No.

IN THE

SUPREME COURT OF THE UNITED STATES

ALEX DANIEL, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Farretta v. California,* 422 U.S. 806, 833-34 (1975), this Court recognized that the Sixth Amendment of the United States Constitution guarantees criminal defendants the right to self-representation at trial. This Court has also held that fundamental fairness requires that an indigent defendant be provided "access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985); *see also Britt v. North Carolina,* 404 U.S. 226, 227 (1971) (access to mistrial transcript or its equivalent when necessary for effective defense or appeal); *Griffin v. Illinois,* 351 U.S. 12, 19-20 (1956) (access to trial transcript or its equivalent when necessary to decision on merits).

This Court, however, has never addressed the government's obligation to provide access to defense tools necessary to present a competent defense to a self-represented indigent defendant. And state courts are split on this issue, where some state courts have held that *Ake* does not obligate the government to provide these tools when the defendant is self-represented, *e.g. State v. Davis,* 318 S.W. 3d 618, 636 (Mo. 2010), and others have found that denying access to these tools to *pro se* defendants violates their due process rights and their right to self-representation, *e.g. State v. Wang,* 92 A. 3d 220, 231-232 (Conn. 2014).

Thus the question presented is: **Whether an indigent defendant can be compelled to accept the representation of appointed counsel and give up his Sixth Amendment right to represent himself, in order to obtain the tools necessary to present an adequate defense.**

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The petitioner, Alex Daniel, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at *People v. Daniel,* 2022 IL App (1st) 182604, appeal denied, 2022 WL 5041224 (Table) (Ill. Sept. 28, 2022), and is published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at *People v. Daniel,* 2022 WL 2041224 (Table) (Ill. Sept. 28, 2022).

JURISDICTION

On March 31, 2022, the Appellate Court of Illinois issued its decision. A petition for rehearing was timely filed and denied on June 24, 2022. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 28, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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.

U.S. Const. amend. IV.

The Fourteenth Amendment to the United States Constitution Provides:

> 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.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

More than eleven years after his arrest, Alex Daniel ("Daniel") was convicted of the murder of his wife, Brenda Daniel ("Brenda"). On May 23, 2007, the police responded to a 911 hangup call at the Daniels residence where they found Brenda lying on the dining room floor with a gunshot wound to her head. She died the next day. After police searched the house and it was turned over to family members, one of Brenda's sons claimed to find a recording device in one of the rooms inside the house. The device contained an audio recording that the State argued at trial portrayed Brenda's final hours and was the only evidence suggesting that Daniel was at the house when the shooting occurred. The admissibility of the recording and its evidentiary value were repeatedly challenged before and during trial. Experts from the FBI testified to its reliability. While proceeding *pro se* prior to trial, Daniel requested an expert who could test the recording device and asked for transcripts of key hearings that involved the discovery of the device. But because the court told him that as an indigent defendant the only way to obtain those requests would be by accepting the representation of the public defender, Daniel was compelled to give up his right to represent himself.

Pre-trial proceedings

Motions to exclude the audio recording

Defense counsel and Daniel filed numerous motions to suppress the audio recording found in the Daniels home. (State's Exhibits ("SE") 12, 13) In 2010, the court ruled that the State needed to have someone test the device in order to satisfy foundational requirements. (R. 104) The court found it necessary to determine whether

it could be verified that there were no gaps in the recording and that the voices in the tape were in fact Daniel's and Brenda's. (R. 103-104) The State sent the device to the FBI for analysis. (R. 110) The FBI report was tendered to defense counsel more than a year later, on September 30, 2011. (R. 200)

During a subsequent hearing on the motion, Detective Tonya Eskridge testified that after the execution of a search warrant on Daniel's home on May 23, 2007, the house was turned over to Brenda's relatives. (R. 220) On May 31, 2007, Brenda's son, Viedell Stewart, contacted Eskridge and told her that on May 24, 2007, his brother, Anthony, had recovered an audio recording device from one of the bedrooms in the house. (R. 221) The device was inside a box underneath the bed. The batteries in the recorder were dead and he was only able to listen to it after buying new ones. Other family members also listened to the recording . (R. 226) Viedell turned over the device to Eskridge. (R. 223)

The State proffered that the FBI had found that the recorder was working properly and had not been tampered with. (R. 229) However, the FBI could not make a voice comparison or conclude that the alleged blast heard in the recording was the sound of a gunshot. (R. 230) The court made a preliminary ruling barring Brenda's children from identifying the voices in the recording. (R. 246) But after listening to the recording, the court found that the recording was relevant because "it is part of the incident and can be considered for its weight." (R. 264) The court also found that the foundational requirements had been established where the FBI reported no tampering. The court ultimately ruled that "no interpretation will be made by any people regarding who was involved in it." (R. 264)

Daniel's *pro se* representation and motion for an expert and transcripts

On May 15, 2014, and years before defense counsel would be reappointed in 2017, and hire an expert to examine the recording device, the court allowed Daniel to represent himself. (R. 409-416) Some months after he was allowed to proceed *pro se*, Daniel requested transcripts of court proceedings stating that he could not afford to order them. (C196) In response to Daniel's request, the court stated the following:

> THE COURT: We're not dealing with a situation of indigency with you. You decided, as if you were a millionaire, for that matter, to go and represent yourself. We're not dealing with indigency here. If you are indigent -- And I gave you what the law mandated me to do, which was to provide you with an attorney, and your attorney could get all of those matters for you.
>
> For that matter, you had three very good trial attorneys to represent you, but you chose not use them and go pro se. So once you jump off the cliff and go pro se, those matters don't count anymore. You could have got them, if you did have your attorney. It's not a matter of indigency here, sir, it's a matter of your choices to go pro se. Those are the choices you made. That's what the law provides, sir. (R. 497-498)

On October 14, 2014, Daniel asked for an investigator to examine the recording device but the court again stated that if he could not pay for one he could not have one. (C. 221-222; R. 533) After the court's cursory denial of Daniel's request, the following exchange took place:

> THE DEFENDANT: ...I would like to state, as I was saying, from the Illinois Compiled Statutes 725/113-3, it says that, "[t]here is no statutory provision for the allowance of investigator fees, but the Defendant may have a constitutional right to investigatory services when the services are necessary to prove a crucial issue and the lack of funds makes it necessary to provide investigative services, which substantially prejudice - - prejudices the Defendant."
>
> THE COURT: Again, those are matters which, if you had appointed counsel, those matters would be provided for you through that. You're allowed to have counsel to represent you and counsel to adequately represent you with things. When you go on your own, you are on your

> own. If you want an investigator, you may hire your own investigator. If you want an expert, you may hire your own expert. But there is no requirement that any such things be provided for you just because you're pro se. You're on your own, Mr. Daniel, and that's where you are. And, once again, I'll tell you, as I've done several dozens of times, it may not be the most prudent thing; but, again, that's your choice. (R. 534-535)

Daniel's motion to reconsider the denial of an expert investigator was also denied. (R. 583-588) The court stated that:

> THE COURT: ...You have chosen not to be represented by counsel. As a result, you are entitled to have counsel represent you but any other matters, you will not. If you had counsel, those issues could have been raised and if you had counsel with the public defender's office, they have a budget of which they could have gotten expert witnesses as they do day after day in the cases they tried.
>
> So therefore at this time your request to have experts or things of that nature, sir, are denied. You have a Sixth Amendment right to be represented by counsel and that goes along with everything else to aid counsel in representing you, but you chose not to have one. When you represent yourself, sir, you represent yourself. That's it. You fill out things on your own. That's my ruling. I'm not going to revisit it again, sir. Move along. (R. 584)

On April 2, 2015, Daniel asked for the public defender to be reappointed to his case. He told the court that "because I feel as though I am not making any progress in my representation as a pro se litigant, I would like to have the public defender to represent me." (R. 635-636) The court granted Daniel's request and reappointed the public defender. (R. 656)

After the reappointment of the public defender, on March 24, 2017, defense counsel filed a motion for sanctions to exclude the recording based on the State's failure to preserve the memory chip from the device for examination. (C. 335-337) Defense counsel hired an expert who examined the device and rendered an expert's opinion. (R. 732, 768, 779) At the hearing, counsel argued that during the extraction of the memory

chip by the FBI, the device malfunctioned and the memory chip could no longer be examined. As a result, Daniel could not fully dispute the results made by the FBI. (R. 774) The trial court denied the defense motion. (R. 788)

Jury Trial

Lisa Kaye Gryczewski, the 911 dispatcher, testified that when she received a call in the morning of May 23, 2007, the computer identified that the call was coming from 717 Oxford in Matteson, Illinois. (R. 1129-1130) The caller hung up the phone. The office policy was to look for any prior calls or incidents. (R. 1131) In this case the information found "regarded a previous domestic with a gun on the premises." (R. 1139)

Officer Beck from the Matteson Police Department testified that he responded to 717 Oxford after Officer Puklo requested backup at the location. (R. 1143) They opened the door, which was unlocked, and immediately saw the victim lying on the ground of the dining room. (R. 1145-1146) Once the ambulance arrived, the officers cleared the house and made sure no one else was inside. (R. 1149-1150) Beck later found out the victim's name was Brenda Daniel. (R. 1150) The Cook County Medical Examiner's report stated that there was a gunshot injury behind the left ear and no evidence of close-range firing.(R. 1417)

Steven Smith testified that in May 2007, he was working as a tile installer and was Alex Daniel's supervisor. (R. 1181-1184) Daniel used to call him "Smitty." (R. 1189) According to Smith, on May 22, 2007, Daniel offered to pick up Smith's check from their employer and bring it to work the next day. Daniel was scheduled to arrive at work on the 23rd at 6:00 a.m. The next day, Smith called him at around 7:00 a.m.

(R. 1184-1185) Daniel told him he would be at work at 8:00 a.m., but never showed up. (R. 1186-1187) Daniel left all of his tools at the site and never gave Smith his paycheck. (R. 1188) Smith knew that Daniel drove a Mountaineer SUV and that Daniel's wife was upset about the purchase of the car. (R. 1190) During casual conversation, Daniel told him once that he and his wife were having marital problems. (R. 1197)

Sergeant Kenneth Arvin was assigned to supervise the investigation of Brenda's shooting. (R. 1344) Arvin arrived at the house at approximately 10:00 a.m. and described the evidence he found at the location. (R. 1136-1375) On the second floor, inside one of the bedrooms, he found papers on a bed and a notebook. (SE 21, 31-32) The notebook was open and the page had a caption that said "Dumb and Dumber." (R. 1349; SE 30) He found a phone on the kitchen counter five to six feet away from the victim. (R. 1355) The phone had what appeared to be blood on it. (R. 1407) In the master bedroom the closet had men's clothes. (R. 1357-1358) The television in the master bedroom was on. A radio was playing in the kitchen. (R. 1393) There were no casings or bullet holes in the dining room. (R. 1360) No signs of forced entry or open windows. The garage door was closed. (R. 1361) When the warrant was executed later that day, police undertook a thorough search of the house for evidence. (R. 1398) Police did not find a gun. (R. 1403) Days later, Arvin received a recording device from Detective White and sent it to the FBI for examination. (R. 1408) Arvin tried to contact Daniel but was unsuccessful. (R. 1377)

Detective Jeremy Sims later learned that Daniel's car was parked at a Jewel-Osco in Chicago. (R. 1435) The loss prevention agent at the Jewel-Osco allowed Sims to obtain footage of the vehicle since its arrival at the parking lot. (R. 1308-1309, 1437;

SE 28A) The video showed a male black with short hair, wearing a black shirt exiting the car and walking west. (SE 28A; R. 1442) The driver left the parking lot and did not go to the Jewel. (R. 1443) Daniel's car was still parked there when Sims arrived. (R. 1443) The car was never reported stolen. (R. 1447) The U.S. Marshals arrested Daniel in Milwaukee on October 17, 2007. (R. 1447)

Viedell Stewart testified that he was one of Brenda's four adult children. (R. 1254) Daniel and Brenda married in 2003. (R. 1291) In 2007, Viedell was living in Minnesota. (R. 1258) As soon as he was informed of the shooting, Viedell drove to Chicago and saw his mother at the hospital. Daniel was not at the hospital and Viedell never heard from him. (R. 1261-1262, 1265) Brenda died the next day, on May 24th. (R. 1263) Viedell identified Brenda's handwriting on the notebook found in one of the bedrooms stating "I'm dumb and dumber" and "you wish." (R. 1266-1268)

On May 24th, Viedell and other family members went to the house and looked around. (R. 1271) While sitting on the bed of the second bedroom, Viedell found a recorder under the pillows. He tried to play it but it didn't work. He changed the batteries and was able to listen. (R. 1277) He didn't listen to all of it until after the funeral, allowed others to listen as well, and turned it over to police a week later. (R. 1280) He claimed he kept the recorder in a safe place. (R. 1279) Viedell denied telling the police that his brother Anthony found the recording. (R. 1297)

Detective Shawn White testified that he spoke to Viedell when he gave them the recorder. Viedell told White that his younger brother, Anthony, had found the device. (R. 1312-1313) White and Eskridge called Anthony Stewart and spoke to him about where the device was found. (R. 1325)

FBI Computer scientist Michael Fisher worked at Quantico. He examined the recorder, an Olympus VN 4100, provided by the Matteson Police Department. (R. 1200-1202, SE 10) When he powered on the device, a light flashed indicating a memory malfunction and the device could not access the data inside itself. Fisher had to remove the memory chip from the device. (R. 1203) He was able to recover a large file and, through a tool developed at Quantico, he recovered 10 recordings he was able to play. (R. 1205) The recordings were saved on to a disc. (R. 1206; SE 12) On direct examination, Fisher claimed that based on his expert opinion, the recording device was functioning properly when the recordings were made. The files had not been tampered with or altered in any way. (R. 1208-1209) There were three ways the recorder would operate: by hitting the record button and stop button; by voice activation; and with a timer. (R. 1209)

During cross-examination Fisher acknowledged that he could not determine what mode was used when the recordings were made. (R. 1212) Although the device had a clock in it, there were no time stamps in any of the recordings. He could not determine the time interval between each recording or when the memory error occurred. (R. 1213, 1215) He was also cross-examined on the device's capability to record sounds on top of other tracks and agreed that they could. He also admitted that any user could move the files around in folders inside the device. (R. 1214) Files could also be uploaded to a computer where they could be spliced together and then placed back into the devide. (R. 1216) He acknowledged that he did not know if the audio files had come from the device itself or if they had been uploaded from a computer. (R. 1218)

FBI forensic examiner Kenneth Marr testified that he conducted a signal

analysis examination of the recording device. (R. 1230-1232) He performed several tests to find out if a particular sound was a gunshot but was unable to make that determination. (R. 1230-1236) He explained that the recorder was good for voices but not for loud impulse sounds. (R. 1237) He was also unable to do a voice comparison examination. (R. 1239) Marr stated in his report that "the authenticity will not be possible on the files due to unknown original audio format[.]" (R. 1242)

Illinois State Police forensic scientist Nicole Fundell analyzed the bullet fragment recovered from the decedent. (R. 11329-1333) The jacket was a .38 mm class bullet. (R. 1334) One of the firearms that could have been used to fire the bullet would be a Rossi .38mm revolver. (R. 1336) On cross, Fundell acknowledged that the bullet could also be a 9mm or a .357 caliber. (R. 1340) The shooter could have been using a semiautomatic weapon as well. (R. 1341)

The parties stipulated to the finance and purchase documents of the Mountaineer and Brenda and Alex Daniel's marriage certificate. (R. 1307, SE 26, 27)

Officer Ray Murray testified that four years before the shooting, on November 18, 2003, he responded to a 911 hang-up call at 8:44a.m. at 717 Oxford. Daniel and Brenda were present. (R. 1457) Murray documented his observations of Brenda in Polaroid photographs. (R. 1379, SE 47) Brenda had minor injuries to her face and neck. A Rossi .38 special revolver was recovered from the master bedroom. The police left the gun with Brenda. Daniel was arrested. (R. 1459-1460)

In closing, the State focused primarily on the significance of the recording and argued to the jury that the recording "gave a voice to Brenda Daniel after the defendant Alex Daniel took it away." (R. 1487) "Brenda Daniel was so scared of this

defendant that she wanted somebody to know what she knew in case she wasn't around to say it...That is why she had this. And this little recorder was able to capture the horrific sound of this defendant firing that gun...the sound of her body making a thud on the dining room floor...this recorder is Brenda's voice." (R. 1488)

The jury found Daniel guilty of first-degree murder and found beyond a reasonable doubt that he personally discharged the firearm. (R. 1555-1556)

On September 7, 2018, counsel filed a motion for a new trial contending, among other things, that the court violated Daniel's right to represent himself when it denied Daniel funds to prepare his defense. (C. 442-446; R. 1604) Counsel argued to the court that as a public defender, he had the necessary tools to prepare a defense, such as an expert to review the evidence, including the recorder. He added that "[b]ecause [Daniel] was not provided with those services it's almost as if Mr. Daniel did not then voluntarily decide, well, I'm going to accept counsel. He was forced and involuntarily had to go and be represent by counsel of the public defender to receive these services as opposed to exercising his right of waiving counsel and representing himself." (R. 1603) The court denied the motion and sentenced Daniel to a total of 65 years in prison. (R. 1663-1664)

Direct Appeal

On direct appeal, Daniel argued, *inter alia,* that his right to represent himself was violated when he was forced to accept the services of the public defender in order to obtain the necessary tools to prepare his defense. Addressing Daniel's argument, the state appellate court found that the trial court had not abused its discretion in denying Daniel funds for an expert to analyze the capability of the recording device and for an

investigator because his "understanding of how the device worked was not crucial to his defense of the murder charge as that information did not go towards defending any element of the charges against him." *People v. Daniel,* 2022 IL App (1st) 182604, ¶ 142. The appellate court was silent regarding the denial of free transcripts of key proceedings that would be necessary to prepare for trial. And the court did not directly address Daniel's relinquishment of his right to represent himself. *Daniel,* 2022 IL App (1st) 182604, ¶ 142. The state appellate court thereafter denied Daniel's petition for rehearing. The Illinois Supreme Court denied Daniel's petition for leave to appeal.

REASON FOR GRANTING CERTIORARI

Where this Court has never addressed the extent to which the government must provide publicly funded defense services to self-represented indigent defendants, review should be granted to resolve the state courts' split over whether a *pro se* indigent defendant is constitutionally entitled to public funds to secure the necessary tools and services for the presentation of an adequate defense.

Seven years after his arrest, and numerous complaints about appointed counsel's representation, Daniel requested to proceed *pro se.* (C. 87-95, 169-173, 179-180) The court allowed him to do so and admonished him regarding the difficulty of self-representation. (R. 409-416) However, after Daniel made proper requests to access the tools necessary to prepare a competent defense, including an expert to evaluate the recording device recovered by Brenda's family and tested by the FBI, and transcripts of prior proceedings, the trial court denied him. (R. 497-498; 534-535, 584) Without addressing Daniel's need for these materials, the trial court told Daniel that because he was proceeding *pro se* he was not entitled to an expert or to free transcripts and the only way he could access these tools would be by accepting the appointment of the public defender. (R. 534-535, 584) After numerous futile requests and several defense motions denied, Daniel reluctantly gave up his right to self-representation and asked to have the public defender reappointed to his case. (R. 635)

The trial court's ruling essentially held that indigent *pro se* defendants are not entitled to access the same tools and experts as indigent defendants represented by counsel, or as *pro se* litigants who have the means to afford them. In effect, the trial court forced Daniel to choose between two constitutional rights: the right to self-representation and the right to reasonably necessary expert and transcripts. *Ferrata*

v. California, 422 U.S. 806, 817–32 (1975); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Griffin v. Illinois,* 351 U.S. 12, 19 (1965).

The right guaranteed by the Fourteenth and Sixth Amendments to proceed as a *pro se* litigant assumes the defendant's right to present a defense. As this Court put it, "the right to self-representation – to make one's own defense personally – is [ ] necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819–20. *Faretta* holds that the rights guaranteed by the Sixth Amendment apply "to the accused personally." *Id.* at 819. "The rights to notice, confrontation, and compulsory process" imply that time to prepare and access to materials and witnesses are crucial to the ability to exercise the right to self-representation. *Id.* at 818.

Given the importance of the defendant's ability to mount a suitable defense, this Court has long recognized that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 76 (including expert assistance); *see also, Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (including transcripts of prior proceedings); *Griffin*, 351 U.S. at 19 (discussing equal protection principles). Yet, it is still *unclear* how the Sixth Amendment right to self-representation impacts that principle. *See Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) ("*Faretta* says nothing about any specific legal aid that the State owes a *pro se* criminal defendant."). Although an incarcerated indigent defendant will be unable to meaningfully exercise his right to represent himself without access to necessary

experts, transcripts, or other tools to prepare a defense, state courts are divided on what legal aid is owed to a self-represented indigent defendant, and whether states may require such defendant to give up his right to self-representation in order to access necessary tools for a competent defense. As a result, this Court should grant certiorari where it has not yet addressed this question: **whether states violate an indigent *pro se* defendant's Sixth Amendment right to self-representation by conditioning access to the basic tools of an adequate defense on acceptance of appointed counsel?**

The majority of federal and state lower courts recognize that a counseled indigent defendant has a right to expert assistance and free transcripts when necessary. *See State v. Brown*, 134 P.3d 753, 759 (N.M. 2006) (noting a majority of states have found a constitutional right to state funding for various defense costs, including expert witness fees); *Little v. Armontrout*, 835 F.2d 1240, 1243–44 (8th Cir. 1987) (finding a constitutional right to a non-psychiatric expert in non-capital cases); *Kennedy v. Lockyer*, 379 F.3d 1041, 1050 (9th Cir. 2004) (finding no substantial compliance exceptions to the requirement that state courts provide indigent defendants with transcripts of prior proceedings).

Courts have applied different standards to determine whether expert funds are constitutionally required, but each acknowledges the right to necessary expert assistance for indigent counseled? defendants. *See United States v. Smith*, 502 F.3d 680, 686 (7th Cir. 2007) (requiring funds when "a reasonable attorney would engage such services for a client having the independent financial means to pay for them"); *United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016) (same); *cf. Moore v. Kemp*,

809 F.2d 702, 712 (11th Cir. 1987) (en banc), *cert. denied*, 481 U.S. 1054 (1987) (requiring funds when the defendant shows a reasonable probability the expert would aid in his defense and that denial would result in an unfair trial); *Little*, 835 F.2d at 1244 (same); *Castro v. Ward*, 138 F.3d 810, 826 (10th Cir. 1998) (requiring funds when a defendant demonstrates with particularity that expert services are necessary to an adequate defense); *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) (requiring funds when an expert is "reasonably necessary" to "prepare for cross-examination of a government expert as well as presentation of an expert defense witness").

For transcripts, this Court held that "there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense." *Britt*, 404 U.S. at 227. Applying *Britt*, most federal circuit courts consider two factors when determining need: "(1) the value of the transcript in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *United States v. Pulido*, 879 F.2d 1255, 1256–57 (5th Cir. 1989); *see, e.g.*, *Riggins v. Rees*, 74 F.3d 732, 735 (6th Cir. 1996) (same); *United States v. Devlin*, 13 F.3d 1361, 1363 (9th Cir. 1994) (same); *United States v. Jonas*, 540 F.2d 566, 573 (7th Cir.1976) (noting that neither tape recordings nor judicial notes are adequate substitutes for a transcript "in the overwhelming majority of cases").

While federal circuit courts have not explicitly addressed how the right to necessary expert assistance applies to indigent *pro se* defendants, the Criminal Justice Act Guidelines instruct courts to allow *pro se* defendants access to investigative, expert,

and other services in accordance with 18 U.S.C. § 3006A(e).[1] State courts, however, are split on this right. *See State v. Davis*, 318, S.W.3d 618 (Mo. 2010); *cf. State v. Wang*, 92 A.3d 220 (Conn. 2014).

In Missouri, the state Supreme Court rejected the idea that *Ake* requires states to offer an indigent *pro se* defendant funds for a necessary expert. *Davis*, 318 S.W.3d at 623–24, 635–36. There, an indigent defendant claimed the trial court forced him to forgo his right to self-representation by incorrectly stating that he would have no right to an investigator if he chose to proceed *pro se*. *Id*. at 623–24. The court held that because *Ake* cautioned that indigent defendants do not have a "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own," the state is not required to offer a defendant his choice of whether to receive these tools personally or through counsel. *Id*. at 635–36. Accordingly, states are allowed to implement the right to necessary experts in the manner they see fit, and "may tie the provision of 'the basic tools of an adequate defense' to provision of appointed counsel." *Id*. (citing *Moore v. State*, 889 A.2d 325, 343–344 (Md. 2005)).

By contrast, the Connecticut Supreme Court held the state must give *pro se* defendants reasonably necessary expert assistance. Otherwise, "the due process right of fundamental fairness is hollow for self-represented defendants." *Wang*, 92 A.3d at 235, 247. Because *Ake* found the right to basic tools of an adequate defense inherent in the Fourteenth Amendment, not the Sixth Amendment, the *Wang* court determined

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[1] *7A Guide to Judiciary Policy* § 310.10.30,https: //www.uscourts.gov/sites/default/files/vol07a-ch03.pdf (last visited Dec. 10, 2022) (noting that courts "should authorize subsection (e) services for pro se litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by CJA panel attorneys").

that access to necessary defense services does not depend on whether a defendant is represented by appointed counsel. *Id.* at 230. Compared to a represented defendant, the court reasoned that "expert or investigative assistance may well be more valuable to a self-represented defendant who presumably will experience greater difficulty in formulating and presenting his defense." *Id.* at 235. And, as the right to self-representation and the right to expert assistance can be enjoyed simultaneously and vindicate different interests, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 231–22 (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968)); *see also Ex parte Moody*, 684 So.2d 114, 122 (Al. 1996) (granting *pro se* defendant a hearing to determine need for an expert).

As for the right to free transcripts of prior proceedings, several courts have applied this right to indigent *pro se* defendants. *See People v. Nord*, 790 P.2d 311, 316 (Colo. 1990) (holding that the rationale for providing indigent defendant free transcripts of a preliminary proceeding applies "even more cogently to pro se defendants"); *Greene v. Brigano*, 123 F.3d 917, 921–22 (6th Cir. 1997) (ruling that election to proceed *pro se* on appeal did not waive right to trial transcript); *Kennedy*, 379 F.3d 1041, 1045, 1049 (9th Cir. 2004) (finding a *pro se* indigent defendant entitled to transcript of all prior proceedings, including all pre-trial motions); *U. S. ex rel. Cadogan v. LaVallee*, 428 F.2d 165, 166 (2d Cir. 1970) (applying same standard to a *pro se* defendant's motion for a free suppression hearing transcript). No state supreme court or federal circuit court has found, as the trial court did here, that states can withhold free transcripts from indigent defendants because they exercised their right to self-representation.

Without guidance, lower state courts disagree on whether the government is required to provide necessary expert assistance and free transcripts to self-represented indigent defendants. In this case, Daniel, as a pro se indigent litigant, needed expert assistance because the State had no direct evidence connecting him to the crime. There were no witnesses placing Daniel at the scene or forensic evidence linking him to the crime. The origin of the recording device was a mystery: no one knew who bought it, or who placed it inside the home. It was never determined how long the device had been recording or for what purpose. There was no information about how the device was operated. Yet, the State argued, at length in closing, that the recording device captured Daniel killing his wife, claiming that "[t]his little recorder gave a voice to Brenda Daniel after the defendant Alex Daniel took it away." (R. 1487–89) Contrary to the Illinois appellate court's findings, the recording played a critical role at trial. *People v. Daniel*, 2022 IL App (1st) 182604, ¶ 141. Given the uncertainties of the source and nature of this evidence, Daniel required expert assistance to assess the accuracy of the prosecution's expert report and determine if anything about the device cast doubt on the recording's authenticity or the prosecution's theory.

An attorney performing effectively would have engaged an expert to analyze the recording device, and in fact, after Daniel was forced to accept the services of the public defender, his appointed counsel secured an independent expert. (R. 635–36); *Smith*, 502 F.3d at 686. Although that expert never testified, it was through counsel's cross-examination regarding the operation of the device that the mishandling of the device after it was recovered, and the weaknesses of the FBI's analysis came to light at trial. (R. 1211–16, 1218). As this Court has recognized, the need for expert assistance is not

just to provide testimony at trial, but also to prepare the cross-examination of the State's witness. *Ake*, 470 U.S. at 82. Expert assistance in this case was crucial to an adequate defense because, without it, Daniel would have had to simply accept, without meaningful challenge, the prosecution's expert analysis of technical evidence from a questionable origin, that played a critical role against him.

The requested transcripts were also necessary. First, the requested transcripts were valuable to Daniel's defense at trial. They contained testimony, obtained at earlier hearings, about who found the device, where they found it, and chain of custody details he could use to impeach State witnesses at trial. (R. 219–29). Jurisprudence presumes the value of transcripts as a discovery device and impeachment tool. *Britt*, 404 U.S. at 228; *see also Devlin*, 13 F.3d at 1364 (finding value in a suppression hearing transcript as an impeachment tool). Second, no alternative sources were available. Daniel was not required to maintain a perfect memory of a proceeding that occurred six years before his trial (R. 215, 491, 515, 1107), or take exhaustive notes when he was not permitted to have a pen in the courtroom. (R. 573–74); *Britt*, 404 U.S. at 229 (rejecting the idea that "counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial"). Thus, Daniel could have made a "particularized showing of need" for the transcripts had the trial court allowed him to do so. *See Id.* at 228.

Critically, the trial court never gave Daniel an opportunity to explain the reasons behind his requests. He made his requests multiple times, but the court refused to consider it, concluding that Daniel lost the right to the requested services when he chose to represent himself. (R. 497–98, 534–35, 584). This resulted in Daniel's

forced relinquishment of his Sixth Amendment right to represent himself. (R. 635–36).

Daniel's case presents this Court with the ideal vehicle to answer this question:

Can the state compel an indigent *pro se* defendant to forgo his Sixth Amendment right to represent himself and accept representation by the public defender in order to access tools necessary for an adequate defense?

Without clarity from this Court, the ability of an indigent defendant to exercise his right to self-representation will vary from state to state. The summary denial that occurred here based on Daniel's choice to proceed *pro se*, offers this Court an opportunity to provide a clear answer to whether indigent *pro se* defendants are entitled to the same necessary tools available to indigent defendants represented by appointed counsel and to *pro se* defendants with means to afford them. This Court should grant review.

CONCLUSION

For the foregoing reasons, petitioner, Alex Daniel, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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