public funding would violate several constitutional rights, including effective assistance of counsel and due process. *See id.* The Utah Supreme Court disagreed. It concluded that, because *Ake* left implementation of its due-process right to the States, the legislature could "couple the availability of defense resources with the retention of government-funded counsel." *Id.* at 1158; *see Ake*, 470 U.S. at 83. And because Utah's legislature made a full "panoply of resources provided by the public defen[der]" available, that

satisfied *Ake*; "nothing in the Constitution requires a different result." *Id.* at 1159.

Finally, in *Thompson*, a defendant was indigent but appeared with retained counsel. *Thompson*, 413 P.3d at 315. The defendant wanted representation from that attorney but "could not pay for ancillary services." *Id.* The trial court denied public funding, so the retained attorney withdrew and the public defender stepped in. *See id.* at 315–16. Thompson contended this "placed him on the horns of a constitutional dilemma" by forcing him to pick between counsel of choice and the "right to present a defense, via the ancillary services." *Id.* at 316.

The Colorado Court of Appeals disagreed, because "the Supreme Court has limited the constitutional right to counsel of choice and the constitutional right to obtain ancillary services at state expense in a way that knits those rights together: Indigent defendants do not have a constitutional right to use state funds to pay . . . for ancillary services of *their* choosing." *Id.* Instead, defendants only have "a right to state-funded ancillary services if the public defender or court-appointed alternate defense counsel"

represents them. *Id.* In large part, that is because "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989); *see Thompson*, 413 P.3d at 318 (emphasizing the same language).

Although the right to counsel of choice "includes attorneys who are willing to represent [defendants] even though the defendants lack funds, the right to does not extend to indigent defendants who require . . . public funds to pay for their ancillary services." *Thompson*, 413 P.3d at 318 (citation omitted). And while that may force a choice, "the Constitution does not . . . always forbid requiring" such a choice. *McGautha v. California*, 402 U.S. 183, 213 (1971), *vacated in part on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941, 941–42 (1972); *accord Thompson*, 413 P.3d at 319. The choice between private counsel or ancillary services wasn't "intolerable," in part because there was no *constitutional* right either to spend another's funds or to receive public funds to hire an

expert of choice—even under *Ake*. *See Thompson*, 413 P.3d at 319 (citing *Ake*, 470 U.S. at 83).

Boiled down, the defendant had to select either private counsel or publicly funded ancillary services "because (1) he did not have a Sixth Amendment right to spend another person's—or the state's—money to obtain ancillary services; and (2) he did not have a constitutional right to receive funds to hire his own experts." *Id.* at 320 (cleaned up). The first proposition flows from *Caplin & Drysdale*; the second flows from *Ake*. *See id.*; *see also Caplin & Drysdale*, 491 U.S. at 626; *Ake*, 470 U.S. at 83. The court further credited *Moore* and *Earl* because those decisions "incorporate the two qualifications that *Ake* placed on the right." *Thompson*, 413 P.3d at 320.

To be sure, some states have concluded that the constitution can require public funding for indigent defendants no matter who represents them. *See, e.g.*, *Tran v. Super. Ct.*, 112 Cal. Rptr. 2d 506, 511 (Ct. App. 2001); *State v. Jones*, 707 So. 2d 975, 976–78 (La. 1998); *State v. Boyd*, 418 S.E.2d 471, 475–76 (N.C. 1992); *cf. Brown*, 134 P.3d at 759 (concluding an indigent defendant with *pro bono*

counsel—rather than paid counsel—has a constitutional right to public funding for auxiliary services without the appointment of a public defender). But the more recent decisions in Maryland, Utah, and Colorado departing from *English* are more persuasive, and better apply the right to defense tools established in *Ake*.

In particular, *Thompson* illustrates a careful analysis that accommodates the nuance attending each of the rights. If section 815.1 forces a defendant to choose between private counsel of choice and access to ancillary services, as the district court concluded (9/22/2020 Order at 4), *Thompson* explains why that doesn't violate the Constitution.

First, "[t]he right to counsel of one's choice is circumscribed in several important respects." *Thompson*, 413 P.3d at 317 (cleaned up). One of those respects is that "[a] defendant has no Sixth Amendment right to spend *another person's* money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale*, 491 U.S. at 626 (1989) (emphasis added). In other words, the right to counsel of choice isn't absolute when the

defendant isn't the one paying. Thus, even assuming Amaya has a right to counsel of choice, paid by his family, that right reaches its limit before it would constitutionally *entitle* Amaya "to spend another person's—or the state's—money to obtain ancillary services." *Thompson*, 413 P.3d at 320.

Thus, section 815.1 doesn't infringe Amaya's right to counsel of choice. If the Constitution permits the State to condition the right to auxiliary services on selecting public counsel, surely it can impose the limited regulations enacted here. Section 815.1 merely recognizes—and enforces—the limitations on the right to counsel of choice the Supreme Court identified after *English*. The law doesn't pit two constitutional rights against one another, because Amaya's right to counsel of choice doesn't extend as far as the district court thought. *Cf. State v. Sewell*, ___ N.W.2d ___, ___ (Iowa 2021) (rejecting a due process claim because the alleged violation "consisted of refusing something [the defendant] had no entitlement to anyway").

Second, *Thompson* correctly applies *Ake*'s limitations on the right to publicly funded experts. *Ake* explained that an indigent

defendant has no "constitutional right to choose [an expert] of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83. *Thompson*, in turn, observes that *Ake* doesn't entitle a defendant "to use state funds to pay for attorneys or for ancillary services of *their* choosing." *Thompson*, 413 P.3d at 316. Yet, the district court's decision does exactly that. The district court was bound by *English*—but this Court is not. Because *English* preceded *Ake*, *Thompson*'s post-*Ake* analysis provides a more comprehensive analytical framework. The Court should adopt it.

C. Even if section 815.1 violates the Constitution, the Court should still vacate the district court's decision because substituting a contractual hourly rate for the statutory rate invalidates more of the law than necessary.

Constitutional "invalidity does not affect other provisions . . . of the same Act or statute which can be given effect without the invalid provision." Iowa Code § 4.12. "Severing constitutionally infirm provisions is appropriate if it does not substantially impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent, and if the remaining portion of the enactment can be given effect without the invalid

provision." *State v. Louisell*, 865 N.W.2d 590, 599 (Iowa 2015) (cleaned up). The district court recognized its duty to save as much of section 815.1 as possible. (9/22/2020 Order at 7.) But the court's severance in practical effect *substituted* the attorney's contractual rate. The severance doctrine doesn't allow this substitution.

Section 815.1's legislative purpose and apparent intent was to provide auxiliary services while setting parameters that conserve fiscal resources where possible. *See State v. Iowa Dist. Ct.*, 750 N.W.2d 531, 534 (Iowa 2008) (noting the legislature's responsibility "to enact laws governing the expenditure of state funds."). Excising the statutory rate from section 815.1 thus doesn't substantially impair the legislative purpose and can be given effect (the first and third *Louisell* criteria). But the district court's severance risks flouting the statute's fiscal conservation intent (the second criterion). Fortunately, there's a way to fix it.

The district court struck only "that portion of section 815.1 that would require application of the court-appointed rate." (9/22/2020 Order at 7.) But the district court didn't explain what *specific* language it struck. That the district court applied the

contractual rate shows that it struck only the final phrase of section 815.1(4)(*c*)(1): "specified under section 815.7." *See* Iowa Code § 815.1(4)(*c*)(1).

There are two ways to interpret the remaining statute. One is as the district court did: with only "the hourly rate of compensation" to consider, review the fee agreement and apply that contractual rate. Yet this interpretation permits private agreements to bind the public fisc. And it risks the possibility that those agreements could be structured to defeat section 815.1—for example, with a higher hourly rate for the first few hours worked on a case.

A better way to interpret the remaining phrase "hourly rate of compensation" in section 815.1 is to vest in the district court discretion to determine, and then apply, a *reasonable* hourly rate—which may be the contractual rate, the statutory rate, or something else. This, too, could be considered "substituting" language to fill the gap. But after severing the statutory rate, there must be *some* way of quantifying the "hourly rate of compensation." And a reasonableness overlay best matches both the rationale for

performing severance analysis and the criteria that guide individual applications of severance analysis.

Reasonableness pervades the rest of section 815.1 and of SPD's claim review process. The court must determine auxiliary costs "are reasonable and necessary," and SPD may review those costs "for reasonableness" on the back end. *Id.* § 815.1(4)(*b*), (6); *see also id.* § 13B.4(4)(*c*)(1) (providing SPD may approve claims "[i]f the charges are appropriate and reasonable"). And *English* contemplated that public funding might properly be denied if a defendant made an "unreasonable expenditure of funds to retain private counsel." *English*, 311 N.W.2d at 294. Therefore, a reasonableness overlay for section 815.1 would be consistent with *English*. *See id.*

Most importantly, however, in related contexts involving fees for criminal defense counsel, the judicial branch has expertise to determine what is reasonable. *See, e.g.*, *Simmons*, 791 N.W.2d at 87; *Soldat v. Iowa Dist. Ct.*, 283 N.W.2d 497, 500 (Iowa 1979); *Parrish*, 262 N.W.2d at 285. It is the "goal of the courts . . . to establish a reasonable fee for the services performed in the

particular case," and "judges . . . have accumulated a considerable amount of experience in accomplishing this result." *Coonrad*, 362 N.W.2d at 200.

A reasonableness overlay best matches the severance criteria because it upholds the legislative intent of section 815.1—even after excising the statutory hourly rate. Automatically applying a contractual rate doesn't. And subjecting attorneys' hourly rates to the court's reasonableness review promotes "uniformity throughout the state of the amount of compensation paid at public expense to attorneys of like ability for . . . representing indigent defendants in criminal matters." *Parrish*, 262 N.W.2d at 287.

CONCLUSION

Section 815.1 doesn't violate the Sixth Amendment. If *English* says it does, then *English* deserves another look. The Court should reverse, vacate, or sustain the writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Samuel P. Langholz, hereby certify that on the 8th day of June, 2021, I, or a person acting on my behalf, filed this Amicus Curiae Brief and served it on counsel of record to this appeal with via EDMS.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 6,999 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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