

No. _____

RECEPTION AND MEDICAL CENTER

DATE 9-19-2018

INMATE INITIALS M.R.

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Bush — PETITIONER
(Your Name)

vs.

Julie Jones, Sec. Fla. Dept. of Corr. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the Eleventh Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Bush

(Your Name)

DC# 069831

Reception and Medical Center, P.O. Box 628

(Address)

Lake Butler, FL 32054-0628

(City, State, Zip Code)

None

(Phone Number)

QUESTION(S) PRESENTED

1. Did the failure of the State of Florida to provide Mr. Bush with a complete copy of his trial transcript to be used in a postconviction evidentiary hearing violate Mr. Bush's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution?
2. Was the decision of the Florida Courts that Mr. Bush was not entitled under the Fifth and Fourteenth Amendments to the United States Constitution to a complete trial transcript for him to use in a postconviction evidentiary hearing contrary to clearly established federal law as determined by this Court?
3. Was the decision of the Florida Courts that Mr. Bush was not entitled under the Fifth and Fourteenth Amendments to the United States Constitution to a complete trial transcript for him to use in a postconviction evidentiary hearing involve an unreasonable application of federal law as determined by this Court?

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Pamela Jo Bondi
Florida Attorney General
The Capitol PL-01
Tallahassee, FL 32399-1050

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 888 F.3d 1188 (11th Cir. 2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 25, 2018.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including September 24, 2018 (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amendment to the United States Constitution-Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. §2254 (d) (1):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (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.

STATEMENT OF THE CASE

At approximately 2:30 am on October 8, 2003, Lori Willenberg observed a man outside of her house located in Miami Shores, Florida. Several minutes later, she saw the man running near the back of her house. She called the police and described the man as a black male wearing a red shirt and black pants. An officer responded and, upon his arrival, spotted a man nearby matching that description riding a bicycle. After the man noticed the officer, he jumped off of the bicycle, discarded a bag and a leaf blower, and ran. The officer followed him but ceased the pursuit soon after the man jumped over a chain-link fence. A k-9 unit was dispatched and at approximately 3:30 am Michael Bush was found on the roof of a house in the area and taken into custody.

The State Attorney for Miami-Dade County charged Mr. Bush by information with burglary of an occupied dwelling, grand theft, and resisting an officer without violence. The trial court declared Mr. Bush indigent and appointed assistant public defenders Lindsey Glazer, Esq. and Gregg Tounge, Esq. to represent him.

Mr. Bush pleaded not guilty to the information and exercised his right to a jury trial. The jury convicted Mr. Bush on all charges, and the trial court sentenced Mr. Bush to a thirty-five year prison term.

Mr. Bush appealed his convictions and sentences to the Third District Court of Appeal of Florida. Court appointed assistant public defenders Bennett Brummer, Esq. and Howard Blumberg, Esq. represented Mr. Bush in his direct appeal.

Portions of Bush's trial had not been transcribed because the court reporter had lost some of her notes. Mr. Bush's appellate counsel sought leave to reconstruct the trial record and prepare a "statement of the evidence or proceedings" ("Statement") pursuant to Florida Rule of Appellate Procedure 9.200(b)(4). With the assistance of Bush's trial attorneys and the prosecutor, Mr. Bush's appellate counsel prepared the statement that depicted what had transpired during the portions of the trial that the Court reported did not transcribe. The statement was included in the record on appeal.

Although the Statement failed to recreate portions of the trial, Mr. Bush's direct appeal went forward on the single issue of whether the trial court erred in sustaining the State's objection to unauthenticated x-rays of Bush's damaged ankle. Mr. Bush contend that the x-rays would substantiate Mr. Bush's claim that he was incapable of evading police in the way the prosecution alleged. The Third District Court of Appeal affirmed Mr. Bush's convictions and sentences in a per curiam decision without an opinion. *Bush v. State*, 992 So. 2d 412 (Fla. 3d Dist. Ct. App. 2008)

Mr. Bush filed a timely *pro se* motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. Mr. Bush's motion presented six claims of ineffective assistance of trial counsel.

The trial court granted Mr. Bush an evidentiary hearing and appointed Alan Byrd, Esq., a private lawyer, to represent Mr. Bush. On August 12, 2010, the trial court held an evidentiary

hearing on Mr. Bush's motion. Mr. Bush's trial attorneys, the prosecutor, and Bush testified. The attorneys' recollection of what transpired during the portions of the trial that the court reporter had not transcribed differed from that of Mr. Bush. They both sharply disputed Bush's version of what had occurred. Mr. Byrd argued that Bush's motion should be granted because, had a complete trial transcript been available, Mr. Bush could have thoroughly impeached the attorneys' testimony and Bush's own testimony would have been bolstered. The trial court denied Mr. Bush's Rule 3.850 motion on September 10, 2010.

Bush appealed the decision to the Third District Court of Appeal of Florida, raising four issues. The first three concerned three of the original six ineffective-assistance claims litigated in the Rule 3.850 proceeding. Mr. Bush's fourth issue was whether the court erred, under the United States and Florida Constitutions, "in denying [his] Rule 3.850 motion for [postconviction] relief on all claims when 80% of the original trial record was lost, destroyed, or [ir]retrievable." Mr. Bush argued that a new trial was required because the missing portions of the trial transcript precluded him from proving his allegations of ineffective assistance and thus prevented the trial court from fairly considering and then ruling on his motion. Mr. Bush claimed that given this circumstance, the trial court should have vacated his convictions and ordered a new trial.

The State, in its answer brief, argued for the affirmance of the trial court's decision with this perfunctory statement: "[T]he court's decision denying the Rule 3.850 motion was based on a careful review of the witnesses, and circumstances of the case; that the Appellant's issues have already been addressed or are meritless, and alternatively, there was no error." The State's answer brief acknowledged that a new trial might have been required had an inadequate trial transcript precluded the Third District Court of Appeal from conducting a meaningful review of his convictions. It went on to assert, however, that Mr. was not entitled to relief to the extent that the adequacy of the record was or could have been raised on direct appeal.

In making its argument, the State did not distinguish between the provision of a trial transcript to be used on direct appeal and a trial transcript to be used in a postconviction proceeding. The State thus raised, but did not answer, the question of whether the remedy for a new trial applied in the postconviction context as well as on direct appeal and, if so, whether the transcript of Bush's trial was inadequate for the purpose of determining whether the performance of Mr. Bush's trial counsel was constitutionally ineffective. The Third District Court of Appeal affirmed the trial court's decision in a per curiam decision without an opinion. *Bush v. State*, 84 So. 3d 323, (Fla. 3rd DCA 2012).

After exhausting his state-court remedies on both his direct appeal and postconviction collateral attack, Mr. Bush petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus pursuant to 28 U.S.C. 2254. The District Court ordered the state to respond to the petition.

The State's response asserted that Mr. Bush waived his fourth claim because Mr. Bush should have raised the issue on direct appeal. The State also argued that Mr. Bush could not show actual prejudice caused by the missing portions of the trial transcript. The State implied in its argument that a convicted defendant has a constitutional right to the provision of a trial transcript for use in postconviction proceedings under the substantive component of the due

process clause. The State also recognized that denial of a transcript might operate to deny the defendant's right of access to the courts. In short, the State's argument was not that there is no constitutional right to a trial transcript in postconviction proceedings. Rather, the State's argument was that notwithstanding the missing portions of the transcript, Mr. Bush received full consideration of his ineffective-assistance claims in the Rule 3.850 proceeding.

The District Court referred Mr. Bush's petition and the State's response to a Magistrate Judge for a report and recommendation. The Magistrate Judge denied Mr. Bush's request for an evidentiary hearing and recommended that the District Court deny Mr. Bush's petition. The Magistrate Judge stated that the United States Supreme Court "has recognized that substantive due process," as distinguished from procedural due process, "includes access to the courts and also a criminal defendant's right to obtain a trial transcript for purposes of appeal." He held, however, that Mr. Bush failed to allege deficiencies in the trial transcript substantial enough to call into question the validity of the appellate process in the state courts.

The District Court also assumed that the State's failure to provide a defendant with a complete transcript of his trial for use in a postconviction proceeding could constitute a denial of substantive due process. However the District Court concluded that a defendant must establish prejudice. Mr. Bush, the District Court concluded, failed to present any evidence that the missing portions of his transcript prejudiced his ability to prosecute his Rule 3.850 motion. Thus, the District Court denied the writ and denied Mr. Bush a certificate of appealability ("COA").

The United States Court of Appeals for the Eleventh Circuit issued a COA on whether Mr. Bush was denied "due process or access to the courts" because he was unable due to the unavailability of a transcript of his criminal trial to prove in motion collaterally attacking his convictions that his trial attorneys rendered ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights.

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's denial of Mr. Bush's petition for a writ of habeas corpus. *Bush v Sec. Florida Department of Corrections*, 888 F.3D (11TH Cir 2018). The Eleventh Circuit found that Mr. Bush's claim was did involves an alleged violation of substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at 1195 The Eleventh Circuit found that there was no United States Supreme Court precedent that confers a substantial due process right claimed by Mr. Bush. The Eleventh Circuit affirmed the District Court's denial of habeas corpus holding that 28 U.S.C. §2254 (d) (1) required it to defer to the summary decision without an opinion of the Third District Court of Appeal that affirmed the trial court's denial of Mr. Bush's post conviction claims.'

REASONS FOR GRANTING THE PETITION

28 U.S.C. §2254 (d) (1) requires federal courts to refuse to grant a writ of habeas corpus to a state prisoner with respect to any claim that was adjudicated on the merits in state court proceedings unless the state court's adjudication of the claim resulted in a decision that (1) was contrary to clearly established Federal law as determined by decisions of this Court; or (2) involved an unreasonable application of clearly established Federal law as determined by the this Court.

Thus to determine if a federal court should defer to a state court's decision on a constitutional claim, a federal court must engage in a three-step process.

First, the federal court must determine if the state court adjudicated the claim on the merits. Because in Mr. Bush's case there was no reasoned written opinion from any state court denying the claim at issue, the federal courts may presume that the state court adjudicated the claim on the merits. *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)

Second, the federal court must determine if the State court's decision was contrary to, or involved an unreasonable application of clearly established Federal law as determined by decisions of this Court. Mr. Bush contends that the decision of the state court's that he was not entitled to a transcript of his trial to use in his postconviction proceedings was contrary to or involved an unreasonable application of clearly established Federal law as determined by the this Court.

This Court has consistently held that an indigent criminal defendant is entitled to a transcript of his trial for appellate purposes. *Griffin v. Illinois*, 351 US 12, 76 S Ct 585, 100 L Ed 891 (1956) *Griffin* involved a postconviction proceeding under Illinois law. The question presented in *Griffin* was whether the Due Process and Equal Protection Clauses of the Fourteenth

Amendment prohibited Illinois from denying appellate review to indigent criminal defendants by denying them a transcript.

The Illinois trial court tried the petitioners, Griffin and Crenshaw, together and convicted them of armed robbery. Both petitioners filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished to them without cost because they were indigent and could not pay the necessary fees to acquire the trial transcript and court records needed to prosecute an appeal. The trial court denied the motions without a hearing.

Both petitioners then filed a petition under the Illinois Post-Conviction Hearing Act. Under the Illinois Postconviction Hearing Act, a defendant may raise only questions arising under the Illinois or Federal Constitution in a postconviction proceeding. Under Illinois law under some circumstances an indigent petitioners may obtain a free transcript to use in proceedings under the Postconviction Act. Thus, under Illinois law, indigent defendants may obtain a free trial transcript to obtain appellate review of state and federal constitutional questions, but not to review other alleged trial errors such as admissibility and sufficiency of evidence.

In their postconviction proceedings, both petitioners alleged that there were manifest non-constitutional errors in the trial which entitled them to have their convictions set aside on appeal and that the only impediment to full appellate review was their lack of funds to buy a transcript. The petitioners alleged that Illinois' refusal to afford full appellate review to them solely because of their poverty was a denial of due process and equal protection. The court dismissed the postconviction petitions without an evidentiary hearing. The Illinois Supreme Court affirmed the dismissal of both petitions.

This Court reversed stating: “Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts” *Id.* 351 U.S. at 19

In *Britt v. North Carolina*, this Court explained the full breath of the holding in *Griffin* stating:

Griffin v Illinois and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L Ed 2d 400 (1971)

In *Lane v Brown*, this Court invoked the rule in *Griffin* to grant an indigent *pro se* defendant a free transcript of a postconviction proceeding for the defendant to use in an appeal of a denial of postconviction relief. *Lane v. Brown*, 372 U.S. 477, 83 S. Ct. 768 , 9 L Ed 2d 892 (1963)

Griffin and its progeny are applicable to any criminal proceeding in which a state offers an appellate review of constitutional claims for the first time—either on direct appeal or in a postconviction proceeding.

Illinois, like Florida, provides a two level process for initial review of claims of error in a defendant’s criminal conviction and sentence. Both provide for direct appeal of errors appearing in the record. Both also provide for postconviction proceedings for errors that do not appear in the record. However, postconviction proceedings in Illinois, unlike Florida, are limited solely to state and federal constitutional questions. In *Griffin*, this court stated that both levels of review constitute a form of initial appellate review stating: “The effect is that indigents may obtain a free transcript to obtain appellate review of constitutional questions (in postconviction proceedings) but not of other alleged trial errors such as admissibility and sufficiency of evidence (in a direct appeal) .” *Griffin* at 351 U.S. at 15 (explanation added).

In *Martinez v. Ryan*, this Court acknowledge that a claim of ineffective assistance of trial counsel in an initial collateral review proceeding—such as a Fla. R. Crim. P. 3.850 motion in Florida—is the functional equivalent of a direct appeal. *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 284 (2012). This Court in *Trevino v. Thaler* expanded the holding in *Martinez* to include states like Florida that makes it virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim on direct appeal. *Trevino v. Thaler*, 569 U.S. 413; 133 S. Ct. 1911; 185 L. Ed. 2d 1044 (2013).

Because a Fla. R. Crim. P. 3.850 motion is the functional equivalent of a direct appeal, *Griffin* and its progeny required that Florida provide Mr. Bush with a transcript of his trial to use in his postconviction proceedings. The holding of the District Court and the Eleventh Circuit was contrary to or involved an unreasonable application of clearly established Federal law as determined by the this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Bush

Michael Bush
Date: September 19th 2018