Appendix

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7799

RONALD BROUNT, a/k/a Ronald Brunt,

Petitioner - Appellant,

v.

BRIAN E. FROSH, Attorney General of State of Maryland,

Respondent - Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, District Judge. (8:17-cv-01465-PWG)

Submitted: May 19, 2020 Decided: May 21, 2020

Before NIEMEYER, HARRIS, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Ronald Brount, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Ronald Brount seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2254 (2018) petition and denying reconsideration. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Brount has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD BROUNT, #1166464 a/k/a RONALD BRUNT	*	
Petitioner	*	
v	*	Civil Action No. PWG-17-1465
THE ATTORNEY GENERAL OF THE STATE OF MARYLAND	*	
Respondent	*	
	***	

MEMORANDUM OPINION

In this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Ronald Brount challenges his state convictions for first degree rape, first degree sexual offense (two counts) and burglary. ECF No. 1.[1] Respondent filed an Answer seeking dismissal of the Petition on the grounds of untimeliness[2] and procedural default. ECF No. 9. Brount filed a Reply. ECF No. 11. Brount subsequently filed a "Motion to Correct" to add additional exhibits to address the timeliness of the Petition,[3] which will be granted. ECF No. 15. Having reviewed the submitted materials, the Court finds that no hearing is necessary. *See* Local R. 105.6 (D. Md. 2018); Rule 8, Rules Governing Section 2254 Proceedings in the United States District Courts; *see Fisher v. Lee*, 215

3a

[1] Brount is incarcerated in Virginia. This Petition was initially filed in the United States District Court for the Western District of Virginia, Roanoke Division, which transferred the case to the District of Maryland. ECF No. 2; ECF No. 9-9 at 12.

[2] Brount's Petition is timely filed consonant with the decision in *Mitchell v. Green*, 922 F.3d 187 (4th Cir. 2019) (holding the one-year limitations for filing a petition under § 2254 was tolled during the pendency of a Motion for a Reduction of Sentence in a Maryland court under Maryland Rule 4-345). *See infra* note 4.

[3] Brount moves to add three exhibits and a memorandum to the record. (ECF Nos. 15-2, 15-3, 15-4, 15-5). He asserts these exhibits were mailed to the Court on November 15, 2018, but not filed. There is no record these documents were ever received by the Clerk. The Motion will be granted.

Appendix B

have to pick one or the other." *Id.* at 7. Brount elected to be represented by the Office of the Public Defender. *Id.*

On March 23, 2012, Brount, now represented by an assistant public defender, made a third appearance before the Circuit Court. ECF No. 9-9 at 4. Brount explained he wanted to represent himself and for the court to appoint a different attorney to assist him. To this end, he filed a pro se Motion for Substitution of Counsel which the court denied as meritless. *Id.* at 10-11, 16; ECF No. 9-2 at 11. The court again informed Brount that he did not have the option of representing himself with the assistance of appointed counsel; rather, Brount could proceed with representation from the Public Defender's Office, retain another attorney at his own expense, or represent himself. ECF No. 9-9 at 7-8, 11, 13, 15-17. After further inquiry from the court, Brount declined to represent himself without the appointment of counsel to assist him with his self-representation. *Id.*

Brount was represented by counsel from the Public Defender's Office at trial. On April 26, 2012, after a three-day trial, a jury returned a verdict finding Brount guilty of all charges. On June 6, 2012, the Court sentenced Brount to twenty years of imprisonment for burglary, and three concurrent life sentences, one for each sex offense conviction. ECF No. 9 at 1-2; ECF No. 1-2.

Procedural History

Brount, by his counsel, raised the following claims on direct appeal: (1) was the evidence legally sufficient to support first degree sexual offense; (2) did the trial court err in denying his request for hybrid representation; (3) did the trial court err in admitting video testimony in violation of his right to confront a witness; (4) did the trial court err by allowing the State to present evidence that the DNA analysis produced a "sperm fraction" and a "non-sperm fraction" where there was no evidence confirming the presence of sperm in the sample. ECF Nos. 9-3; 9-4; ECF 1-1. The

Court of Special Appeals of Maryland affirmed Brount's judgment of conviction in an unpublished opinion entered on October 14, 2014. *Brount v. State of Maryland,* 109 A.3d 665 (Table) (February 23, 2015); *see also* ECF No. 9-5.[4]

On February 23, 2015, the Court of Appeals of Maryland denied Brount's request for further review. *Brount v. State of Maryland,* Petition Docket No. 537 (Sept. Term, 2014); *see also* ECF No. 9-6 at 32.

On March 7, 2016, Brount filed a Petition for Post Conviction Relief in the Circuit Court for Montgomery County. ECF No 1 at 3; ECF No. 1-2. He presented three claims of error: (1) he was denied his constitutional right to conduct his own defense; (2) he was denied his constitutional right to the effective assistance of counsel in connection with his efforts to exercise his right to self-representation; and (3) he was denied his constitutional right to effective assistance of appellate counsel for failure to argue that Brount was denied his right to conduct his own defense at trial. ECF No. 1-1; ECF No. 1-2.

On August 26, 2016, the Circuit Court held a hearing on the Petition and on October 11, 2016, found that Brount had waived his right to self-representation and that neither trial nor appellate counsel rendered ineffective assistance. ECF 1-2 at 8-10. The court denied post-conviction relief as to all claims. *Id.* at 9-10.

[4] Brount also filed a Motion for Reconsideration and an Application for Sentence Review. ECF No. 9-2 at 21. On July 7, 2015, the sentence review panel issued an order leaving the sentence unchanged. *Id.* at 24. Brount's Motion for Reconsideration of his Sentence expired by operation of law on June 6, 2017. *See* Md. Rule 4-345(e) (providing a court may not revise a sentence after five years from the date the sentence was originally imposed). Pursuant to the holding in *Mitchell v. Green,* 922 F.3d 187 (4th Cir. 2019) (holding the one-year limitations for filing a petition under § 2254 was tolled during the pendency of a Motion for a Reduction of Sentence in a Maryland court under Maryland Rule 4-345), Brount's Motion for Reconsideration tolled the running of the one-year limitations period so that the Petition is timely filed. *See* ECF No. 9 at 12 n. 2 (acknowledging that if Brount's Motion for Reconsideration of Sentence tolled the limitations period under 28 U.S.C. § 2244(d)(2), then the Petition is timely).

On January 3, 2017, the Court of Special Appeals dismissed Brount's Application for Leave to Appeal the denial of post-conviction relief as untimely filed. Brount filed the Application more than 30 days after the Circuit Court's entry of its October 11, 2016 order denying relief, depriving the appellate court of jurisdiction under Maryland Rule 8-204(b)(3)(A) (application for leave to appeal must be filed within thirty days after entry of judgment). *Keys v. State,* 195 Md. App. 19, 27-28 (2010) (30-day time limit is jurisdictional). ECF No. 1-2 at 11.

Brount filed this Petition in the United States District Court for the Western District of Virginia on May 25, 2017, and it was transferred to the District of Maryland on May 31, 2017.

CLAIMS PRESENTED

Brount advances the following claims of error in support of his Petition for federal habeas relief: (1) he was denied his right to self-representation on the basis of trial court error; (2) he received ineffective assistance of counsel; and (3) he received ineffective assistance of appellate counsel. ECF No. 1 at 5, ECF No. 1-1.

DISCUSSION

Legal Standard

The habeas statute provides that a district court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The statutory framework of the federal habeas statute sets forth a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997); *see also Bell v. Cone*, 543 U.S. 447, 455 (2005). The standard is "difficult to meet," and requires

courts to give state-court decisions "the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be."). A federal court may not grant a writ of habeas corpus unless the state's adjudication on the merits: 1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or 2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Procedural Default

Before considering the substance of a habeas claim, a petitioner must satisfy several threshold conditions. Relevant here is the doctrine of procedural default which occurs when the petitioner fails to present the claim to the highest state court with jurisdiction to hear it, and the state courts would now find that the petitioner cannot assert that claim. *See Murray v. Carrier*, 477 U.S. 478, 489-91 (1986) (failure to raise claim on direct appeal); *Murch v. Mottram*, 409 U.S. 41, 45-46 (1972) (failure to raise claim during post-conviction); *Bradley v. Davis*, 551 F. Supp. 479, 481 (D. Md. 1982) (failure to seek leave to appeal denial of post-conviction relief). A procedural default also may occur where a state court declines "to consider the merits [of a claim] on the basis of an adequate and independent state procedural rule." *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999).

Procedural default bars presentation of the claim, unless the petitioner can demonstrate "cause and actual prejudice resulting from the errors of which he complains," or "actual innocence." *United States v. Pettiford*, 612 F.3d 270, 280 (4th Cir. 2010) (citing *United States v.*

Mikalajunas, 186 F.3d 490, 492-93 (4th Cir. 1999)):*Gray v. Zook*, 806 F.3d 783, 798 (4th Cir. 2015).[5] Cause consists of "some objective factor external to the defense [that] impeded counsel's efforts to raise the claim in state court at the appropriate time." *Murray*, 477 U.S. at 488. Even if a petitioner fails to show cause and prejudice for a procedural default, a court must still consider whether it should reach the merits of a petitioner's claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).

Analysis

Respondent argues Brount's claims read as the same ones presented to the state post-conviction court at the circuit level and are procedurally defaulted. ECF No. 9 at 16, *see also* ECF No. 1 at 5; ECF No. 1-1. Respondent asserts none of these claims was presented properly to the state post-conviction court at the appellate level. Specifically, Brount failed to file a timely application for leave to appeal the denial of post-conviction relief under state law, thereby rendering his claims procedurally defaulted. ECF No. 9 at 9, 16. To the extent that Brount may intend to argue in his Reply that the Court of Special Appeals improperly dismissed the Application for Leave to Appeal as untimely (ECF No. 11 at 3-4),[6] the procedural default is unaltered. The Application for Leave to Appeal was dismissed as untimely based on a state procedural rule (Md. Rule 8-204(b)(3)(A)), which provided an independent and adequate ground for the dismissal. *See Coleman*, 501 U.S. at 731-32.

---

[5] Habeas petitioners may use an actual innocence claim to excuse the procedural default of a separate constitutional claim upon which they request habeas relief. *See Murray*, 477 U.S. at 496. "[When] a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.; see also Reid v. True*, 349 F.3d 788, 806 (4th Cir. 2003). A petitioner who wants to use a claim of actual innocence as a gateway to raising an otherwise defaulted constitutional claim must demonstrate by a preponderance of the evidence that a reasonable juror could not have convicted the petitioner in light of the new evidence. *See Buckner v. Polk*, 453 F.3d 195, 199-200 (4th Cir. 2006).

[6] Brount's assertions, however, appear to address the question of whether his federal petition was timely filed.

Brount offers no argument to establish cause and prejudice to excuse the procedural default. Even if Brount could be deemed to have shown sufficient cause, the record provides no basis to find prejudice to excuse procedural default. The claims of ineffective assistance of trial and appellate counsel in the context of his concerns to represent himself did not work "to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494. Further, Brount does not claim actual innocence. For these reasons, I find the claims are procedurally defaulted.

Brount's claim of error on direct review (the trial court erred by denying his request for "hybrid representation") is arguably a semantic variation of his claim of trial court error. But even if the claim presented here were not procedurally defaulted, it provides no cause for federal habeas relief. The Court of Special Appeals rejected Brount's claim that the trial court erred in denying his request for "hybrid representation" claim on direct appeal, stating:

> Appellant argues that the circuit court erred when it failed to allow him to represent himself with the assistance of court appointed counsel. Appellant asserts that the circuit court had the authority to allow hybrid representation, but that the circuit court abused its discretion when it failed to recognize that authority and grant appellant's request.
>
> The State counters that Maryland generally recognizes two forms of representation- self-representation and representation by counsel- and that the circuit court's denial of appellant's request for hybrid representation is strongly supported by Maryland case law.

ECF No. 9-5 at 20.

****

> "The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration." *Parren v. State*, 309 Md. 260, 262-63 (1987) (quoting *Rutherford v. Rutherford*, 296 Md. 347 ,357(1983)). Defendants also have a constitutional right to defend *pro se*. *Leonard*

> *v. State,* 302 Md.111, 119 (1985).The right to counsel and the right to defend *pro se* are independent rights. *Parren v. State*, 309 Md. at 263 (citing *Faretta v. California*. 422 U.S. 806, 819 n. 15 (1975)). "The rights are mutually exclusive and the defendant cannot assert both simultaneously." *Leonard*, 302 Md. at 119. "The two rights are disjunctive." *Parren*, 309 Md. at 264.

ECF No. 9-5 at 21.

The Court characterized Brount's claims that the Circuit Court abused its discretion when it declined his request to represent himself and have a court-appointed attorney assist him as "disingenuous," noting he had requested "hybrid representation" on numerous occasions. ECF No. 9-5 at 22 (listing requests). Brount did not want to proceed pro se if the court declined to appoint defense counsel pursuant to his Sixth Amendment right to representation. But, his right to represent himself and his right to representation by counsel are disjunctive rights, and he could not exercise both at the same time. *Id.*[7]

The State court decision is amply supported by the record and is not contrary to, nor does it involve "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The decision is not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Accordingly, even if this claim were not procedurally defaulted, it provides no grounds to award federal relief.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that the district court "must issue or deny a certificate of appealability when it enters a

[7] The Court of Special Appeals noted too that the Circuit Court has discretion to allow a pro se defendant to avail himself or herself of the aid or advice of counsel as the court deems appropriate, a defendant must first elect to appear pro se, effectively waiving the right to representation under the Sixth Amendment. Even after a defendant makes such an election, any assistance from an attorney is entirely a matter of discretion by the court. ECF No. 9-5 at 23.

final order adverse to the applicant" on a § 2254 petition. Because the accompanying Order is a final order adverse to the applicant, Brount must receive a certificate of appealability before an appeal may proceed. 28 U.S.C. § 2253(c)(1). Where, as is the case here, a petition is denied on procedural grounds, the petitioner satisfies the standard with a showing that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because I find that Brount has not made the requisite showing, I decline to issue a certificate of appealability. Brount may request a certificate from the United States Court of Appeals for the Fourth Circuit. *See* Fed. R. App. P. 22(b); *Lyons v. Lee*, 316 F.3d 528, 532 (4th Cir. 2003) (considering whether to grant a certificate of appealability after the district court declined to issue one).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus is DENIED AND DISMISSED. A certificate of appealability shall not issue. A separate Order follows.

November 5, 2019

Date

Paul W. Grimm
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD BROUNT, #1166464 a/k/a RONALD BRUNT	*	
	*	
Petitioner	*	
v		Civil Action No. PWG-17-1465
	*	
THE ATTORNEY GENERAL OF THE STATE OF MARYLAND	*	
Respondent	*	
	***	

ORDER

For reasons stated in the foregoing Memorandum Opinion, it is this 5th day of November, 2019, by the United States District Court for the District of Maryland, hereby ordered:

1. Petitioner's "Motion to Correct" (ECF No. 15) IS GRANTED;
2. The Petition IS DENIED and DISMISSED;
3. A certificate of appealability SHALL NOT ISSUE;
4. The Clerk SHALL CLOSE this case; and
5. The Clerk SHALL SEND a copy of this Order and Memorandum Opinion to Petitioner and to counsel of record.

November 5, 2019

Paul W. Grimm
United States District Judge

FILED: October 6, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7799
(8:17-cv-01465-PWG)

RONALD BROUNT, a/k/a Ronald Brunt

Petitioner - Appellant

v.

BRIAN E. FROSH, Attorney General of State of Maryland

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Harris, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
vs.	:	**Case No. 119260-C**
RONALD BROUNT	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

This matter came before the court on August 26, 2016, regarding Defendant Ronald Brount's Petition for Post-Conviction Relief. At that time, the court heard testimony and oral argument, and then took the matter under advisement. For the reasons stated below, the court denies the petition.

I. Background

On October 13, 2011, Defendant was indicted on one count of first-degree rape, two counts of first-degree sexual offense, and one count of burglary alleged to have been committed by him in Silver Spring, in 1981.

He appeared before the Honorable John W. Debelius for a Rule 4-215 Scheduling Hearing on January 20, 2012, unrepresented by counsel. During this hearing, the court advised Defendant of his right to counsel. The following exchange occurred:

> **Defendant:** To make it easier on the Court . . . I plan to represent myself and invoke my rights under the Sixth Amendment to self-representation under Reddick [sic] v. California.
>
> And I also invoke my right to assistance of counsel for my defense.
>
> **Court:** Now, I'm not sure I follow you. You want to represent yourself but you're invoking your right of insistence [sic] of counsel for your defense?
>
> **Defendant:** Yes, sir. I want to represent myself and I want counsel to assist me in my self-representation.
>
> **Court:** All right. Well, we have two categories. We have represented and we have not represented. And you have an absolute right to an attorney to represent you, but I'm not going to appoint an attorney who is not going to represent you but is going to advise you. So those are your two choices.
>
> What I'm going to do, though, is I'm going to postpone this a week and let you, at least, talk with an attorney from the Public Defender's

> Office. You do have an absolute right to waive counsel and represent yourself. I will tell you that given the nature of these charges, I wouldn't do that lightly. But it's your right and if that's what you want to do, I'll respect that. But we'll have that conversation next week.

Ronald Gottlieb, Esq. of the Office of the Public Defender entered his appearance as counsel for Defendant on January 24, 2012. The Rule 4-215 hearing was continued until February 3, 2012. Defendant appeared at that time before Judge Debelius, along with Mr. Gottlieb. Regarding Defendant's previous oral motion, Mr. Gottlieb stated:

> **Mr. Gottlieb:** We got some, here's the situation. We got some dates from the Assignment Office that were given to me and Ms. Grimes. Mr. Brount has addressed you before and needs to address you today, if he wants to, about his request to, sort of that hybrid representation. It's unlikely we'll do it, because the law pretty much says I, we, can't do it.

During this hearing, Defendant again stated that he wanted to "invoke my right to self-representation and my right under the Sixth Amendment to have counsel assist me in my defense." The Court again explained that Defendant could either represent himself or have a Public Defender represent him, but not both. Defendant then made an oral motion asking for self-representation and for an attorney to assist him. The Court denied this motion. The following conversation then occurred:

> **Defendant:** Well, it's impossible for me to represent myself without the assistance of counsel. So since you denied my motion, then I'm, I'm forced to, to accept some type of representation.
> **Court:** Well, just so we're clear, I'm not forcing you to do anything.
> **Defendant:** No, I –
> **Court:** You have a choice to make.
> **Defendant:** Yeah.
> **Court:** You can represent yourself or you can be represented by [Mr. Gottlieb] through the Public Defender's Office.
> **Defendant:** Right. I never said you were forcing me. I said I was forced to make that choice if I wanted representation. And since you're not going to give me what I asked for, then the only choice that's available to me, if, to have that representation, because I, it's no way that I could represent myself, exercise my right, effectively, without the assistance of counsel because I'm, I'm incarcerated. I don't have access to the legal materials that I need.
> **Court:** All right. Well, here's where we are. [Mr. Gottlieb], this gentleman who is standing next to you, is willing to represent you. So my question to you is, do you want [Mr. Gottlieb] to represent you?
>
> Now, we have two categories. We have yes and we have no. And I just need to know which it is.

Defendant: Yes, sir. I thought I answered that question.
Court: Well, I'm, I just want to be very clear about it, because I wasn't hearing the yes in there. So I have heard a yes, so I will go ahead and accept [Mr. Gottlieb's] appearance line.

Defendant filed a *pro se* motion on March 23, 2012, asking the Court to discharge his attorney and have a new attorney appointed for him. In this motion, he reiterated his request that he be permitted to represent himself with the assistance of counsel. The Honorable Sharon V. Burrell denied relief.

On April 24, 2012, Defendant, represented by Mr. Gottlieb, was tried before Judge Burrell. The jury returned a verdict of guilty on all counts. On June 6, 2012, he was sentenced to three life sentences and one twenty (20) year sentence, all to be served concurrently. He submitted an application for a review of sentence on June 12, 2012. On July 7, 2015, a Sentence Review Panel affirmed Judge Burrell's sentence without a hearing.

On June 13, 2012, Defendant appealed to the Court of Special Appeals, which affirmed his convictions on October 14, 2014. His appellate counsel was Brian M. Saccenti, Esq. The Court of Special Appeals found that the trial court did not abuse its discretion by denying Defendant's oral motion for "hybrid representation." The Court of Special Appeals also ruled against Defendant on three other issues that are not relevant to this Petition. On March 3, 2015, the Court of Appeals denied Defendant's petition for writ of *certiorari*.

This Petition for Post Conviction Relief was filed, *pro se*, by Defendant on March 7, 2016. Subsequently, Matthew Lynn, Esq. entered his appearance as counsel.

II. Petition for Post Conviction Relief

Defendant alleges three errors in support of his request to have his convictions vacated: 1) he was denied his constitutional right to conduct his own defense; 2) he was denied his constitutional right to the effective assistance of his trial counsel, Mr. Gottlieb, and 3) he was denied his constitutional right to the effective assistance of his appellate counsel, Mr. Saccenti.

a. Denial of Right of Self-Representation

Defendant claims that he was forced, against his will, to proceed to trial while represented by an attorney. According to Defendant, the trial court's acceptance of the Public Defender's appearance as his counsel violated his Sixth Amendment Right to conduct his own defense. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (a State may not constitutionally

"hale a person into its criminal courts and there force a lawyer upon him . . . when he insists that he wants to conduct his own defense."). Defendant asserts that he "clearly and unequivocally" wished to represent himself and then have counsel appointed to assist him in his own self-representation.

b. Ineffective Assistance of Trial Counsel

Defendant asserts that he was denied effective assistance of trial counsel at critical stages of the criminal process for three reasons. *See McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("[t]he Counsel Clause itself . . . implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial."). First, he claims that Mr. Gottlieb made a false and misleading representation to the court that Defendant was seeking "hybrid representation" and that "the law pretty much says I, we can't do it." He claims that Mr. Gottlieb failed to advocate for his right to self-representation in multiple hearings by remaining silent on the issue. Finally, Defendant avers that Mr. Gottlieb failed to properly file a Motion for New Trial based upon Defendant being denied his right to self-representation.

b. Ineffective Assistance of Appellate Counsel

Defendant alleges that he was denied the effective assistance of counsel on direct appeal of his convictions because of Mr. Saccenti's failure to argue that Defendant was denied his Sixth Amendment right to conduct his own defense at trial. Instead, Mr. Saccenti's choice to argue for hybrid representation was unreasonable and frivolous. *See Parren v. State*, 309 Md. 260, 269 (1987) (holding that the right of representation by counsel and the right of self-representation "may not be asserted simultaneously.") According to Defendant, the reasonably competent attorney would have raised the argument that Defendant was denied his right to conduct his own defense, and the failure of Mr. Saccenti to do so amounted to ineffective assistance of counsel on his first appeal as of right. *See generally Evitts v. Lucey*, 469 U.S. 387 (1985) (applying the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), to a criminal defendant's first appeal as of right).

III. State's Answer to Petition

a. Court's Denial of Hybrid Representation

The State argues that Defendant's allegation that the trial court erred in denying his request for self-representation is barred because such a claim is either waived or finally litigated under UPPA by virtue of the ruling by the Court of Special Appeals on the issue of

hybrid representation. MD. CODE ANN., CRIM. PROC. § 7-106 (2001). The State characterizes what Defendant requested as hybrid representation, which was an issue finally litigated by the Court of Special Appeals. Alternatively, the State argues that Defendant has waived his right to self-representation.

However, the State also argues that Defendant's claim lacks merit because he was not entitled to have the Public Defender represent him in a standby capacity. *Harris v. State*, 344 Md. 497, 511 (1997) ("The participation, moreover, in a hybrid capacity, as standby counsel in the defense of the accused" is not a "constitutional resource to which indigent defendants are entitled.")

b. Ineffective Assistance of Counsel

The State claims that Defendant failed to show that Mr. Gottlieb's conduct amounted to ineffective assistance of counsel under the standard established in *Strickland*. *See Bowers v. State*, 320 Md. 416, 424 (1990) (holding that the petitioner bears the burden to show both deficient performance and prejudice). Further, the State argues that Defendant's claim is without merit because he disingenuously asserts that Mr. Gottlieb could have reasonably argued that he had been denied his right to self-representation. Additionally, Defendant's assertion that his motion would not have been denied but for Mr. Gottlieb's statements is groundless, unproven, and contradicted by the Court of Special Appeals decision in this case. *See Bowers*, 320 Md. at 426-27 (using a "but for" test to establish prejudice).

c. Ineffective Assistance of Appellate Counsel

Similarly, the State also argues that Mr. Saccenti's representation of Defendant on appeal was not ineffective because Mr. Saccenti's decision to not raise Defendant's Sixth Amendment claim was not unreasonable, and it is unlikely that, had the issue been raised, the appellate court would have found in his favor. *See State v. Gross*, 134 Md. App. 528, 556-58 (2000) *aff'd.* 371 Md. 334, (2002) (clarifying the *Strickland* test to find that "the burden remains with the petitioner to demonstrate prejudice at the appellate level by showing that had the unraised argument been raised, the appeal would probably have been successful.")

VI. Law & Analysis

a. Allegation of Error in the Denial of Self Representation

1. Issues Finally Litigated or Waived under UPPA

Under the Uniform Postconviction Procedure Act ("UPPA"), a criminal defendant can begin a proceeding to set aside his sentence if the "alleged error has not been previously and finally litigated or waived" by the defendant. MD. CODE ANN., CRIM. PROC. § 7-102(b) (West 2001).

An allegation of error is finally litigated when "an appellate court of the State decides on the merits of the allegation . . . on direct appeal." MD. CODE ANN., CRIM. PROC. § 7-106(a) (West 2001). Here, the court denied Defendant's motion for hybrid representation. The Court of Special Appeals found that the trial court did not abuse its discretion in denying the motion. The State correctly argues that, to the extent Defendant is making the same arguments he made on appeal, this allegation cannot be argued anew, because that issue has been finally litigated. Defendant is barred from making such a claim again.

An allegation of error is waived when "a petitioner could have made but intelligently and knowingly failed to make the allegation" at an appropriate time. MD. CODE ANN., CRIM. PROC. § 7-106(b)(1)(i) (West 2001). "There is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation" when the petitioner could have done so on a direct appeal. MD. CODE ANN., CRIM. PROC. § 7-106(b)(2) (West 2001). "Failure to make an allegation of error" waives it, unless the petitioner can show that "special circumstances exist." MD. CRIM. PROC. CODE ANN. § 7-106(b)(1)(ii).

For post-conviction purposes, the standard of whether an allegation was "intelligently and knowingly" waived depends upon "whether the allegation is premised upon a fundamental right or a non-fundamental right." *State v. Torres*, 86 Md. App. 560, 568 (Md. Ct. Spec. App. 1990). Fundamental rights are "basic rights of a constitutional origin . . . that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth determining process." *Wyche*, 53 Md. App. at 406. If the right is fundamental, the State must prove waiver, as judged under the "intelligent and knowing standard." *Torres*, 86 Md. App. at 568 (quotations omitted). If the right is non-fundamental, then waiver is determined by "general legal principals," such as the "failure to exercise a prior opportunity to raise an allegation of error." *Id.*

Defendant's first allegation is premised upon his Sixth Amendment right to conduct his own defense, which is a fundamental right. *Parren*, 309 Md. at 277 (citing *Faretta*, 466 U.S. at 815). The burden is then placed on the State to prove that the petitioner has knowingly and

intelligently waived this right. Here the State has shown that Defendant had explicitly waived his right to self-representation in front of Judge Debelius, knowing that there was "no way" he could represent himself without the help of an attorney. Defendant then asserted his right to counsel, essentially waiving his right to self-representation. *See Parren*, 309 Md. at 264 ("The two rights are disjunctive.") Thus, the State has met its burden, and Defendant's waiver has barred him from making the allegation of error based upon his right to self-representation. Defendant has not shown any special circumstances that would overcome this waiver.

2. Indigent Defendant's Right to Self-Representation

If Defendant did not waive his right to self-representation, the issue of whether or not he was denied that right would need to be considered on the merits. Implied in the Sixth Amendment's provision for the assistance of counsel for criminal defendants is the "right to self-representation." *Feretta*, 422 U.S. at 819. "The right to counsel and the right to defend *pro se* cannot be asserted simultaneously." *Parren*, 309 Md. at 264; *see also Feretta*, 422 U.S. at 852 (finding that the Sixth Amendment only "guarantee[s] a choice between representation by counsel and the traditional practice of self-representation"). When a defendant asserts that he wants to proceed *pro se*, the court must conduct a two-step inquiry to determine whether he actually wants to do so. *Snead*, 286 Md. at 127-28 (citing *Feretta*, 422 U.S. at 834.). In doing so, the court must determine "whether the defendant 'clearly and unequivocally' wants to defend himself" and, if so, whether he does so knowingly and intelligently. *Id.* (citations omitted).

Here, Defendant did not clearly and unequivocally assert that he wanted to defend himself and therefore did not properly assert his right to conduct his own defense. While he did continually state that he wanted to represent himself or invoke his right to self-representation, his statements were immediately preceded or followed by a desire to also have the assistance of counsel. When the court clarified Defendant's options, he stated that it was "impossible" for him to represent himself without the help of an attorney, showing that he clearly understood the complexity of his case and the necessity of counsel. When asked directly if he wanted to have Mr. Gottlieb represent him, Defendant responded, "Yes, sir." Even if Defendant is given the benefit of the doubt, the ambiguity of his statements necessarily show that he did not clearly and unequivocally assert his right to conduct his own defense. Not only did he fail to assert his right to self-representation, he affirmatively asserted his right to representation by counsel. *See*

Leonard v. State, 301 Md. 111, 119 (1985) ("The rights are mutually exclusive and the defendant cannot assert both simultaneously.").

Ineffective Assistance of Trial Counsel

In order to succeed on an ineffective assistance of counsel claim, the defendant must establish "(1) that counsel's representation fell below an objective standard of reasonableness," *Strickland*, 488 U.S. at 688, and "(2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Defendant has not shown that Mr. Gottlieb's conduct did not fall below an objective standard of reasonableness. *See Harris*, 303 Md. 685, 687 (1985) (noting that the burden on a defendant to establish deficiency is "a heavy burden"). Mr. Gottlieb's characterization of Defendant's request was consistent with that of both Judge Debelius and the Court of Special Appeals, and, given the context of the statements, a more accurate depiction of what Defendant desired. As such, Mr. Gottlieb's decision to label the request as "hybrid representation" was not unreasonable. Additionally, the decision not to assert Defendant's obviously incorrect argument both in hearings and in a Motion for a New Trial was likewise reasonable. *See Strickland*, 466 U.S. at 689 (" [A] strong presumption [exists] that counsel's conduct falls within the wide range of reasonable professional assistance.") The trial judge had informed Defendant that he could proceed *pro se* or with counsel and that he was not going to appoint a standby attorney. Mr. Gottlieb knew that the trial judge had the discretion to deny a standby attorney, and it would have been unreasonable for him to argue otherwise.

Mr. Gottlieb's conduct also did not prejudice Defendant. Other than representation by counsel, the only other choice for Defendant was to represent himself. Given the complexity of a case that involved highly technical scientific evidence and an advanced knowledge of law, it cannot be said that there was a substantial possibility that Defendant would have been successful completely on his own. *See Oken v. State*, 343 Md. 256, 284 (1994) (holding that there must be "a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Mr. Gottlieb's conduct neither fell below an objective standard of reasonableness nor did it prejudice Defendant in any way.

a. Ineffective Assistance of Appellate Counsel

Indigent criminal defendants do have the right to effective assistance of counsel on the first appeal as of right. *Evitts*, 469 U.S. at 396-97. The *Strickland* standard in determining the ineffective assistance of trial counsel is essentially the same standard that applies to claims of ineffective assistance of appellate counsel. *Gross*, 134 Md. App. at 556 ("[T]he juridical events to which those principles apply obviously differ somewhat depending on the operational level being scrutinized.").

As with his claim of ineffective assistance of trial counsel, Defendant also fails to show under the *Strickland* standard that he was denied the effective assistance of appellate counsel. Mr. Saccenti had discretion to choose whether or not to assert a Sixth Amendment violation of Defendant's right to conduct his own self-defense. *See id.* ("[S]election of which appellate issues to raise and which to ignore is one entrusted to the strategic judgment of appellate counsel."). Defendant never properly asserted his right to conduct his own defense— in fact, he had asserted his right to representation by the Public Defender—, and it was reasonable for Mr. Saccenti to refrain from arguing that Defendant said what he obviously did *not* say. *See id.* at 557 ("A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions.") (citation omitted). Defendant had already asserted four separate issues in his appeal; adding another obviously weak argument could have detracted from the meritorious arguments he had. Thus, his conduct was not unreasonable, and the court finds no prejudice.

For the reasons stated above, it is therefore this 30th day of September, 2016, by the Circuit Court for Montgomery County, Maryland,

ORDERED, Defendant's request for post-conviction relief is hereby **DENIED.**

ENTERED

OCT 11 2016

Clerk of the Circuit Court
Montgomery County, Md.

Robert A Greenberg

ROBERT A. GREENBERG, Judge
Circuit Court for Montgomery County

RONALD BROUNT,	*	IN THE
	*	COURT OF SPECIAL APPEALS
Applicant	*	OF MARYLAND
v.	*	September Term, 2016
STATE OF MARYLAND,	*	No. 2060
Respondent	*	(Post Conviction) (CC # 119260)

* * * * * * * * * * * * *

ORDER

On October 11, 2016, the circuit court entered an order denying post conviction relief. Applicant filed an Application for Leave to Appeal which was docketed on November 22, 2016. Applicant filed his Application more than 30 days after the entry of the October 11, 2016 order. The requirement in Maryland Rule 8-204(b)(2)(A) that an application for leave to appeal be filed within thirty days after entry of judgment is jurisdictional. *Keys v. State*, 195 Md. App. 19, 27-28 (2010). If the requirement is not met, this Court does not acquire jurisdiction, and the appeal must be dismissed. *Id.*

Accordingly, it is this 3rd day of January, 2017, by the Court of Special Appeals,

ORDERED that the above-captioned application for leave to appeal be and hereby is dismissed pursuant to Md. Rule 8-602(a)(3).

(CHIEF JUDGE'S SIGNATURE APPEARS ON ORIGINAL ORDER)

PETER B. KRAUSER, CHIEF JUDGE

Appendix E

RONALD BROUNT,	*	IN THE
	*	COURT OF SPECIAL APPEALS
Applicant	*	OF MARYLAND
v.	*	September Term, 2016
STATE OF MARYLAND,	*	No. 2060
Respondent	*	(CC # 119260)

* * * * * * * * * * * * *

ORDER

It is this 26th day of January, 2017, by the Court of Special Appeals,

ORDERED that the motion for reconsideration, having been read and considered, is denied.

(CHIEF JUDGE'S SIGNATURE APPEARS ON ORIGINAL ORDER)

Peter B. Krauser,
Chief Judge

Appendix F