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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6780

MARK FRENCH,

Petitioner - Appellant,

v.

FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF MARYLAND,

Respondents - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:18-cv-00879-RDB)

Submitted: November 19, 2020 Decided: November 23, 2020

Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Mark French, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

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

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

DISMISSED

FILED: November 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6780
(1:18-cv-00879-RDB)

MARK FRENCH

Petitioner - Appellant

v.

FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF MARYLAND

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

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

FILED: November 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6780, Mark French v. Frank Bishop, Jr.
1:18-cv-00879-RDB

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

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PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

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FILED: December 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6780
(1:18-cv-00879-RDB)

MARK FRENCH

Petitioner - Appellant

v.

FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF MARYLAND

Respondents - Appellees

O R D E R

The court grants the motion for extension and extends the time for filing a petition for rehearing to 12/28/2020.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Note: Received in Legal Mail on Dec 29. 20
At R.C.I. - cell 5-B-3

FILED: January 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6780
(1:18-cv-00879-RDB)

MARK FRENCH

Petitioner - Appellant

v.

FRANK B. BISHOP, JR.; ATTORNEY GENERAL OF MARYLAND

Respondents - Appellees

M A N D A T E

The judgment of this court, entered November 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

Received Jan 22, 2021 at 5:07 PM RCI
5-B-3

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APPENDIX B

pages 1-20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK FRENCH	*	
Petitioner	*	
v	*	Civil Action No. RDB-18-879
FRANK B. BISHOP, JR. and THE ATTORNEY GENERAL OF THE STATE OF MARYLAND	*	
Respondents	*	

***

MEMORANDUM OPINION

Petitioner Mark French filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for attempted first degree murder, robbery, and two counts of use of a handgun in a felony from the Circuit Court for Baltimore County, Maryland. ECF 1 at 1. Respondents filed an Answer asserting that the one claim raised by French does not merit federal habeas relief because the claim concerns a matter of State law only and any constitutional claim implied by the petition has been waived. ECF 4 at 29. French filed a Reply disputing Respondents' assertion. ECF 20.

No hearing is necessary to resolve the matters pending before this Court. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2016); *see also Fisher v. Lee*, 215 F. 3d 438, 455 (4th Cir. 2000) (petitioner not entitled to a hearing under 28 U.S.C. §2254(e)(2)). For the reasons stated below, the Petition for Writ of Habeas Corpus shall be denied and a certificate of appealability shall not issue.

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Background

I. Trial and Conviction

French was tried by a jury in the Circuit Court for Baltimore County in connection with the October 31, 1993[1] armed robbery of Brian Sherry and the shooting of police officer James Beck. Evidence produced at trial through the testimony of Brian Sherry established that he was robbed after a woman in a pick-up truck that was following him down Pulaski Highway pointed a gun out of the window and demanded he turn down Chesaco Avenue. ECF 4-2 at 167. When Mr. Sherry stopped his car in a church parking lot the woman, who he later identified as Heather Kendall, came up to his car and demanded his wallet, but Mr. Sherry refused. *Id.* at 169-70. Another car pulled in behind them and the other driver ran to the side of Mr. Sherry's car, stuck a black automatic pistol through the window and demanded that Mr. Sherry do what Ms. Kendall told him to do. *Id.* at 170-71. Mr. Sherry gave Ms. Kendall his wallet which contained $43; Ms. Kendall took the money, returned the wallet, and fled the scene along with her accomplice. *Id.* at 172. Mr. Sherry described the pick-up truck that Ms. Kendall and her accomplice drove and explained he later saw the same truck at a Royal Farm store. *Id.* at 174.

Baltimore County Police Officer James Beck was shot later that same evening. Officer Beck was in a patrol car in the area of Pulaski Highway and was accompanied by a ride-along student, Sandra Lowery, who witnessed the shooting and testified for the State. ECF 4-2 at 181-201. Ms. Lowery explained that there was a call on the radio to be on the lookout for a brown Ford truck with wooden racks. *Id.* at 184. Ms. Lowery and Officer Beck saw a truck fitting that

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[1] French asserts, and Respondents do not dispute, that when he was granted a new appeal by the post-conviction court on February 20, 2015, the one-year filing deadline for federal habeas relief began anew. ECF 1 at 3 and 5. The Court of Special Appeals denied French's request for relief on June 10, 2016 and his petition for writ of certiorari filed with the Court of Appeals was denied October 21, 2016. ECF 4-10 and 4-11. His petition for writ of certiorari filed with the United States Supreme Court was denied on October 2, 2017. ECF 1 at 5. French filed his petition in this Court on March 20, 2018. *Id.* at 6 (signature and date).

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description during their travel on Pulaski Highway and saw two people inside the truck. *Id.* at 185-6. Officer Beck followed the truck, turned on the overhead lights, and the truck pulled over immediately. The driver of the truck, later identified as Mark French, rolled down his window and the passenger, Heather Kendall, did not move. *Id.* at 186. Beck approached the truck with his right hand on his gun; when he got slightly ahead of the front of his car, the driver of the truck spun his right arm and part of his head out of the window and began firing the gun. *Id.* 187; 205.

Officer Beck testified that he saw the muzzle flash from the first shot and felt pain in his left shoulder, causing him to stagger backward. ECF 4-2 at 205. He felt a second pain in his chest area and began to try to get between the two vehicles. *Id.* He could not recall the third shot, but said he later found out it hit him in the chest and caused him to fall to the ground between the two vehicles. *Id.* Officer Beck recalled hearing the tires squealing as the pick-up truck raced off; hearing voices around him reassuring him; and the sound of a helicopter landing, but could not remember anything else until a month and a half later. *Id.* at 207. He testified that he was hospitalized in Shock Trauma for two and a half months and then hospitalized at "Good Sam" for therapy to treat nerve damage to his arm and legs which he stated is permanent.[2] *Id.* at 208. Officer Beck also testified that the medications he received in the hospital worked on his central nervous system which caused the messages relayed from his ears to his brain to no longer work, leaving him with progressive hearing loss. *Id.*

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[2] Dr. Steven Z. Turney, the surgeon who treated Officer Beck, testified that the initial assessment included a partially collapsed right lung as well as blood in the right chest cavity. A chest tube was inserted to alleviate the pressure and to help Officer Beck breathe. Three bullets were seen on x-ray: one in the left shoulder and two in the lower back. Dr. Turney explained that one bullet went through Officer Beck's right lung and another lodged in his left shoulder; the third bullet went through his abdomen on the right side, shattering a rib. The rib fragments had perforated both the small and large intestines in several places, causing the contents to leak into the abdominal cavity. Officer Beck was placed on an artificial lung because he was dying and his condition was deteriorating rapidly. ECF 4-3 at 88-96.

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Detective Michael Peregoy investigated the armed robbery of Mr. Sherry as well as the shooting of Officer Beck and testified for the State at trial. ECF 4-3 at 3-34. Detective Peregoy recovered 9 mm spent cartridges from the scene as well as bullet fragments recovered from Officer Beck's body that were provided to him by a nurse at Shock Trauma. *Id.* at 14; 16-18. The police department elicited help from the public in identifying and locating the suspects involved in the shooting. *Id.* at 14. To assist in identifying the perpetrators, a forensic sketch artist worked with Brian Sherry to draw a composite sketch of the female who robbed him. *Id.* The Ford truck was recovered from the backyard of Lisa Morton's home. *Id.* at 19. Business cards with Mark French's name on them were found inside the truck. *Id.* at 23. After defense counsel cross-examined Detective Peregoy regarding the number of trucks that were called in matching that description and suggesting that not enough was done to develop more suspects (*id.* at 27-33), Detective Peregoy explained that all trucks reported as fitting the description and possible persons responsible were ruled out. *Id.* at 33-34.

Lisa Morton testified that Mark French came to her house on October 31, 1993, the day after the shooting at approximately 11 a.m., and told her he had taken $1600 for a roofing job he had not done and came across the guy who paid him which resulted in a shoot-out. ECF 4-3 at 57. She further testified that French had three guns with him: a .9mm Glock, a .38, and a .22. *Id.* at 59. French was holding the .9mm Glock in his hand and told Ms. Morton that it was dirty because he used it in the shoot-out. *Id.* at 60. Later in the evening, the news came on with a story about the shooting featuring the composite sketch and describing a white male involved in a police shooting; French was in the kitchen and came into living room to hear the news, he asked them to turn up the volume. *Id.* at 62. French said the sketch looked like Heather; Ms. Morton responded: "don't tell me that you shot the police." French told Ms. Morton that "it was either me or him."

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Id. at 63. French then told Ms. Morton about going to Pulaski Highway for Heather to pick up a "John" so they could rob him. *Id.* French said the "John" called the police and before they could get away, the police had come up to the truck and French shot the police officer with the .9 mm Glock. *Id.* at 64. The following morning, Ms. Morton went to University Hospital and spoke with the police officers[3] who were with Officer Beck to report what French had told her and to tell them his truck was in her backyard. *Id.* at 67-68.

A tactical response team from the Baltimore City Police performed a raid on Lisa Morton's house on November 1, 1993, with the objective of locating the alleged suspect in Officer Beck's shooting and arresting him. ECF 4-3 at 98-108. The tactical team entered the house with a battering ram and found a white male, later identified as Mark French, in the kitchen. *Id.* at 99-100. French was taken to the floor, handcuffed, and taken into custody. *Id.* at 101. In addition, Heather Kendall was found in the same house. *Id.* at 108. After French was handcuffed, he was searched and .9 mm bullets were found in his left front pocket. *Id.* at 111-12. In addition, a black .9 mm Glock was recovered from a dish drainer on the side of the kitchen sink. *Id,* at 116.

Additional evidence connecting Mark French to the crime was introduced through the testimony of Detective Walter Clipper of the Baltimore County Police; Jonathan Murphy for whom French worked; and William ("Bill") Martin, French's coworker. A burglary had occurred at the home of Jonathan and Dawn Murphy one-day prior to the robbery of Mr. Sherry and the shooting of Officer Beck.[4] In addition to investigating the burglary, Detective Clipper was also a part of

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[3] On cross-examination Lisa Morton admitted that she used and sold drugs, but denied she reported her conversation with French in order to collect the reward money. ECF 4-3 at 71-84. Rather, she testified on redirect that her brother had been murdered and although people knew who did it and why, nobody stepped forward. She stated she reported French to the police in order to assist the family of Officer Beck; something nobody did for her family in similar circumstances. ECF 4-3 at 86-87.

[4] French was also charged with burglary and daytime housebreaking in a separate case; those charges were placed on the stet docket following the guilty verdict in the attempted first-degree murder case. *See* ECF 4-4 at 83-4. A pre-trial motion to sever, filed by the defense, was granted as to the burglary and breaking and entering which

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the search and arrest team that went to Lisa Morton's house because he had information that evidence pertaining to the break-in was inside that house. ECF 4-3 at 126. The property stolen mainly consisted of rifles, shotguns, a couple of handguns, and cash. *Id.* When Ms. Morton's house was searched, approximately ten firearms, handcuffs, and magazines for rifles were located in the basement. *Id.* at 126-7. Also recovered from the residence was a 35 mm camera with the name "Dawn" on it believed to belong to Dawn Murphy. *Id.* at 127-8. The magazines recovered were determined to belong to Jonathan Murphy. *Id.* at 128. Under cross-examination Detective Clipper admitted that Dawn Murphy's initial report to police was that she thought French or his brother broke into their house because they were doing work on the house along with other people including Bill Martin. *Id.* at 139. Detective Clipper never spoke to Bill Martin, did not observe the handgun in the kitchen, and did not ask the Murphy's if the Glock belonged to them. *Id.* at 140, 143-45.

Jonathan Murphy testified that he had hired French to put siding, gutters, and a new roof on his home. ECF 4-3 at 152. The week before October 31, 1993, the work was near completion and Mr. Murphy struck up a conversation with French about his gun collection which he showed to French. *Id.* at 153-54. Mr. Murphy told French and Kendall that he and his wife were going to a Halloween party on Saturday October 30, 1993. *Id.* at 156. When they returned from the party at approximately 1:00 a.m., the saw their house had been burglarized and all the guns that were not locked up had been stolen. *Id.* at 157. In addition, Mr. Murphy stated that his wife Dawn Murphy is an auxiliary police officer and handcuffs, mace, and a vest belonging to her were missing. *Id.* at 158.

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occurred on October 30, 1993. ECF 4-2 at 21. The motion was denied for severance of the armed robbery and attempted murder charges because in the trial court's view they constituted "one transaction occurring all relatively within the same time" and "the defendant is not entitled to a severance of those two events." *Id.*

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Bill Martin testified that he worked on the Murphy's house the week before Halloween, 1993. ECF 4-3 at 166. Mr. Martin worked for French for one and a half years and claimed that after French had seen Mr. Murphy's guns stated that "he could sell the guns to his nigger friends in the City where he bought drugs." *Id.* at 167. Under cross-examination it was established that Mr. Martin frequently drove the truck that was used during the commission of the crime, but he said he never took the truck home. *Id.* at 170. Rather, French would pick him up at his house and then Martin would drive to their worksite.[5] *Id.* Mr. Martin also testified that there were only one set of keys to the truck. *Id.* at 172. Police came to Mr. Martin's house the day after the break-in at the Murphy's house; Mr. Martin's girlfriend let the police into the house and they looked around but did not search the house. *Id.* at 173. According to Mr. Martin, the police came to his house because French gave them his name and address and told them he was the one driving the truck the night before in an attempt to implicate Mr. Martin in the crime. *Id.* at 173-4.

Timothy Ostendarp, a latent print examiner with the Maryland State Police Crime Lab, testified as an expert that latent prints lifted from the truck matched both Mark French and Heather Kendall. ECF 4-3 at pp. 180-9.

Also testifying as an expert witness was Joseph Kopera,[6] who worked for the Ballistics Unit of the Maryland State Police. ECF 4-3 at 192-207. During the voir dire to qualify Mr. Kopera as an expert witness, Mr. Kopera stated that he held an engineering degree from the University of

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[5] It was established through the testimony of Marion Louise Suggs that French did not have a valid driver's license and that he hired Mr. Martin to drive the truck and pick up supplies. ECF 4-3 at 49. Ms. Suggs testified that Bill Martin sometimes took the truck home and that French had told her Martin robbed someone and when the police pulled him over he shot the police officer. *Id.*at 49; 44-45.

[6] Joseph Kopera, who testified as an expert in hundreds of criminal trials in and around Maryland, was later discovered to have falsified his educational credentials. *Kulbicki v. State*, 207 Md. App. 412, 430 (2012) *rev'd on other grounds by* 440 Md. 33 (2014) (noting that parties stipulated that Kopera had lied about his credentials as he had not earned degrees in engineering as he alleged and had never been accepted to University of Maryland or Rochester Institute of Technology). After his fraud was discovered, Kopera committed suicide. *Id.* at n.9.

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Maryland and from Rochester Institute of Technology. *Id.* at 193-4. Mr. Kopera further testified that he graduated from the FBI Academy with certifications in firearms identification and gunpowder residue, he was on the Board of Directors for the Association of Firearm and Tool Mark Examiners, and on staff of several colleges in the local area teaching in the fields of criminology and forensic science. *Id.* at 194. Following the voir dire, Mr. Kopera was accepted as an expert and testified that the bullets and cartridge casings recovered from the scene where Officer Beck was shot were fired from the Glock recovered during Mark French's arrest. *Id.* at 201. He further testified that the bullets recovered from Officer Beck's body were also fired from the same Glock. *Id.* Cross examination of Mr. Kopera focused on the commonality of the ammunition found in French's possession. *Id.* at 202-7.

At the close of the State's evidence, and after French's Motion for Judgment of Acquittal was denied (ECF 4-3 at 209-10), French was advised regarding his rights to testify and to remain silent and chose not to testify. *Id.* at 212. The defense offered no evidence. *Id.* at 214.

The jury returned a guilty verdict on first degree attempted murder, robbery, and two counts of use of a handgun in the commission of a felony. ECF 4-4 at 80-81.

On May 25, 1994, French was sentenced to serve life with consecutive sentences totaling 35 years, the first ten years of the consecutive sentences without possibility of parole. ECF 4-5 at 21-22. His request for a recommendation for commitment to Patuxent was denied as the trial judge believed that facility was not secure enough for the type of sentence imposed. *Id.* at 22.

II. Appeals and Post-Conviction

A. First Direct Appeal

On March 28, 1995, the Maryland Court of Special Appeals issued an unpublished opinion affirming French's conviction. ECF 4-6. On appeal, French raised one issue: Did the trial court

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err in denying a motion in limine to exclude his prior burglary conviction *Id.* at 2. French's claim concerned the testimony of Detective Clipper and Jonathan Murphy regarding the prior break-in and the items stolen during the burglary. *Id.* at 4. The appellate court observed that the "[g]eneral rule is if the trial judge rules to admit the evidence the opposing party must object at the time the evidence is actually offered to preserve the issue for appellate review." *Id.* at 4; citing *Prout v. State*, 311 Md. 348, 356 (1988), also citing *Hickman v. State*, 76 Md. App. 111, 117 (1988). Turning to French's claim, the court observed that:

> The motion *in limine* was denied at the start of trial on April 11, 1994. The testimony relating to the burglary was not offered until the following day, after a lunch recess. The court did not restate its ruling on the motion *in limine* prior to the testimony at issue. Because appellant did not object when the evidence was offered, the issue has not been preserved for our review. *Hickman*, 76 Md. App. at 118.
>
> For the benefit of counsel, we add one final point. Evidence of other crimes may be admitted when it tends to show 'the identity of the person charged with the commission of a crime on trial.' *Ross v. State*, 276 Md. 664, 669-70 (1976). The type of evidence that may be admitted under the identity exception includes evidence of 'the defendant's prior theft of a gun, car or other object used in the offense on trial.' *Cross v. State*, 282 Md. 468, 477 (1978).

ECF 4-6 at 5-6.

B. Post-Conviction Petition

In 2014, French filed a Petition for Post-Conviction Relief in the Circuit Court for Baltimore County asserting numerous claims for relief, including a claim of ineffective assistance of appellate counsel for failing to raise the claim that the trial court erred by failing to comply with Md. Rule 4-215(e) after it received a letter from French stating he wished to discharge trial counsel and for failing to raise a claim that the verdict was defective. *See* ECF 11-1 at 40-92; 124-37 (post-conviction transcript); ECF 4-7 (post-conviction court's decision). The post-conviction court found that appellate counsel's performance was deficient and granted French a new appeal limited

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to the issues of whether the trial court erred when it failed to comply with Md. Rule 4-215(e) and the flawed verdict. ECF 4-7 at 38-39. Relief was denied on all other claims.[7] With regard to the ineffective assistance of appellate counsel for failing to raise the discharge of counsel claim, the post-conviction court observed:

> 'The two-pronged test enunciated in *Strickland* applies to claims of ineffective assistance of appellate counsel just as surely as it does to claims of ineffective assistance of trial counsel.' *State v. Gross*, 134 Md. App. 528, 556 (2000). While appellate counsel 'is not require[d] . . . to advance every conceivable argument on appeal which the trial record supports,' *id.* at 562 (quoting from *Gray v. Greer*, 800 F.2d 644, 647 (7th Cir. 1986)), 'when ignored issues are clearly stronger than those presented . . .[,] the presumption of effective assistance of counsel [will] be overcome,' *id.* (quoting from *Gray* 800 F.2d at 646). Where deficient performance of appellate counsel has been established, prejudice can be established by demonstrating that there was a 'substantial possibility' of success had an issue been raised on appeal. *Id.* at 555-56. In his case, Petitioner has met both prongs of the test enunciated in *Gross* and this Court will grant Petitioner a second appeal to the Court of Special Appeals.
>
> With respect to the performance of appellate counsel, this Court looks to whether the 'ignored' issue of the failure of the trial court to conduct the colloquy required by Md. Rule 4-215(e) was 'clearly stronger' than the sole issue raised in Petitioner's actual appeal, whether the trial court erred in denying Petitioner's motion *in limine* regarding a prior burglary Petitioner was alleged to have committed. *See Gross*, 134 Md. App. at 562. The Court of Special Appeals denied the appeal actually filed by Petitioner in a brief, unreported opinion of slightly more than four pages. *See French v. State*, No. 1277, Sept. Term 1994 (COSA unreported op., filed March 28, 1995) (*per curiam*). The Court of Special Appeals, citing to well-established Maryland law, held that the issue raised in Petitioner's appeal had not been preserved for review. *See French* at 3-4. The Court of Special Appeals also strongly implied, in a final paragraph that is entirely *dicta*, that, had it reached the merits of Petitioner's appeal, it

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[7] French raised thirteen claims for post-conviction relief, including the two claims the post-conviction court found meritorious. The remaining claims were (1) ineffective assistance of trial counsel for: (a) failure to inform the trial judge French wanted to discharge him (ECF 4-7 at 10-13); (b)failure to properly investigate credentials of Joseph Kopera (*id.* at 13-18); (c) failure to file a motion for modification of sentence (*id.* at 18-20); (d) failure to object to the flawed delivery of the verdict on attempted murder (*id.* at 21-23); (e) failure to cross-examine witnesses regarding the manufacturer of the ammunition recovered from French's pockets (*id.* at 35-36); (f) failure to request removal of an allegedly biased juror (*id.* at 36-38); (2) the State failed to comply with discovery requirements (*id.* at 23-25); (3) the trial court engaged in judicial misconduct for failing to address the request to discharge counsel (*id.* at 32-33); (4) he was deprived of a fundamentally fair trial because of the perjured testimony of Kopera (*id.* at 33-34); (5) the trial court committed judicial misconduct when the trial judge failed to take corrective action upon hearing the flawed verdict (*id.* at 34-35); and (6) the flawed reading of the verdict rendered it a nullity entitling French to a new trial (*id.* at 38-39).

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> would have summarily rejected the appeal on the basis of other well-established Maryland law. *See French* at 4-5. In light of the ease with which the Court of Special Appeals rejected the appeal which Petitioner actually filed, this Court has no difficulty concluding that the issue raised by that appeal was not a "strong" issue.

ECF 4-7 at 26-27 (brackets and ellipses in original). By comparison, the post-conviction court found that French's potential claim for appellate review regarding his request for discharge of counsel not being properly addressed by the trial court was a strong one under well-established Maryland law. *Id.* at 28-31. French's letter, received by the trial court on April 8, 1994, seeking to discharge his trial attorney, John Henderson, was unequivocal and listed reasons for his desire to do so. *Id.* at 28. And, under Md. Rule 4-215(e), the trial court was required to permit French to explain the reasons for his request to discharge counsel and either (1) find the reasons meritorious and continue the case or (2) find the reasons without merit and inform French that the trial would proceed, but he would not be represented by counsel. *Id.* at 30. That colloquy did not take place on the record in French's case. *Id.*

The issue regarding the flawed verdict concerned the manner in which the trial court clerk asked the jury foreman to read the verdict for the attempted murder count. The following occurred:

> THE CLERK: Mr. Foreman, would you stand. What say you in case number 93-CR-4253, State of Maryland versus Mark P. French, as to attempted murder of James Beck. Not guilty or guilty as charged.
>
> THE FOREPERSON: Guilty as charged.
>
> THE CLERK: As to the use of a handgun in the commission of a felony, namely, attempted first degree or attempted second degree murder. Not guilty or guilty as charged?
>
> THE FOREPERSON: Guilty as charged.

ECF 4-4 at 80. French was charged with both first degree and second degree attempted murder which was indicated on the verdict sheet provided to the jury. Because the clerk did not specify

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whether the attempted murder count the foreman was asked about was first or second degree, French argued that the verdict was defective and a legal nullity. ECF 11-1 at 131-3.

The post-conviction court first found that trial counsel was not ineffective for failing to raise an objection to the defective verdict because "even assuming it was a deficient act for . . . trial counsel to fail to object" the claim fails due to a lack of prejudice to French caused by that failure to object. ECF 4-7 at 22. The post-conviction court noted that the "Verdict Sheet makes it clear that, had Petitioner's trial counsel objected to the flawed verdict, the trial court would merely have corrected the error of the courtroom clerk and a proper verdict of guilty on Attempted First Degree Murder would have been entered." *Id.*, citing *Kelly v. State*, 162 Md. App. 122, 152 (2005), *rev'd on other grounds by* 392 Md. 511 (2006).

With respect to appellate counsel's failure to raise the flawed verdict issue on appeal, the post-conviction court held that the "verdict in Petitioner's case was flawed and the flaw was not capable of correction by the hearkening of the verdict." ECF 4-7 at 31. Further, the failure of trial counsel to object to the flawed verdict did not waive the issue for appeal under *State v. Santiago*, 412 Md. 28, 41-2 (2009). *Id.* The court then opined that "[i]n light of the well-established case law on the requirement that an oral verdict whether a defendant is being convicted of First Degree or Second Degree Murder . . ., Petitioner would have had a 'substantial possibility' of achieving success with this issue on appeal." *Id.* (citations omitted). Having already concluded that the issue actually raised on appeal was lacking in merit, the post-conviction court concluded that appellate counsel rendered ineffective assistance of counsel by failing to raise the flawed verdict claim on appeal. *Id.* at 32.

C. Second Appeal (granted by post-conviction court)

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As noted, French's second, new appeal was limited to the two issues his first appellate counsel failed to raise. The Maryland Court of Special Appeals rendered an unpublished opinion on June 10, 2016, denying relief on both claims. ECF 4-10. The appellate court, after reviewing the content of French's April 8, 1994 letter to the trial court asking the court to "hear my motion to dismiss John J. Henderson as my counsel" (*id.* at 2-3), analyzed the discharge of counsel claim as follows:

> On the morning of April 11, 1994, the case was called for trial before the Honorable James T. Smith, Jr. Both of appellant's defense counsel were in attendance. A reference in the transcript to discussions among the court and counsel 'in camera' indicates that there had been conversations in chambers before the case was called. At the outset of the pretrial proceedings on the record, Judge Smith confirmed that, except for two pending motions (namely, the defendant's motions for severance and for exclusion of his criminal record), and a motion for sequestration of witnesses, 'all open motions' had been 'withdrawn.' There was no express discussion of appellant's motion to discharge Mr. Henderson, but appellant was present when Judge Smith confirmed that, other than the three motions he mentioned, all other open motions had been withdrawn. And the record reflects that appellant was provided numerous opportunities to speak to the court.

ECF 4-10 at 5-6. Significant to the appellate court's analysis was the pre-trial colloquy during which the trial judge stated the following:

> THE COURT: It is my understanding that there are two motions, in addition to a motion for sequestration of witnesses. One is a motion for severance of various counts, the Defendants motion for severance of counts which I will have you describe in just a second, and another is a motion in limine relating to the criminal record of the Defendant.
>
> **Other than those two motions, are all open motions withdrawn?**
>
> MR. HENDERSON: **Yes, they are, Your Honor.**
>
> **THE COURT: Let the record reflect that all open motions are withdrawn other than those described by the court.** I'll hear from you on your motion for severance, Mr. Henderson or Mr. Gordon.

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Id. at 6-7 (emphasis in original). The record reflects that French was in the courtroom at the time this exchange took place. Later in the pre-trial proceedings, after a jury trial was elected, French was advised by the trial court as follows:

> THE COURT: Counsel, would you approach the bench? Mr. French, would you also approach the bench?
>
> (WHEREUPON, COUNSEL AND THE DEFENDANT APPROACHED THE BENCH AND THE FOLLOWING ENSUED)
>
> THE COURT: Mr. French, I want you to understand that you have the absolute right to be present at all bench conferences when the lawyers come up to the bench. Do you understand that you have that right?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I would like to have this understanding with you. If you want to attend a bench conference if we have a bench conference, you just come up with your lawyer. If you do not want to attend a particular bench conference, you just remain at the trial table. If you remain at the trial table I will assume that for that bench conference only you have elected to waive or give up your right to be present. Is that agreeable with you.
>
> THE DEFENDANT: Yes, sir?
>
> THE COURT: That does not mean that if you stay at the trial table for one bench conference that you can't come up afterwards. You can come up if you want or stay at the trial table if you want. Do you understand?
>
> THE DEFENDANT: Yes, sir.

ECF 4-10 at 10-11. In concluding that French's discharge of counsel claim was not preserved for appellate review, the appellate court relied on the "affirmative statement that all other motions had been 'withdrawn'" and that under Maryland law "withdrawing a motion, an affirmative act of commission as opposed to an act of omission, constitutes a waiver rather than a forfeiture." *Id.* at 16, citing *Carroll v. State*, 202 Md. App. 487, 514 (2011). The court also observed that:

> At the time the trial judge in this case expressly confirmed in open court that all open motions (other than the three specifically identified) had been withdrawn, appellant was present and was also represented by a second attorney who was

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> never the subject of a motion to discharge. Neither appellant nor Mr. Gordon took issue with the court's statement that all other motions had been withdrawn. And despite having numerous opportunities to renew the motion to discharge Mr. Henderson, appellant never did so. Under the circumstances he waived the motion to discharge Mr. Henderson, and the court did no err in failing to conduct further discussions on the record relative to the motion.

ECF 4-10 at 16-17.

With respect to the defective verdict claim, the Court of Special Appeals found that the clerk's omission of the words "first degree" was "corrected when the jury was asked to hearken to the verdict." *Id.* at 17. When the clerk asked the jury to hearken to the verdict the omitted words were included and the jury "responded affirmatively" when asked to confirm. *Id.* The appellate court noted that French had relied on *Williams v. State*, 60 Md. 402, 403-4 (1883) for his position that the hearkening was insufficient to correct the defective pronouncement, but "more recent cases from the Court of Appeals make clear that a verdict can be corrected during the hearkening." *Id.* at 17-18, citing *State v. Santiago*, 412 Md. 28, 38 (2009). The court concluded that French's "verdict was not finalized until the jury hearkened to it" and when the jury was hearkened it "confirmed its verdict that [French] was guilty of attempted first degree murder, as clearly reflected on the verdict sheet, and accurately stated in the clerk's hearkening inquiry." *Id.* at 19.

D. Claim in this Court

In his Petition for Writ of Habeas Corpus filed with this Court, French raises one claim, that his motion to discharge counsel was not properly addressed by the trial court. *See* ECF 1 at 5; ECF 1-1 at 26. French's Memorandum of Law in support of his Petition also goes into depth regarding the reasons he wanted counsel removed, his asserted educational disabilities that prevented him from raising the issue with the trial court, that the state courts' actions violated his Sixth Amendment right to counsel because there was an irreconcilable conflict between French

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and trial counsel, and generally reiterates his claims of ineffective assistance of counsel in a bid to establish "prejudice" for the failure to entertain his motion to remove counsel. ECF 1-1 at 26-35.

Respondents assert that the issue presented to the state courts regarding his motion to discharge counsel was a matter of state-law that is not cognizable on federal habeas review and to the extent that French is raising a constitutional claim, that claim has been defaulted. ECF 4 at 16. Respondents also argue that any constitutional challenge asserted with regard to the State court's ruling on this claim survives scrutiny under 28 U.S.C. § 2254(d).

Standard of Review

An application for writ of habeas corpus may be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). The federal habeas statute at 28 U.S.C. § 2254 sets forth a "highly deferential standard for evaluating state-court rulings" *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *see also Bell v. Cone*, 543 U.S. 447 (2005). The standard is "difficult to meet," and requires courts to give state-court decisions the benefit of the doubt. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted); *see also White v Woodall,* 572 U.S.415, 419-20 (2014), quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (state prisoner must show state court ruling on claim presented in federal court was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.").

A federal court may not grant a writ of habeas corpus unless the state's adjudication on the merits: 1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"; or 2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state adjudication is

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contrary to clearly established federal law under § 2254(d)(1) where the state court 1) "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under the "unreasonable application" analysis under 2254(d)(1), a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S.. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 785 (internal quotation marks omitted).

Further under § 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).

Analysis

French's discharge of counsel claim that was first presented to the post-conviction court and later was the subject of a newly granted direct appeal, relied entirely on the contours and requirements of Maryland State law. Specifically, the error assigned to the trial court by French in his discharge of counsel claim was the failure to abide by Maryland Rule 4-215(e). *See* ECF

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11-1 at 124-30 (Post-Conviction Transcript). Further, the post-conviction court's decision granting relief on the claim in the form of a second appeal and the Court of Special Appeals' decision were also based entirely on the application and interpretation of Maryland law. *See* ECF 4- 9 at 25-31 (post conviction court's decision) and ECF 4-10 at 14-17 (Court of Special Appeals decision). Violation of a state law which does not infringe upon a specific constitutional right is cognizable in federal habeas corpus proceedings only if it amounts to a "fundamental defect which inherently results in a complete miscarriage of justice." *Hailey v. Dorsey*, 580 F.2d 112, 115 (4th Cir. 1978) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)), *cert. denied*, 440 U.S. 937 (1979), *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas corpus court to reexamine state court determinations on state law questions.").

In his Reply, French asserts that "it is unreasonable for the Respondents to state this violates only a State rule or law" because "Md. Rule 4-215(e) was made to protect a defendant's Sixth Amendment rights." ECF 20 at 2, citing *Johnson v. State*, 355 Md. 420, 426 (1999) (holding trial court erroneously found criminal defendant waived his right to counsel by failing to comply with application procedures for representation by public defender's office). French's reliance on the *Johnson* decision does not assist his argument as the decision focused on Maryland Rule 4-215(a), setting forth requirements of a trial court when a defendant makes a first appearance without counsel, and did not address the Md. Rule 4-215(e), governing the colloquy to take place when a criminal defendant requests permission to discharge an attorney whose appearance has been entered. The difference in the two sections of the rule cannot be overlooked. In the first instance the criminal defendant is unrepresented by counsel and the trial court is charged with ensuring he or she is well aware of their rights. Md. Rule 4-215(a). In the second instance the criminal defendant is represented by counsel and the trial court is charged with ensuring he or she knows

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what will occur if counsel is discharged without cause. Md. Rule 4-215(e). French cites to no legal precedent stating that the colloquy required by Md. Rule 4-215(e) is mandated by the United States Constitution, nor can he. Thus, the state courts were never presented with a Sixth Amendment claim in the context of French's motion to discharge counsel and this Court may not revisit the matter. *Estelle*, 502 U.S. at 67-68. Having found no cognizable federal claim for relief, the Petition for Writ of Habeas Corpus shall be denied.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U. S.C. § 2253(c)(2); *see Buck v. Davis*, 137 S.Ct. 759, 773 (2017). The petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (citation and internal quotation marks omitted), or that "the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Because this Court finds that there has been no substantial showing of the denial of a constitutional right, a certificate of appealability shall be denied. *See* 28 U. S.C.§ 2253(c)(2). Petitioner may still request that the United States Court of Appeals for the Fourth Circuit 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.

3/27/2020
Date

/s/
RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX B PG. 19.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK FRENCH,

Petitioner,

v.

FRANK B. BISHOP, JR.,
MARYLAND ATTORNEY GENERAL,

Respondents.

Civil Action No.: RDB-18-879

ORDER

Pending is correspondence from Petitioner Mark French which has been construed as a Motion for Reconsideration. ECF 24. In the motion French lodges objections to this Court's Memorandum Opinion denying his Petition for Writ of Habeas Corpus and denying a certificate of appealability. He does not state what those objections are; rather, he asks for an open-ended extension of time in which to file a memorandum in support. *Id.* While this motion was pending, French filed a Notice of Appeal and the case was transmitted to the Fourth Circuit Court of Appeals. ECF 25; ECF 26. Because the motion states no basis for relief and French's request for an "open-ended" extension of time is untenable in light of French's appeal, the motion shall be and is hereby DENIED.

It is so ORDERED this 27th day of May, 2020, by the United States District Court for the District of Maryland.

/s/
RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

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APPENDIX C

pages: 1-2

MARK PHILLIP FRENCH	*	**IN THE**
	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket No. 273 September Term, 2016**
STATE OF MARYLAND	*	**(No. 147, Sept. Term, 2015 Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Mary Ellen Barbera

Chief Judge

DATE: September 29, 2016

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RD

MARK PHILLIP FRENCH	*	**IN THE**
	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket No. 273 September Term, 2016**
STATE OF MARYLAND	*	**(No. 147, Sept. Term, 2015 Court of Special Appeals)**

ORDER

The Court having considered the "Motion for Reconsideration & Notice to the Court" filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the above pleading be, and it is hereby, denied.

/s/ Mary Ellen Barbera

Chief Judge

DATE: December 15, 2016

APPENDIX C PS. 2

APPENDIX D

pages: 1-17

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0147

September Term, 2015

MARK PHILLIP FRENCH

v.

STATE OF MARYLAND

Meredith,
Eyler, Deborah S.,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 10, 2016

Following a three-day jury trial in the Circuit Court for Baltimore County in 1994, Mark Phillip French, appellant, was convicted of attempted first degree murder, armed robbery, and two counts of use of a handgun in the commission of a crime of violence. On May 25, 1994, appellant was sentenced to life in prison plus thirty-five years. French filed a direct appeal the day after sentencing; this Court affirmed his convictions in an unreported opinion filed on March 28, 1995. *French v. State*, No. 1277, September Term, 1994.

On June 5, 2014, appellant filed a petition for post-conviction relief, alleging ineffective assistance of appellate counsel. The circuit court conducted a hearing on February 6, 2015, and, on February 20, 2015, the circuit court granted appellant the right to file a belated appeal as to two issues, one relating to a pretrial request French made to discharge one of his defense attorneys, and the second relating to the manner in which the clerk received the jury's verdict.

QUESTIONS PRESENTED

Appellant presents the following two questions for our review:

1. Whether the trial court erred by failing to comply with Maryland Rule 4-215 after receiving a letter from appellant prior to trial that clearly expressed his desire to discharge counsel?

2. Whether the trial court erred by accepting a flawed verdict in violation of Maryland Rule 4-327(a) and Criminal Law Article § 2-302?

For the reasons that follow, we answer both questions in the negative, and affirm the judgments of conviction entered by the circuit court in 1994.

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FACTS AND PROCEDURAL HISTORY

The underlying facts surrounding the armed robbery of Brian Sherry and the shooting of Baltimore County Police Officer James Beck are not at issue. But appellant asserts that there were two procedural errors at his trial, and that either or both require that he be granted a new trial.[1]

A. The motion to discharge counsel.

The first alleged procedural error has to do with a motion appellant submitted to the court a few days before trial was scheduled to begin, asking to dismiss one of his defense counsel. At the time the motion was submitted, appellant was represented by two counsel of record: John J. Henderson and Spencer Gordon. The handwritten motion was postmarked April 7, 1994, and appears to have been received by the clerk of court and stamped "CRIMINAL DEPT. APR. 8 1994." The document reads as follows:

STATE OF MARYLAND	–vs.—	MARK P. FRENCH
Balto. Co. CIRCUIT		Case # 053562C5
Court 401 Bosley		404 Kenilworth Dr
Ave. Towson Md.		Towson Md. 21204

I the petitioner ask the court to hear my motion to dismiss John J. Henderson as my counsel. The reasons are as follows:

[1]It is mind-boggling that appellant is raising two procedural errors for the first time 20 years after the alleged errors were committed. But the State has raised no issue in this appeal as to untimeliness. *Cf. Jones v. State*, 445 Md. 324, 343 (2015), in which the Court of Appeals held "unequivocally" that "the doctrine of laches may, as an affirmative defense in a coram nobis action, bar an individual's ability to seek coram nobis relief."

In Dec. 93 I asked John to file for a bail hearing and he said he would. He never did.

At the same meeting I asked John for a copy of the contents of the discovery. He said as so [sic] as he got it he would copy it for me. I still do not have all of it.

In Jan. 94 John came and read the contents of the discovery to me. And he said I should pled [sic] guilty as soon as possi[ble] before the vict[i]m dies. A week lat[]er he came out of the hospital. And I said I was not guilty of this crime he said I was lying. I feel this alone is a great conflict of interest. I asked him for my copy of the contents of the discovery. He didn't have it but said he would copy parts of it for me. And at the same meeting I asked him to file for a change in venue. He said he would.

In March 94 John came to see me and s[ai]d he was not going to file a change of venue. I asked him why. He said he didn't feel a need to. I feel there is. He has not file[d] one motion to uliminate [sic] or anything in my case. At the same meeting he said he was going to start interviewing the witnesses in my case and start the investigation in my case. I feel that 20 day [sic] before tr[ia]l is late to start working on my case.

I don't kno[w] if it is the nature of my charge or he knows the victim in my case but I know I don't have my counsel [sic] undivided loyalty to look out for my best interests.

And for the reasons above I feel there would be a great injustice to have a trial with John as my counsel.

Thank you

Mark French

[/s/]

On the morning of April 11, 1994, the case was called for trial before the Honorable James T. Smith, Jr. Both of appellant's defense counsel were in attendance. A reference in the transcript to discussions among the court and counsel "in camera" indicates that there had

been conversations in chambers before the case was called. At the outset of the pretrial proceedings on the record, Judge Smith confirmed that, except for two pending motions (namely, the defendant's motions for severance and for exclusion of his criminal record), and a motion for sequestration of witnesses, "all open motions" had been "withdrawn." There was no express discussion of appellant's motion to discharge Mr. Henderson, but appellant was present when Judge Smith confirmed that, other than the three motions he mentioned, all other open motions had been withdrawn. And the record reflects that appellant was provided numerous opportunities to speak to the court. The pretrial colloquy on the record was as follows:

THE COURT: Counsel, identify yourselves for the record.

MR. HENDERSON: John J. Henderson, Office of the Public Defender representing Mark French.

MR. GORDON: Spencer Gordon also representing Mark French.

THE COURT: The Defendant will be in momentarily.

(WHEREUPON, THE DEFENDANT ENTERED THE COURTROOM AND THE FOLLOWING ENSUED.)

THE COURT: Let the record reflect that the Defendant is present in court and counsel have identified themselves for the record.

It is my understanding that there are two motions, in addition to a motion for sequestration of witnesses. One is a motion for severance of various counts, the Defendant's motion for severance of counts which I will have you describe in just a second, and another is a motion in limine relating to the criminal record of the Defendant.

Other than those two motions, are all open motions withdrawn?

MR. HENDERSON: **Yes, they are, Your Honor.**

THE COURT: Let the record reflect that all open motions are withdrawn other than those described by the court. I'll hear from you on your motion for severance, Mr. Henderson or Mr. Gordon.

MR. HENDERSON: Your Honor, I would first —

THE COURT: The Defendant can be seated.

MR. HENDERSON: I would first have the court rule on my motion for sequestration of witnesses.

THE COURT: I'm going to grant that. Do you want that granted before you argue on your other motions?

MR. HENDERSON: Yes, I do.

THE COURT: The motion for sequestration is granted. All of those persons that have been advised that you may be called as a witness for either the State or the defense, you are not to discuss your testimony with anyone except when you testify and you will have to remain outside the courtroom until you are called by the respective attorney to come in and testify.

So, all of those persons that have been advised that you may be called as witnesses, you have to remain outside the courtroom until you are called in to testify.

Counsel, satisfy yourselves that all of your prospective witnesses have responded to the sequestration order.

MR. HENDERSON: Yes, Your Honor. I would also like to put on the record that we will be making a motion in limine with respect to criminal records. We spoke about this in camera. The court had indicated that you would reserve that motion until later during the case in chief.

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THE COURT: Well, it is my understanding that the motion in limine relates to the event that the Defendant might testify and the Defendant hasn't made his election as to whether he is going to testify or not. So, rather than ruling on something that may or may not be a moot point, I'm going to reserve it until such time as the election is made and then I'll rule as you requested.

MR. HENDERSON: With respect to the motion for severance of counts, Mr. Gordon will handle that motion for the defense.

THE COURT: Mr. Gordon?

MR. GORDON: Your Honor, there are, in essence, three separate criminal events charged in the indictment in this case. Reference to them was made in chambers.

(Emphasis added.)

Argument of Mr. Gordon and the prosecutor (Mr. Gentry) continued for 16 pages of transcript, after which the court took a brief recess to consider the issues, and the court then granted defense counsels' motion to sever two of the counts. The pretrial colloquy then continued:

MR. GENTRY: Judge, because I want to make sure that I'm guided in what I'm going to do, unless I'm told otherwise, although they are severed I intend on introducing evidence of the burglary in the armed robbery and attempted murder prosecution.

THE COURT: I'm not precluding you from offering evidence and there has been no motion in that respect. What I am doing is severing the trial of the B&E and burglary from the trial of the armed robbery and the attempted murder. We'll address issues on the basis of objections that counsel make at the time.

Counsel, is your client familiar with the nature of the charges and waive the reading?

MR. HENDERSON: Yes, Your Honor Your Honor [sic].

THE COURT: And the pleas?

MR. HENDERSON: The plea is not guilty, Your Honor.

THE COURT: His election as to how he wants to be tried?

MR. HENDERSON: Your Honor, I would like to explain to him what a jury trial is.

THE COURT: Go ahead.

MR. HENDERSON: Mr. French, you have the right to have your case tried either by the court or by a jury. A jury would be made up of prospective jurors and they would be taken from the voter rolls of Baltimore County. In order to be found guilty by a jury there must be a unanimous verdict, which means that all twelve must find you guilty beyond a reasonable doubt and to a moral certainty. Also, to be acquitted it must be a unanimous verdict, all twelve must feel that you are not guilty of the charges.

The State has the burden of proof in this case and they must prove this case and each and every element of this case beyond a reasonable doubt and to a moral certainty. That is with respect to a jury trial.

You also have a right to a court trial. A court trial is where the judge alone would listen to the testimony, view the evidence, and based on what the judge heard and saw he would decide your guilt or innocence. The burden is the same, it must be beyond a reasonable doubt and to a moral certainty.

Do you understand what a court trial is?

THE DEFENDANT: Yes.

MR. HENDERSON: Do you understand what a jury trial is?

THE DEFENDANT: Yes.

MR. HENDERSON: What is your election this morning?

THE DEFENDANT: Jury trial.

MR. HENDERSON: Jury trial, Your Honor. Thank you.

THE COURT: Have a seat. The jurors are here.

* * *

MR. HENDERSON: Your Honor, before the actual —.

THE COURT: Let the record reflect I don't think anybody from the Defendant's family is here.

MR. GENTRY: It is the family of Officer Beck.

THE COURT: So, the only people who have left the courtroom in response to the court's request are the family of the alleged victim in this case.

Go ahead, Mr. Henderson.

MR. HENDERSON: Your Honor, before the actual voir dire begins, I would ask the court if it would be permissible for us to sit on this side.

THE COURT: Sure. Absolutely. Let's get the jurors in. Are the jurors here?

* * *

Counsel, would you approach the bench? Mr. French, would you also approach the bench?

(WHEREUPON, COUNSEL AND THE DEFENDANT APPROACHED THE BENCH AND THE FOLLOWING ENSUED.)

THE COURT: Mr. French, I want you to understand that you have the absolute right to be present at all bench conferences when the lawyers come up to the bench. Do you understand that you have that right?

THE DEFENDANT: Yes, sir.

THE COURT: I would like to have this understanding with you. If you want to attend a bench conference if we have a bench conference, you just come up with your lawyer. If you do not want to attend a particular bench conference, you just remain at the trial table. If you remain at the trial table I will assume that for that bench conference only you have elected to waive or give up your right to be present. Is that agreeable with you.

THE DEFENDANT: Yes, sir?

THE COURT: That does not mean that if you stay at the trial table for one bench conference that you can't come up afterwards. You can come up if you want or stay at the trial table if you want. Do you understand?

THE DEFENDANT: Yes, sir.

B. The jury verdict.

For appellant's second alleged procedural error, he contends that the verdict was defective because the clerk did not specify the degree of attempted murder the first time the clerk asked for the jury's verdict on the first count on the verdict sheet. But the record reflects that the clerk corrected that omission when it asked the jury to hearken to the verdict.

At the conclusion of the trial court's instructions to the jury, the court told the jury about the formalities that would be followed when announcing its verdict.

[THE COURT:] Also, in connection with the verdict, after you have retired and deliberated and arrived at your unanimous verdict, the verdict will be taken like this. You will knock on the door and let my clerk know you have arrived at a verdict. You will come back into the courtroom and although the verdict will be written out it will be taken verbally. I'll ask the clerk to take the verdict and he will turn to all of you and say, ladies and gentlemen, have you agreed upon your verdict. Assuming that you all have or you shouldn't be in here, you will all respond we have. Then the next question he will ask is who shall say for you and you will say our Foreperson.

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Now, Mr. Foreperson, you will be asked to rise and although it is written out you will actually deliver it verbally. The clerk does all the reading. He reads the title of the case and the charges. All you do is say not guilty or guilty. He will go to the first one and then goes to the second and third and read [sic] the charge. You just respond not guilty or guilty and so on until you finish the verdict. Then he will come over and ask you to give him the original of the verdict sheet which will actually be put with the court file.

So, that is how the verdict will be taken . . . .

I ask that the jury now retire to consider your verdict. The clerk will bring you back the original of the verdict sheet and all the exhibits excepting the bullets and guns as I have indicated.

When the jury indicated that it had reached a verdict, the jury returned to the courtroom with a verdict sheet that was marked as follows:

VERDICT SHEET

CHARGE	NOT GUILTY	GUILTY
Attempted 1st degree murder of James Beck	_____	X
Attempted 2nd degree murder of James Beck	_____	—
Use of a handgun in the commission of a felony, namely, attempted 1st degree or attempted 2nd degree murder	_____	X
Robbery of Brian Sherry with a dangerous and deadly weapon	_____	X
Use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon	_____	X

The transcript reflects the following ensued:

THE COURT: Mr. Clerk, please take the verdict.

THE CLERK: Mr. Foreperson and ladies and gentlemen of the jury, have you agreed upon your verdict?

THE JURORS: We have.

THE CLERK: Mr. Foreman, would you stand. **What say you in case number 93-CR-4253, State of Maryland versus Mark P. French, as to attempted murder of James Beck.** Not guilt[y] or guilty as charged.

THE FOREPERSON: Guilty as charged. . . .

THE CLERK: As to the use of a handgun in the commission of a felony, namely, attempted first degree or attempted second degree murder. Not guilty or guilty as charged?

THE FOREPERSON: Guilty as charged.

THE CLERK: As to robbery of Brian Sherry with a dangerous and deadly weapon. Not guilty or guilty as charged?

THE FOREPERSON: Guilty as charged.

THE CLERK: As to use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon. Not guilty or guilty as charged?

THE FOREPERSON: Guilty as charged.

THE COURT: Do you wish the jury polled?

MR. HENDERSON: No, sir[.]

THE CLERK: **Harken [sic] to the verdict as the court has recorded it, in State of Maryland versus Mark P. French, your Foreperson has**

recorded that you find him guilty of attempted first degree murder of James Beck; you find him guilty of use of a handgun in the commission of a felony, namely, attempted first degree or attempted second degree murder; you find him guilty of robbery of Brian Sherry with a dangerous and deadly weapon; and you find him guilty of use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon.

And so say you all?

THE JURORS: Yes.

THE COURT: Members of the jury, I want to thank you for the attention and deliberation that you gave to this case.

(Emphasis added.)

DISCUSSION

We review both of appellant's questions *de novo*. *See, e.g.*, *Gutloff v. State*, 207 Md. App. 176, 180 (2012); *Jones v. State*, 173 Md. App. 430, 451 (2007).

I. Discharge of counsel.

Appellant contends that he is entitled to a new trial because the trial court failed to comply with the mandatory requirements of Maryland Rule 4-215(e), which remains unchanged since the time of appellant's trial, and provides:

> **If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request.** If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without

> first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

(Emphasis added.)

The Court of Appeals has held that, "when a defendant expresses a desire to discharge his or her counsel in order to substitute different counsel or to proceed self-represented, a court must ask 'about the reasons underlying a defendant's request to discharge the services of his trial counsel and provid[e] the defendant an opportunity to explain those reasons.'" *State v. Taylor*, 431 Md. 615, 631-34 (2013), quoting *Pinkney v. State*, 427 Md. 77, 93 (2012). The "trial court's failure to inquire into the reasons behind [the defendant's] request to discharge counsel" was held to be "reversible error" in *Williams v. State*, 435 Md. 474, 478 (2013).

Here, the State "concedes that, under *Williams*, [appellant's] motion [to discharge Mr. Henderson], at the time it was filed, was sufficient to trigger the trial court's obligation under Rule 4-215(e) to conduct a colloquy into the reasons for why French wished to discharge his counsel." But the State further argues that there was no reversible error in this case because the transcript makes plain that the motion was withdrawn, citing *Grandison v. State*, 305 Md. 685, 765 (1986) ("The right of appeal may be waived where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal. . . . By dropping the subject and never again raising it, Grandison waived

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his right to appellate review of this issue.") ; *Malarkey v. State*, 188 Md. App. 126, 156 (2009) ("We agree with the State's waiver claim. To be sure, the defense repeatedly moved for acquittal, and the court repeatedly reserved. But, appellant never made known to the court that he was entitled to a ruling before submission to the jury. Had he done so, the court might well have been willing to rule. A party cannot complain about the court's failure to rule on a pending motion unless it has 'brought [it] to the attention of the trial court.'"); *Jackson v. State*, 52 Md. App. 327, 331-32 (1982) ("If a defendant, after filing a Rule 736 motion, fails to pursue it, a waiver may result."); and *White v. State*, 23 Md. App. 151, 156 (1974) ("The motion to be decided must be brought to the attention of the trial court. Appellant may not take advantage of an obscurely situate, undecided motion and stand mute in the face of repeated requests by the judge for all pending motions to be decided.").

In appellant's case, there was an affirmative statement that all other motions had been "withdrawn." "This Court specifically has stated that withdrawing a motion, an affirmative act of commission as opposed to an act of omission, constitutes a waiver rather than a forfeiture." *Carroll v. State*, 202 Md. App. 487, 514 (2011). At the time the trial judge in this case expressly confirmed in open court that all open motions (other than the three specifically identified) had been withdrawn, appellant was present and was also represented by a second attorney who was never the subject of a motion to discharge. Neither appellant nor Mr. Gordon took issue with the court's statement that all other motions had been withdrawn. And despite having numerous opportunities to renew the motion to discharge Mr. Henderson,

appellant never did so. Under the circumstances, he waived the motion to discharge Mr. Henderson, and the court did not err in failing to conduct further discussions on the record relative to the motion.

II. The verdict and hearkening

As noted above, appellant was charged with both attempted first-degree and attempted second-degree murder. In his second contention on appeal, appellant argues that the jury's verdict was fatally flawed because, when the clerk asked the foreman what the jury's verdict was on the first issue, the clerk omitted the words "first degree." But that omission was corrected when the jury was asked to hearken to the verdict. During the hearkening, the clerk asked the jury to hearken "to **the verdict as the court has recorded it**, in State of Maryland versus Mark P. French, **your Foreperson has recorded that you find him guilty of attempted first degree murder** of James Beck; . . . ." (Emphasis added.) And the jury responded affirmatively when the clerk asked: "And so say you all?"

Relying on *Williams v. State*, 60 Md. 402, 403-04 (1883), appellant now claims that the hearkening was insufficient to "fix" the jury's initial announcement. In *Williams*, when the jurors were polled, all of the jurors "responded 'guilty,' without specifying the degree of murder." *Id.* at 403. As in appellant's case, when the clerk hearkened the jury to the verdict of its foreman, the clerk specified the verdict was murder "in the first degree." The Court of Appeals held in 1883: "The fact that the clerk, immediately after polling the jury, called upon

them to hearken to the verdict, as the Court had recorded it [*i.e.*, 'guilty of murder in the first degree'] . . . does not affect the question." *Id.* at 403-04.

But the more recent cases from the Court of Appeals make clear that a verdict can be corrected during the hearkening. Indeed, that is the purpose of the hearkening procedure. *State v. Santiago*, 412 Md. 28, 38 (2009) (quoting *Givens v. State*, 76 Md. 485, 488 (1893), for the principle that "**[h]earkening 'enable[s] the jury to correct a verdict**, which they have mistaken, or **which their foreman has improperly delivered** . . . .'" (emphasis added)).

In *State v. Santiago*, 412 Md. at 38-39, the Court of Appeals stated plainly:

> A verdict is not final "until after the jury has expressed their assent in one of [two] ways," by hearkening or by a poll. *Givens* [*v. State*], 76 Md. [485] at 487, 25 A. at 689 [(1893)]. We have said that "[u]ntil the case is removed from the jury's province the verdict may be altered or withdrawn by the jurors, or by the dissent or nonconcurrence of any one of [the jurors]." *Smith*, 299 Md. at 168, 472 A.2d at 992–93. If there is no demand to poll the jury, hearkening and the "ensuing acceptance of the verdict finally removes the matter from the jury's consideration." *Smith*, 299 Md. at 168, 472 A.2d at 993. If there is a demand to poll the jury, "it is the acceptance of the verdict upon the poll that removes the verdict from the province of the jury." *Id.* We summarized this concept of finality succinctly in *Smith*, stating:
>
> > [T]he jury has control of the verdict until it is final. Absent a demand for a poll, the verdict becomes final upon its acceptance when hearkened. When a poll is demanded, the verdict becomes final only upon its acceptance after the poll.
>
> *Id.*

In this case, the verdict was not finalized until the jury hearkened to it. At that point, the jury confirmed its verdict that appellant was guilty of attempted first-degree murder, as clearly reflected on the verdict sheet, and accurately stated in the clerk's hearkening inquiry. Appellant's claim that he is entitled to a new trial because of the manner in which the foreman responded to the clerk's initial question is without merit.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IN CASE NO. 93-CR-4253 AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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