Appendix

FILED: October 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6970
(1:18-cv-00133-ELH)

BENJAMIN E. VANCE

Petitioner - Appellant

v.

WARDEN FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF THE STATE OF MARYLAND

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6970

BENJAMIN E. VANCE,

Petitioner - Appellant,

v.

WARDEN FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Ellen L. Hollander, District Judge. (1:18-cv-00133-ELH)

Submitted: October 20, 2020 Decided: October 23, 2020

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and SHEDD, Senior Circuit Judge.

Dismissed and remanded by unpublished per curiam opinion.

Benjamin E. Vance, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Benjamin E. Vance seeks to appeal the district court's order dismissing his 28 U.S.C. § 2254 petition. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). "Ordinarily, a district court order is not final until it has resolved *all* claims as to all parties." *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015) (internal quotation marks omitted).

Our review of the record reveals that the district court did not adjudicate all of the claims raised in Vance's § 2254 petition. *Id.* at 696-97. More specifically, although the district court acknowledged Vance's claim that the state prosecutor discriminated based on gender in exercising peremptory challenges against prospective jurors, the district court failed to assess and resolve that claim. We therefore conclude that the order Vance seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we dismiss the appeal for lack of jurisdiction and remand to the district court for consideration of the unresolved claim. *Id.* at 699.

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 AND REMANDED

FILED: November 5, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6970
(1:18-cv-00133-ELH)

BENJAMIN E. VANCE

Petitioner - Appellant

v.

WARDEN FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF THE STATE OF MARYLAND

Respondents - Appellees

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

FILED: November 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6970
(1:18-cv-00133-ELH)

BENJAMIN E. VANCE

Petitioner - Appellant

v.

WARDEN FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF THE STATE OF MARYLAND

Respondents - Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc and the motion to vacate sentence and remand. 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: Chief Judge Gregory, Judge Diaz, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: December 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6970
(1:18-cv-00133-ELH)

BENJAMIN E. VANCE

Petitioner - Appellant

v.

WARDEN FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF THE STATE OF MARYLAND

Respondents - Appellees

M A N D A T E

The judgment of this court, entered 10/23/2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN E. VANCE,

Petitioner,

v.

WARDEN FRANK B. BISHOP, JR., ATTORNEY GENERAL FOR THE STATE OF MARYLAND,

Respondents.

Civil Action No.: ELH-18-133

ORDER

Benjamin Vance, the self-represented petitioner, filed a Petition for Writ of Habeas Corpus (the "Petition"). ECF 1. By Memorandum Opinion (ECF 16) and Order (ECF 17) docketed on May 22, 2020, I dismissed the Petition and I declined to issue a Certificate of Appealability. However, Vance was advised that he could ask the United States Court of Appeals for the Fourth Circuit to issue such a certificate. ECF 16 at 17.

On June 15, 2020, Vance filed in the Fourth Circuit a motion for a certificate of appealability. ECF 21 at 2-7 ("Motion"). The Fourth Circuit has construed the Motion as a notice of appeal. ECF 21 at 1. And, it forwarded the Motion to this court "for appropriate disposition," pursuant to Fed. Rule of App. Proc. 4(d). *Id.* at 1.

At the time petitioner filed his motion for certificate of appealability with the Fourth Circuit, this Court had recently declined to issue a certificate of appealability. *See* ECF 16, ECF 17. I discern no basis for this Court to grant the certificate, for the reasons previously stated.

Accordingly, it is this 21st day of October, 2020, by the United States District Court for the District of Maryland, hereby ORDERED that Petitioner's motion for certificate of appealability (ECF 21) IS DENIED, without prejudice to his right to seek such relief from the Fourth Circuit.

/s/
Ellen L. Hollander
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN E. VANCE,

Petitioner,

v.

WARDEN FRANK B. BISHOP, JR., THE ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents.

Civil Action No.: ELH-18-133

MEMORANDUM

Petitioner, Benjamin Vance, a prisoner in the State of Maryland, filed for habeas corpus relief under 28 U.S.C. § 2254, challenging his conviction for murder and related offenses. ECF 1. He asserted several grounds for relief. *Id.* I denied the petition in a Memorandum Opinion and Order of May 22, 2020. ECF 16; ECF 17. In addition, I declined to issue a certificate of appealability. *Id.*

Vance noted an appeal to the United States Court of Appeals for the Fourth Circuit. ECF 18. By unpublished per curiam opinion dated October 23, 2020 (ECF 23-1), the Fourth Circuit dismissed Vance's appeal and remanded the matter to this court for consideration of Vance's claim that "the state prosecutor discriminated based on gender in exercising peremptory challenges against prospective jurors." ECF 23-1 at 2. Because the appellate court concluded that this court did not address that claim, it viewed petitioner's appeal as "neither a final order nor an appealable interlocutory or collateral order" and remanded to this court for "consideration of the unresolved claim." *Id.*

I incorporate by reference, in its entirety, the Memorandum Opinion of May 22, 2020. *See* ECF 16. The discussion set forth below merely augments and supplements that earlier opinion.

The "unresolved claim" referenced by the Fourth Circuit is, in actuality, part of petitioner's *Batson* claim. *See Batson v. Kentucky*, 476 U.S. 79 (1986). I noted that petitioner claimed that African American women had been unlawfully excluded from the jury. *See* ECF 16 at 10. Further, in an unreported opinion (ECF 11-1), the Maryland Court of Special Appeals determined that the *Batson* claim was not preserved for appellate review and was, in any event, without merit. *Id.* at 7-10; *see* ECF 16 at 4-6, 11. The Maryland appellate court stated, ECF 11-1 at 9-10:

> We agree that [Vance's] *Batson* challenge is not preserved. "[A] defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Gilchrest v. State*, 340 Md. 606, 616-18 (1995) (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)); *see also State v. Stringfellow*, 425 Md. 461, 469-70 (2012) (noting that a party waives his voir dire objection going to the inclusion or exclusion of a prospective juror by unqualifiedly accepting the seated jury panel at the conclusion of the jury selection process). Here, the trial court denied the appellant's *Batson* challenge and, after the selection of two alternates, [Vance] agreed without qualification that he was satisfied with the final jury panel. [Vance's] claim, therefore, is waived. *See Foster v. State*, 304 Md. 439, 450-51 (1985). . . .
>
> However, even if this claim were preserved, we would nevertheless reject it. We consider a trial court's *Batson* decisions using a deferential standard of review. . . . This deferential standard of review applies not only to the trial court's decision at the end of a three-step *Batson* analysis, but also to the initial determination of whether or not a defendant has made a *prima facie* case. *See e.g., United States v. Martinez*, 621 F.3d 101, 109-10 (2d Cir. 2010); *State v. Taylor*, 694 A.2d 977, 980 (N.H. 1997).
>
> In this case, the trial court concluded that Vance had failed to make a *prima facie* showing of intentional discrimination, noting that eight female African Americans were members of Vance's jury and that the jury panel was "mostly" African American. The State had one more strike but did not use it, a fact that supports the trial court's decision. *See Taylor*, 694 A.2d at 980.

In my Memorandum Opinion (ECF 16), I observed that the "rejection" of petitioner's *Batson* claim by the Maryland Court of Special Appeals "does not represent an unreasonable application of federal law and therefore is not a viable basis for federal habeas relief." ECF 16 at

11. Further, this court determined that the Maryland appellate court did not err in concluding that "peremptory challenges to potential jurors of the same race is not enough alone to support a valid *Batson* challenge" . . . . *Id.* In so stating, this court considered and rejected petitioner's *Batson.*

If petitioner's *Batson* claim regarding the race of potential jurors was both unpreserved for appellate review and without merit, it follows that his claim that women of color were improperly challenged was also unpreserved and otherwise without merit. In other words, if petitioner did not have a valid *Batson* claim regarding the exclusion of African Americans generally, then he also did not have a valid claim regarding the exclusion of African American *women.* Indeed, the Maryland appellate court observed, ECF 11-1 at 8:

> The basis for [Vance's] *Batson* challenge is that the nine prospective jurors stricken by the State were female African Americans. Other than this bare statistic, the appellant tells us nothing about the composition of the venire as a whole or the racial or gender-based composition of the final jury panel of twelve plus two alternates. We know from the observation of the trial judge, however, that the final jury panel contained eight female African Americans and that the panel as a whole was mostly African American. At the end of jury selection, the State had one strike remaining, which it did not use.

In sum, this court was asked to address petitioner's *Batson* claim regarding the exclusion of African American women from the jury pool. I conclude that Petitioner's claim regarding the alleged exclusion of African American women does not present a viable basis for federal habeas relief. *See* 28 U.S.C. § 2254(d)(1); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011). And, for the reasons stated in my Memorandum Opinion of May 22, 2020 (ECF 16), I decline to issue a certificate of appealability.

A separate Order follows.

December 1, 2020
Date

/s/
Ellen L. Hollander
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN E. VANCE,

Petitioner,

v.

WARDEN FRANK B. BISHOP, JR., THE ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents.

Civil Action No.: ELH-18-133

ORDER

For the reasons stated in the foregoing Memorandum, it is this 1st day of December, 2020, by the United States District Court for the District of Maryland, hereby ORDERED:

1. Federal habeas relief IS DENIED with respect to Petitioner's claim that African American women were unlawfully excluded from the jury, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986);
2. Relief is also DENIED as to all other asserted claims, for the reasons previously provided in this court's Memorandum Opinion of May 22, 2020 (ECF 16);
3. A certificate of appealability SHALL NOT issue;
4. The Clerk SHALL PROVIDE a copy of the foregoing Memorandum and a copy of this Order to Petitioner and to counsel for respondents; and
5. This case SHALL REMAIN CLOSED.

/s/
Ellen L. Hollander
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN E. VANCE,

Petitioner,

v.

WARDEN FRANK B. BISHOP, JR., THE ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents.

Civil Action No.: ELH-18-133

MEMORANDUM OPINION

The self-represented Petitioner, Benjamin E. Vance, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, naming Warden Frank Bishop, Jr. and the Attorney General of Maryland as Respondents. ECF 1 (the "Petition"). He challenges his conviction in the Circuit Court for Prince George's County, Maryland for murder and related offenses. *Id.* The Petition is supported by exhibits. ECF 1-1.

Respondents assert that three of the four grounds raised by Vance are unexhausted and the Petition must therefore be dismissed. ECF 9. The Court advised Vance of the legal implications of Respondents' assertion and of his right to file a reply indicating whether he wanted to withdraw any unexhausted claims or, alternatively, to demonstrate why the merits of the claims should nevertheless be reached by this court. ECF 12; ECF 13. Vance filed his reply (ECF 14), along with an exhibit (ECF 14-1), withdrawing his second claim. But, he argues that the other three claims warrant this court's consideration on the merits. ECF 14.

The court finds no need for an evidentiary hearing. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2018); *see also*

the handgun offense. All other charges merged. *Id.* Vance's conviction was affirmed by the Maryland Court of Special Appeals on February 12, 2014. *See Vance v. State*, No. 448, Sept. Term 2013, ECF 9-3; ECF 11-1. The mandate issued on April 4, 2014. ECF 9-1 at 16. The Maryland Court of Appeals denied certiorari on June 24, 2014. ECF 9-1 at 16-17; *see also Vance v. State*, 438 Md. 741 (2014).

On direct appeal, Vance raised the following claims: (1) the trial court erred when it denied defense counsel's *Batson* challenge; (2) the trial court erred when it did not allow the admission of prior inconsistent statements made by David Hester; (3) the trial court erred when it allowed prior consistent statements by Travis Bonner; (4) the evidence at trial was insufficient to sustain a conviction for unlawful use of a handgun because the State did not provide evidence that the weapon used was a handgun; and (5) the trial court erred when it permitted a firearms examiner to use a handgun capable of firing 9mm cartridges as a demonstrative device and erred in allowing the prosecutor to use a toy handgun as a demonstrative exhibit in rebuttal argument. ECF 9-2, Appellant's Brief.

In affirming the conviction, the Maryland Court of Special Appeals issued a 25-page unreported opinion. It concluded that Vance's *Batson* claim was not preserved for appellate review and was without merit. The court said, ECF 11-1 at 7-10:

> Under *Batson v. Kentucky*, 476 U.S. 79 (1986) a party may not use a peremptory challenge to exclude potential jurors based on a juror's race or gender. To trigger a full *Batson* analysis, the objecting party must make a *prima facie* showing of intentional discrimination. *Id.* at 94. If the trial court determines that the *prima facie* case has been established, the burden shifts to the party exercising the strike to offer a racially neutral explanation and, finally, the trial court will then determine whether purposeful discrimination has occurred. *Id.* at 94-97; *see Khan v. State*, 213 Md. App. 554, 567-71 (2013) (applying the three-step *Batson* formula to review the trial court's determination regarding the exercise of peremptory challenges by the defendant).

However, if the trial judge finds that the objecting party has failed to establish a *prima facie* case, "there is no obligation on the prosecutor to offer any explanation for the use of a peremptory challenge and no entitlement of the defendant to a hearing on the issue." *Gorman v. State*, 315 Md. 402, 411 (1989), *vacated on other grounds*, 499 U.S. 971 (1991). In other words, the moving party must establish a *prima facie* case in order to trigger any further inquiry by the trial court. *Bailey v. State*, 84 Md. Ap. 323, 327 (1990). Absent a *prima facie* case, the trial court has no obligation to conduct a further inquiry. A trial court's decision as to whether a moving party has made a *prima facie* case will not be reversed unless it is clearly erroneous, *Whittlesey v. State*, 340 Md. 30, 48 (1995), or a clear abuse of discretion, *Bailey*, 84 Md. App. at 326, 329. *See also Bridges v. State*, 116 Md. App. 113, 134 (1997).

The basis for [Vance's] *Batson* challenge is that the nine prospective jurors stricken by the State were female African Americans. Other than this bare statistic, the appellant tells us nothing about the composition of the venire as a whole or the racial or gender-based composition of the final jury panel of twelve plus two alternates. We know from the observation of the trial judge, however, that the final jury panel contained eight female African Americans and that the panel as a whole was mostly African American. At the end of jury selection, the State had one strike remaining, which it did not use.

We agree that [Vance's] *Batson* challenge is not preserved. "[A] defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Gilchrest v. State*, 340 Md. 606, 616-18 (1995) (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)); *see also State v. Stringfellow*, 425 Md. 461, 469-70 (2012) (noting that a party waives his voir dire objection going to the inclusion or exclusion of a prospective juror by unqualifiedly accepting the seated jury panel at the conclusion of the jury-selection process). Here, the trial court denied the appellant's *Batson* challenge and, after the selection of two alternates, [Vance] agreed without qualification that he was satisfied with the final jury panel. [Vance's] claim, therefore, is waived. . . .

However, even if this claim were preserved, we would nevertheless reject it. We consider a trial court's *Batson* decisions using a deferential standard of review. . . . This deferential standard of review applies not only to the trial court's decision at the end of a three-step *Batson* analysis, but also to the initial determination of whether or not a defendant has made a *prima facie* case. *See e.g., United States v. Martinez*, 621 F.3d 101, 109-10 (2d Cir. 2010); *State v. Taylor*, 694 A.2d 977, 980 (N.H. 1997).

In this case, the trial court concluded that Vance had failed to make a *prima facie* showing of intentional discrimination, noting that eight female

> African Americans were members of Vance's jury and that the jury panel was "mostly" African American. The State had one more strike but did not use it, a fact that supports the trial court's decision. *See Taylor*, 694 A.2d at 980.

The intermediate appellate court found Vance's claim regarding the exclusion of Hester's prior inconsistent statements partially meritorious because the trial court's decision excluding the statements was erroneous. ECF 11-1 at 12. However, the court found that the error was harmless because the substance of the excluded evidence, which defense counsel used during cross-examination, was known to the jury and the evidence against Vance was substantial. *Id.* at 13. According to the court, because "a reasonable jury, beyond a reasonable doubt, would not have been influenced by the excluded evidence," the trial court's error was harmless. *Id.* at 12-13.

The Maryland Court of Special Appeals also found a waiver as to Vance's claim that the trial court erred when it allowed into evidence the prior consistent statements made by Bonner during his grand jury testimony. ECF 11-1 at 16-17. The court noted, *id.* at 17:

> It is true that the State originally argued for the admission of Bonner's statements under Md. Rule 5-802.1(B) and that the trial court agreed. However, when it came time to tell the jury what to do with this evidence, the State changed course and asked that the jury's use of these prior statements be restricted to impeachment. It was the appellant, not the State, who insisted and ultimately persuaded the trial court to tell the jury that it could use these statements as substantive evidence. In our view, although the initial basis for admission was erroneous, its appellate value disappeared when Vance asked for and received a jury instruction saying that the prior statements of Hester and Bonner could be used as substantive evidence. A party cannot ask for something at trial, receive it, and then complain on appeal that the trial judge gave him what he wanted, even if doing so is otherwise erroneous. . . . As a consequence, whether any or all of the prior statements of these witnesses should have been admitted as substantive evidence, limited to impeachment, or not admitted at all is waived.

With regard to Vance's claim that the evidence was insufficient to support a conviction for use of a handgun because no gun was ever recovered, the Court of Special Appeals agreed with the State's position that the circumstantial evidence that the victim was shot with a handgun was sufficient to support the jury's finding of guilt. ECF 11-1 at 19-22.

Vance's final claim, regarding use of demonstrative evidence at trial, was also rejected by the appellate court. The court observed that the State's expert witness "used a gun of the same caliber of both (1) the only bullets and (2) the only shell casings found at the scene" and the demonstration for the jury was of "the cartridge ejection process of the weapon, as he earlier described in his testimony about semi-automatic guns." *Id.* at 24. Under applicable Maryland law, '"demonstrative evidence helps jurors understand the testimony, but is otherwise unrelated to the case.'" *Id.* (citing J. Murphy, Maryland Evidence Handbook, § 1101 at 526).

In addition, the court said, ECF 11-1 at 24: "The demonstration assisted the jury in understanding how, where, and why shell casings would be found at the scene of this particular killing and that the gun used to kill Speaks likely was a semi-automatic and not a revolver." *Id.* The court also described the State's use of a toy gun during closing argument to explain how two cartridges ended up inside of Speaks's car as "a perfectly proper use of demonstrative evidence." *Id.* at 25.

As noted, on or about June 24, 2014, Vance's petition for writ of certiorari was denied by the Maryland Court of Appeals. *See Vance v. State*, 438 Md. 741 (2014).

On October 20, 2014, Vance filed a petition for writ of habeas corpus with the Circuit Court for Prince George's County, asserting that his custody was unlawful because the trial court did not properly dispose of his pre-trial motion to suppress. ECF 9-3 at 2. The circuit court denied the petition, without a hearing, on November 13, 2014,. *Id.*

On November 24, 2014, Vance filed an appeal of the denial of habeas relief. His appeal was dismissed by the Maryland Court of Special Appeals on May 5, 2016 (ECF 9-3), because "Vance's habeas corpus petition challenged the legality of his criminal conviction and sentence"

and "Md. Rule 8-602(a)(1) . . . provides that '[o]n motion or on its own initiative, the Court may dismiss an appeal . . . .[if] the appeal is not allowed by the rules or other law.'" *Id.* at 4.

Maryland's Uniform Post Conviction Procedure Act provides that if a person elects to pursue a claim by seeking a writ of habeas corpus, or other remedy outside of the procedures outlined by the Post Conviction Procedure Act, that person may not appeal the decision to the Court of Appeals or the Court of Special Appeals. *Id.* at 4-5 (citing Md. Code (2001, 2008 Repl. Vol.), Crim. Pro. Art. § 7-107(b)). The appellate court also noted that the lower court properly dismissed the petition because Vance's claim "raises the issue of a pretrial motion to suppress evidence which should have been raised during his first appeal." ECF 9-3 at 6, n. 3.

Vance filed his federal habeas petition in this court on January 12, 2018. ECF 1. He raises four claims: (A) the conviction was unconstitutional under *Batson v. Kentucky*, 476 U.S. 79 (1986), because the State challenged potential jurors solely on the basis of race; (B) his constitutional rights were violated when the trial court admitted prior inconsistent statements; (C) his constitutional rights were violated because the trial court did not rule on his motion to suppress and, as a result, unreliable identification evidence was admitted; and (D) his constitutional right to a speedy trial was violated. ECF 1 at 12-26.

As noted, respondents assert that Vance has not exhausted State remedies with respect to all but his first claim, and argues that, absent Vance's withdrawal of his unexhausted claims, the entire Petition should be dismissed. ECF 9. In his reply, Vance withdrew only his second claim (Claim "B"). ECF 14.

II. Standard of Review

not demonstrate the type of prejudice warranting consideration of the merits of a procedurally defaulted claim. Federal habeas relief is denied on this claim.

C. Certificate Of Appealability

When a district court dismisses a habeas petition solely on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.' " *Rose v. Lee,* 252 F.3d 676, 684 (4th Cir. 2001) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). However, Vance is advised that he may ask the United States Court of Appeals for the Fourth Circuit to issue such a certificate. *See 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).

A separate Order follows.

May 22, 2020
Date

/s/
Ellen L. Hollander
United States District Judge

of federal law is different from an incorrect application of federal law." *Id.* at 785 (internal quotation marks omitted).

Pursuant to § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question," a federal habeas court may not conclude that the state court decision was based on an unreasonable determination of the facts. *Id.* "[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly." *Renico v. Lett,* 559 U.S 766, 773 (2010).

Further, the habeas statute provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "Where the state court conducted an evidentiary hearing and explained its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of error on the state court's part." *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010). This is especially true where state courts have "resolved issues like witness credibility, which are 'factual determinations' for purposes of Section 2254(e)(1)." *Id.* at 379.

III. Discussion

A. *Batson* claim

Vance alleges that the prosecutor used peremptory challenges to strike African American women from the jury in violation of his right to due process and equal protection under the Fourteenth Amendment. "[T]he Equal Protection Clause forbids the prosecutor to challenge

potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), *as modified by Powers v. Ohio*, 499 U.S. 400 (1991). Once a *Batson* objection is raised, the prosecutor is given the opportunity to offer "a race-neutral explanation" and upon finding the explanation to be "race-neutral" the trial court may deny the objection. *See Thaler v. Haynes*, 559 U.S. 43, 44-45 (2010).

A three step process was established by *Batson*. "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'" *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 242, 478 (2008)).

Respondents concede that Vance's *Batson* claim has been properly exhausted as it was presented to the Maryland Court of Special Appeals on direct appeal. The Court of Special Appeals found the claim had not been preserved for appellate review but, in any event, that it lacked merit. *See* ECF 11-1 at 7-10. The appellate court's rejection of this claim does not represent an unreasonable application of federal law and therefore is not a viable basis for federal habeas relief. The view, expressed by the trial court and endorsed by the Maryland Court of Special Appeals, that peremptory challenges to potential jurors of the same race is not enough alone to support a valid *Batson* challenge, is without error. Relief is denied on this claim.

B. Remaining Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENJAMIN E. VANCE,

Petitioner,

v.

WARDEN FRANK B. BISHOP, JR., THE ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents.

Civil Action No.: ELH-18-133

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 22nd day of May, 2020, by the United States District Court for the District of Maryland, hereby ORDERED that:

1. The petition for writ of habeas corpus IS DISMISSED;
2. A certificate of appealability SHALL NOT ISSUE;
3. The Clerk SHALL PROVIDE a copy of the foregoing Memorandum Opinion and a copy of this Order to petitioner and to counsel for Respondents; and
4. The Clerk SHALL CLOSE this case.

/s/
Ellen L. Hollander
United States District Judge

UNREPORTED

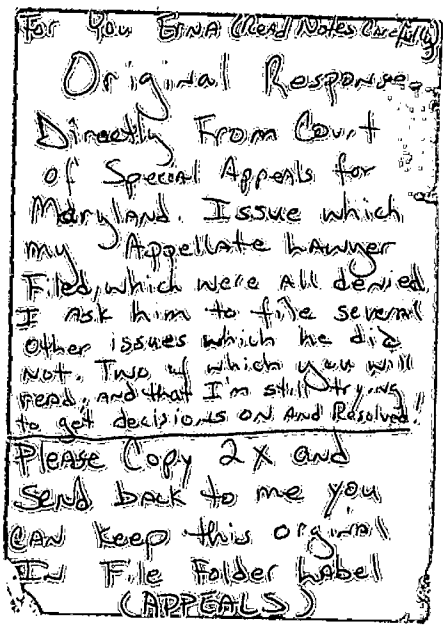
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 448

September Term, 2013

ON MOTION FOR RECONSIDERATION


For You Erna (Read Notes Carefully)
Original Response
Directly From Court
of Special Appeals for
Maryland. Issue which
my Appellate Lawyer
Filed, which were all denied.
I ask him to file several
other issues which he did
not. Two of which you will
read, and that I'm still trying
to get decisions on And Resolved!
Please Copy 2 x and
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(APPEALS)

BENJAMIN VANCE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Rubin, Ronald B.
(Specially Assigned),

JJ.

Opinion by Rubin, J.

Filed: April 4, 2014

On May 11, 2011, James Speaks, Jr. died after being shot three times at close range. His death occurred during a robbery of sixty dollars' worth of marijuana. Speaks was found by paramedics lying some thirteen feet from the car he was driving on the night of the murder, a green Cadillac. Two of the shots were fired into his back, apparently as he tried to flee from the driver's seat of his car. He was shot at least one time while in the car.

Benjamin Vance, the appellant or "Vance," was arrested for Speaks' murder on May 20, 2011. The appellant's thumbprint was found on the exterior passenger handle of the victim's car. Two witnesses placed the appellant in the victim's car at the time of the shooting. We are asked to reverse the appellant's convictions. We decline to do so.

In the Circuit Court for Prince George's County, the appellant was convicted after a jury trial of felony-murder, robbery with a dangerous weapon, and use of a handgun. He was acquitted of first-degree premeditated murder. The trial judge sentenced the appellant to life for felony-murder and twenty years (concurrent) for his use of a handgun. The robbery count was merged for sentencing purposes.

The appellant filed a timely appeal and raises five questions, which we quote:

1. "Did the trial court err in denying defense counsel's *Batson* challenge where the State used all nine of its strikes against African American females?"

2. "Did the trial court err in preventing the admission of prior inconsistent statements made by David Hester?"

3. "Did the trial court err in admitting purported prior consistent statements made by Travis Bonner?"

4. "Was the evidence insufficient to sustain the conviction for use of a handgun in the commission of a felony?"

into the Tahoe and heard Vance scream, "get out of here." Vance had marijuana with him when he reentered the Tahoe.

Bonner then drove Hester and Vance to the Minnesota Avenue Metro station, where they got out of his car. Both Vance and Hester appear in a surveillance video on the platform of this Metro station on May 11, 2011.

At approximately 7:00 p.m., the Prince George's County police responded to 4451 Wheeler Road in Oxon Hill where they found Speaks lying on the pavement suffering from multiple gunshot wounds. Speaks was transported to United Medical Center and pronounced dead upon arrival.

The Jury Selection Issue

Jury selection took place on January 29, 2013. After twelve jurors were seated, the defense, in response to a query from the trial judge, announced that it was satisfied. Defense counsel then asked to approach the bench. The following exchange occurred:

DEFENSE COUNSEL:	Your Honor, I'll make a motion under both Batson versus Kentucky and J.E.B., ex rel., versus Alabama. The State has used nine strikes. Each of their nine strikes have been used against an African-American, which is a prima facie case of racial-based exclusion under the Batson case. Each of their –
THE COURT:	Well, give me the numbers of the nine. Which is the first one?
DEFENSE COUNSEL:	They struck – this is not in order, Your Honor, but 16, 18, 19, 1, 23, 10, 14, 34 and 35, which are not only all African-American jurors but all female jurors. So there's a pattern.
THE COURT:	There's a lot of females on the panel.

DEFENSE COUNSEL:	I understand, Your Honor, but they've used a 100 percent of their strikes on African-American and 100 percent of their strikes on females. I think that's a prima facie case of both gender and racial bias.
THE COURT:	There's eight females, African-Americans, on the panel who he did not strike
DEFENSE COUNSEL:	I understand that, Your Honor, but –
THE COURT:	So I don't think that's going to work for you because there's eight on there.
DEFENSE COUNSEL:	Just for purposes of the record, I think I've made a prima facie case of prejudice on behalf of the State.
THE COURT:	The only other basis would be for African-Americans What race are they? Most are African-Americans. The panel is mostly African-American. That's the problem.
DEFENSE COUNSEL:	I understand that, Your Honor.
THE COURT:	But for the record, that's denied. Thank you.

After the selection of two alternates, the trial judge asked whether the parties were satisfied with the panel. Both the State and defense counsel said they were satisfied.

The appellant contends on appeal that the trial judge erred in denying his *Batson* challenge based both on race and gender. The State counters that no *Batson* challenge has been preserved and that, if preserved, the claim is without merit.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a party may not use a peremptory challenge to exclude potential jurors based on a juror's race or gender. To trigger a full *Batson* analysis, the objecting party must make a *prima facie* showing of intentional discrimination. *Id.* at 94. If the trial court determines that the *prima facie* case has been established, the burden

shifts to the party exercising the strike to offer a racially neutral explanation and, finally, the trial court will then determine whether purposeful discrimination has occurred. *Id.* at 94-97; *see Khan v. State*, 213 Md. App. 554, 567-71 (2013) (applying the three-step *Batson* formula to review the trial court's determination regarding the exercise of peremptory challenges by the defendant).

However, if the trial judge finds that the objecting party has failed to establish a *prima facie* case, "there is no obligation on the prosecutor to offer any explanation for the use of a peremptory challenge and no entitlement of the defendant to a hearing on the issue." *Gorman v. State*, 315 Md. 402, 411 (1989), *vacated on other grounds*, 499 U.S. 971 (1991). In other words, the moving party must establish a *prima facie* case in order to trigger any further inquiry by the trial court. *Bailey v. State*, 84 Md. App. 323, 327 (1990). Absent a *prima facie* case, the trial court has no obligation to conduct a further inquiry. A trial court's decision as to whether a moving party has made a *prima facie* case will not be reversed unless it is clearly erroneous, *Whittlesey v. State*, 340 Md. 30, 48 (1995), or a clear abuse of discretion, *Bailey*, 84 Md. App. at 326, 329. *See also Bridges v. State*, 116 Md. App. 113, 134 (1997).

The basis for the appellant's *Batson* challenge is that the nine prospective jurors stricken by the State were female African Americans. Other than this bare statistic, the appellant tells us nothing about the composition of the venire as a whole or the racial or gender-based composition of the final jury panel of twelve plus two alternates. We know from the observations of the trial judge, however, that the final jury panel contained eight female African Americans and that the panel as a whole was mostly African American. At the end of jury selection, the State had one strike remaining, which it did not use.

We agree that the appellant's *Batson* challenge is not preserved. "[A] defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Gilchrist v. State*, 340 Md. 606, 617-18 (1995) (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)); *see also State v. Stringfellow*, 425 Md. 461, 469-70 (2012) (noting that a party waives his voir dire objection going to the inclusion or exclusion of a prospective juror by unqualifiedly accepting the seated jury panel at the conclusion of the jury-selection process). Here, the trial court denied the appellant's *Batson* challenge and, after the selection of two alternates, the appellant agreed without qualification that he was satisfied with the final jury panel. The appellant's claim, therefore, is waived. *See Foster v. State*, 304 Md. 439, 450-51 (1985) ("This Court has repeatedly taken the position that where a party has previously made an objection with regard to a prospective juror or prospective jurors, and thereafter, at the conclusion of the jury selection process, unequivocally states that the jury as selected is acceptable, such party has withdrawn or abandoned his prior objection.").

However, even if this claim were preserved, we would nevertheless reject it. We consider a trial court's *Batson* decisions using a deferential standard of review. *Khan*, 213 Md. App. at 568 (citing *Bailey*, 84 Md. App. at 329) ("In reviewing a trial judge's *Batson* decision, appellate courts do not presume to second-guess the call by the 'umpire on the field' either by way of *de novo* fact finding or by way of independent constitutional judgment."). This deferential standard of review applies not only to the trial court's decision at the end of a three-step *Batson* analysis, but also to the initial determination of whether or not a defendant has made a *prima facie* case.

See, e.g., United States v. Martinez, 621 F.3d 101, 109-10 (2d Cir. 2010); *State v. Taylor*, 694 A.2d 977, 980 (N.H. 1997).

In this case, the trial court concluded that Vance had failed to make a *prima facie* showing of intentional discrimination, noting that eight female African Americans were members of the Vance's jury and that the jury panel was "mostly" African American. The State had one more strike but did not use it, a fact that supports the trial court's decision. *See Taylor*, 694 A.2d at 980.

The mere fact that the State used its strikes in this case against female African Americans tells us nothing of constitutional significance. *Bailey,* 84 Md. App. at 330-33; *see Johnson v. Commonwealth*, 529 S.E.2d 769, 780-81 (Va. 2000) (State's use of peremptory strikes against African Americans failed to show *prima face* case under *Batson* when the ultimate jury panel was predominately African American). The appellant has not provided us with any other information about the jury selection process, especially the racial and gender composition of the venire as a whole and the panel of twelve trial jurors and thee two alternates. *See Mora v. State*, 355 Md. 639, 650 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed."). We expressly rejected this very sort of challenge as wholly insufficient in *Bailey* and have been presented with no basis to depart from the reasoning of that decision. Under the facts presented in this case we easily conclude that the trial court properly denied the appellant's *Batson* challenge.

The Exclusion of the Transcript of Hester's Inconsistent Statements

Md. Rule 5.802.1(a) allows the prior inconsistent statements of a witness to be admitted at trial as substantive evidence if certain foundation requirements are met. The appellant contends that the trial court erred in declining to allow him to admit into evidence Hester's handwritten statement he gave to the police on May 19, 2011,[2] as well as the transcript of Hester's police interview, also given on May 19, 2011.[3] Some of the statements Hester made in both writings were inconsistent with portions of his trial testimony. The State concedes that the trial court erred in this regard. We agree that the trial judge erred in declining to admit these written statements into evidence since they fell squarely within Md. Rule 5.802.1(a) and, therefore, were admissible as substantive evidence. *McClain v. State*, 425 Md. 238, 249-50 (2012); *Thomas v. State*, 213 Md. App. 388, 405-07 (2013).

The State contends, however, that this erroneous evidentiary ruling is harmless because Hester, during his trial testimony, was referred by counsel to both written statements and conceded on cross-examination that he made the inconsistent statements contained in those documents. Our own review of the trial transcript shows that the jury was made aware of Hester's prior statements and that defense counsel had a copy of the transcript of the statements. Holding this transcript, in front of the jury, defense counsel cross-examined Hester, at length and nearly verbatim from that transcript, pointing out the inconsistencies with his trial testimony. On re-direct, Hester again admitted that he had initially lied to the police. This point was driven

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[2] Hester's handwritten statement is State's Exhibit 75. It was marked for identification by the State and shown to Hester during direct examination.

[3] The transcript of Hester's tape-recorded statement is Defense Exhibit 4.