Circuit Court for Baltimore County
Case No. 03-K-10-001691

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1440

September Term, 2021

SEAMUS ANTHONY COYLE

v.

STATE OF MARYLAND

Nazarian,
Reed,
Zic,
JJ.

Opinion by Reed, J.
Dissenting Opinion by Nazarian, J.

Filed: March 25, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104 (a)(2)(B).

In the instant appeal, the Appellant, Seamus Anthony Coyle was charged by criminal indictment in the Circuit Court for Baltimore County with first-degree murder, conspiracy to commit first-degree murder, conspiracy to commit first-degree assault, and use of a handgun in the commission of a felony. Following a jury trial that spanned four days, the jury found Coyle guilty of first-degree murder, conspiracy to commit first-degree murder, and use of a handgun in the commission of a crime of violence. Following sentencing[1], Coyle exercised his right to a direct appeal to this Court and alleged various errors by the trial court. On appeal, we affirmed the convictions.

Coyle subsequently filed a Petition for Post-Conviction Relief, and a hearing was held on the Petition on October 22, 2020. Following the hearing, the trial court denied the Petition for Post-Conviction Relief. Next, Coyle filed an Application for Leave to Appeal, which we granted on November 17, 2021. In bringing this appeal, Appellant presents three issues for appellate review, which we reorder and restate as follows:

I. Under the Public Defender Act, was Coyle's right to effective counsel violated when counsel failed to timely file the petition for writ of certiorari?
II. When the Office of the Public Defender appointed counsel and approved the petition of certiorari being filed, was Coyle entitled to effective assistance of counsel?
III. Did the trial court err in holding that Coyle must establish that his petition for writ of certiorari would have been granted by the Supreme Court of Maryland?[2]

[1] The court sentenced Coyle to concurrent sentences of life in prison for first degree murder, twenty-five (25) years for conspiracy to commit murder, and five (5) years without possibility of parole for the use of a handgun in the commission of a crime of violence.

[2] Appellant identifies the following three questions for appellate review in his brief:

For the reasons outlined *infra*, we affirm the trial court and deny Coyle the right to file a belated petition for writ of certiorari to the Supreme Court of Maryland.

FACTUAL & PROCEDURAL BACKGROUND

On March 1, 2010, William Raymond Porter was shot and killed at a Hess gas station in Towson. An investigation into the shooting revealed that Walter Bishop shot the decedent after Porter's wife, Karla Porter hired him and supplied a firearm for the commission of the crime. The investigation also revealed other people participated in the conspiracy to kill Mr. Porter, including Seamus Coyle (Ms. Porter's nephew) and Meagan Porter (Ms. Porter's daughter). Coyle was charged as a co-conspirator in the murder. At trial, the State's theory was that Coyle arranged for Bishop to commit the murder on Ms. Porter's behalf. The evidence showed that Ms. Porter contacted various people in an attempt to hire someone to kill her husband, including her daughter's boyfriend.

At trial, the State introduced evidence to prove their theory by displaying phone records that demonstrated a pattern of communication. First, Ms. Porter would call her nephew and then he would immediately call Bishop. Further evidence of the conspiracy

I. Was Mr. Coyle denied his right, under the Public Defender statute, to the effective assistance of assigned public defender appellate counsel who failed to timely file a petition for writ of certiorari?

II. When the Office of the Public Defender appointed counsel to Mr. Coyle and approved of assigned counsel's determination that a petition for writ of certiorari should be filed, was Mr. Coyle entitled to the effective assistance of counsel in filing such a petition?

III. Must prejudice be presumed when, due to ineffective assistance of counsel, Mr. Coyle was denied the right to file a petition for writ of certiorari and did the post-conviction court err in holding that Mr. Coyle must establish that the petition would have been granted?

included testimony that all three parties met at two meetings to discuss the plan to kill Mr. Porter.[3] Further evidence from the trial will be discussed as needed later in the opinion.

Following the jury trial, the jury found Coyle guilty of first-degree murder, conspiracy to commit first-degree murder, and use of a handgun in a crime of violence or felony. The trial court sentenced him to concurrent sentences of life in prison for first-degree murder, twenty-five (25) years for conspiracy to commit murder, and five (5) years without possibility of parole for use of a handgun in a crime of violence. Coyle timely filed an appeal following his convictions and alleged that the trial court committed error throughout the course of the trial.[4] On appeal, this Court affirmed the trial court in an unreported opinion. *Seamus Anthony Coyle v. State*, No. 0997, Sept. Term 2012, filed: July 11, 2014. Following the decision, counsel for the Appellant was preparing to file a Petition for Writ of Certiorari but missed the deadline to file with the Supreme Court of Maryland.

On June 29, 2020, Coyle filed a Petition for Post Conviction Relief and Request for Hearing. Coyle alleged various errors by both trial counsel and appellate counsel. Namely,

[3] The parties met at a local Wal-Mart where Bishop agreed to Ms. Porter's plan to murder her husband. The second meeting was at the Bel-Loc Diner where Ms. Porter gave Bishop a firearm to use in the commission of the murder.

[4] Coyle presented four issues for review on his direct appeal: "(1) Did the trial court err in excluding Walter Bishop's statement as inadmissible hearsay? (2) Did the trial court err in excluding Meagan Porter's complete videotaped statement as inadmissible hearsay? (3) Did the trial court err in precluding Appellant from presenting particular character evidence regarding whether Appellant "gets into conflict or arguments," was a "combative person," or had a "tendency to engage in hostile conduct?" and (4) Did the trial court err in denying Appellant's motions for judgment of acquittal based on the sufficiency of the evidence?"

Coyle argued that trial counsel rendered ineffective assistance of counsel by failing to seek accommodations for his hearing impairment, failing to object to questions during voir dire, failing to strike a juror, failing to object to the state's improper closing argument, and failing to file a motion to modify sentence at the conclusion of trial. Coyle also argued for relief by alleging that appellate counsel was ineffective by failing to meet the deadline to file his Petition for Writ of Certiorari on time to the Supreme Court of Maryland. The State filed an Answer to the Petition responding to each point in the Petition and requested that the Petition be denied.

The post-conviction court held a hearing on the Petition on October 22, 2020. The court issued a Memorandum Opinion and Order Denying Post Conviction Relief on March 18, 2021. The court ultimately concluded that there was no basis for relief based on Coyle's various arguments. As to Coyle's argument that his appellate counsel was ineffective, the court ruled that Coyle did not suffer prejudice under the *Strickland* test and, even further, stated that "there is not the slightest possibility that the Court of Appeals of Maryland[5] would have granted Certiorari in this action had a Petition been timely filed." Furthermore, the court denied Coyle's Petition for Post Conviction Relief in its entirety.

Following the decision by the court, Coyle filed an Application for Leave to Appeal to this Court on April 19, 2021, which was granted. The instant appeal followed.

[5] On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland.

DISCUSSION

I. Right to Counsel under the Public Defender Statute

A. Parties' Contentions

Coyle contends that he had a right to appellate counsel to file a writ of certiorari to the Supreme Court of Maryland under the Public Defender Act ("PDA"), as amended in 2008. He argues that the statute extends the right to counsel for all stages of an appeal, including the filing of discretionary appeals such as a petition for writ of certiorari. Specifically, Coyle argues that the statute was amended in 2008 to remove specific language that the right to counsel only encompassed an appeal through the intermediate appellate court. Finally, Coyle argues that the rights conferred in the Public Defender Act trump the right to counsel as set forth in Md. Rule 4-214, discussed in further detail *infra*. We disagree with all of these contentions.

The State responds by arguing that Coyle does not have the right to counsel under the Public Defender Act to file discretionary appeals. The State disagrees that the Public Defender Act prevails over Md. Rule 4-214. After reviewing the legislative history for the Public Defender Act, the State contends that the Act was not substantively changed in 2008. The State further argues that deletions were made to the Act to remove specific language that was determined to be surplusage.

B. Standard of Review

"[W]here an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are legally correct under a *de novo* standard of review." *Mayor and City Council of Baltimore v. Thornton Mellon, LLC*, 478 Md. 396, 410 (2022) (internal citation and quotations omitted). Due to the argument that Coyle had a right to counsel under statutory authority, we conduct a *de novo* review.

C. Analysis

Coyle asserts his claim that he had a right to counsel for his discretionary appeal under the Public Defender Act as enacted in Md. Code Ann., Crim. Proc. § 16-204. In whole, this statute provides:

> Representation provided by Public Defender
>
> (a) Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defenders, district public defenders, assistant public defenders, or panel attorneys.
>
> Proceedings eligible for representation
>
> (b) (1) Indigent defendants or parties shall be provided representation under this title in:
>
> (i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;
>
> (ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;
>
> (iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;
>
> (iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;
>
> (v) a proceeding involving children in need of assistance under § 3-813 of the Courts Article; or
>
> (vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of

> the Family Law Article, including:
>
> 1. for a parent, a hearing in connection with guardianship or adoption;
> 2. a hearing under § 5-326 of the Family Law Article for which the parent has not waived the right to notice; and
> 3. an appeal.
>
> (2)(i) Except as provided in subparagraph (ii) of this paragraph, **representation shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal.**
>
> (ii) Representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner.

CP § 16-204 (emphasis added). Coyle also relies on Md. Rule 4-214(b), which defines the extent of the duty of appointed counsel. Md. Rule 4-214(b) states:

> **When counsel is appointed by the Public Defender or by the court, representation extends to all stages in the proceedings, including but not limited to custody, interrogations, preliminary hearing, pretrial motions and hearing, trial, motions for modification or review of sentence or new trial, and appeal**. The Public Defender may relieve appointed counsel and substitute new counsel for the defendant without order of court by giving notice of the substitution to the clerk of the court. Representation by the Public Defender's office may not be withdrawn until the appearance of that office has been stricken pursuant to section (d) of this Rule. **The representation of appointed counsel does not extend to the filing of subsequent discretionary proceedings including petition for writ of certiorari,** petition to expunge records, and petition for post conviction relief.

Md. Rule 4-214(b) (emphasis added).

In further support of his argument that he had a right to counsel, Coyle cites to *State v. Flansburg*, 345 Md. 694 (1997). In *Flansburg*, the Supreme Court of Maryland held that the defendant had a right to effective assistance of counsel when his trial counsel failed to

file a motion for modification of sentence following a probation hearing *Id.* at 703. While on probation for a sexual offense, Flansburg was convicted of battery and second-degree murder. *Id.* at 696. The trial court revoked his probation and reimposed the full sentence at a probation revocation hearing. *Id.* Following that hearing, the defendant requested that his probation attorney file a motion for modification of his sentence, which his counsel failed to do. *Id.* On appeal, the Supreme Court of Maryland determined that Flansburg had a right to counsel under the Public Defender Act. *Id.* at 699. Under the PDA, as codified in CP § 16-204, indigent defendants are guaranteed the right to counsel for probation hearings, including the period right after when a motion to modify would be filed. *Id.* at 700-01. Specifically, the Court held that the right to counsel was found in Section (b)(4) of the Public Defender Act, which provides representation in "[a]ny other proceeding where possible incarceration pursuant to a judicial commitment of individuals in institutions of a public or private nature may result…" The Court reiterated that the right to counsel does encompass the right to effective assistance of that counsel. *Id.* at 703. The Court clarified that the right to counsel under the Public Defender Act encompasses effective assistance because "the entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective." *Id.* (quoting *Wilson v. State*, 284 Md. 664, 671, *cert. denied*, 446 U.S. 921). As such, the Court held that the defendant could file a belated motion for reconsideration of sentence.[6] *Id.* at 468.

[6] The Supreme Court's decision in *Flansburg* left open the question of the trial court's discretion to revise a sentence following a belated motion for modification. *State v. Schlick*, 465 Md. 566, 577 (2019). In *Schlick*, the Supreme Court considered the role of

However, *Flansburg* is distinguishable from the instant case based on the factual scenario at play. The appeal in *Flansburg* arose following a probation revocation hearing where there is an explicit guarantee of representation for indigent defendants in the statute. In Coyle's case, he claims that he had a right to counsel to file a discretionary appeal that is not directly contemplated or explicitly stated by the Public Defender Act. Whereas in *Flansburg*, the petitioner had filed a motion to modify which is contemplated by the statute.

We can find no direct caselaw on the question of whether Coyle had a right to counsel under the Public Defender Act for filing his discretionary appeal. So we turn to consider the statutory construction and legislative history of the Public Defender Act. First, we must determine whether the plain meaning of the language of the statute establishes a right to representation when a discretionary appeal is determined to be needed. When interpreting a statute, "our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Phillips v. State*, 451 Md. 180, 196 (2017). Furthermore, "[w]e first look to the language of the statute to determine its plain meaning, and we neither add nor delete language as to reflect an intent not evidenced in the plain and unambiguous language of the statute." *Connor v. State*, 223 Md. App. 1, 15 (2015) (internal citations omitted). If the plain language of the statute is

Flansburg and held that the trial court retains revisory authority over a belated motion for reconsideration pursuant to the operation of Md. Rule 4-345(e) ("[u]pon a motion filed within 90 days after imposition of a sentence … in a circuit court whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.") *Id.* at 574, 587.

ambiguous, the Court proceeds to consider other indicia to reveal the General Assembly's intent including the history of the statute. *Mihailovich v. Dep't of Health & Mental Hygiene*, 234 Md. App. 217, 224 (2017), *cert. denied*, 457 Md. 396 (2018). Specifically, we examine "the structure of the statute, how the statute relates to other laws, the statute's general purpose, and the relative rationality and legal effect of various competing constructions." *Id.* (quoting *Hailes v. State*, 442 Md. 488, 495-96.

Section 16-204 of the Criminal Procedure Article is found in Title 16, which delineates the statutory authority of the Office of the Public Defender ("OPD"). Other subtitles under Title 16 govern the structure of OPD, reporting mandates, appropriations, etc. Subtitle 2 provides general mandates on the functions of OPD including terminating representation, powers and duties of public defenders, panel attorneys, and conflicts, etc.

As noted above, Coyle relies on § 16-204(b)(2)(i) for his claim that he had a right to counsel. In relevant part, that statute provides: "…representation shall be provided to an indigent individual in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal." CP § 16-204(b)(2)(i). Subsection (b)(2)(ii) carves out that representation is not required at an initial appearance before a District Court commissioner. CP § 16-204(b)(2)(ii). The statute directly references paragraph 1, which guarantees representation to an indigent defendant "in a criminal…proceeding in which a defendant or party is alleged to have committed a serious offense." CP § 16-204(b)(1). The plain meaning of the statute is to provide

representation to indigent defendants through the services of OPD at every step of a criminal case. The parties agree that the purpose of the statute is clear. However, their views diverge on the statute's impact on the appellate process. We find that the plain meaning of the statute is not apparent to an observant citizen who is making an inquiry. The statute makes clear that the Public Defender will represent individuals who have an appeal. Only after an inquiry into the law that governs in these cases is it clear that this statute does not extend to discretionary appeals.

The General Assembly revised the statute in 2008. Specifically, the phrase "before the District Court of Maryland, the various courts within the State of Maryland, and the Court of Special Appeals" was removed from subsection (b)(1)(i). 2008 Md. Laws, ch. 15.[7] Coyle argues that this removal signals the legislature's intent to expand the scope of OPD's representation through all stages of an appeal. The elimination of the specific language makes this a compelling argument that the legislature wanted to expand the scope of public defender services on appeal. The State however points to the Revisor's Note that accompanied the revisions in 2008. The Revisor's Note for Section 16-204 states that "[t]his section is new language derived **without substantive change** from former Art. 27A, §4(b), (d)(1), and the second sentence of (a)." Furthermore, the Revisor's Note says, "[i]n subsection (b)(1)(i) of this section, the former phrase 'before the District Court of

[7] Before the statute was amended in 2008, § 16-204(b)(1)(i) provided representation in "a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense before the District Court of Maryland, the various circuit courts within the State of Maryland, and the Court of Special Appeals."

Maryland, the various courts within the State of Maryland, and the Court of Special Appeals' is deleted as **surplusage**." (Emphasis added).

The Revisor's Note from the General Assembly directly refutes Coyle's claim that the amendment in 2008 expands the scope of representation to all stages of an appeal. The General Assembly notes that the 2008 amendments are "derived without substantive change." As we have noted before "[w]hile there is no substantive change, as the Revisor's Note states, the change in language signifies a clarification." *Payne v. State*, 243 Md. App. 465, 492 (2019).[8] A general tenet of statutory interpretation is to "read the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *State v. Fabien,* 259 Md. App. 1, 19 (2023). Furthermore, "[a] change in the phraseology of a statute as part of a recodification will ordinarily not be deemed to modify the law unless the change is such that the intention of the Legislature to modify the law is unmistakable." *Office & Prof. Employees Int'l v. MTA*, 295 Md. 88, 100 (1982). "[R]ecodification of statutes is presumed to be for the purpose of clarity rather than change of meaning." *Hoffman v. Key Fed, Sav. & Loan Ass'n*, 286 Md. 28, 37 (1979). Furthermore, "even a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so radical and material that the intention of the Legislature to modify the law appears unmistakably from the language of the Code." *Id.*

[8] Although the change in the statute in *Payne* was amended from "any" to "a" in a child pornography statute, the Revisor's Note for §16-204 expressly that the changes were "derived without substantial change". *See Payne*, 243 Md. App. at 492.

In this instance, the Revisor's Note states that the phrase that specifically delineates various court levels was deleted as surplusage. Black's Law Dictionary defines surplusage as "redundant words in a statute or legal instrument; language that does not add meaning." Surplusage Definition, *Black's Law Dictionary* (11th ed. 2019). Because the statute was amended without substantive change and language was deleted as surplusage, we conclude that § 16-204 does not convey the right to counsel for the filing of a discretionary appeal. There is no clear intention of the legislature to modify the law in 2008.

Alongside direction on the right to counsel promulgated by the legislature, the Supreme Court of Maryland has provided insight on this issue through Rule 4-214. Specifically, Rule 4-214(b) states that "[t]he representation of appointed counsel does not extend to the filing of subsequent discretionary proceedings including petition for writ of certiorari…" Under Coyle's interpretation of these various authorities, the provisions of the judiciary and legislature would be in conflict. Coyle correctly asserts that in the instance of an actual conflict, we would apply the later adopted. *See Schlick v. State*, 238 Md. App. 681, 691 (2018), *aff'd*, 465 Md. 566 (2019). However, "we prefer to harmonize rather than find inconsistency." *Id.* (quoting *Savage Manufacturing Co. v. Magne*, 154 Md. 46, 54 (1927)). In conclusion, the amendments to § 16-204 did not expand the right to counsel. Therefore, this statute is not in conflict with Rule 4-214. Under Rule 4-214(b), representation of appointed counsel does not extend to a discretionary petition for writ of certiorari. To be sure this would also not be the best method for enacting legislative changes that were in direct conflict with the common law of the United States and Maryland.

The parties point to countervailing authority where our sister states have decided the question of whether the right to counsel extends to the filing of discretionary appeals.[9] However, because the right to counsel is specifically delineated within Maryland's statutory scheme and Rules, out-of-jurisdiction authority is not dispositive of this issue. We conclude that Coyle does not have a right to counsel under the interplay of CP § 16-204 and Rule 4-214(b) or as they are interpreted in concert or together. There was no "unmistakable" intention of the legislature to modify the law. *Office & Prof. Employees Int'l*, 295 Md. at 100.

II. Right to Counsel under the Due Process Clause

A. Parties' Contentions

Alternatively, Coyle contends that he had a right to counsel as a matter of due process under Article 24 of the Maryland Declaration of Rights. He argues that the

[9] *Compare Villados v. State*, 148 Haw. 386, 477 P.3d 826 (2020) (affirming that appellate counsel was ineffective when she did not file an application for writ of certiorari after saying that she would and allowing the application to the Supreme Court to proceed), *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986) (holding that the defendant had ineffective assistance of counsel when appellate counsel did not file an application for a writ of certiorari when that petition is an application of law under the Colorado Constitution), *Kargus v. State*, 284 Kan. 908, 169 P.3d 307 (2007) (concluding that the defendant was entitled to effective assistance to pursue a petition for review on direct appeal and allowing the defendant to re-petition the court, with *State v. Carruth*, 21 So.3d 764, 769 (Ala. Crim. App. 2008)) (holding that the defendant did not have a right to counsel for a discretionary appeal under Alabama's statutory scheme and, therefore, counsel could not have been ineffective), *People v. James*, 111 Ill. 2d 283, 281, 489 N.E.2d 1350, 1354 (1986) (ruling in accordance with the United State Supreme Court decision in *Torna* that "the defendant was not deprived of his constitutional right to the effective assistance of counsel when his appellate counsel failed to seek discretionary review of [his] attempted murder conviction.").

constitutional right to counsel is broader than a right to counsel under the Sixth Amendment. At oral argument, counsel for Coyle argued that *Wainwright v. Torna*, relied on by the State, does not apply in this case.

The State replies to this argument by arguing that the Supreme Court of the United States has already answered the question of whether an untimely filing of a discretionary appeal violates due process. The State cites to *Wainwright v. Torna*, 455 U.S. 586 (1982) to support this proposition.

B. Standard of Review

"[W]here an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are legally correct under a *de novo* standard of review." *Mayor and City Council of Baltimore v. Thornton Mellon, LLC*, 478 Md. 396, 410 (2022) (internal citation and quotations omitted). For this issue, Coyle argues that he had a right to counsel under the Maryland constitution and, therefore, we review this claim *de novo*.

C. Analysis

The Due Process Clause of the Maryland Declaration of Rights is contained in Article 24 and sets forth "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by judgment of his peers, or by the Law of the land." Md. Const. Decl. of Rts. Art. 24. Article 24 of the Maryland Declaration of Rights conveys a broader right to counsel than under the Sixth Amendment of the United States

Constitution. *Clark v. State*, 485 Md. 674, 717 (2023). As the Supreme Court of Maryland has noted, "the due process right to counsel under Article 24 is broader than the right to counsel under Article 21 or the Sixth Amendment." *DeWolfe v. Richmond*, 434 Md. 444, 460-61 (2013). Specifically, the right to counsel under Article 24 is not limited to "critical stages of criminal proceedings" unlike Article 21[10] or the Sixth Amendment. *Id.* at 459-60.

As the State posits, Maryland courts have generally "interpreted Article 24 to apply in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution. *Washington v. State*, 450 Md. 319, 340 (2016) (quoting *Attorney General v. Waldron*, 289 Md. 683, 704 (1981)). In effect, decisions of the Supreme Court of the United States interpreting the Fourteenth Amendment function as "practically direct authorities." *Id.* at 340-41.

In a per curiam opinion, in *Torna*, the Supreme Court of the United States addressed the right to counsel to pursue discretionary state appeals. *Wainwright v. Torna*, 455 U.S. 586, 587 (1982) (per curiam). In this case, the defendant was convicted of several felonies

[10] Article 21 of the Maryland Declaration of Rights guarantees "a right to counsel, including appointed counsel for an indigent in a criminal case involving incarceration." *Rutherford v. Rutherford*, 296 Md. 347, 357-64 (1983). This right extends to every critical stage of the proceedings. *Id.* The full text of Article 21 says:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

in the state of Florida. *Id.* at 586. On appeal, the Florida Supreme Court denied his application for a writ of certiorari because the application was untimely. The defendant filed a writ of habeas corpus in federal court that continued up to the United States Supreme Court. *Id.* The Court reversed the Court of Appeals and pursuant to prior precedent, held that the defendant had no constitutional right to counsel. *Id.* at 587. Therefore, because he had no right to counsel, "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Id*. In a footnote, the Court added that the defendant was not deprived of due process because his counsel failed to timely file the petition or because the Florida Supreme Court dismissed the action. *Id*. at 588, n.4.

Before *Torna*, the Supreme Court of the United States considered a defendant's right to appointed counsel for discretionary appeals in *Ross v. Moffitt*, 417 U.S. 600 (1974). In *Ross*, after being convicted of forgery in two counties in North Carolina, the defendant sought discretionary review in the North Carolina Supreme Court. *Id.* at 604. The Court of Appeals for the Fourth Circuit held that the defendant was entitled to appointed counsel furnished by the state for his discretionary state and federal appeals. *Id.* at 604-05. The Supreme Court reversed the Fourth Circuit and held that the Fourteenth Amendment did not mandate free counsel for an indigent defendant in a discretionary federal or state appeal. *Id.* at 610; 617. The Court reasoned that neither the Due Process Clause nor the Equal Protection Clause required the states to ensure representation for an indigent defendant's discretionary appeal. *Id*. at 611-16.

In response to the defendant's due process argument, the Court reasoned that "there are significant differences between the trial and appellate stages of a criminal proceeding." *Id.* at 610. The Court continued that "[t]he defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." *Id.* at 610-11. The Court concluded that the due process clause did not mandate appointed counsel for indigent individuals for discretionary appeals. *Id.* at 611.

The Court also examined whether the equal protection clause conferred the right to counsel for discretionary appeals. *Id.* at 611-16. The Supreme Court opined that the function of a state Supreme Court is different than an appellate court that hears appeals as a matter of right. *Id.* at 615. The Court summarized the function of the North Carolina Supreme Court and, by extension, other state supreme courts as:

> The critical issue in that court, as we perceive it, is not whether there has been 'a correct adjudication of guilt' in every individual case, see *Griffin v. Illinois*, 351 U.S., at 18, 76 S.Ct., at 590 but rather whether 'the subject matter of the appeal has **significant public interest,'** whether 'the cause involves legal principles **of major significance to the jurisprudence** of the State,' or whether the decision below is in **probable conflict with a decision of the Supreme Court.**

Id. The Court continued to state, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Id.* at 616. Moreover, the Court reasoned that:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate

process.

Id. at 616. The Supreme Court reversed the decision of the Fourth Circuit and held that the guarantees of the Fourteenth Amendment do not mandate appointed counsel to a defendant that seeks discretionary review. *Id.* at 619.[11]

The parties disagree about the precedential value that *Torna* has in the instant case. At oral argument, counsel for Coyle argued that *Torna* is distinguishable from the present case because Coyle's claim involves a panel attorney instead of a private counsel, as was the case in *Torna*.[12] Coyle argues that because his appellate counsel was a panel attorney assigned pursuant to OPD's statutory authority pursuant to CP § 16-208[13], then *Torna* does

[11] Justice Douglas wrote a dissenting opinion to the majority opinion in *Ross* joined by Justices Brennan and Marshall. *Id.* at 619 (Douglas, J., dissenting). Justice Douglas would have affirmed the decision of the Fourth Circuit and held that an indigent defendant had the right to appointed counsel for discretionary appeals. *Id.* (Douglas, J., dissenting). Justice Douglas echoed the Fourth Circuit decision and noted that "in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive." *Id.* (Douglas, J., dissenting). Justice Douglas further discussed the importance of counsel in discretionary appeals and said "[c]ertiorari proceedings constitute a highly specialized aspect of appellate work. The factors which (a court) deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant." *Id.* at 621 (Douglas, J., dissenting) (quoting *Boskey*, The Right to Counsel in Appellate Proceedings, 45 Minn.L.Rev 783, 797 (1961)). The dissenting justices would have found the defendant had a right to counsel because "the same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." *Id.* (Douglas, J., dissenting). This dissent has not evolved into the law of the land or been followed in courts around the country.

[12] We were unable to find any representation agreement in the record between the OPD and the Appellant.

[13] CP §16-208 governs the Office of the Public Defender's authority to appoint panel attorneys. OPD exercised this authority to assign Coyle's case to his appellate counsel. In relevant part, the statute provides: "[e]xcept in cases in which an attorney in the Office

not apply in this case. We disagree. We agree with the State's argument that under the strong authority of the United State Supreme Court's decision in *Torna* and *Ross* that Coyle was not deprived of due process when his appellate counsel failed to timely file his petition for writ of certiorari.

III. Ineffective Assistance of Counsel

A. Parties' Contentions

Appellant argues alternatively that if Coyle did not have an explicit right to counsel, then he was entitled to effective assistance once OPD agreed that a panel attorney should submit a petition for writ of certiorari. Coyle further argues that when OPD provided counsel, he was entitled to enjoy effective assistance of counsel. We disagree with both of these assertions. Coyle urges this Court to not apply the traditional *Strickland* analysis for his ineffective assistance claim but instead to presume that Coyle was prejudiced when his appellate counsel failed to file the petition for writ of certiorari.

The State argues that the *Strickland* test for ineffective assistance should apply if Coyle does have a right to counsel. The State cites to the findings of the postconviction court to assert that the court properly applied the requisite factors. The postconviction court ruled that it was unclear whether counsel's performance was sufficiently deficient under *Strickland*. We disagree.[14]

provides representation, the district public defender, subject to the supervision of the Public Defender shall appoint an attorney from an appropriate panel to represent an indigent individual." CP §16-208(b)(1).

[14] The State also contends that the trial court properly ruled that there was not a reasonable probability that the results of the proceeding below would not have been

B. Standard of Review

Our review of a post-conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*. The appellate court exercises its own independent analysis as to the reasonableness, and prejudice therein, of counsel's conduct. *State v. Syed*, 463 Md. 60, 73 (2019).

C. Analysis

We begin by analyzing Coyle's claim that once the OPD exercised their authority to appoint a panel attorney, he was entitled to effective assistance of counsel. At first glance there appears to be merit to this argument. Because there was a conflict of interest to represent Coyle, OPD exercised their discretionary power to panel the case out to a member of the private bar. The Public Defender Act sets forth the discretionary power to appoint panel attorneys that is frequently exercised by OPD. Specifically, CP § 16-208(b)(1) states: "[e]xcept in cases in which an attorney in the Office provides representation, the district public defender, subject to the supervision of the Public Defender, shall appoint an attorney from an appropriate panel to represent an indigent individual." §16-208(b)(2) continues that "[p]anel attorneys shall be used as much as practicable." §16-204(a) tracks with the other statutes in the PDA and states that "[r]epresentation of an indigent individual may be provided in accordance with this title by the Public Defender or, …panel attorneys." The

different but for counsel's error. We disagree with this finding. Finally, the State seeks to distinguish the line of cases that were cited by Coyle to stand for the proposition that prejudice should be presumed in this matter.

statute provides no clear prohibition against the assignment of attorneys in a discretionary appeals status.

As discussed *supra*, Coyle did not have a right to counsel under the PDA or under Article 24 of Maryland's Declaration of Rights. However, OPD did exercise their perceived authority under the PDA to assign a panel attorney to Coyle for his appeal. OPD paneled the case to Attorney Brian Edmunds and approved of his preparation of a petition for writ of certiorari to the Supreme Court of Maryland. Coyle argues that this action entitled him to effective assistance of counsel. Coyle argues that if there is no requirement for panel attorneys to render effective assistance, then there is no recourse for indigent individuals with claims of ineffective assistance. The State responds to this argument by comparing the current case to the factual scenario in *Torna*.

Justice Marshall briefly discusses the underlying facts in his dissenting opinion to the per curiam opinion in *Torna*. 455 U.S. at 588-90 (Marshall, J., dissenting). In *Torna*, the defendant's retained counsel "promised him that he would seek review in the Florida Supreme Court." *Id*. at 589. Defendant's counsel failed to timely file his application and the defendant was "deprived of his right to seek discretionary review by the State's highest court." *Id.* The application was filed one day late after a secretary in the private attorney's office got lost on the way to the Clerk's Office and arrived after it had already closed. *Id.* The State asks this Court to rule that Coyle was not entitled to effective assistance of counsel according to the same logic as the United States Supreme Court applied in *Torna*. However, the United States Supreme Court in *Torna* ruled that the defendant did not have

a constitutional right to counsel to file a discretionary appeal under the Sixth Amendment. 455 U.S. at 587. However, Appellant has pointed out that, in the present case, his attorney was not a member of the private bar but instead a panel attorney appointed pursuant to OPD's statutory authority in the PDA. This is not a compelling argument as we have analyzed in another portion of this opinion. The PDA did not confer or upon amendment provides for a right to counsel in a discretionary appeal. While it is understandable why a manager in the OPD might look at the statute and believe that it was appropriate to appoint counsel. Our duty as a court requires us to analyze and recognize precedent in this case. We have also heard the arguments of appellant's counsel. Coyle asserts that his claim is not predicated on the Sixth Amendment right to counsel and is distinguishable from *Torna* in this regard. Therefore, they are in effect recognizing that there is not a right to counsel when there is a discretionary appeal. OPD elected to panel the case to an outside attorney pursuant to their explicit authority contained in CP §16-204(a).

However, this decision did not entitle Coyle to the assistance of counsel under the law.[15] First the right to an outside attorney is derivative of the PDA, per the Appellant, which does not allow for a discretionary appeal because of the common law. Also, the Ross case cited earlier in this opinion clearly holds that the right to counsel to file a discretionary appeal is not provided under the law. In *Ross*, the Supreme Court reversed the Fourth Circuit and held that the Fourteenth Amendment did not mandate free counsel for an

[15] This analysis may have been different if the petition for writ of certiorari had been timely filed.

indigent defendant in a discretionary federal or state appeal. *Ross*, 417 U.S. at 610, 617. The Court reasoned that neither the Due Process Clause nor the Equal Protection Clause required the states to ensure representation for an indigent defendant's discretionary appeal. *Id*. at 611-16.

Because he was not entitled to a panel attorney, we decline to reach the issue of whether he was entitled to effective assistance of counsel. And, after concluding that Coyle was not entitled to effective assistance by his panel attorney, we are not required to consider whether the assistance that he received was in fact ineffective.

If we did consider this issue, we would conclude that counsel's performance was ineffective. Following his appointment as a panel attorney, Mr. Edmunds drafted the petition. According to his affidavit, counsel worked "extensively" and "around the clock" to compile a compelling petition. *See* Affidavit of Brian T. Edmunds. On the day that the petition was due to be filed, counsel was finishing up the document to transmit it to OPD by noon, so they could file it with the Court. However, due to unexpected delays concerning the first day of school for counsel's children, he was not able to meet the noon deadline. Counsel decided to personally deliver the petition to Annapolis for filing. Further complications ensued including a computer crash and unexpected gridlock traffic, leading counsel to not be able to reach Annapolis before the clerk's office closed. Counsel characterizes the failure to timely file this petition and having to inform Coyle as "the worst professional experiences of [his] career."[16]

[16] Coyle's appellate counsel's Declaration states in full:

I an attorney admitted to practice by the Court of Appeals of Maryland. Since my admission in 2002, I have worked in various capacities as a litigator, including an extensive practice as an appellate litigator.

In or about 2012, the Public Defender appointed me to represent the Petitioner, Seamus Anthony Coyle, in his direct appeal to the Court of Special Appeals. I prepared and filed Mr. Coyle's opening and reply briefs and motions in that court and argued before the panel assigned to hear Mr. Coyle's appeal.

It was and remains my view that [sic] the Court of Special Appeals erred when it affirmed Mr. Coyle's conviction. I felt that some of the issues in the case presented questions for which the Court of Appeals should grant a writ of certiorari.

I discussed seeking a writ with both the Office of the Public Defender and Mr. Coyle and was authorized to file a petition.

I prepared the petition for a writ of certiorari that has been attached as an exhibit to Mr. Coyle's petition for post-conviction relief. As with the other papers I prepared for Mr. Coyle, I worked extensively on the petition to try to give him the best chance possible of prevailing. Concerned that Mr. Coyle had been convicted in error, I labored as hard as I could to try to give him a chance of reversing that error.

I worked around the clock on Mr. Coyle's petition, but had a difficult time getting to the point where I felt it sufficient for the difficult task. On the due date, I turned to finalizing the petition with the goal or revising it, shortening it, proofreading it, and sending it to the Office of the Public Defender by noon, in time for the Office to print and deliver it to the Court of Appeals.

I am a bit of a perfectionist, though, and had an unexpected development in the morning relating to the first day of school for my children, which coincided with the deadline. At around noon, I was still struggling with balancing the need to shorten the petition and still present the arguments strongly. I felt that I could still improve it and did not want to sacrifice the strength of the arguments. I therefore decided that I should continue to work on it a bit more, print it myself, and personally deliver it to Annapolis for filing, I thought that I could get it done, and that it would give Mr. Coyle a better chance if I did.

The postconviction court also relied on the *Strickland* standard when it held that "the Petitioner did not suffer prejudice, within the meaning intended by the Supreme Court of the United States in Strickland" and "counsel's calamities on the morning when he intended to file the Petition are simply not the type of professional errors recognized by the Supreme Court as reaching Constitutional significance under Strickland."

In *Strickland v. Washington*, the United States Supreme Court articulated a two-part test to analyze an ineffective assistance of counsel standard in a death penalty case. 466 U.S. 668, 687 (1984). The Court held that for an ineffective assistance claim, the defendant must show: (1) "that counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." *Id.* Before implementing this standard, the *Strickland* Court traced the foundations of the right to counsel conveyed by Sixth Amendment and the

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> I was badly mistaken. I encountered difficulties with the computer and printing, including a computer crash. I completed the petition and printed copies and left just before 3:00pm, which gave me a little more than 90 minutes to make the 39-mile drive from the Bethesda area to the Court of Appeals, a drive that usually took me about 45 minutes, since it is almost entirely highway. I thought that rush hour traffic would not have picked up on the Capital Beltway by then. But as I drove south to the Beltway, entering from the Wisconsin Avenue ramp there was heavy, standstill traffic. I was stuck on the Beltway, without an alternative, until well after it became obvious that I could never make it to the Court of Appeals on time. From the road, I called both the Clerk's Office and the Office of the Public Defender to see if anything could be done to get the petition timely to the Court, but there were no options to avoid the petition being marked as late and not considered.
>
> This error, and having to inform Mr. Coyle of it, remain the worst professional experiences of my career. I truly thought I could both perfect the petition, which I thought was necessary, and still timely file it. I was wrong.

right to constitutional effective assistance of counsel that flows therefrom. *Id.* at 685-86. Maryland jurisprudence has applied the *Strickland* standard to evaluate ineffective assistance claims in Sixth Amendment right to counsel cases. *Newton v. State*, 455 Md. 341, 355 (2017).

In its postconviction opinion, the court denied the ineffective assistance claim and as to the first prong found that "it is far from clear that every lawyer who misses a filing deadline in a criminal case is guilty of Strickland-level ineffectiveness." We agree with the court that the bare fact that appellate counsel missed the deadline is not dispositive of whether counsel's representation fell below the standard. However, looking at the full factual record, Coyle's appellate counsel had promised him that he would file the petition to the Supreme Court of Maryland. Through a series of unfortunate events, counsel missed the deadline to transmit the petition to OPD for filing and subsequently ran out of time to file the petition in person before the Clerk's Office closed. At oral argument, neither party disputed that counsel's representation fell below an objective standard of reasonableness. In fact, appellate counsel characterized this experience as "the worst professional experiences of [his] career."

At the postconviction hearing, the court expressly denied Coyle's argument that he suffered prejudice due to appellate counsel's failure to file the petition for writ of certiorari. Specifically, the trial court stated that the Court of Special Appeals "thoroughly but easily dealt" with the issues in Coyle's appeal and that the appeal was "patently without merit." The court succinctly analyzed the likelihood of a different result in the hearing if the

petition had been filed on time by stating "there is not the slightest possibility that the Court of Appeals of Maryland would have granted Certiorari in this action had a Petition been timely filed." Finally, the trial court found that Coyle did not suffer prejudice as contemplated by the standard in *Strickland*.

Although we decline to reach the issue, we will note that the ineffective assistance analysis that the postconviction court employed is a convoluted issue. We do not feel the same certainty as the postconviction court to extrapolate whether the Supreme Court would have granted certiorari had the petition been timely filed.[17]

CONCLUSION

Accordingly, we affirm the decision of the Circuit Court for Baltimore County because Appellant did not have a right to counsel for his discretionary appeal to the

[17] A conclusion whether the Supreme Court would have granted the petition for writ of certiorari is full of speculation. "In recent years the Supreme Court of Maryland has granted roughly 15% of petitions for certiorari in civil cases and 12% in criminal cases." Petitions for Certiorari—View from the Bar, Appellate Practice for the Maryland Lawyer: State and Federal, Chap. 18 (2023). *See also* Steve Klepper, Maryland Certiorari Statistics, 2020 Term (June 28, 2021) (available at: https://mdappblog.com/2021/06/28/maryland-certiorari-statistics-2020-term/).

"For example, in FY 2021, 36 of 263 petitions (approximately 14%) were granted in civil cases and 30 of 235 (approximately 13%) in criminal cases." In FY 2020, "35 of 240 petitions (approximately 15%) were granted in civil matters and 27 of 237 petitions (approximately 11%) in criminal matters." Petitions for Certiorari—View from the Bench, Appellate Practice for the Maryland Lawyer: State and Federal, Chap. 19 (2023) (citing *Maryland Judiciary Statistical Abstract, Fiscal Year 2021*, at Table CA-5, archived at https://perma.cc/Y7QE-UHFB.)

Based on these statistics, we do not agree with the postconviction court that "there is not the slightest possibility that the Court of Appeals of Maryland would have granted Certiorari in this action had a Petition been timely filed."

Supreme Court of Maryland.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.

Circuit Court for Baltimore County
Case No. 03-K-10-001691

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1440

September Term, 2021

SEAMUS ANTHONY COYLE

v.

STATE OF MARYLAND

Nazarian,
Reed,
Zic,
JJ.

Dissenting Opinion by Nazarian, J.

Filed: March 25, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104 (a)(2)(B).

I appreciate the clean analytical path between the majority's two critical conclusions in this case: *first*, the conclusion, with which I agree, that Seamus Coyle did not have an enforceable constitutional or statutory right to counsel at the *certiorari* stage of his direct appeal, and *second*, the conclusion that Mr. Coyle couldn't have suffered a constitutional or statutory injury from the deprivation of a right to counsel he never had. In between these two milestones, though, I remain stuck on a point our Supreme Court made first in *Wilson v. State*, 284 Md. 664, 671 (1979), *cert. denied*, 446 U.S. 921 (1980), then reiterated in *State v. Flansburg*, 345 Md. 694, 703 (1997): "Entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective." Mr. Coyle may not have been entitled to demand a lawyer at the *certiorari* stage under the Sixth Amendment to the Constitution of the United States, Articles 21 and 24 of the Maryland Declaration of Rights, or the Public Defender Act, Md. Code (2008, 2018 Repl. Vol.), § 16-204 of the Criminal Procedure Article ("CP"). But he had a lawyer, and properly so. The Office of the Public Defender had the authority to appoint a lawyer to represent Mr. Coyle at the *certiorari* stage of the case and there is no dispute that the Office did so here pursuant to that authority. And once Mr. Coyle had that properly and publicly appointed lawyer,[18] he was entitled to have that lawyer assist him effectively.

I agree with my colleagues that on the record developed in the circuit court, counsel's failure to file a petition for writ of *certiorari* satisfied the deficient performance

[18] It makes no difference that Mr. Coyle's publicly appointed counsel was a private lawyer appointed by the Office of the Public Defender. What matters is that the Office had the authority to appoint counsel here, *see* CP § 16-208(c), and did.

prong of the *Strickland v. Washington* analysis. 466 U.S. 668 (1984). From there, I would hold that counsel's failure to file the petition under these circumstances prejudiced Mr. Coyle and that he should be granted the opportunity to file a belated petition for writ of *certiorari*. The majority concludes otherwise and, with respect, I dissent.

I.

I agree with my colleagues that Mr. Coyle did not have an enforceable right to counsel at the *certiorari* stage of his direct appeal under the Constitution of the United States, the Maryland Constitution, or the Public Defender Act. Were we writing on a blank slate, I am inclined to agree with Justice Thurgood Marshall, in his dissent in *Wainwright v. Torna*, 455 U.S. 586, 588 (1982), that we should recognize that a defendant has a constitutional right to counsel to pursue discretionary appeals (and thus that *Ross v. Moffitt*, 417 U.S. 600 (1974), was decided wrongly), and that counsel's failure to file a petition for writ of *certiorari* when the defendant relied on counsel's promise to do so would be a violation of the defendant's due process rights. *Torna*, 455 U.S. at 588–89 (Marshall, J., dissenting). The federal and Maryland constitutional rights to counsel extend through one layer of appellate review, *see Wilson*, 284 Md. at 671, as does the right to a public defender in Maryland for those who qualify. CP § 16-204(b)(2)(i). But intermediate appellate courts sometimes reach the wrong answers on important issues in criminal cases—or, more to the point, superior courts sometimes reach different final conclusions. *See, e.g.*, *State v. Bircher*, 446 Md. 458 (2016), *reversing Bircher v. State*, 221 Md. App. 376 (2015); *Spencer v. State*, 450 Md. 530 (2016), *reversing Spencer v. State*, No. 493, Sept. Term

2014 (Md. App. Oct. 2, 2015); *Norman v. State*, 452 Md. 373, *reversing Norman v. State*, No. 1408, Sept. Term 2015 (Md. App. Aug. 11, 2016); *Devincentz v. State*, 460 Md. 518 (2018), *reversing Devincentz v. State*, No. 1297, Sept. Term 2016 (Md. App. Sept. 25, 2017); *Rogers v. State*, 468 Md. 1 (2020), *reversing State v. Rogers*, 240 Md. App. 360 (2019); *see also Lewis v. State*, 470 Md. 1 (2020), *reversing Lewis v. State*, 237 Md. App. 661 (2018); *Clark v. State*, 485 Md. 674 (2023), *reversing Clark v. State*, 255 Md. App. 327 (2022). The opportunity for *certiorari* review can mean the difference between a new trial or no new trial, incarceration or freedom or, in the federal system or many other states, life or death. I struggle to understand why the right to counsel covers only one round of appellate review when the judiciary provides an opportunity to ask for a second.

In any event, the majority's analysis in this case leaves Mr. Coyle completely without a remedy for failures on the part of the counsel he actually had. This case literally is *the* post-conviction forum available for him to raise ineffective assistance of counsel during his direct appellate process, but the Court holds today that he can't raise an ineffective assistance claim arising at the *certiorari* stage because he had counsel as a matter of discretion rather than of right. The majority follows a well-trod path, but not, in my view, a path we are compelled to take.

II.

Ultimately, it doesn't matter that Mr. Coyle didn't have an affirmative, enforceable right to a lawyer grounded in a constitution or statute. What matters is that he had a lawyer—in this case, a lawyer appointed for him by the Office of Public Defender under

the authority granted to it by the Public Defender Act. The Office wasn't required by statute to appoint a lawyer for him, but it had and exercised the discretionary authority to appoint a lawyer for him in this case.

If Mr. Coyle didn't have counsel, it would be on him to keep his case alive and raise whatever arguments he wanted to raise. *Compare Gideon v. Cochran*, 370 U.S. 908 (1962) (granting *pro se* petition for writ of *certiorari*). Once Mr. Coyle had counsel, though, he had the right to rely on them to represent him effectively, or at least not ineffectively. Counsel's professional obligations to Mr. Coyle flowed regardless of the nature of the case or who was paying. *See* CP § 16-208(c)(1) ("The primary duty of a panel attorney is to the indigent individual represented by the panel attorney with the same effect and purpose as though privately engaged and without regard to the use of public funds to provide the service."); *see also Attorney Grievance Comm'n of Md. v. Willcher*, 340 Md. 217, 221–23 (1995) (disbarring attorney convicted for unlawful solicitation of money from an indigent client appointed under the Criminal Justice Act.); *Attorney Grievance Comm'n of Md. v. Smith*, 442 Md. 14, 29–32 (2015) (suspending prosecutor who failed to give required notice to victims); *Attorney Grievance Comm'n of Md. v. Hoerauf*, 469 Md. 179, 217–18 (2020) (disbarring attorney for multiple rules violations in the course of defending clients in criminal cases). But unlike a civil client, criminal defendants have no effective remedy against counsel, retained or paid, who commit malpractice or violate the Rules of Professional Conduct in the course of the representation. Sure, they can complain to the Attorney Grievance Commission, but professional discipline against the lawyer doesn't

(and can't) resurrect the claim or argument that the lawyer failed to raise in the criminal case. Whatever the outcome of the discipline case, a client who was convicted and sentenced stays convicted and sentenced. *See Attorney Grievance Comm'n of Md. v. Jones*, 484 Md. 155, 170–86 (2023); *Hoerauf*, 469 Md. at 193–207; *cf. Attorney Grievance Comm'n of Md. v. Taniform*, 482 Md. 272, 303–05 (2022) (client's vulnerability to removal from United States can be an aggravating factor in attorney discipline cases).

Wilson and *Flansburg* fill the gap. "'[T]he entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective.'" *Flansburg*, 345 Md. at 703 (*quoting Wilson*, 284 Md. at 671). *Wilson* established the first steps: a defendant has a constitutional right to counsel through a direct appeal and, importantly, effective counsel, 284 Md. at 669–71, and a circuit court has the authority under the Uniform Postconviction Procedure Act to remedy counsel's failure to file a notice of appeal by allowing a belated appeal. *Id*. at 671–80. *Flansburg* applied *Wilson* to a case involving a defendant entitled to counsel under the Public Defender Act in connection with a motion for modification of sentence and held that the right to counsel found in the Public Defender Act encompasses the right to effective assistance of that counsel to the same extent as the right to counsel arising under the federal or Maryland constitutions.[19] 345 Md. at 698–703.

[19] Portions of *Flansburg* relating to the time limits for granting a motion for modification of sentence have been superseded by statute, *see State v. Schlick*, 465 Md. 566, 576 n.3 (2019), but those statutory changes don't affect the portion of the Court's analysis relating to the right to effective counsel.

The only distinction between this case and *Flansburg* is that Mr. Flansburg's right to a public defender, on the posture of his particular case, was mentioned expressly in the Public Defender Act whereas Mr. Coyle's arose through the Office's discretionary authority. So at most, I suppose, Mr. Coyle had the right to ask the Public Defender to represent him. But he did ask, the Office exercised its discretionary authority and did agree to provide counsel for him. In my view, that's a distinction without a difference. I would hold that, under *Flansburg*, Mr. Coyle had the right to effective counsel in this case by virtue of the Office of Public Defender's decision to appoint counsel to represent him in connection with a petition for writ of *certiorari*.

III.

Having the right to effective counsel would give Mr. Coyle the corresponding opportunity to prove that his counsel was ineffective. And in that regard, I agree that the classic ineffective assistance analysis articulated in *Strickland v. Washington*, 466 U.S. at 687, should govern.[20] Although the majority holds that Mr. Coyle had no right to counsel or to bring an ineffectiveness claim, the opinion offers views on Mr. Coyle's ineffective assistance contentions, slip op. at 23–28, and I agree with my colleagues' core conclusions. I agree in full that on this record, counsel's performance fell below an objective standard of reasonableness. *Id*. at 26. There is no way that counsel's failure to file a petition for writ of *certiorari* could be viewed as a reasonable tactical decision—as my colleagues explain,

[20] Under *Strickland*, a defendant seeking to establish ineffective assistance of counsel must prove *first* that "counsel's performance was deficient," and *second* that "the deficient performance prejudiced the defense." 466 U.S. at 687.

counsel promised Mr. Coyle that he would seek *certiorari* review, that he viewed the petition as meritorious, and that he took all but one of the necessary steps to accomplish that objective. Mr. Coyle relied to his detriment on counsel's promises to file, and the petition was late not because counsel consciously and deliberately declined to file it, but solely because of technical and logistical failures on counsel's part. In a different case, where the record reflected, for example, that counsel never promised to file a *cert* petition, that counsel advised against filing one, or that counsel's analysis revealed no *cert*-worthy question, the failure to file might not represent deficient performance. Here, though, I agree that the first prong of *Strickland* was met.

The second *Strickland* prong, prejudice, seems a little trickier at first blush but ultimately has a straightforward solution. The circuit court found in definitive terms that Mr. Coyle wasn't prejudiced because "there [wa]s not the slightest possibility that the [Supreme Court] of Maryland would have granted Certiorari in this action had a Petition been timely filed." But I share my colleagues' reluctance, slip op. at 27 n.17, to be so certain. As eleven sets of law clerks (so far) can attest, my (in)ability to predict what our superior courts will do, at the *certiorari* stage or the merits stage of any case, is a long-running joke in the life of our Chambers.

To condition prejudice on a prediction of what the Supreme Court would do, though, is to frame the prejudice question too broadly. Nobody is claiming that the circuit court (or this Court or anyone) could order the Supreme Court of Maryland to review Mr. Coyle's case as a remedy for counsel's failure to file a timely *cert* petition. The only available

remedy here is the opportunity to file a belated petition, just as courts award, routinely, the opportunity to file a belated direct appeal. *See Rosales v. State*, 463 Md. 552, 568–70 (2019) (thirty-day deadline for filing notice of direct appeal is a claim-processing rule, not jurisdictional, and can be waived if not raised on appeal and the right to file belated appeal awarded as post-conviction relief); *Wilson*, 284 Md. at 671–80. The proper question, then, is whether counsel's deficient performance—his failure to file the petition on time—prejudiced the defense. *Strickland*, 466 U.S. at 687. And we know that it did. Even if the petition were a longshot at best, as nearly all are, a late petition is 100% certain to be denied, and for reasons that have nothing to do with its merits. If the likelihood of a grant went from fifteen percent or twelve percent or five percent to absolute zero due to counsel's performance, Mr. Coyle was prejudiced, at least to the extent that counsel's failure deprived him categorically of the opportunity to have the Supreme Court consider, if deny, the petition on the merits. That's a narrow failure that can be remedied fully by a narrow remedy.

Finding ineffective assistance in this case wouldn't open our courts to a deluge of *cert*-stage ineffective assistance claims. This analysis would apply only where the record revealed counsel's stated intention to seek discretionary review and a demonstrably deficient failure to follow through on it, and at most would put the Supreme Court to a trickle of additional petitions to consider. It may well be that Mr. Coyle's lacks merit, and I offer no views on whether it should or could or might be granted (my predictions wouldn't be worth much anyway). But the possibility that a petition could have merit and the impact

that it might have if it did makes this right worth viewing with appropriate breadth and remedying in this tailored manner.

I would, therefore, reverse the judgment of the circuit court, and I dissent, respectfully, from the decision to affirm it.