No. 19-8650

IN THE

SUPREME COURT OF THE UNITED STATES

SEBASTIAN ALBERT CAMPBELL

Petitioner,

v.

STATE OF MARYLAND

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR REHEARING

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

PETITION FOR REHEARING

I. Substantial Grounds Not Previously Presented

COMES NOW Sebastian Campbell, herein "Petitioner, pro se," and pursuant to Rule 44.2 respectfully moves this Court to reconsider the denial of Petitioner's Petition for Writ of Certiorari to the Maryland Court of Special Appeals ("COSA"), decided January 11, 2021 at case No: 19-8650, for the reasons set forth as follows:

The State of Maryland employs a statutory scheme that uniformly compells ALL indigent defendants to completely relinquish their right to self-representation as defined by this Court in *Faretta v. California*, in order to be provided with the basic tools, (including, but not limited to, audio/visual equipment, investigative services, expert testimony, copies, or an ink pen) to present an adequate defense at State expense. In justifying this seemingly unconstitutional compulsion, Maryland precedents have concluded that the right to self-representation and the right to counsel of choice are "virtually identical," *Campbell v. State*, 243 Md App 507, 525 (2019), and applying *Moore v. State*, 390 Md 343 (2005) to Petitioner's case the COSA qualified, "although an indigent criminal defendant enjoys the right to the assistance of counsel, this entitlement does not translate into an absolute right to

Counsel of defendant's choosing... [I]n the absence of such a right to choice of counsel, there is no violation when the state requires that an indigent defendant avail himself of the [O.P.D.] in order to obtain [certain services]." *Campbell* @ 526 (quoting *Moore* @ 377). Extrapolating from the plain language, Maryland holds, without actually discussing, that an indigent defendant has no "absolute right" to represent himself, (contrary to numerous findings by this Court and the U.S. Circuit Courts of Appeals) and can therefore be COMPELLED to accept representation from the Office of the Public Defender ("OPD") in order to secure any opportunity to present an adequate defense and, by extension, receive a fair trial. Ultimately, in Maryland, an indigent defendant can be lawfully denied a fair trial if he elects to represent himself.

There are undoubtedly significant disadvantages in legal acumen inherent in the exercise of self-representation which, unlike the federal judicial system, Maryland provides no compensation for. In fact, Maryland strictly prohibits its appointed counsel from simply providing defendants with the "assistance of counsel for his defense," as the Sixth Amendment describes and *Faretta* explicitly clarifies, stating, "an assistant, however expert, is still an assistant." *Id.* @ 820. In response to

Petitioner's unequivocal request to the trial court for legal assistance at his very first appearance (See Montgomery County Circuit Court ("MCCC") case No. 131730c - Docket #19 - Motion to Proceed in Proper Person and Appoint Standby Counsel) Deputy District Public Defender for Montgomery County, MD, Teresa Chernosky testified,"

> "In terms of standby counsel our office does not allow us to stand in as standby counsel. Ethically we wouldn't be able to control what was going on in the courtroom, so it would be against us ethically if something were going on that we otherwise wouldn't be able to do on our own... [D]uring the whole proceeding, when we are the attorney, there are decisions that we make that the client is NOT ALLOWED TO MAKE. If we were being standby counsel, the client would be making all of the decisions and we would be in a position where we might be against professional conduct in what we would be allowed to do. So our office does not provide or act as standby counsel AT ALL."

(Trans. 6/30/17@ 12-13) (emphasis added).

First Petitioner notes that the expressed position of the OPD precluding its participation as standby counsel is apparently based on the predisposition that indigent defendants electing to exercise their constitutional right to self-representation are inherently unethical which, as a policy is, in itself inherently unethical. Secondly, this Court has authorized the trial court to appoint standby counsel "even over the defendant's

objection." *McKaskle v. Wiggins*, 468 US 168, 184 (1984). Consequently, the trial court was not without authority to appoint standby counsel, despite the OPD's refusal, had it chosen to do so. And finally, Petitioner asserts his election to self-representation was not based on caprice or arrogance. In his initial consultation with assigned Public Defender, Joseph Atkins, Petitioner uncovered three important facts; 1) Joseph Atkins had represented numerous defendants in Montgomery County but had not prevailed in a single jury trial resolving Petitioner's odds of conviction under his independent representation to about 99%. Petitioner, representing himself, had defeated the assigned prosecutor in a previous jury trial, resolving to a nearly 50-50 chance of success, the deficiency in legal expertise not withstanding; 2) Mr. Atkins adamantly conveyed his discomfort with respect to questioning a teenage girl about her sexual practices, the very and only information capable of producing an acquittal; and 3) after considering Mr Atkins' reluctance, Petitioner realized that he, himself, would be uncomfortable with a stranger inquiring into his daughters intimate sexual details and, as it needed to be done effectively it would be best if he did it. Petitioner reasonably believed his mathematical odds of success would be greatly enhanced with the "assistance of counsel for his

defense." *Faretta* @ 821. This Court has conclusively recognized the "defense tool" of a legal expert in a criminal cause as being of paramount necessity in securing a fair trial for over half a century.

> "Even the intelligent and educated layman has small and sometimes no skill at the science of law... He is unfamiliar with the rules of evidence... He lacks both skill and knowledge adequate to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he doesn't know how to establish his innocence."

Gideon v. Wainwright, 372 US 335, 344-45 (1965). Those eloquent words have probably never been more true than in the case now before the Court.

The alleged victim, Petitioner's middle daughter, testified at trial that five (5) years earlier, during a specific period of time in 2012, Petitioner retrieved her from foster care ("kidnapped") in Michigan, transported her to Maryland where he deflowered, repeatedly raped, beat and held her hostage for months in the two-bedroom apartment in Rockville, MD where she lived with Petitioner, his girlfriend and their two children, the alleged victim's half-siblings. The record will reflect that in addition to adducing testimony from the mother of Petitioner's

two younger children indicating that Petitioner and the alleged victim never lived "a single day" in that apartment during the specified period of time, Petitioner also attempted to introduce what he believed was certified proof of incarceration from the Michigan Department of Corrections (Trial- 9/15/17- Def Ex. 3) clearly depicting that Petitioner was incarcerated 500 miles away, in Michigan, at the exact time the offenses were alleged to have been continuously occuring, rendering the alleged victim's testimoney materially and PHYSICALLY impossible. However, the trial court refused to admit the documents into evidence, citing improper foundation and lack of authentication. Consequently this vital evidence of Petitioner's innocence was never before the jury in deliberations. It is these very circumstances that the Constitution's and this Court's establishment of the absolute right to the assistance of counsel was designed to circumvent. It is reasonable to conclude that had Petitioner been granted the assistance of the legal expert he specifically requested in presenting his overwhelmingly exculpatory and impeaching evidence, there is a substantial or significant possibility that the verdict of the trier of fact would have been different in Petitioner's favor, and Petitioner was unrecoverably prejudiced by the absence thereof.

In the State's Brief in Opposition to Petition for a Writ of Certiorari ("State's Opposition") this Court directed the State to submit, the State asserted that "this case is a "poor vehicle" for assessing the impact the denial of expert assistance had on Petitioner's right to self-representation, noting that Ake and subsequent cases require a "threshold showing" that the expert "would be relevant and helpful." (State's Opposition @ 8). The State went on to erroneously suggest to the Court, "Even now, following trial and appeal, it remains unclear what kind of expert assistance Campbell sought, or how it would have been relevant." Id. @ 9. To the contrary, the record clearly reflects that Petitioner explicitly requested the assistance of a legal expert at his very first appearance in the trial court, that the trial court unwaveringly relied upon the statutory construction of the State law governing the operation of the OPD in denying that request; and, the COSA upheld the denial on the untenable grounds that the right to self-representation and the right to counsel of choice are "virtually identical" which, as Petitioner stated previously, decides the matter of self-representation in a manner that contradicts the rulings of this Court and the US Circuit Courts of Appeals. The posture of this Court regarding the incontrovertible necessity

of the assistance of Counsel in a criminal proceeding obviates any further contingency on the particular facts of the case or the "threshold showing" of relevance as defined by Ake. Consequently, it is indisputable that the need and intended use for the legal expert Petitioner requested on the record, before trial is firmly established.

Where this Court has reasoned, "An accused may INSIST on representing himself... that choice MUST BE HONORED out of respect for the individual which is the lifeblood of the law. The right to appear pro se exists to affirm the dignity and autonomy of the accused." McCoy v. Louisiana, 138 S.Ct. 1500 (2018) (emphasis added), the State of Maryland contests, "a defendant's right to self-representation... is not absolute." (States Opposition @ 10). Where this Court dictates, "The pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury, this is the core right of Faretta," McKaskle @ 178, and, more recently stating, "The choice is not all or nothing. To gain assistance a defendant need not surrender control entirely to counsel," McCoy @ 1508, the State of Maryland requires indigent defendants to accept the "complete package of services or forgo them entirely," Campbell @ 571. That "package", as defined by the OPD, includes FULL representation where the defendant is "NOT ALLOWED TO

MAKE" decisions about his own defense. The conflict between this Court's relevant rulings and Maryland's posture on self-representation is tangible, and the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

With respect to an indigent defendant's entitlement to relevant expert assistance as defined by *Ake*, it is nearly unanimously held in the U.S. Circuit Courts of Appeals that have considered the issue, as well as the vast majority of state supreme courts, including the Maryland Court of Appeals, that *Ake* "extends beyond the capital context and extends to non-capital cases," *Moore* @ 364. Also, that "the right announced in *Ake* is not limited to providing psychiatric experts... when... the requested assistance is needed for him to have a fair opportunity to present his defense" *Id* @ 366 (quoting *Ake* @ 76). In the case at bar, Petitioner's ability to present an adequate defense was catastrophically diminished by the trial court's denial of expert assistance.

While a consensus in the Circuits and state supreme courts on a constitutional issue does not establish constitutional laws, it does negate the need for further "percolation" on the issue. The matters of self-representation

and the States obligation to provide indigent, pro se, defendants with the basic tools to present an adequate defense, including but not limited to expert assistance, is sufficiently well established to justify certiorari where the State's precedents are diametrically opposed to the relevant holdings of this Court. Certiorari on this matter, where *Faretta* and *Ake* are already formidably entrenched in American jurisprudence, can only serve to elevate the applicability of two, decades-old constitutional cornerstones from pre-technological ambiguity, into a unified, new millenium, internet protocol, DNA, nanotech, 5G, 4K, HD, laser-sharp focus with the determination of a pro se defendant's right to an "extra Sixth Amendment" provision of a legal expert at State expense emerging as an added dividend. The well of experts a defendant may potentially require to assist in his defense in the modern era is virtually limitless, however, the need for the assistance of a legal expert remains an immutable constant.

Petitioner asserts that this Court's holding in *McKaskle* only rejects the claim of a "Sixth Amendment" guaranteed right to "hybrid representation" *Id.* @ 183. It in no way diminishes the constitutionally defined value of the assistance of counsel, nor does it prohibit the provision of legal assistance through hybrid representation by other means. In fact, it seems

dramatically inconsistent that the participation of a legal expert which can be compelled by the court over objection, Ake 1984, can then be denied by the court when a legitimate request is made. It is undeniable that an indigent defendant who has waived his right to the assistance of counsel "under the Sixth Amendment," in favor of maintaining the "dignity and autonomy of the accused," can still, upon request in the federal court system (See Criminal Justice Act Guidlines § 310.10.30(a)), or by compulsion from the trial court, avail himself of the assistance of a legal expert at State expense. It follows logically then, pursuant to the principles defined by Ake, where the fundamental necessity of a legal expert to assist in the defense of indigent defendants has been predetermined by this Court, and, where a pro se defendant with the financial means is not prohibited from utilizing that essential defense tool in establishing his innocence before the jury, the denial of a legal expert upon request of the indigent, pro se defendant manifests the very unconstitutional deprivation of equal protection the holding in Ake has been nearly unanimously interpreted to circumscribe. Unfortunately, the State of Maryland can not reach the merits of this argument unless it first discusses and recognizes that the right to self-representation

and the conditional right to counsel of choice are not synonymous as the COSA has ruled in this case.

II. Intervening Circumstances of Substantial Effect

On November 12, 2020, the Post-Conviction Court ("PCC") held a hearing on Petitioner's Petition for Post Conviction Relief. The Petition cited as an allegation of error that the "trial court impermissibly compelled Petitioner, by applying the incorrect legal standard, to relinquish his constitutional right to self-representation in order to assert his right as an indigent defendant to be provided with the basic, necessary tools for an adequate defense, at State expense." (Attachment - MCCC case# 131730c Petition for Post-Conviction Relief ("Petition/Post"), Docket# 331, pg 2). The argument Petitioner presented specifically indicates he is asserting his "right to self-representation, not counsel of choice," in bold face type (Petition/Post, pg 3-8). Nevertheless the PCC simply disregarded Petitioner's due process right to a fair adjudication of the issues actually presented. In denying Petitioner relief the PCC's Memorandum Opinion and Order did not make a single reference to the right to self-representation (See Attachment Memorandum Opinion and Order, filed Dec 11, 2020, pg. 5-6). And, even more noteworthy, the PCC determined, "While Petitioner argued at the Nov. 12, 2020 hearing that the Court of Special Appeals

had failed to discern the true nature of Petitioners allegations of error - thus failing to properly reach the merits of the allegation - the Court sees NO MEANINGFUL DISTINCTION between Petitioners arguments." Id. (emphasis added). The PCC, like the COSA, simply ruled without discussion that there is "no meaningful distinction" between the right to self-representation and the right to counsel of choice, once again diverging from clearly established federal law. Petitioner has timely filed an Application for Leave to Appeal the PCC's ruling. However, the tenor of the Maryland courts strongly suggests the COSA will not employ a legitimate contemplation of the actual asserted error, leaving this very same issue on a boomerang path to this Court's almost immediate reconsideration. In the interests of justice, finality and preservation of judicial resources it is far more reasonable to have an issue definitively decided as opposed to categorically ignored, even if Petitioner's interpretation is incorrect.

In its Opposition to Certiorari the State suggested, "It is premature for this Court to address the issue of whether a state is required to provide an indigent defendant who elects to represent himself state-funded experts to prepare a defense for trial." (State's Opposition @ 13). The State also pleaded,

"This Court should give state high courts an opportunity to apply *Faretta* and *Ake* to varying factual scenarios before it considers whether to resolve a question left open by those cases;" *Id.* @ 18-19. Petitioner believes the State's arguments were disingenuous at best. It is now abundantly clear that the Maryland courts have absolutely no intention of allowing the issue to ever reach the "state high court" or contemplate the "meaningful distinction" in the scenario it is already faced with. Without this Court's intervention the State of Maryland is apparently content to stand in perpetual violation of Petitioner's fundamental right under the First Amendment to have legal redress of his grievances, as well as the due process violation argued in this Petition. Maryland is clearly not leading the charge in resolving this issue, and it is doubtful, regardless of how many "opportunities" this Court bestows, that they ever will.

CONCLUSION

In light of the facts submitted above, Petitioner prays this Court will reconsider and GRANT his Petition for Writ of Certiorari.

Dated: March 12, 2021

Respectfully Submitted,
Sebastian Lyttrell

SEBASTIAN ALBERT CAMPBELL
Petitioner

v.

STATE OF MARYLAND
Respondent

IN THE
SUPREME COURT OF THE
UNITED STATES
No. 19-8650

CERTIFICATION
(Rule 44.2)

I, Sebastian Campbell, do hereby certify that the attached Petition for Rehearing only raises grounds limited to intervening circumstances of substantial or controling effect, or to other substantial grounds not previously presented.

I further certify that the Petition for Rehearing is presented in good faith and not for delay.

Dated: March 13, 2021

Sebastian Campbell
Petitioner, pro se
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ABCI
14100 McMullen Hwy SW
Cumberland, MD 21502

I solemnly affirm this 13th day of March, 2021, under the penalty of perjury and upon personal knowledge that the foregoing statements are true.

SEBASTIAN CAMPBELL

SEBASTIAN ALBERT CAMPBELL
Petitioner

v.

STATE OF MARYLAND
Respondent

IN THE
SUPREME COURT OF THE
UNITED STATES
No. 19-8650

CERTIFICATE OF SERVICE

I, Sebastian Albert Campbell, do hereby certify that on this 16th day of March, 2021, I did serve upon the Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202, a true copy of the foregoing Petition for Rehearing, by first-class U.S. Mail with postage prepaid.

SEBASTIAN CAMPBELL

SEBASTIAN CAMPBELL
Petitioner

v.

STATE OF MARYLAND
Respondent

IN THE
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No. 19-8650

CERTIFICATE OF FILING

I, Sebastian Campbell, certify that, 1) I am currently involuntarily confined in North Branch Correctional Institution in Cumberland, Maryland; 2) I have no direct access to the U.S. Postal Service or to a permitted means of electronically filing the attached Petition for Rehearing; 3) on March 16, 2021 at approximately 5:30 pm I delivered it to an employee of the facility authorized by the facility to collect outgoing mail; and 4) the package was in mailable form and had the correct postage on it.

I solemnly affirm this 16th day of March, 2021, under the penalty of perjury and upon personal knowledge that the foregoing statements are true.

Sebastian Campbell

SEBASTIAN CAMPBELL
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APPENDIX A

Petition for Post-Conviction Relief

STATE OF MARYLAND

IN THE CIRCUIT COURT FOR MONTGONERY COUNTY

SEBASTIAN A. CAMPBELL

Petitioner,

v. Case No. 131730C

STATE OF MARYLAND,

Respondent.

PETITION FOR POST-CONVICTION RELIEF

COMES NOW Sebastian Campbell, hereinafter, "Petitioner" pro se, and pursuant to Md Rule 4-401 et. seq., respectfully moves this Honorable Court to GRANT this Petition and provide Petitioner with post-conviction relief for the reasons set forth as follows:

1. Petitioner is currently unlawfully confined by Warden Allen Gang in the Jessup Correctional Institution in Jessup, Maryland as a result of an inequitable trial, conviction, and sentence rendered March 22nd, 2018 in the Montgomery County Circuit Court, case #131730c, Judge Cheryl A McCally presiding.
2. No previous Petition for post-conviction relief has been filed.
3. As of this writing May 12th, 2020, Petitioner, Sebastian Campbell #466146 is confined in the Jessup Correctional Institution in Jessup Maryland.
4. Petitioner was convicted of four counts of second-degree rape and two counts of sexual abuse of a minor in a four-day jury trial, August 14th through August 17th, 2017 in Montgomery County Maryland, Judge Chery A. McCally presiding, and sentenced to 130 years.
5. Petitioner is unable to pay for the cost of the proceedings or to employ counsel.
6. Previous proceedings include the four-day jury trial; the denial of three motions for new trial (Dkt #190, #240, and #315); the affirming of conviction on direct appeal (Court of Special Appeals, Sept. Term, 2018, No. 156); denial of petition for writ of certiorari in the Court of Special Appeals; and, a pending appeal in the for the denial of Petitioner's latest motion for new trial based on the full recantation of the complaining witness (Sept. Term, 2019, No. 1397).

331

indigent, *pro se* defendant, responded by filing a Motion for *Ex Parte* Hearing to Establish Necessity for Appointment of Expert Witness (Docket #68). Trial court declined to conduct the requested hearing and summarily denied Petitioner's request for appointment of expert witness on the grounds that Maryland statute (CP § 16-101 et. seq.) and precedent (*Moore v. State,* 390 Md 343 (2005)) required Indigent, *pro se* defendants to relinquish their constitutional right to self-representation in order to assert their right to be provided with the basic tools for an adequate defense at State expense (T-8/7/17, pg. 12-59). In a reported opinion (Opinion-Sept. Term, 2018, No. 156) the Court of Special Appeals upheld the trial Court's decision without contemplating the specific facts of the case. Instead, it determined without discussion that the right to self-representation and the right to counsel of choice were "virtually identical" (Opinion-12/18/19, pg.4), therefore the precedent governing the determination involving counsel of choice was controlling. Petitioner asserts that the trial court's and Court of Special Appeals' decisions were contrary to or involved and unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

Discussion

The trial court inappropriately applied *Moore v. State* and CP § 16-101 et. seq. In the determination of Petitioner's request for State funds to acquire expert testimony in his defense, making the request contingent upon the relinquishment of Petitioner's constitutional right to self-representation, contrary to governing, clearly established federal law. In *Faretta v. California,* 422 US 806 (1975) the US Supreme Court firmly established a defendant's right to make one's own defense personally, stating:

> "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense... Although not stated in the Amendment in so many words, the right to self-representation - to make one's own defense personally - is thus necessarily implied by the structure of the Amendment... The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and the spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant - not an organ of the state interposed between an unwilling defendant and his right to defend himself personally... An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not **his** defense."

Faretta @ 819-21 (citations omitted) (emphasis in original). The Office of the Public Defender's expressed position is diametrically opposed to the "spirit" of the Sixth Amendment as defined by

than ensure that a defendant will inexorably be represented by the lawyer whom he prefers."). The *Miller* Court then concluded:

> "Failure to provide a free transcript to the indigent appellant cannot interfere with the right to choice of counsel where no such absolute right exists. In the absence of such a right to choice of counsel, there is no constitutional violation when the State requires that an indigent defendant avail himself of the services of the Office of the Public Defender in order to obtain a free transcript... Miller has not been denied his right to assistance of counsel, because he may apply to the Office of the Public Defender and receive effective representation... Public Defender representation, like a transcript, it is part of the 'package' provided by the State, and requiring Miller to comply with reasonable State procedures in no way infringes upon his right to assistance of counsel."

Miller @ 87-88. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, agreed with the holding on federal habeas corpus review, concluding:

> "Because the State of Maryland's statutory scheme provides indigent criminal defendants with counsel on direct appeal and Miller, on account of his indigency, had no constitutional right to demand that Bray, in particular, represent him on appeal to the Court of Special Appeals of Maryland, Miller's Sixth Amendment rights were not violated in this case."

Miller v. Smith, 115 F3d 1136, 1144 (1997). Petitioner interjects that in stark contrast to both *Miller* rulings, and the conclusion in *Moore* Petitioner is unequivocally entitled (where he has not been deemed incompetent; see *Indiana v. Edwards*, 128 S.Ct. 2379, 2386-88 (2008)), to absolutely demand that he be allowed to represent himself. The *Moore* Court was expressly guided by the determination in *Miller*, concluding:

> "Our holding in *Miller* governs the outcome of the case sub judice. Although the Maryland Rules contain no analog to Md Rule 1-325 (b) with respect to the appointment of experts, the practical effect of non-severable OPD Services under Art. 27a [now CP § 16-101 et seq.] is the same. Indigent defendants may utilize the OPD's complete "package" of services or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between **counsel of choice** and ancillary services provided by the OPD."

Moore @ 345-46 (emphasis added). The decision is completely inapposite to Petitioner's issues since the record clearly reflects that at no time was Petitioner represented by a private attorney. As the reviewing courts in Petitioner's case simply relied on the *Moore* decision, they failed to make a reasonable factual determination taking into account the specifics of Petitioner's presented issues. Instead, each Court completely ignored the legally relevant fact that Petitioner was asserting his right to **self-representation, not counsel of choice**; a fact the court needed to fully consider in order to reach the correct result. Had the reviewing courts actually

> "The defendant [Petitioner] was told to wave either his right to counsel [right to self-representation] or his right to testify [right to be provided with the basic tools for an adequate defense]... in so doing, the court leveled and ultimatum upon Midgett [Petitioner] which, of necessity, deprived him of his constitutional right to testify on his own behalf [right to be provided with the basic tools for an adequate defense]. See *U.S. ex rel Wilcox v. Johnson*, 555 F.2d 115, 120-21 ("A defendant in a criminal proceeding is entitled to certain rights...he is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted."). Forcing this 'Hobson's choice' upon the defendant constituted error that calls for a new trial."
>
> "We conclude that in the circumstances of this case the court impermissibly Force the defendant to choose between two constitutionally protected rights: the right to testify on his own behalf [to be provided with the basic tools for an adequate defense] and the right to counsel [self-representation]. Because all three [six] convictions were affected by this error, each is vacated, and the case remanded for a new trial."

United States v. Midgett, 342. F.3d 321, 327 (2003).

Under the specific circumstances of the case at bar the OPD statute and the court rulings combined to deprive Petitioner of his right to equal protection under the law as afforded by the Fourteenth Amendment. The Maryland court of appeals reasoned:

> "The State is free to place **reasonable** restrictions on the exercise of [Petitioner's] rights... There can be no equal protection violation when an individual is denied a right simply because of his own failure to comply with **reasonable** State procedures and regulations."

Moore @ 344-45 (quoting Miller @ 85-86) (emphasis added). This formulation found it reasonable to establish and enforce a State law requiring that when a defendant who intends to relinquish the autonomy over his defense to a private attorney seeks State funding for ancillary services, that defendant must utilize the procedures defined by CP § 16-101 et. seq., including accepting representation by the OPD, in conjunction with that request. Petitioner concedes he finds that statutory scheme "marginally" reasonable as it does not take into account the impracticality of requiring the State to provide funding for both representation **and** ancillary services when the defendant only requires the latter. However, even this wounded rationale fails catastrophically when the indigent defendant has fully exercised his constitutional right under the Sixth Amendment to independently navigate the course of his own defense. This singular factor dramatically distinguishes the case at bar from those relied upon by the previous courts. Again, had the trial court, and the Court of Special Appeals applied the proper standard it would have easily concluded that depriving the indigent Petitioner of expert assistance would result in the Petitioner being denied a fair opportunity to meaningfully engage in a judicial proceeding in which his liberty was at stake for no reason other than financial insolvency. It has been

rendered its decision denying Petitioner relief with full knowledge of the consensus between the Petitioner and the State that relevant information had been withheld.

Discussion

Petitioner expressed numerous contemporaneous objections during trial and asserted on appeal that the trial court inappropriately allowed a minimum of three armed Sheriff's to stalk him in a close proximity, mobile perimeter as he conducted his defense, thereby depriving him of his right to the presumption of innocence, and ultimately a fair trial. Petitioner also asserted that the trial court failed to exercise its discretion and ultimately acquiesced to what it deemed "the sheriff's protocol" without consideration of the possible prejudice to Petitioner's case or any potential alternatives. Despite full knowledge of a consensus between Petitioner and the State that material dialog was missing from the record, the court rendered its decision denying Petitioner relief on the issue based on a prejudicially incomplete record.

The Court of Special Appeals acknowledges in its opinion that Petitioner filed a motion to correct record (See Attachment-Petitioner's Motion to Correct Record) in October of 2018, which it denied in November 2018 (Opinion-12/18/19, Sept Term, 2018, No. 156). The Court also acknowledges that in September of 2019, "the State filed its own Motion to Correct Record, claiming the transcript 'may be incomplete with regard to the issues raised and appellants motion' and indicating that the omitted portions 'would likely be relevant to Campbell's first question presented" (Opinion-pg. 13). Petitioners first question in his appellate brief read as follows:

> "I. Did the trial court violate Appellant's due process in the presumption of innocence by compelling him to present his defense in a four-day trial before the jury while conspicuously restrained by tactical security team composed of at least three armed Montgomery County Sheriff's, forming a close-proximity, mobile perimeter?"

The dialogue supporting Petitioner's claims on this issue was some of the very dialogue Petitioner mentioned in his Motion to Correct Record. Also, in that motion Petitioner not only asserted that material dialogue was missing, but specifically alleged that the trial court had deliberately withheld or omitted the dialogue from the consideration of the higher courts. Further, Petitioner specifically requested that a forensic digital analysis be conducted on the verbatim record to recover deleted information. In denying Petitioner's request for evidentiary clarification, the State foreclosed on any opportunity for further development of the facts. The State's subsequent discovery of missing dialogue in no way discounts Petitioner's assertion that the trial court deliberately with held it, as no explanation has been provided as to its absence from the initial transmission to the Appellate Court. The State declined to present a copy of the missing dialogue to the Court in its motion, but instead attempted to have the Court order

Accordingly, as the Court of Special Appeals has declined to develop the record thereby forfeiting it's opportunity to adjudicate the issues on the merits, both the issue submitted in this petition and the underlying issues are properly before this court for *de novo* review. Petitioner hereby adopt and incorporates by reference the relevant arguments contained in his appellate brief as if fully set forth herein (See Attachment-Petitioners Appellate Brief).

III. Trial Court's utilization of Maryland Pattern Instruction 3.0 without modification, under the specific facts of Petitioner's case, explicitly prohibited the jury from considering the bulk of Petitioner's sworn testimony as evidence in clear violation of his due process rights as defined by the Sixth and Fourteenth amendments.

Statement of Facts

Petitioner chose to exercise his constitutional right to represent himself from the onset of the proceedings (Dkt. #15). The Petitioner was faced with persistent resistance from the trial court and at one point was forced to inquire as to what was the legal basis for the obvious restrictions being imposed on his ability to litigate effectively (Request for Judicial Clarification (Dkt. #69). On the third day of trial Petitioner took the stand to testify in his own defense. The court allowed an armed Sheriff to sit within arm's reach of him. Over objection the court instructed that the Sheriff would in fact remain next to Petitioner as he testified on the stand, with the only other alternative being that he testify from the counselor's table (T-8/17/17,exerpt,pg.15-18). Petitioner did in fact testify from the counselors table, giving the bulk of his sworn testimony from that location. However, the Court's specific instruction to the jury was that only testimony adduced from "**the witness stand**" could be considered as evidence in deliberations (T-8/17/17,pg.149)

Discussion

The trial court administered to the jury Maryland Pattern Instruction 3.0, What Constitutes Evidence, which reads in pertinent part:

> "In making your decision, you must consider the evidence in this case. That is, testimony from the witness stand and physical evidence or exhibits that have been admitted into evidence."

This instruction on what constitutes evidence is unambiguous and requires no further explanation under normal trial circumstances. However, the record will reflect that the trial court specifically inquired if, after the first break in his testimony, Petitioner was going to "resume the witness stand?" Acknowledging that Petitioner declined, and that Petitioner did, in fact, have

completely negating the criminality associated with the State's DNA evidence. That would have reduced the State 's case, leaving, as the only incriminating evidence the testimony of the alleged victim, who the State itself conceded was, in fact, a liar (T-8/17/17; pg. 165, L 5-6). In this context Petitioner's testimony before the jury was a critical issue in the necessary determination of guilt beyond a reasonable doubt. Indeed, Petitioner's entire defense was integrally intertwined in the perception of his credibility. It is therefore impossible to conclude that the unjustified restriction of Petitioner's testimony from the jury's consideration in any way conformed to the principles of fundamental fairness, substantial justice, or the edicts of the American adversarial process.

> "The Court of Appeals has acknowledged that the main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury deliberations, and to help the jury arrive at a correct verdict. With respect to guiding a judge in giving jury instructions this Court has opined that the jury instruction must be a correct statement of the law and be applicable **under the facts of the case**"

State v. Bircher, 446 Md 458, 462 (2015) (citations and quotations omitted) (emphasis added). It is unequivocal that the facts of this case demand that the jury be properly instructed that Petitioner's testimony, albeit from the lawyer's table, is still evidence that must be considered in deliberations. Instead the trial court issued an instruction that clearly mislead the jury into believing it was not. It can only be assumed, absent any evidence to the contrary, that the jury followed the misleading instruction to the letter, as they are required and sworn to do. Appellate Courts will generally assume that jurors followed the instructions. *Alston v. State,* 414 Md 92, 108 (2010).

The Court of Appeals declared long ago, "Instructions which are ambiguous, **misleading** or confusing to jurors can never be classed as non-injurious." *Midgett v. State,* 216 Md 26, 41 (1958) (emphasis added). Failing to amend the pattern instruction to conform to the facts of the case was an unjustifiable error on the part of the trial court. Moreover, effectively concealed in that error is the Petitioner's unknowing an involuntary waiver of his constitutional right to testify in his own defense. When the trial court offered Pattern Jury Instruction 3.0 which, under the specific circumstances of this case, effectively abridged Petitioner constitutional right to testify in his own defense the court had a duty, given the strong presumption against the waiver of constitutional rights (See *Johnson v. Zerbst,* 304 US 458, 464 (1938) holding "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights"), to affirmatively advise Petitioner, who was not represented by counsel, that accepting the instruction as written would disqualify the bulk of his constitutionally protected testimonial

(Memorandum/Defective Indictment, Dkt. #40, pg. 1-9). Judge McCally acknowledged on the record that the State was not disputing the inaccuracy of the time frame and was amending it accordingly. Nevertheless, both the State and Judge McCally allowed the complaining witness to make material statements that were ruled, admittedly believed, or at the very least, should have been known to be false. Neither the State nor the Court corrected the testimony. In fact, the state doubled-down on its impact on the jury through use of visual aids (T-8/16/17, pg. 74, L13), again over objection.

During the hearing on Petitioner Motion for New Trial based on newly discovered evidence the State's complaining witness testified under oath that prior to taking the stand on the second day of her testimony she informed State's Attorney Haynos that she had been dishonest about the circumstances of the case (T-5/8/19, pg. 66-67). The State did not disclose this information to the Petitioner then, during trial, or at any time thereafter.

Discussion

The Fourth Circuit Court of Appeals has long held, "A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony by government witnesses does not establish a government's known use of false testimony. "*United States v. Riley,* 814 F.2d 967, 970 (1987). In this case the witness testified that she was retrieved from Foster Care on February 25, 2012 by the Petitioner; she left Michigan with him "about a week later" in March; that she remained in Petitioner custody until he was arrested in 2013; and, that the assaults begin "about a month after I arrived," resolving the time of the initial assault and deflowering to, roughly, early April 2012 (T-8/15/17, pg. 87-88). The only undisputed fact is that in February 2012 the complaining witness was in foster care in Michigan. On direct examination, State's Attorney Haynos promptly elicited testimony from the witness it has specifically conceded woulld force Petitioner to "present evidence that he could not have been there because he was in jail," and that would be, "prejudicial to him at trial." Despite verbally indicating that the State's "work product" revealed that Petitioner was, in fact, incarcerated until August 7th 2012, and successfully petitioning the court to amend and exclude specifically the months of February, March, April, May, June, and July, 2012, from its theory of the case, it still immediately asked the witness if she had left with her father to go to Maryland at the "end of February 2012" (T-8/15/17, pg. 28, L 23-25). The witness testified under direct that she was deprived of her virginity on that first assault (T-8/15/17, pg.30, L10); that she lived with her father at that location "for about 8 months" (T-8/15/17, pg.30, L16-18); and that during that 8 month period, beginning late March or early

got locked up three weeks after arriving in Maryland (Opinion - pg. 16). A review of the entire record will reflect that the witness **never once** actually stated that Petitioner got locked up three weeks after arriving in Maryland. The actual transcript illustrates the State's unequivocally leading question as being:

> "Q. Okay, and then I think you said about three weeks later, the defendant got locked up again?"

Although the transcript places a question mark after the statement, under the rules of English grammar, it is clearly **not** a question. The State clearly intended to lead the witness through its new, revised theory, just as it indicated to the witness that it would. Prosecution offered no evidence of an arrest in Maryland, necessarily followed by an extradition to Michigan in that time frame. Such evidence it would have had absolute dominion over, as well as a legal obligation to produce in Discovery if it intended to utilize that evidence at trial. The State had the unrestricted ability to uncover that its witness's initial account of events was materially impossible, but declined to fulfill its duty to investigate what it knew or should have known to be false. If the prosecution did not disbelieve the truth of the alleged victim's initial statement, it certainly would not have attempted to reconfigure and blatantly lead the witness into a timeline which significantly diverged from the witness's actual testimony. The fact is, the State had in its possession documents from the Oakland County Circuit Court in Michigan (see Attachment-Michigan Parole & Probation Report & Michigan Judgment of Sentence) that irrevocably placed Petitioner in custody in Michigan during the period of the alleged initial rapes. The fact is, the prosecution had in its possession a police report that preceded the allegations utilized to initiate Petitioner charges in this case which, filled by the alleged victim herself, explicitly state that the alleged victim was in the custody of her paternal grandmother in Michigan until November 2012. The prosecution not only ignored this information, but attempted to physically conceal it from the Petitioner by corrupting the copy it presented in Discovery (See Attachment-Corrupted Police Report & Actual Police Report). The fact is, the prosecution had in its possession transcripts of recorded phone calls between the Petitioner and his mother, the complaining witness's paternal grandmother, clearly depicting the grandmother as being responsible for transporting the alleged victim from Michigan to Maryland (See Attachment-Recorded Phone Calls Between Petitioner & His Mother). The fact is, prosecution acknowledged on the record that the witness's biological mother indicated she had a conversation with her daughter in November of 2012 that was transmitted from Petitioner mother's cell phone in Michigan (T-8/15/17, pg.9). The fact is that despite an abundance of material evidence clearly indicating that the witness's testimony could not possibly be true, the State still deliberately adduced the false

the case at bar the prosecution allowed its witness to construct and assert an absolutely heart-wrenching tragedy with full knowledge of its falsehood. It is reasonable to conclude that every word she uttered did illicit, as Judge McCally intimated, "a visceral reaction." (T-12/14/17, pg.78, L20-24). Accordingly, the appropriate remedy in this case, and under these specific circumstances, is reversal.

B. Brady Violation

Pursuant to *Brady v. Maryland*, 373 US 83 (1963), "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady* @ 87. *Brady* extends to impeachment evidence, *United States v. Bagley,* 473 U.S. 667, 676 (1985), and to the failure to disclose favorable evidence that is only known to the police, see *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Evidence is material if it would reasonably "put the whole case in such a different light as to undermine confidence in the verdict," *Id.*

The Fourth Circuit Court of Appeals has held that in order to establish a *Brady* violation, a criminal defendant "must show (1) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (2) that the information was material; and (3) that the prosecution knew about the evidence and failed to disclose it." *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015).

In this case the complaining witness's admission that she could not remember **"anything"** about the offenses Petitioner was presently standing trial for was at the very least impeaching. As stated above, the complaining witness's testimony was the only evidence that could establish the elements of the offenses and criminal agency. Her admitted lack of memory of both events would have dramatically undermined the credibility of her testimony. Without it, the jury would have been left with nothing but pure conjecture. Her testimony was not only material, but critical to establishing guilt beyond a reasonable doubt. The alleged victim testified during cross-examination that she had already "recanted everything in the Care House video" (T-8/16/17, pg. 61). It had been determined previously that the Care House video was the foundation for the charges against Petitioner and was substantially similar to her in-court testimony (T-8/15/17, pg. 25). The alleged victim later testified that she rendered the recantation of the Care House interview testimony to ASA Haynos during trial. ASA Haynos failed to disclose that information to the defense in violation *Brady, as* well as the Maryland Rules governing Discovery.

The newly discovered assertions of the complaining witness create an unanimous consensus between every individual who could have had personal knowledge of the charged offenses, due to either proximity or participation which, when viewed objectively, categorically establish that even if the offenses had been committed at all, they most certainly did not occur in Montgomery County, Maryland as the State asserted. In fact, with the evidence now before the court, not only could the State not obtain a conviction, it could not even bring charges for lack of territorial jurisdiction. Accordingly, Petitioner conviction, sentence, and current incarceration are illegal pursuant to the Sixth Amendment of the United States Constitution. which states in pertinent part:

> "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**..."

CONCLUSION

For the foregoing reasons Petitioner, Sebastian Campbell, humbly requests this Honorable Court to GRANT this Petition for Post-Conviction Relief to remedy his unconstitutional confinement.

Respectfully Submitted

Sebastian Campbell

Sebastian Campbell
Inst. ID 466146
PO Box 53
Jessup, MD 20794

CETERFICATE OF SERVICE

I, Sebastian Campbell do hereby certify that on this 12th day of June 2020, a true copy of the foregoing Petition for Post-Conviction Relief was served upon Elizabeth Haynos, States Attorney Office, 50 Maryland Ave, Rockville MD 20850.

Sebastian Campbell
Sebastian A. Campbell

APPENDIX B

Memorandum Order & Opinion
(Post-Conviction Court)

CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

SEBASTIAN ALBERT CAMPBELL	:	
Petitioner,	:	
v.	:	Case No. 131730-C
STATE OF MARYLAND	:	
Respondent.	:	
	:	

MEMORANDUM OPINION AND ORDER
(Denying Petition for Writ of Habeas Corpus and Petition for Postconviction Relief)

I. Introduction

This matter was before the Court on November 12, 2020 for a hearing on Petitioner Sebastian Campbell's ("**Petitioner**" or "**Campbell**") Petition for Writ of *Habeas Corpus* [DE # 330] and Petition for Postconviction Relief [DE #331], as amended [DE #339] and supplemented [DE #347] (collectively, Campbell's "**Petitions**"). Petitioner appeared *pro se.*[1] The State opposed both of Campbell's Petitions in a single Opposition [DE #354].[2] For the reasons set forth below, Campbell's Petitions will be denied.

[1] Petitioner waived representation on the record.

[2] Two things that occurred at the start of the hearing are mentioned. First, prior to the commencement of argument, Petitioner represented to the Court that Division of Corrections officers had broken his eyeglasses during a body search several days earlier. The Court observed that Petitioner's eyeglasses were missing one temple but were otherwise intact. Although Petitioner had previously arranged for a witness to bring him replacement eyeglasses to him at the hearing, which the Court would have allowed, the witness had in fact forgotten to bring the eyeglasses. The Court offered to provide Petitioner with a replacement temple, but

II. Procedural History

On May 26, 2017, Petitioner was indicted on six separate sex offenses relating to his alleged sexual abuse of his then eleven-year-old daughter. Petitioner waived Court-appointed representation and represented himself at trial. On August 17, 2020, a jury found Petitioner guilty on all six offenses. *See* DE #155. On March 22, 2018, the Hon. Cheryl A. McCally sentenced Petitioner to a total of 130 years of incarceration. *See* DE #222. Petitioner filed a Notice of Appeal to the Court of Special Appeals on March 23, 2018, *see* DE #226, and he represented himself before the appellate court. *Campbell v. State*, 243 Md. App. 507, 221 (2019), cert. denied, 467 Md. 695 (2020). On December 18, 2019, the Court of Special Appeals denied Petitioner's appeal, and the Court of Appeals subsequently denied certiorari. *Id.*

Petitioner represented that he was able and preferred to proceed with his eyeglasses as they were.

Second, Petitioner represented to the Court that he had not received or reviewed the State's Opposition (the Court notes that the Opposition contained a Certificate of Service, signed by Senior Assistant State's Attorney James Dietrich, Esq., certifying that the Opposition was mailed first-class to Petitioner at the Jessup Correctional Institute on October 30, 2020). Petitioner further represented that he did not have a copy of either of his own Petitions due to flooding in his cell. The Court offered Petitioner the choice to either review the Petitions and Opposition prior to argument, or to continue the hearing to a later date. Petitioner elected to review the documents in a recess. The Court recessed and provided Petitioner with printed copies of his Petitions and the Opposition. The Court resumed the hearing after Petitioner indicated that he had reviewed the documents, was ready to proceed, and that he wishes to move to argument without delay.

III. The Allegations and the Relevant Law

The Petitions allege identical grounds for relief,[3] summarized as follows:

a. That Petitioner was entitled to funding from the Office of the Public Defender ("**OPD**") to hire an expert; or alternatively, to have the Court appoint an expert for him.

b. That portions of the trial record containing Petitioner's objections to the presence and movements of deputy sheriffs was not transmitted to the Court of Special Appeals.

c. That the trial court's jury instruction concerning evidence was erroneous because Petitioner testified from counsel's table instead of the witness stand.

d. That the State's prosecutors committed misconduct by failing to disclose at trial false statements made by the victim.

e. That newly discovered evidence shows that Petitioner's criminal conduct occurred outside the State of Maryland, thus depriving the trial court of jurisdiction.

A petition for a writ of habeas corpus and a petition for postconviction relief are distinct, but related actions. The office of the writ of habeas corpus is not to determine guilt or innocence, but the legality of the restraint. *Johnson v. Warden, Montgomery Cty. Det. Ctr.*, 244 Md. 384, 389 (1966). Postconviction relief, governed by Maryland's Uniform Postconviction Procedure Act (§§ 7-101 to 7-301 of the Criminal Procedure Article), allows the convicted person to attack the judgment collaterally by challenging the legality of the conviction and incarceration in a separate evidentiary proceeding. *Mosley v. State*, 378 Md. 548, 559 (2003). Because

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[3] The grounds for relief are identical in both Petitions, though stylized as "Alligations [sic] of Error" in Campbell's Petition for Postconviction Relief [DE #331] and "Grounds for Issuance of the Writ" in Campbell's Petition for Writ of *Habeas Corpus* [DE # 330].

Petitioner raises the same arguments in both Petitions, and the principles applicable in habeas corpus proceedings also apply to postconviction proceedings, *Bowie v. State*, 234 Md. 585, 593 (1964) ("The attack now being made under the Post Conviction Procedure Act on the judgment and sentence is a collateral attack, as an attack on habeas corpus would be, and the same principles apply as in habeas corpus."), the Court will address discuss each of Petitioner's grounds for relief in turn, incorporating the arguments made in both Petitions.

The State argues in response that all of Petitioner's grounds for relief have been finally litigated or waived. As to the "finally litigated" argument, a person may attack a conviction under the Uniform Postconviction Procedure Act only if the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction. Md. Code Ann., Crim. Proc. § 7-102(b). An allegation of error is finally litigated when, among other times, "an appellate court of the State decides on the merits of the allegation on direct appeal." *Id.* at § 7-106(a).[4] As the Court of Appeals of Maryland has observed, the aforementioned provision of the Criminal Procedure Article manifests an intent to "put a stop to the endless repetition of the same grounds of a collateral attack on a conviction." *Tillett v. Warden of Md. House of Correction*, 220 Md. 677, 679 (1959).

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[4] A contention raised in a petition for postconviction relief cannot be deemed to have been finally litigated where there has been no decision on the merits thereof by the Court of Appeals or Court of Special Appeals, on direct appeal. *Hadder v. Warden, Md. Penitentiary*, 7 Md. App. 584, 587 (1969).

As to the State's waiver argument, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation: (i) before trial; (ii) at trial; (iii) on direct appeal, whether or not the petitioner took an appeal; (iv) in an application for leave to appeal a conviction based on a guilty plea; (v) in a habeas corpus or coram nobis proceeding began by the petitioner; (vi) in a prior petition under the general provisions of the Uniform Postconviction Proceeding Act; or (vii) in any other proceeding that the petitioner began. Md. Code Ann., Crim. Proc. ("CP") § 7-106(b)(1)(i). Moreover, "when a petitioner could have made an allegation of error at a proceeding [set forth above but did not do so], there is a rebuttable presumption that [he/she] intelligently and knowingly failed to make the allegation." *Id.* at § 7-106(b)(2). While failure to make an allegation of error is excused if special circumstances exist. *id.* at § 7-106(b)(1)(ii), the burden of proving "special circumstances" is on the petitioner. *Id.*[5]

IV. Discussion

A. Petitioner's argument that he was entitled to funding from the OPD to hire an expert; or alternatively, to have the Court appoint such an expert for him was previously decided.

Petitioner argues that the trial court erred in denying his pretrial motion, in which he asked the trial court to hold a hearing to determine whether he should be appointed a State-funded expert witness. But Petitioner made this exact argument before the Court of Special Appeals in the direct appeal of his 2017 conviction. *See*

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[5] The "special circumstances" doctrine only becomes pertinent where there is an intelligent and knowing failure of the petitioner to previously raise an issue. *State v. Adams*, 406 Md. 240, 261 (2008), *overruled on other grounds by Unger v. State*, 427 Md. 383 (2012).

Campbell at 524 (2019) (rejecting Petitioner's claim that he was constitutionally and statutorily entitled to a state-funded expert witness). While Petitioner argued at the November 12, 2020 hearing that the Court of Special Appeals had failed to discern the true nature of Petitioner's allegation of error – thus failing to properly reach the merits of the allegation – the Court sees no meaningful distinction between Petitioner's arguments on appeal and those contained in his Petitions.[6] As the Court of Special Appeals has decided on the merits of this allegation on direct appeal, this ground for relief has been finally litigated. CP § 7-106(a).

B. Petitioner waived the argument that portions of the trial record containing Petitioner's objections to the movements of deputy sheriffs were missing.

Petitioner argues that the trial court "maliciously, or through deliberate indifference," withheld portions of the record from the Court of Special Appeals that contained additional objections by Petitioner as to the presence and movement of deputy sheriffs in the courtroom (similar objections by Petitioner were contained in the record sent to the Court of Special Appeals— Petitioner's allegation is that *additional* objections were withheld). Def.'s Pet. for Writ of Habeas Corpus at 3. While the Court of Special Appeals did consider and discuss this allegation, it did not reach the merits. *See Campbell* at 524, n. 3 (finding "no need to address" the

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[6] Petitioner argued at the hearing that the trial court's refusal to appoint a State-funded expert witness left him in the untenable position of either proceeding without an expert witness (*i.e.*, an ineffective defense), or proceeding against his wishes with the OPD (*i.e.*, not the counsel of his choice), thus violating his Sixth Amendment right to counsel. The Court finds this distinction unavailing, and to the extent that the Court of Special Appeals did not address Petitioner's allegation of error in the light he might have desired, it was Petitioner himself who framed the allegation for appeal.

issue). Thus, the Court is not convinced, as the State argues, that the issue has been finally litigated pursuant to CP § 7-106(a). However, the reason the Court of Special Appeals did not address the issue is relevant. As reported by that court in a lengthy footnote, when the opportunity arose for Petitioner to correct the record with the missing portions of the trial transcript, he refused, finding the suggestion that he bear the burden of correcting the record "absurd." *Id.* (". . . appellant has made clear that he no longer wishes to correct the record."). But the burden of ordering a transcription of any proceeding relevant to the appeal fell squarely on Petitioner, as appellant. Md. Rule 8-411 *et seq.* As Petitioner made the affirmative decision not to pursue this allegation at the Court of Special Appeals (by failing to perform the tasks necessary to effectively raise it), this Court finds that Petitioner has intelligently and knowingly waived this issue. CP § 7-106(b).

C. The argument that the trial court's jury instruction concerning evidence was erroneous because Petitioner testified from counsel table instead of the witness stand was previously litigated.

At his trial, Petitioner was given the option of testifying from the witness stand or from counsel table. Ultimately, Petitioner chose to testify from counsel table. At the close of argument, the trial court proposed giving Maryland Pattern Instruction 3.0, "What Constitutes Evidence" to the jury. *See* MPJI-Cr 3:00 (evidence includes ". . . testimony from the witness stand . . ."). Petitioner made no objection to this instruction at trial. Petitioner argues here that the trial court's instruction was erroneous because it in essence instructed the jury that his testimony was not evidence, given that Petitioner presented the bulk of his testimony from counsel table and not the witness stand. Again, Petitioner made this

exact argument before the Court of Special Appeals in his direct appeal. *See Campbell* at 536-7. The Court of Special Appeals found that Petitioner had waived this issue by failing to object at the time the instruction was proposed by the trial court. *Id.* The Court of Special Appeal further failed to find plain error, as the instruction given by the trial court was identical to the Maryland pattern instruction. *Id.* at 538. In his instant Petitions, Campbell asks that the Court consider an "embedded" issue—that he was denied his Fifth Amendment right to testify in his own defense, because he was forced to testify not from the witness stand, but counsel table. The Court of Special Appeals discussed the situation as follows:

> Prior to appellant testifying, the court gave appellant the option of testifying from the witness stand or from the lawyer's table. Although appellant initially gave his testimony from the witness stand, he ultimately decided, mid-testimony, to switch to the lawyer's table, where he stayed for the remainder of his testimony.
>
> *Campbell* at 536.

Petitioner argues that, as a result of the presence and movements of the deputy sheriffs at trial, he was forced to testify from counsel table, *i.e.*, not testify at all. But the record reflects that Petitioner did, initially at least, testify from the witness stand. *Id.* Petitioner, unhappy with the presence of deputy sheriffs near him during his testimony, then *chose* to testify from the lawyer's table. This Court cannot rescue Petitioner from his own decision to testify from counsel table and is not convinced by Petitioner's argument that the Court of Special Appeals missed this "embedded" issue. As the Court of Special Appeals has decided on the merits of this allegation on direct appeal, this ground for relief has been finally litigated. CP § 7-106(a).

D. The claim that the State's prosecutors committed misconduct by failing to disclose at trial false statements made by the victim was waived.

Petitioner alleges that the State failed to disclose a conversation between Assistant State's Attorney Elizabeth Haynos, Esq. ("**Haynos**") and the victim, in which the victim admitted to Haynos that she [the victim] had previously been dishonest with the State regarding the circumstances of the alleged sexual abuse. Petitioner claims this conversation took place shortly before the victim testified on the second day of Petitioner's trial. Petitioner alleges that the State failed to disclose the existence or content of the conversation at any time before, during, or after the trial. He asserts that he first became aware of the existence and content of the conversation between the victim and Haynos on May 8, 2019, during a hearing on his motion for a new trial before the trial judge. *See* DE #309 (Petitioner's Motion for a New Trial was subsequently denied on August 20, 2019 at DE #315).

Petitioner testified in the hearing on his Petitions that he both learned of *and* argued the existence of this conversation at the May 8, 2019 hearing on his motion for a new trial. Petitioner further testified that he challenged the State's attorney on that point at the hearing. Accepting Petitioner's representation that this issue was raised and argued as grounds for a new trial, it is undisputed that his motion for a new trial was denied, and that Petitioner failed to make the allegation on his direct appeal. The issue was thus waived. CP § 7-106(a).

E. The argument that newly discovered evidence shows that Petitioner's criminal conduct occurred outside the State of Maryland, thus depriving the trial court of jurisdiction was waived.

Lastly, Petitioner argues that the discovery of new evidence, in the form of an affidavit regarding Petitioner and the victim's residence during the time of the abuse[7], deprived the trial court of jurisdiction. This very argument was also raised by Petitioner in his August 22, 2018 Motion for a New Trial. *See* DE #246. It is thus apparent that Campbell was aware of this alleged jurisdictional issue, and indeed, argued it to the trial court, more than a year before noticing his direct appeal. Yet, Petitioner failed to raise the issue in that appeal. As a result, this Court finds that Petitioner intelligently and knowingly failed to make the allegation on direct appeal, pursuant to § 7-106(b)(1)(i) of the Criminal Procedure Article. Petitioner has alleged no special circumstances that would excuse his intelligent and knowing failure to raise the allegation in his direct appeal under § 7-106(b)(1)(ii).

V. Order

Upon consideration of Campbell's Petitions, the State's opposition thereto, and a hearing held thereon, and for the reasons set forth above, it is this 9th day of December, 2020, by the Circuit Court for Montgomery County, Maryland

ORDERED, that Campbell's Petition for Writ of Habeas Corpus [DE # 330] is **DENIED**; and it is further

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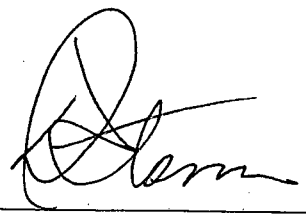
[7] The affidavit, executed by the victim on June 1, 2020, contains testimony that the victim and Campbell lived in Washington, DC during the period of abuse, and never in Montgomery County, Maryland.

ORDERED, that Campbell's Petition for Postconviction Relief [DE #331], as amended [DE #339] and supplemented [DE #347], is **DENIED**.



Harry C. Storm, Judge
Circuit Court for Montgomery County, Maryland