[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12532

D.C. Docket No. 1:12-cv-21916-JAL

MICHAEL BUSH,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 25, 2018)

Before TJOFLAT and MARCUS, Circuit Judges, and STEELE,* District Judge.

TJOFLAT, Circuit Judge:

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* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

Michael Bush is a Florida prison inmate serving sentences for burglary of an occupied building, grand theft, and resisting an officer without violence. After exhausting his state-court remedies on direct appeal and collateral attack, he petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus vacating his convictions pursuant to 28 U.S.C. § 2254. The Court denied the writ and a judge of this Court issued a Certificate of Appealability ("COA").[1] The COA posed the following question: whether 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 collaterally attacking his convictions that his trial attorneys rendered ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights. *See generally Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The answer to this question depends upon whether the Florida Third District Court of Appeal's ("DCA") decision affirming the collateral-attack court's denial of relief "was contrary to, or involved an unreasonable application of, clearly established" United States Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). We conclude that the answer is no and therefore affirm the District Court's denial of the writ.

[1] *See* 28 U.S.C. § 2253(c).

I.

A.

The crimes in this case occurred in the night of October 7–8, 2003, in Miami Shores, a village in Miami-Dade County, Florida. Around 2:30am on October 8, Lori Willenberg briefly observed a man outside of her house. Minutes later, she saw the man running swiftly 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. He was riding a bicycle. After the man noticed the officer, he jumped off of the bicycle, discarded a bag and a leaf blower, and then 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 around 3:30am Michael Bush was found on the roof of a house in the area and taken into custody.

On October 29, 2003, the State Attorney for Miami-Dade County charged Bush by information with burglary of an occupied dwelling, grand theft, and resisting an officer without violence. He was declared indigent, and the Circuit Court of Miami-Dade County appointed public defenders Lindsey Glazer and Gregg Toung to represent him. Bush pleaded not guilty to the information and stood trial before a jury on February 7, 8, and 9, 2006. The jury convicted Bush on all charges, and the court sentenced him to prison for thirty-five years. He

appealed his convictions to the DCA, represented by separate appointed counsel, public defenders Bennett Brummer and Howard Blumberg. Portions of Bush's trial had not been transcribed because the court reporter had lost some of her notes,[2] so 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).[3] With the assistance of Bush's trial attorneys and the prosecutor, counsel prepared the Statement, which depicted what had transpired during the portions of the trial that had not been transcribed. The Statement was included in the record on appeal.

Although the Statement failed to recreate portions of the trial, the appeal went forward presenting a single issue: whether the trial court erred in sustaining the State's objection to unauthenticated x-rays of Bush's damaged ankle, which would have helped Bush substantiate his claim that he was incapable of evading

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[2] The court reporter lost her notes for a portion of the trial proceedings that took place on February 8 and for all of the proceedings on February 9, 2006.

[3] Florida Rule of Appellate Procedure 9.200(b)(4) provides that

> if the transcript is unavailable, a party may prepare a statement of the evidence or proceedings from the best available means, including the party's recollection. . . . Thereafter, the statement and any objections or proposed amendments shall be filed with the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

police in the way the prosecution alleged.[4] The DCA affirmed summarily. *Bush v. State*, 992 So. 2d 412 (Fla. 3d Dist. Ct. App. 2008) (mem.).

B.

On September 29, 2009, Bush returned to the trial court and filed a *pro se* motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. His motion presented six claims of ineffective assistance of trial counsel.[5] Annexed to his motion was the Statement that had been presented to the DCA in the direct appeal of his convictions.

The trial court appointed Alan Byrd, a private lawyer, to represent Bush and on August 12, 2010, it held an evidentiary hearing on Bush's motion. Bush's trial attorneys, the prosecutor, and Bush testified.[6] The attorneys' recollection of what transpired during the portions of the trial that had not been transcribed differed

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[4] The portion of the trial transcript included in the record on appeal was sufficient to enable the DCA to provide meaningful review of this issue.

[5] His six claims of ineffective assistance were as follows:
(1) Trial counsel failed to contemporaneously object and to renew all objections pursuant to the trial court's denial of the defense's peremptory challenge of a juror.
(2) Trial counsel failed to properly authenticate x-rays in support of the testimony of Bush's expert witness.
(3) Trial counsel failed to allow Bush to testify.
(4) Trial counsel failed to object or move for a mistrial when the prosecutor made statements ridiculing the defense in the presence of the jury.
(5) Trial counsel failed to submit into evidence certain certified medical records.
(6) Trial counsel failed to impeach or attempt to impeach the inconsistent testimony and credibility of one of the state's witnesses.

[6] The State began the hearing by calling Lindsey Glazer, one of Bush's trial attorneys, and Benjamin Simon, the prosecutor. Byrd followed with the testimony of Gregg Toung, Bush's other trial attorney, and Bush.

from that of Bush; they sharply disputed Bush's version of what had occurred. Byrd thus argued that Bush's motion should be granted because, had a complete trial transcript been available, he could have thoroughly impeached the attorneys' testimony and Bush's own would have been bolstered. The trial court was not persuaded and denied Bush's Rule 3.850 motion on September 10, 2010.

Bush appealed the decision to the DCA. In his brief, he raised four issues. The first three concerned three of the original six ineffective-assistance claims litigated in the Rule 3.850 proceeding.[7] 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."[8] Bush claimed that given this circumstance, the court should have vacated his convictions and ordered a new trial.

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. He supported his argument by citing a series of Florida appellate

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[7] The three claims raised on appeal were claims (1), (2), and (6) in Bush's Rule 3.850 motion. *See supra* note 5.

[8] Bush did not specify how or why the missing transcript resulted in a violation of his United States constitutional rights. The sole federal authority his brief cited on this point was *Hardy v. United States*, 375 U.S. 277, 84 S. Ct. 424 (1964), which is inapposite. *See infra* note 9.

decisions, all reviewing a defendant's conviction on direct appeal[9]; none reviewed the denial of postconviction relief. In the most recent decision Bush cited, *Jones v. State*, the Florida Supreme Court expressed its precedent in cases involving the absence of a trial transcript in the direct appeal of a defendant's conviction[10]: "It is . . . clear that under our precedent, this Court requires that the defendant demonstrate that there is a basis for a claim that the missing transcript would reflect matters which prejudice the defendant." 923 So. 2d 486, 489 (Fla. 2006).

The State, in its answer brief, expressed its argument 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

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[9] *Jones v. State*, 923 So. 2d 486 (Fla. 2006); *Delap v. State*, 350 So. 2d 462 (Fla. 1977) (per curiam); *Vilsaint v. State*, 890 So. 2d 1293 (Fla. 3d Dist. Ct. App. 2005) (mem.); *L.I.B. v. State*, 811 So. 2d 748 (Fla. 2d Dist. Ct. App. 2002); *Blasco v. State*, 680 So. 2d 1052 (Fla. 3d Dist. Ct. App. 1996). In addition to these decisions, Bush cited Justice Goldberg's statement in *Hardy*, 375 U.S. at 288, 84 S. Ct. at 431 (Goldberg, J., concurring), that:

> the most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

The *Hardy* Court was addressing the question of whether under the scheme created in 28 U.S.C. § 1915, which allowed "any federal court [to] authorize an 'appeal' *in forma pauperis*," a court-appointed counsel, who had not represented the indigent defendant at trial, should be provided a complete transcript of the trial proceedings at government expense in order to discharge his professional duty to the defendant, as his appellate counsel, as described in *Ellis v. United States*, 856 U.S. 674, 675, 78 S. Ct. 974, 975 (1958). *Hardy*, 375 U.S. at 278–82, 84 S. Ct. at 425–28. In answering the question in the affirmative, the Court did not "reach a consideration of constitutional requirements." *Id.* at 282, 84 S. Ct. at 428.

[10] The Florida Supreme Court reviewed the defendant's conviction in exercising its "conflict" jurisdiction. *See* Fla. Const. art. V, § 3(b)(3).

circumstances of the case; that the Appellant's issues have already been addressed or are meritless, and alternatively, there was no error." Referring to *Jones v. State* and two of the other cases Bush had cited,[11] the State's answer brief acknowledged that a new trial might have been required had an inadequate trial transcript precluded the DCA from conducting a meaningful review of his convictions. It went on to assert, however, that "to the extent that the adequacy of the record was or could have been raised on direct appeal, [Bush] was not entitled to relief." In making its argument, the State did not distinguish between the provision of a trial transcript on direct appeal and in a postconviction proceeding. The State thus raised, but did not answer, the question of whether the *Jones* remedy applied in the postconviction context as well as on direct appeal and, if so, whether the transcript of Bush's trial was inadequate for Rule 3.850 purposes—*i.e.*, to determine whether defense counsels' trial performance was constitutionally ineffective under *Strickland v. Washington*. It was precisely this unanswered question that Bush's fourth point posed: whether the Florida appellate decisions Bush cited required the denial of Rule 3.850 relief to be reversed and a new trial granted.

The DCA summarily affirmed the trial court's decision. *Bush v. State*, No. 3D10-3063, 2012 WL 560916 (Fla. 3d Dist. Ct. App. Feb. 22, 2012) (unpublished table decision).

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[11] *Delap*, 350 So. 2d 462; *L.I.B.*, 811 So. 2d 748.

C.

Having exhausted his state-court remedies, Bush brought the habeas petition now before us. In his petition, Bush challenged the DCA's disposition of the three ineffective-assistance claims presented on appeal and of his claim that the unavailability of eighty percent of the trial transcript required the vacation of his convictions and a new trial. Bush reframed that claim, which is the only claim relevant here, to assert two violations of the United States Constitution: His convictions were invalid because "his Fifth and Fourteenth Amendment rights to due process and access to the courts were violated by being required to appeal and seek postconviction remedies with an incomplete record."[12] As stated, the claim amounted to a substantive restatement of the fourth claim Bush presented to the DCA in appealing the denial of Rule 3.850 relief.

The District Court ordered the state to respond to the petition. Concerning Bush's fourth claim, the State's response first asserted that the claim had been waived. Bush, the State contended, should have raised on direct appeal his allegations about the effect of the incomplete transcript on meaningful appellate review. The State then argued that, should the merits be reached, Bush could not

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[12] The District Court expressed the claim in these quoted words in its order denying Bush's petition. As stated in Bush's petition and by the Magistrate Judge in his report and recommendation to the District Court, the claim was this: "The petitioner has a constitutional right under the Fifth Amendment and Fourteenth Amendments to the guarantee of due process and fundamental right to access the courts through a complete record on appeal which is indispensable to the realization of this constitutional right."

show that he was actually prejudiced by the missing portions of the transcript. Implicit in this argument was the State's recognition that a convicted defendant has a constitutional right to the provision of a trial transcript for use in postconviction proceedings. It recognized the right as created by the substantive component of the Due Process Clause. It 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, its argument was that notwithstanding the missing portions of the transcript, Bush received full consideration of his ineffective-assistance claims in the Rule 3.850 proceeding.

The District Court referred Bush's petition and the State's response to a Magistrate Judge for a report and recommendation. The Magistrate Judge denied Bush's request for an evidentiary hearing and, after consulting the records of the state courts' criminal and Rule 3.850 proceedings, recommended that the District Court deny his petition. In his recommendation, the Magistrate Judge "decline[d] to engage in an analysis of procedural bar" resulting from Bush's failure to present his insufficient-record argument as two, discrete federal constitutional claims in his Rule 3.850 motion and instead reached the merits. Citing *Mayer v. City of Chicago*, 404 U.S. 189, 92 S. Ct. 410 (1971), a case about an indigent defendant

being denied a free transcript in appealing his conviction,[13] 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 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."[14]

The District Court agreed. It too 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,[15] but only if the defendant established prejudice. Bush, the District Court concluded, failed to

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[13] *Mayer* involved an Illinois Supreme Court's denial of a transcript to an indigent who had been convicted of violating Chicago ordinances. 404 U.S. at 190–93, 92 S. Ct. at 412–14. Applying the principle it announced in *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956)—that the "constitutional guarantees of due process and equal protection" require the provision of trial transcripts sufficiently complete to permit proper consideration of an *indigent's direct appeal* of his conviction—the United States Supreme Court vacated the Illinois Supreme Court's order denying the transcript. *Mayer*, 404 U.S. at 199, 92 S. Ct. at 417. Nothing in *Mayer* or any other United States Supreme Court decision we are aware of extends this equal protection right to a case in which the State has not discriminated against the defendant on account of his indigent status.

[14] We note that the quoted part of these statements did not distinguish between the direct appeal of a conviction and the appeal of an adverse postconviction decision.

[15] The District Court noted that "[i]n Ground Four [of his petition, Bush] argues that his Fifth and Fourteenth Amendment rights to due process and access to the courts were violated by being required to appeal and seek post-conviction remedies with an incomplete record." In adopting the Magistrate Judge's recommendation, however, the Court did not explicitly address the question of whether the Due Process Clause incorporated a right to access the courts.

present any evidence that the missing portions of his transcript prejudiced his ability to prosecute his Rule 3.850 motion.

Bush sought a COA on the four claims he asserted in his habeas petition. The District Court denied the COA, but this Court granted a COA with respect to his fourth claim, framing the issue as "[w]hether the absence of significant portions of the trial transcript violated Bush's rights to due process or access to the courts." The COA was granted under the assumption that Bush had presented the due process and access to the courts claims to the DCA and that it had summarily decided that neither constitutional right had been infringed.

II.

A.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, circumscribes a federal court's authority to grant a writ of habeas corpus setting aside a state-court conviction. The relevant portion states:

> 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—
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> (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). Bush does not contend that the DCA's affirmance of the Rule 3.850 court's decision was based on an unreasonable determination of facts. Rather, his argument is that the decision was contrary to, or an unreasonable application of, clearly established Federal Law, and that the District Court erred in failing to recognize that.

Under § 2254(d)(1), "clearly established Federal Law, as determined by the Supreme Court of the United States," refers to the Court's holdings, not its dicta, as of the time of the state-court decision in question. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000). A state-court decision is "contrary to" a Supreme Court holding "if the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Id.* at 412–13, 120 S. Ct. at 1523.

B.

Bush sought a COA, and this court granted it, on issues of access to the courts and due process. In his opening brief on appeal, though, Bush says nothing

about access to the courts. He has therefore abandoned the claim.[16] *See United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004). As to due process, the parties, the Magistrate Judge, and the District Court treated Bush's petition as claiming a violation of the right in its substantive rather than procedural form. And Bush and the State continue to do so here. We do likewise. Our analysis starts with the function of a trial transcript on direct appeal versus in postconviction proceedings.

The state creates a trial transcript for purposes of direct appeal out of necessity. That is, the state provides direct appellate review of convictions, so it also provides a court reporter and transcript in order to allow for review to be meaningful. A trial transcript, in some instances, might be critical to reviewing for alleged trial-court errors; affirming a conviction without one might be arbitrary. Thus if a defendant's conviction cannot be meaningfully reviewed on direct appeal, due to a deficient transcript or otherwise, state law requires the conviction

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[16] Regardless of abandonment, Bush's access to the courts claim is not persuasive. Access to the courts claims generally assert a right to something that the state could provide, or they involve state interference with individuals' ability to challenge their convictions. *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747 (1969) (holding that, unless alternative sources of assistance are provided, prisoners must be allowed access to inmate "writ-writers"); *Ex Parte Hull*, 312 U.S. 546, 61 S. Ct. 640 (1941) (holding that the state could not refuse to mail a prisoner's inartful pleadings to the courts). Here, portions of Bush's trial transcript were lost through no fault of the State, and the State had no power to conjure the missing portions.

to be vacated. *See, e.g.*, *Vilsaint v. State*, 890 So. 2d 1293 (Fla. 3d Dist. Ct. App. 2005) (mem.). And indeed the United States Constitution does too, as such would violate one's right to procedural due process. *See Entsminger v. Iowa*, 386 U.S. 748, 750, 87 S. Ct. 1402, 1403 (1967) (holding that a defendant was denied "adequate and effective review" of his conviction because significant parts of the trial record were missing). In Bush's direct appeal of his convictions, he did not have a complete trial transcript, but that did not preclude meaningful review. Bush concedes this.[17]

A trial transcript plays a different role in Rule 3.850 proceedings. Once a Rule 3.850 motion is filed, the clerk must "forward the motion and file to the court." Fla. R. Crim. P. 3.850(f). If the motion states a claim for relief "but the files and records in the case conclusively show that the defendant is not entitled to relief," the claim "shall be summarily denied on the merits without a hearing." *Id.* at 3.850(f)(4), (5). If the files and records—including among their contents the trial transcript—do not conclusively show that the defendant is not entitled to relief, as here, then the court must order the state attorney to file an answer to the defendant's motion. *Id.* at 3.850(f)(6). After Bush filed his motion and the State filed its response, the Rule 3.850 court decided an evidentiary hearing was

[17] Bush has never contended, and does not contend here, that the missing trial transcript caused him any prejudice in advocating the single claim of trial-court error he presented to the DCA in appealing his convictions.

required. *See id.* at 3.850(f)(8). It was only at this point that Bush needed the trial transcript. The full transcript was unavailable but the hearing proceeded nonetheless.

In this context, the transcript was merely to serve as a piece of evidence in Bush's Rule 3.850 proceeding. Bush's constitutional claim is that, without a transcript in his Rule 3.850 hearing, he could neither impeach the other witnesses' testimony nor show that his memory of the events at trial was, in fact, better than that of the other witnesses. Bush contends that this hindered his ability to argue his ineffective-assistance claims. The transcript, then, was to be used to increase or decrease the value of witness testimony, like any other piece of evidence. This evidentiary role is different in kind than the role a trial transcript plays on direct appeal, where it is potentially indispensable for identifying trial-court errors and conducting meaningful appellate review.

Holding the Rule 3.850 proceeding despite the missing evidence (the transcript) is not a procedural due process violation. "Procedural due process requires only an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Cherry v. Heckler*, 760 F.2d 1186, 1190 (11th Cir. 1985) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). Bush was represented by counsel in his Rule 3.850 proceeding, testified about his own recollection of trial, called Toung as a witness and had an opportunity to cross-

examine Glazer and Simon, and had the right to appeal. He also had available to him the record which he and his trial counsel had previously supplemented with a statement of proceedings via Florida Rule of Appellate Procedure 9.200(b)(4). What's more, the transcript's incompleteness is in no way a result of trial-court error, and the full transcript would not aid in identifying trial-court errors. So, necessarily, Bush contends that he has a substantive due process right to the full transcript.

We know of no United States Supreme Court case that confers a substantive due process right of the sort Bush claims. Substantive due process rights are "fundamental" rights; no amount of process can justify their infringement. *McKinney v. Pate*, 20 F.3d 1550, 1556–57 (11th Cir. 1994) (en banc). None of the decisions Bush, the State, the Magistrate Judge, or the District Court cite stand for the proposition that Bush had a substantive due process right to a transcript of portions of his trial that were critical to prosecuting his *Strickland* claims postconviction. Rather, they hold that affirming a conviction on direct appeal notwithstanding the absence of portions of the trial transcript essential to meaningful appellate review of trial-judge error could deny the defendant procedural due process of law. *See, e.g.*, *Mayer*, 404 U.S. at 193–96, 92 S. Ct. at 414–15; *Draper v. Washington*, 372 U.S. 487, 495–98, 83 S. Ct. 774, 779–80 (1963); *Griffin v. Illinois*, 351 U.S. 12, 15, 76 S. Ct. 585, 589 (1956). Further, the

Griffin line of cases—Bush's main authority—are grounded primarily in equal protection principles, standing for the proposition that "a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." *See Ross v. Moffitt*, 417 U.S. 600, 608, 94 S. Ct. 2437, 2442 (1974) (characterizing the *Griffin* line of cases as standing for the quoted proposition). And beyond lacking case law, the parties, the Magistrate Judge, and the District Court also do not explain why, or how, having access to a complete trial transcript is a "fundamental" right.

As discussed, a trial transcript functions to ensure *procedural* due process on direct appeal. There may be instances in which a trial transcript is crucial to meaningful appellate review. But there may also be instances in which meaningful review can be conducted without a trial transcript. Adequate process can remedy a missing or deficient trial transcript. Florida Rule of Appellate Procedure 9.200(b)(4), for example, provides litigants a way to receive a fair hearing without a trial transcript.

In Rule 3.850 proceedings, trial transcripts are but one part of the record that informs a state postconviction court's decision of whether to conduct an evidentiary hearing. Here, Bush was granted an evidentiary hearing. Within that hearing, the trial transcript's function was then an evidentiary one: to substantiate Bush's testimony and impeach adverse testimony. Being unable to use a portion of

the trial transcript was akin to being unable to produce a witness. Bush's claim therefore cannot be feasibly characterized as a *substantive* due process violation.

III.

The DCA's affirmance of the Rule 3.850 court's denial of relief was not contrary to, and did not involve an unreasonable application of, clearly established United States Supreme Court precedent. We therefore affirm the District Court's dismissal of Bush's 28 U.S.C. § 2254 petition.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-21916-CIV-LENARD/WHITE

MICHAEL BUSH,

Petitioner,

v.

MICHAEL D. CREWS,

Respondent.
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ORDER ADOPTING REPORT OF MAGISTRATE JUDGE (D.E. 12), DISMISSING PETITIONER'S PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS (D.E. 1), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick White ("Report," D.E. 12), issued on April 1, 2013, recommending the Court dismiss Petitioner Michael Bush's Petition Under 28 U.S.C. section 2254 for Writ of Habeas Corpus ("Petition," D.E. 1), filed May 21, 2012. Judge White recommends that the Petition be dismissed because: (1) in each of Petitioner's claims of ineffective assistance of counsel, he failed to establish that counsel was deficient and/or that any alleged deficiency resulted in prejudice (Report at 18-19, 21, 24); and (2) Petitioner failed to establish that he was denied a constitutional right by virtue of being required to appeal without a complete trial transcript (id. at 27-28). On May 9, 2013, Petitioner filed Objections to Judge White's Report ("Objections," D.E. 15), to which Respondent did

not file a response. Upon de novo review of the Report, Objections, Petition, and the record, the Court finds as follows.

I. Background

This case involves a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254 challenging Petitioner's conviction in state court for burglary of an occupied dwelling, grand theft, and resisting an officer without violence. (Petition at 1.) The issues presented to the Court, paraphrased for clarity, are as follows:

1. Whether Petitioner was denied his (1) Fifth Amendment right to due process when the trial court denied a peremptory challenge, (2) Sixth Amendment right to effective assistance of counsel when counsel failed to object to the trial court's denial of a peremptory challenge, and/or (3) Fourteenth Amendment rights to equal protection and a fair trial by virtue of the Fifth and Sixth Amendment violations. (Id. at 5.)

2. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment rights to equal protection and a fair trial when trial counsel failed to properly authenticate medical documents (x-rays) for introduction into evidence. (Id. at 7.)

3. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to impeach a witness with inconsistent testimony that "would compel the jury to acquit the accused as enough reasonable doubt became obvious." (Id. at 9.)

4. Whether Petitioner's Fifth and Fourteenth Amendment rights to due process and access to the courts were violated by being required to appeal and seek post-conviction remedies with an incomplete record. (Id. at 11.)

Petitioner was tried in state court and convicted on February 9, 2006; he was sentenced to thirty-five years' imprisonment. (Id. at 1.) On September 8, 2006, Petitioner filed a

notice of direct appeal. See Bush v. Florida, Case No. 3D06-2220 (Fla. Dist. Ct. App. 2006).[1] During the preparation of the direct appeal, it was discovered that the court reporter who transcribed the state trial proceedings lost her notes and was unable to render a complete transcription of the trial proceedings. (See Motion to Supplement Record on Appeal, D.E. 9-10 at 3.) Missing from the record are a portion of the trial proceedings which took place on February 8, 2006 and all of the trial proceedings on February 9, 2006. (Id.) As a result, a statement of proceedings was submitted to the trial court pursuant to Florida Rule of Appellate Procedure 9.200(b)(4), and that statement of the proceedings was approved by the court. (Id.) On February 4, 2008, the court of appeals granted Petitioner's motion to supplement the record. (D.E. 9-10 at 12.)

The only issue raised on direct appeal was whether "[t]he trial court erred in excluding from evidence x-rays of [Petitioner's] damaged ankle where the defense had established the proper foundation for the admission of those x-rays." (D.E. 9-9 at 26.) On October 15, 2008, the court of appeals issued a per curiam affirmance without opinion. Bush v. Florida, 992 So. 2d 412 (Fla. Dist. Ct. App. 2008). Thereafter, Petitioner sought post-conviction relief in state court pursuant to Florida Rule of Criminal Procedure 3.850 raising six grounds of ineffective assistance of counsel. (D.E. 9-11 at 11-63.) An evidentiary hearing was held on Petitioner's motion on August 12, 2012. (See Transcript of Proceedings, D.E. 9-12 at 3-67, D.E. 9-18 at 4-73.) At the evidentiary hearing, Petitioner's former attorneys Lindsey Glazer and Gregg Toung, prosecutor

[1] The online docket for Petitioner's direct appeal is available at http://www.3dca.flcourts.org/.

Benjamin Simon, and Petitioner each testified. (See id.) Judge White summarized the relevant testimony as follows:

> Glazer's testimony confirmed she and Toung represented petitioner during his trial and remembered the facts and circumstances surrounding the case. (DE#9, App.S:9-10). When questioned regarding petitioner's first claim in his Rule 3.850 motion, wherein he asserts counsel failed to object to being forced to use a peremptory challenge on one of the jurors during the last portion of jury selection, Glazer responded she renewed all objections at the end of jury selection. (Id.:10).
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> . . . Finally, Glazer confirmed she investigated petitioner's medical records. (Id.). In particular, she called an expert witness about the x-rays and agreed with petitioner that the x-rays should have been introduced at trial; however, they were denied under the business record exception notwithstanding her objection. (Id.). Although the issue was preserved for appeal, the district court affirmed the trial court's decision to exclude the records. (Id.). However, at trial there was still testimony from Dr. Millheiser. (Id.:13-14).
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> . . .
>
> On cross-examination, Simon testified the state had vigorously objected to the introduction of the x-rays because there was no record of custodian presented, thus the records were not authenticated. (DE#9, App.S:32). He further explained the x-rays were from Jackson Memorial hospital, while the witness, Dr. Millheiser, was just that, a witness. (Id.). However, the state indicated that fortunately for the defense, they were able to discuss the records through Dr. Millheiser's testimony at trial. (Id.).
>
> With respect to the jury selection, Simon failed to recall the trial judge saying anything to the defense along the lines that it should reconsider its peremptory challenges nor does he recall the judge putting any pressure on the defense to get a jury selected so that trial could begin. (DE#9,App.S:33).
>
> After Simon's testimony concluded, the state rested. (DE#9, App.S:34). The defense then called Glazer's co-counsel, Gregg Toung. (Id.). Toung confirmed he had been involved in petitioner's trial, but did not subpoena the custodian of records or technician who took petitioner's x-ray. (Id.). He

> was also unable to recall whether petitioner ever mentioned to him or asked him to get other records, other than the x-ray that was an issue, or other medical records from prior treatments. (Id.:37).
>
> . . . When questioned regarding his cross-examination of Officer Lee, Toung testified he did not have any concerns or specific recollections thereof. (Id.:38). He also did not remember any issues regarding a helicopter pilot. (Id.:38-39).
>
> With regards to the jury selection process, Toung did not recall anything specific about jury selection or about the efforts to reconstruct the record. (DE#9, App.S:38-40).
>
> . . . On further questioning by the court, Toung testified that Ofc. Lee's K-9 had gotten an alert at the base of a house near a tree; that Lee contacted a helicopter pilot, who illuminated the area; and that petitioner was spotted and found on a rooftop even though he allegedly could not run, jump or climb. (Id.:40-41). The foregoing facts/inconsistencies were discussed with petitioner as part of his decision about whether he should testify, but Toung was unable to recall any specifics. (Id.:41).
>
> Next, petitioner testified. (DE#9, App.S:44). Petitioner testified that his first claim of his Rule 3.850 motion was based on his memory of the trial proceedings. (Id.:46). He took notes during trial, neither of his attorneys objected to the court's request that they reconsider their peremptory challenges; neither of the attorneys renewed their objections prior to the panel being sworn; the jury selection process went almost all the way through the second panel; the judge did not want to have another jury panel, so instead, he intimidated the attorneys to not use their peremptory challenges. (Id.:46-47).
>
> Regarding his medical records, petitioner testified he had informed his attorneys he had been x-rayed after an accident in 1990; he has a fused left ankle; he has been unable to run after the accident; and he informed his attorneys of his medical condition. (DE#9, App.S:47-49). . . .

(Report at 6-11.) On September 10, 2010, the trial court denied Petitioner's Rule 3.850 Motion in open court (D.E. 9-18 at 70-79), followed by a written order denying the Motion on October 12, 2010 (D.E. 9-17 at 98). Petitioner appealed to the Third District Court of Appeals, making the same four arguments he makes here. (See D.E. 9-19 at 4-

5); see Bush v. Florida, Case No. 3D10-3063 (Fla. Dist. Ct. App. 2010).[2] The court of appeals issued a per curiam affirmance without opinion on February 22, 2012. See id., 2012 WL 560916 (Fla. Dist. Ct. App. Feb. 22, 2012). After exhausting his state court remedies, Petitioner filed the instant action on May 21, 2012. (See Petition, D.E. 1.) Additional facts will be developed below where relevant to the Court's analysis.

II. Legal Standards

Upon receipt of the Magistrate Judge's Report and Petitioner's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3).

> The district court must conduct a de novo review of any part of the R & R that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988); see United States v. Schultz, 565 F.3d 1353, 1360 (11th Cir. 2009) ("a party that wishes to preserve its objection must . . . pinpoint the specific findings that the party disagrees with").

Leatherwood v. Anna's Linens Co., 384 F. App'x 853, 856-57 (11th Cir. 2010). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

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[2] The online docket for Petitioner's post-conviction appeal to the Third District Court of Appeals is available at http://www.3dca.flcourts.org/.

A federal court may not grant a petition for a writ of habeas corpus on behalf of a person in custody with respect to a claim that was adjudicated on the merits in a state court unless the state court's 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; 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." Id. § 2254(d). "A state court decision is 'contrary to' clearly established federal law where the state court either applied a rule in contradiction to governing Supreme Court case law or arrived at a result divergent from Supreme Court precedent despite materially indistinguishable facts." Hannon v. Dep't of Corr., 562 F.3d 1146, 1150 (11th Cir. 2009) (citing Jones v. Campbell, 436 F.3d 1285, 1293 (11th Cir. 2006)). A federal court may also grant relief "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 413 (2000). Additionally, findings of fact made by the state court are presumed correct and may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Crowe v. Hall, 490 F.3d 840, 844 (11th Cir. 2007).

Insofar as Petitioner's claims involved allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result

is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). However, Petitioner

> must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. See Williams, supra, at 411, 65 S. Ct. 363. Rather, he must show that the [Florida] Court of Appeals applied Strickland to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99 (2002). This is because a state court's rejection of a federal constitutional issue qualifies as an adjudication on the merits under 28 U.S.C. section 2254(d) that is entitled to deference. Florida's Third District Court of Appeal issued per curiam affirmances without written opinion of both (1) Petitioner's conviction, see Bush, 992 So. 2d 412 (Fla. Dist. Ct. App. 2008), and (2) the trial court's rejection of Petitioner's motion for post-conviction relief, see Bush, 2012 WL 560916. Insofar as the issues raised in Smith's Amended Petition are the same as those raised in state court, the state appellate court's per curiam affirmance qualifies as an adjudication on the merits which is entitled to deference. Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002).

III. Discussion

A. Ground One

In Ground One, Petitioner argues that he was denied his (1) Fifth Amendment right to due process when the trial court denied peremptory challenges, (2) Sixth Amendment right to effective assistance of counsel when counsel failed to object to the trial court's denial of peremptory challenges, and/or (3) Fourteenth Amendment rights to

equal protection and a fair trial by virtue of the Fifth and Sixth Amendment violations described in this claim. (Petition at 5.) Judge White determined that Petitioner was not entitled to habeas relief because: (1) there is no evidence supporting Petitioner's factual assertions; (2) even if his factual assertions were true he could not establish prejudice under Strickland; and (3) the denial of a peremptory challenge is a matter of state law not subject to federal habeas review. (Report at 18-19.) Petitioner objects by essentially rearguing the position he took in his Petition. Specifically, Petitioner alleged that:

> After a second panel of prospective jurors, defense counsel used a peremptory challenge to dismiss Donna Marie Lewis, even though the State accepted her. The court advised the defense to reconsider their decision because this was the defense's last peremptory challenge and being that Ms. Lewis and another potential juror, Ms. Rolle were the last two candidates in the second panel however, the court was not inclined to grant a third panel of potential jurors. The defense argued that a peremptory challenge needs no reasoning and the defendant was willing to continue until he was satisfied with competent jurors being seated instead of accepting Ms. Lewis and Ms. Rolle. Ms. Lewis told the court in voir dire that she could or would require that the defendant to testify to prove or try to prove his innocence... And, Ms. Rolle, might want more evidence...physical evidence. Trial counsel failed to formally contemporaneously object, nor to renew the objection.

(Id. at 5-6.) Thus, Petitioner argues that defense counsel failed to object and renew an objection to being denied a peremptory challenge. (See id.)

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Id.; see also Ross v. Oklahoma, 487 U.S. 81, 85 (1988) ("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an

impartial jury."). "Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ." Smith v. Phillips, 455 U.S. 209, 217 (1982).

Accordingly, "a state criminal defendant who can demonstrate that a member of the jury which heard his case was biased or incompetent is entitled to federal habeas corpus relief." Rogers v. McMullen, 673 F.2d 1185, 1189 (11th Cir. 1982). However, Petitioner has made no such demonstration. As Judge White noted, this identical claim was raised and rejected by the state courts during post-conviction proceedings following an evidentiary hearing. (Report at 16.) And, as the state court found, a full review of the evidentiary hearing reveals counsel was not ineffective for allegedly failing to preserve for appellate review the denial of the peremptory challenge to a jury during voir dire.

As recounted above, during the evidentiary hearing, trial counsel Glazer was asked about whether she had failed to object to being forced to use a peremptory challenge on one of the jurors during the last portion of jury selection. (D.E. 9-18 at 15.)[3] Glazer responded that she renewed all objections at the end of jury selection. (Id.) She clarified: "I renew all jury selection peremptories. At the end of jury selection we renew everything." (Id.) She further testified:

Q: And do you specifically recall doing that in this case?

A: Yes.

(Id.) Then, on cross-examination:

Q: [D]o you remember the jury selection process?

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[3] The page citations to the appellate record filed as exhibits to the State's Response to Order to Show Cause (D.E. 9) are the page numbers assigned to the .pdf document, not the page numbers assigned to the exhibits.

A: Yes, I remember the jury selection process. I can't tell you that I remember a specific juror, but I do remember renewing all the objections prior to the jury walking in, which I do in every case.

...

Q: Do you remember if Judge Reyes, for lack of a better term, applied some kind of pressure to encourage you to give up your peremptory challenge?

A: No. I made a habit of not responding to judges' pressures. It's kind of a PD requirement.

(Id. at 26-27.) Finally, state prosecutor Simon testified that he did not recall Judge Reyes putting pressure on the Defense to select a jury, or reconsider its peremptory challenge to one of the last two jurors. (Id. at 33.) However, he did "recall this trial being very smooth, including jury selection." (Id.)

On the other hand, Petitioner testified from his own memory that defense counsel failed to renew the objection before the jury was sworn in. (Id. at 51.) He further testified that the trial judge intimidated the Defense not to pursue a peremptory challenge against one of the jurors. (Id. at 52.)

As previously mentioned, Petitioner brought this identical claim for post-conviction relief in state court. (See D.E. 9-19 at 4.) The trial court denied Petitioner post-conviction relief on these grounds in open court (see D.E. 9-18 at at 70-79), followed by a written order on October 12, 2010 (D.E. 9-17 at 98). The state appellate Court affirmed the trial court's judgment. See Bush, 2012 WL 560916. This affirmance qualifies as an adjudication on the merits which is entitled to deference. Wright, 278 F.3d at 1254. Nor has Petitioner shown that the state court proceedings "(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). Specifically, he has not made the required showing that the state court of appeals applied Strickland to the facts of his case in an objectively unreasonable manner. Bell, 535 U.S. at 698-99. Indeed, the Court finds that the decision was based on an entirely reasonable determination of the facts in light of the evidence presented.

To begin with, there is no evidence, other than Petitioner's allegedly superior memory, supporting Petitioner's assertion that: (1) the trial court forced the Defense to use a peremptory; (2) that even if the trial court did force the Defense to use a peremptory that defense counsel failed to object; and/or (3) that defense counsel failed to renew the objection. In fact, the rest of the evidentiary hearing testimony contradicts this version of events. However, even if the Court was to assume, without deciding, that counsel failed to object and/or renew her objection to the trial court's denial of a peremptory challenge during voir dire, and that such failures constituted deficient performance, Petitioner has not demonstrated any prejudice. He has made no showing that a proper objection and/or renewal would have been sustained. And, other than vaguely arguing that he was prejudiced, Petitioner has made no showing that but for counsel's alleged deficiencies, the outcome of the proceeding would have been different and that he would have been acquitted of the offenses. Under these circumstances, Petitioner has failed to establish prejudice stemming from counsel's alleged deficient performance under Strickland. 466

U.S. at 714 (holding that to establish prejudice, habeas petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). For all of these reasons, he is not entitled to relief on this claim for ineffective assistance of counsel.

Finally, to the extent Petitioner argues that the trial court erroneously denied his peremptory challenge to Juror Lewis, the claim fails because the Supreme Court has held that the erroneous denial of a defendant's peremptory challenge presents only an issue of state law:

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.
>
> . . . [T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. See, e.g., Martinez–Salazar, 528 U.S., at 311, 120 S. Ct. 774. We have characterized peremptory challenges as "a creature of statute," Ross v. Oklahoma, 487 U.S. 81, 89, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), and have made clear that a State may decline to offer them at all. McCollum, 505 U.S., at 57, 112 S. Ct. 2348. See also Holland v. Illinois, 493 U.S. 474, 482, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990) (dismissing the notion "that the requirement of an 'impartial jury' impliedly compels peremptory challenges"). When States provide peremptory challenges (as all do in some form), they confer a benefit "beyond the minimum requirements of fair [jury] selection," Frazier v. United States, 335 U.S. 497, 506, 69 S. Ct. 201, 93 L. Ed. 187 (1948), and thus retain discretion to design and implement their own systems, Ross, 487 U.S., at 89, 108 S. Ct. 2273.
>
> Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution.

Rivera v. Illinois, 556 U.S. 148, 157-58 (2009) (footnote omitted).[4] "A federal court may not issue the writ on the basis of a perceived error of state law." See Pulley v. Harris, 465 U.S. 37, 41 (1984). Accordingly, Petitioner is not entitled to habeas relief on Ground One.

B. Ground Two

In Ground Two, Petitioner argues that he was denied his (1) Sixth Amendment right to effective assistance of counsel and (2) Fourteenth Amendment rights to equal protection and a fair trial when trial counsel failed to properly authenticate x-rays of Petitioner's ankle for introduction as an exhibit at trial. (Petition at 7.) "The facts of the case reveal that the assailant was particularly light on his feet, agile, speedy to run or flee, had great ability to climb and jump fences and trees." (Id. at 7.) Apparently, Petitioner believes that x-rays of his ankle would have created a doubt as to whether he was able to physically perform as the assailant was alleged to have performed. (See id.) Judge White found that Petitioner was unable to establish prejudice under Strickland because the contents of the x-rays were ultimately admitted through Dr. Millheiser, the Defense's expert witness. Petitioner objects and apparently argues that prejudice is established as follows:

> Trial counsel's failure to authenticate the x-ray photograph invited an unnecessary objection by the State which planted doubt in the jury's mind as to Petitioner being able to run, jump or climb or not. Counsel's failure to authenticate the x-ray photograph invited the jury to be suspicious of the defense and the defense witness in that the defense was being viewed of trying to slant improper evidence in.

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[4] Petitioner's objections do not allege that the trial court's denial of the peremptory challenge was made in bad faith.

(Objections at 5.)

At the evidentiary hearing, defense counsel Glazer testified that she agreed with Petitioner that the x-rays should have been admitted at trial. (D.E. 9-18 at 18.) She attempted to have them admitted under the business records exception to the hearsay rule, but the trial court denied that attempt. (Id.) The defense objected and preserved the issue, but the trial court's ruling was ultimately affirmed on appeal. (Id.) Notwithstanding the defense's inability to have the x-rays admitted at trial, the contents thereof were nonetheless introduced by way of Dr. Millheiser's testimony. (Id. at 19.) On cross-examination, Glazer admitted that she did not have the records custodian for those x-rays, nor did she subpoena the x-ray technician who actually took the x-rays. (Id. at 19-20.)

Glazer also testified that the trial evidence established that on the day of the offense, Petitioner was located on a rooftop, by a helicopter, in an area where a police perimeter had been set. (Id. at 28.) The Court questioned Glazer:

> Q: Was there anything that you recall from evidence that was introduced in that trial that rebutted that information?
>
> A: The X-rays which we tried to get.
>
> Q: Any physical evidence from or testimonial evidence from witnesses in the case, other than his prior injury to his ankle, that he wasn't on a rooftop when he was located.
>
> A: No.
>
> Q: All right. Anything that came out of discovery when you did all the witnesses and the officers that were involved depositions that he wasn't up on a rooftop?

A: No.

(Id. at 28-29.) Glazer was unable to remember if Petitioner ever told her how he got on the roof. (Id. at 29.)

Similarly, prosecutor Simon testified that that the x-rays were not admitted into evidence because there was no records custodian presented and the x-rays had not been authenticated. (Id. at 37.) However, he noted that "[f]ortuantely for the Defense, they were able to discuss those records through Dr. Millheiser." (Id.)

As previously mentioned, Petitioner brought this identical claim for post-conviction relief in state court. (See D.E. 9-19 at 4.) The trial court denied Petitioner post-conviction relief on these grounds in open court (see D.E. 9-18 at at 70-79), followed by a written order on October 12, 2010 (D.E. 9-17 at 98). The state appellate Court affirmed the trial court's judgment. See Bush, 2012 WL 560916. This affirmance qualifies as an adjudication on the merits which is entitled to deference. Wright, 278 F.3d at 1254. Nor has Petitioner shown that the state court proceedings "(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). Specifically, he has not made the required showing that the state court of appeals applied Strickland to the facts of his case in an objectively unreasonable manner. Bell, 535 U.S.

at 698-99. Indeed, the Court finds that the decision was based on an entirely reasonable determination of the facts in light of the evidence presented.

Specifically, the Court agrees with Judge White that even if counsel can be deemed deficient for failing to subpoena the records custodian and/or otherwise authenticate the x-rays pursuant to Florida law, Petitioner has not established prejudice. First, the uncontroverted evidentiary hearing testimony establishes that although the x-rays were not admitted at trial, the defense was nonetheless able to introduce their contents through Dr. Millheiser's testimony. Additionally, he has failed to show how the outcome of the proceeding would have been different and that he would have been acquitted of the offenses had the x-rays been admitted. His conclusory allegation that counsel's failure to authenticate the x-rays "invited the jury to be suspicious of the defense and the defense witness in that the defense was being viewed of trying to slant improper evidence" is woefully insufficient to establish a Strickland violation, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 714. Accordingly, he is not entitled to habeas relief on Ground Two.

C. Ground Three

In Ground Three, Petitioner argues that he was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to impeach a witness with inconsistent testimony of that witness that "would compel the jury to acquit the accused as enough reasonable doubt became obvious." (Petition at 9.) Specifically, he claims that counsel was ineffective for failing to impeach Officer Lee's trial testimony that the

helicopter pilot searching for Petitioner spotted Petitioner's leg and foot with his pretrial deposition statement that the helicopter pilot saw no evidence of anyone on the roof during the aerial surveillance. (Id.) Judge White found no Strickland violation because Lee's trial and deposition testimony are consistent—that is, Officer Lee never testified that the helicopter pilot spotted a leg and foot on the roof. (Report at 24.) Petitioner's objections do not address this finding. Rather, the Objections to Ground Three state, in their entirety:

> Mr. Bush testified that there was no way he could have gotten on the roof. And, that even though he asked his attorney to depose Mr. Degocki (the ambulance attendant, E.M.T.) who took care of the wound to Mr. Bush's head, he also asked Ms. Glazer to depose the helicopter pilot and to depose each of the law enforcement officers that supposedly pulled him down from the roof..... but Ms. Glazer didn't do as Mr. Bush requested. Police authorities claim that Mr. Bush suffered head injuries from landing head first as they pulled him from the roof. Mr. Bush maintains that Officer Johnson or Johnston hit him in the head with his flashlight (postconviction pg. 52-54; App pg. 55-57). Had trial counsel properly investigated the case as Mr. Bush requested of her, she would have discovered and evidence which would have overcome the State's theory of prosecution through proper impeachment/effective impeachment of State witness testimony.

(Objections at 5-6 (ellipses in original).) These objections are insufficient to invoke this Court's de novo review of Judge White's Report.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), "a party may serve and file specific written objections to the proposed findings and recommendations." See also 28 U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.").

> The district court must conduct a de novo review of any part of the R & R that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988); see United States v. Schultz, 565 F.3d 1353, 1360 (11th Cir. 2009) ("a party that wishes to preserve its objection must . . . pinpoint the specific findings that the party disagrees with").

Leatherwood v. Anna's Linens Co., 384 F. App'x 853, 856-57 (11th Cir. 2010). Petitioner has completely failed to challenge Judge White's finding that Officer Lee's deposition testimony was consistent with his trial testimony. Rather, he presents a completely unrelated argument in his Objection to Ground Three, which the Court declines to address. And, in any event, the Court agrees with Judge White's findings of fact and conclusions of law with respect to this claim. Accordingly, Petitioner is not entitled to habeas relief on Ground Three.

D. Ground Four

In Ground Four, Petitioner argues that his Fifth and Fourteenth Amendment rights to due process and access to the courts were violated by being required to appeal and seek post-conviction remedies with an incomplete record. (Id. at 11.) Judge White concluded that Petitioner "failed to show specific errors to have occurred during the unrecorded portions to support a claim that the absence of a complete transcript resulted in prejudicial error requiring a new trial." (Report at 27.) He further concluded that Petitioner failed to show that "the statement of proceedings, as adopted by the court, was an inadequate alternative for effecting an appeal. Petitioner's general assertions that the

reconstructed transcript was unreliable do not warrant habeas relief." (Id. at 28.) In his Objections, Petitioner argues that (1) he is entitled to an appeal based on a complete trial transcript, and (2) a complete transcript would have shown that fundamental error occurred in voir dire with respect to the allegations in Ground One, supra.

There is no constitutional right to a completely accurate transcript of a state criminal trial. Tedford v. Hepting, 990 F.2d 745, 747 (3d Cir. 1993). A constitutional violation only occurs "if inaccuracies in the transcript adversely affected the outcome of the criminal proceeding." Id. Petitioner "must point to specific errors alleged to have occurred during the unrecorded portions to support a claim that the absence of a complete transcript resulted in prejudicial error requiring a new trial." Bergerco, U.S.A. v. Shipping Corp. of India, Ltd., 896 F.2d 1210, 1215 (9th Cir. 1990). The Court must consider the totality of the circumstances surrounding the omission to determine whether hardship or prejudice resulted from the failure to record statements. United States v. Gallo, 763 F.2d 1504, 1531 (6th Cir. 1985). Tedford, 990 F.2d at 747. "[I]n order to demonstrate denial of a fair appeal, petitioner must show prejudice resulting from the missing transcripts." Bransford v. Brown, 806 F.2d 83, 86 (6th Cir. 1986) (citing Mitchell v. Wyrick, 698 F.2d 940, 942 (8th Cir. 1983); United States ex rel. Cadogan v. LaVallee, 428 F.2d 165, 168 (2d Cir. 1971)). Although it may be more difficult to demonstrate prejudice with an incomplete transcript, "petitioner must present something more than gross speculation that the transcripts were requisite to a fair appeal." Id.

Here, the only specific error Petitioner alleges to have occurred which, he argues, a complete transcript would reveal, is that Jurors Lewis and Rolle were not impartial and,

therefore, should have been removed from the panel. (Objections at 7-8.) He dismisses his attorneys' and the prosecutor's recollection of these events and suggests, simply, that his memory is better than theirs are. (Id. at 8.) He points to no evidence, other than his superior memory, to support his claims. Petitioner's conclusory allegations do not merit relief. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." Ross v. Estelle, 694 F.2d 1008, 1011-12 (5th Cir. 1983) (citing Woodard v. Beto, 447 F.2d 103 (5th Cir. 1971)). "[M]ere conclusory allegations do not raise a constitutional issue in a habeas proceeding." Id. (citing Schlang v. Heard, 691 F.2d 796, 798 (5th Cir. 1982)). Accordingly, Petitioner is not entitled to habeas relief on these grounds.

IV. Evidentiary Hearing and Certificate of Appealability

To the extent Petitioner argues that he is entitled to a federal evidentiary hearing on his claims, the Court disagrees. "'If [petitioner] alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" Holmes v. United States, 876 F.2d 1545, 1552 (quoting Slicker v. Wainwright, 809 F.2d 768, 770 (11th Cir. 1987) (quoting McCoy v. Wainwright, 804 F.2d 1196, 1199-1200 (11th Cir. 1986))). However, no hearing is required where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous. Holmes, 876 F.2d at 1553; see also Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that a petitioner is not entitled to an evidentiary

hearing "when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible.") (citations and internal quotation marks omitted). For the reasons stated above, Petitioner's claims are all affirmatively contradicted by the record, and/or wholly incredible, so no federal hearing is necessary or warranted.

Nor is a Certificate of Appealability warranted. Petitioner has failed to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot, 463 U.S. at 893 n.4))). He is therefore not entitled to a COA.

V. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge (D.E. 12), issued April 1, 2013, is **ADOPTED**;
2. Petitioner Michael Bush's Petition Under 28 U.S.C. section 2254 for Writ of Habeas Corpus (D.E. 1), filed May 21, 2012, is **DISMISSED**;
3. A Certificate of Appealability **SHALL NOT ISSUE**;
4. All pending motions are **DENIED AS MOOT**; and
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of May, 2014.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-21916-CV-LENARD
MAGISTRATE JUDGE P.A. WHITE

MICHAEL BUSH, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

MICHAEL D. CREWS,[1] :

Respondent. :

I. Introduction

Michael Bush, who is presently confined at Everglades Correctional Institution in Miami, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his convictions and sentences in case number F03-28617, entered in the Eleventh Judicial Circuit Court for Miami-Dade County.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The Court has before it the petition for writ of habeas corpus, the Respondent's response to an order to show cause and appendix of exhibits and petitioner's reply thereto.

[1]Michael D. Crews has replaced Kenneth S. Tucker as Secretary of the Florida Department of Corrections, and is now the proper respondent in this proceeding. Crews should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

IV. Custody

The respondent concedes petitioner is currently in the lawful custody of the Florida Department of Corrections pursuant to a valid judgment and sentence entered by the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida in case number F03-28617. (DE#9:2).

III. Claims

Petitioner raises the following claims, verbatim:

1. Whether petitioner was denied constitutional rights protection under the 5th, 6th and 14th Amendments of the United States Constitution. His 5th Amendment due process rights were violated when the trial court denied peremptory challenges, his 6th Amendment right to effective assistance of counsel were violated in that counsel failed to object to the trial court's denial of peremptory challenges and his 14th amendment right to equal protection and a fair trial was violated as a result of the claim above. The trial court abused discretion. (DE#1:5).

2. The petitioner's right to effective legal counsel was negated pursuant to the precepts of the 6th Amendment to the United States Constitution. While the lower tribunal court abused discretion in denying post conviction claims of ineffective assistance of counsel in that; trial counsel failed to properly authenticate medical documents (X-Rays) evidence as a matter of law pursuant to the Florida Evidence Statutes and that required chain of custody procedure which rendered the petitioner nothing less than an unfair trial under the 14th Amendment including equal protection under the law. (DE#1:7).

3. The petitioner has a constitutional guarantee to effective legal counsel under the 6th Amendment of the United States Constitution. A defendant has the right to face his accuser under the 14th Amendment, and is

protected under the 5th Amendment, which guarantees due process rights. [A]ll these amendments, including the confrontation clause of the 6th Amendment, which guarantees an accused the right to an actual face-to-face encounter at trial with all witnesses who appear and give evidence. Trial counsel failed to impeach the state witness when inconsistent testimony of that witness would compel the jury to acquit the accused as enough reasonable doubt became obvious. (DE#1:9).

4. The petitioner has a constitutional right under the Fifth Amendment and Fourteenth Amendments to the guarantee of due process and fundamental right to access the courts through a complete record on appeal which is indispensable to the realization of this constitutional right. (DE#1:11).

IV. Procedural History

The procedural history of this case can be summarized as follows. Petitioner was charged by information with burglary of an occupied dwelling, a violation of Fla. Stat. §810.02(3)(A) (Count 1); grand theft, a violation of Fla. Stat. §812.014(2)(C) (Count 2); and resisting an officer without violence, in violation of Fla. Stat. §843.02 (Count 3). (DE#9,App.D:11-15).

The case proceeded to trial and on February 9, 2006, petitioner was convicted by a jury on all counts. (DE#9,App.D:67-69). On August 9, 2006, petitioner was sentenced to 35 years in prison as to Count 1, with a 30-year minimum mandatory sentence as a violent career criminal and a 15-year minimum mandatory sentence as a prison release reoffender; 5 years in prison as to Count 2; and 364 days in Miami-Dade Jail as to Count 3; all to run concurrently with one another. (DE#9,App.D:67-69,71-73,139-43,146).

On September 5, 2006, a notice of direct appeal was filed and thereafter transmitted to the Third District Court of Appeal, case

number 3D06-2229.(DE#9,App.D:145).[2]

During the preparation of direct appeal, it was discovered the court reporter, who transcribed the state trial proceedings, lost her notes and was unable to render a complete transcription thereof. (DE#9,App.H). Missing from the record include a portion of the trial proceedings which took place on February 8, 2006 and all of the trial proceedings on February 9, 2006. (Id.). The court reporter certified her inability to transcribe those proceedings because she lost her notes. (Id.). As a result, the Assistant Public Defender, submitted a statement of proceedings to the trial court pursuant to Fla.R.App.P. 9.200(b)(4), which was approved. (Id.). On February 4, 2008, the district court granted petitioner's motion to supplement the record. (DE#9,App.I).

On appeal, petitioner raised the sole claim "The trial court erred in excluding from evidence x-rays of the defendant's damaged ankle where the defense had established the proper foundation for the admission of those x-rays." (DE#9,App.G). Following the state's response (id.,App.J), the district court, on October 15, 2008, per curiam, affirmed petitioner's conviction and sentence. Bush v. State, 992 So.2d 412 (Fla. 3d DCA 2008)(citing §90.901, Fla. Stat. (2005); Charles W. Ehrhardt, Florida Evidence §§901.1-901.2 (2007)); (DE#9,App.K). The mandate issued on October 31, 2008. (DE#9,App.L). It does not appear from the record petitioner sought review from the Florida Supreme Court.

Petitioner, pro se, pursued state post-conviction relief, when on September 29, 2009, he filed a motion pursuant to Fla.R.Crim.P.

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[2]The Court takes judicial notice of information available at the database maintained by the Third District Court of Appeal, http://www.3dca.flcourts.org/, in Bush v. State, Case No. 3D06-2229. See Fed.R.Evid. 201.

3.850 raising the following claims:

> 1. Trial counsel rendered ineffective assistance in failing to contemporaneously object and failing to renew all objections pursuant to the trial court's denial of the defense's peremptory challenge of a juror.
>
> 2. Trial counsel rendered ineffective assistance in failing to properly authenticate medical documents "x-rays" evidence in which to support testimony of defense expert witness where such authentication of evidence is mandatory pursuant to Florida law.
>
> 3. Trial counsel rendered ineffective assistance in failing to exercise his constitutional right to testify pursuant to the Fifth Amendment of the United States Constitution and Article 1 Section 9 of the Florida Constitution.
>
> 4. Trial counsel rendered ineffective assistance in failing to object or move for a mistrial when the prosecutor made statements which ridiculed the defense in the presence of the jury during the state's closing arguments.
>
> 5. Trial counsel rendered ineffective assistance in failing to submit into evidence, certified medical records that documented specific recommendation by Orthopedic Specialist to the Florida Department of Corrections and the Social Security Administration.
>
> 6. Trial counsel rendered ineffective assistance in failing to impeach or attempt to impeach the inconsistent testimony and credibility of the state's witness, Officer John Lee of the canine unit.

(DE#9,App.M). Following the state's response (DE#9,App.N), an evidentiary hearing was held on August 12, 2010, on petitioner's motion, during which he was represented by private court-appointed counsel, Alan Byrd. (See DE#9,Apps.O,S).

During the August 12, 2010, evidentiary hearing petitioner's former attorneys, Lindsey Glazer and Gregg Toung; former trial

prosecutor, Benjamin Simon and petitioner all testified. (DE#9,App.S:4-69).

Glazer's testimony confirmed she and Toung represented petitioner during his trial and remembered the facts and circumstances surrounding the case. (DE#9,App.S:9-10). When questioned regarding petitioner's first claim in his Rule 3.850 motion, wherein he asserts counsel failed to object to being forced to use a peremptory challenge on one of the jurors during the last portion of jury selection, Glazer responded she renewed all objections at the end of jury selection. (Id.:10).

Glazer's testimony also revealed that she in no way prevented and/or threatened petitioner from testifying. (DE#9,App.S:10-11). Rather, she informed petitioner, that if he were to testify, his prior convictions would come out during his testimony. (Id.:11). Petitioner thereafter chose not to testify. (Id.). During her testimony, Glazer acknowledged petitioner informing her of a defense witness, but failed to provide any identifying information about this witness other than the fact she was a prostitute that was with petitioner at the time of his arrest. (Id.:11-12).

Moreover, Glazer confirmed the state, during its closing arguments on the case, never made an argument to the effect that petitioner was a very bad person who should be removed from society for a very long time. (DE#9,App.S:12). Had the state made any such comments, Glazer would have objected and moved for a mistrial. (Id.). Likewise, Glazer recalled making several objections during closing arguments; however, she specifically recalled objecting to a statement made by the state at closing, which had been excluded

at a Richardson[3] hearing. (Id.:12-13).

Glazer was unable to recall any statements made during the state's closing argument to the effect that the state had all the witnesses, the defense had none, and therefore, the defense was unable to prove their case. (DE#9,App.S:13). Had the foregoing statement been made, Glazer stated she would have objected. (Id.). Finally, Glazer confirmed she investigated petitioner's medical records. (Id.). In particular, she called an expert witness about the x-rays and agreed with petitioner that the x-rays should have been introduced at trial; however, they were denied under the business record exception notwithstanding her objection. (Id.). Although the issue was preserved for appeal, the district court affirmed the trial court's decision to exclude the records. (Id.). However, at trial there was still testimony from Dr. Millheiser. (Id.:13-14).

On re-direct, Glazer further explained that after discussing with petitioner his right to testify, the state trial court judge colloquied him, also giving petitioner the option to testify. (DE#9,App.S:22-23).

Former Assistant State Attorney, Benjamin Simon, testified petitioner must have been colloquied by the trial court as to his decision to testify because Judge Reyes always colloquied defendants on that issue. (DE#9,App.S:26-27). Simon confirmed it was the trial judge's custom and practice to colloquy defendants after the close of the state's case as to whether they wanted to testify. (Id.:27).

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[3]Richardson v. State, 246 So.2d 771 (Fla. 1971).

Moreover, Simon denied ever telling the jury during his closing arguments at trial that petitioner was a menace to society and that he should be removed from the streets of society for a very long time. (DE#9,App.S:27). Likewise, Simon never told the jury that the state had all the evidence and petitioner had none, therefore, petitioner was unable to prove his innocence. (Id.).

On cross-examination, Simon testified the state had vigorously objected to the introduction of the x-rays because there was no record of custodian presented, thus the records were not authenticated. (DE#9,App.S:32). He further explained the x-rays were from Jackson Memorial hospital, while the witness, Dr. Millheiser, was just that, a witness. (Id.). However, the state indicated that fortunately for the defense, they were able to discuss the records through Dr. Millheiser's testimony at trial. (Id.).

With respect to the jury selection, Simon failed to recall the trial judge saying anything to the defense along the lines that it should reconsider its peremptory challenges nor does he recall the judge putting any pressure on the defense to get a jury selected so that trial could begin. (DE#9,App.S:33).

After Simon's testimony concluded, the state rested. (DE#9,App.S:34). The defense then called Glazer's co-counsel, Gregg Toung. (Id.). Toung confirmed he had been involved in petitioner's trial, but did not subpoena the custodian of records or technician who took petitioner's x-ray. (Id.). He was also unable to recall whether petitioner ever mentioned to him or asked him to get other records, other than the x-ray that was an issue, or other medical records from prior treatments. (Id.:37).

Toung also confirmed that it was petitioner's decision to testify had he truly wanted to do so, but would have given him advise if it was against petitioner's best interest. (DE#9,App.S:37-38). When questioned regarding his cross-examination of Officer Lee, Toung testified he did not have any concerns or specific recollections thereof. (Id.:38). He also did not remember any issues regarding a helicopter pilot. (Id.:38-39).

With regards to the jury selection process, Toung did not recall anything specific about jury selection or about the efforts to reconstruct the record. (DE#9,App.S:38-40).

When questioned by the court, Toung testified that it was his experience at trial with Judge Reyes that he would always colloquy the defendant at the close of the state's case regarding the right to testify. (DE#9,App.S:40). On further questioning by the court, Toung testified that Ofc. Lee's K-9 had gotten an alert at the base of a house near a tree; that Lee contacted a helicopter pilot, who illuminated the area; and that petitioner was spotted and found on a rooftop even though he allegedly could not run, jump or climb. (Id.:40-41). The foregoing facts/inconsistencies were discussed with petitioner as part of his decision about whether he should testify, but Toung was unable to recall any specifics. (Id.:41).

Next, petitioner testified. (DE#9,App.S:44). Petitioner testified that his first claim of his Rule 3.850 motion was based on his memory of the trial proceedings. (Id.:46). He took notes during trial, neither of his attorneys objected to the court's request that they reconsider their peremptory challenges; neither of the attorneys renewed their objections prior to the panel being sworn; the jury selection process went almost all the way through the second panel; the judge did not want to have another jury

panel, so instead, he intimidated the attorneys to not use their peremptory challenges. (Id.:46-47).

Regarding his medical records, petitioner testified he had informed his attorneys he had been x-rayed after an accident in 1990; he has a fused left ankle; he has been unable to run after the accident; and he informed his attorneys of his medical condition. (DE#9,App.S:47-49). With respect to his claim about his right to testify, petitioner stated he spoke with Toung, not Glazer, about the right to testify, but Toung would not let him do so. (Id.:49). Petitioner explained that he did not inform the court of his attorneys precluding him from testifying because he was not aware that he could speak up at trial and he also felt intimidated by the judge. (Id.:49-51).

Petitioner also testified he informed his attorneys about an alibi witness, a lady named Rose. (DE#9,App.S:51-53). Notwithstanding, his attorneys never looked for this witness nor did they send out an investigator to procure more information. (Id.).

Next, petitioner testified the prosecutor, during closing argument, ridiculed his defense. (DE#9,App.S:53). In support of this argument, petitioner listed statements he recalled from trial, since he did not have any record or transcript to refer to. (Id.:53-54). Finally, he testified that had he taken the witness stand, he would have testified that he was not on the roof, he would have been unable to climb the tree, he had a fused ankle, the state's witnesses had lied, that a police officer hit him in the head and his attorney should have deposed the pilot who spotted him and the ambulance driver. (Id.:55-57).

Following the conclusion of petitioner's testimony, the trial court heard arguments from both parties. (DE#9,App.S:57-65). When defense counsel finished his argument, the court indicated it wanted to review the case law and reset the matter. (Id.:66-68).

On September 10, 2010, the trial court, in open court, denied petitioner's Rule 3.850 motion, followed by a written order denying the motion on October 12, 2010. (DE#9,App.S:70-79;App.R:493).

A notice of appeal as to the denial of his Rule 3.850 motion was filed on or about November 19, 2010, with the Third District Court of Appeal, case number 3D10-3063.[4] On June 17, 2011, petitioner filed his initial brief, arguing as follows:

> 1. Whether the trial court erred in denial of the defendant's claim of ineffective assistance for failing to object to being forced to use a peremptory challenge during jury selection; and whether the court abused its discretion.
>
> 2. Whether the trial court abused its discretion in denying defendant's claim that trial counsel was ineffective in failing to properly authenticate medical documents (X-Rays) evidence pursuant to the Florida evidence laws and the required chain of custody.
>
> 3. Whether the trial court erred in denying defendant's claim that trial counsel was ineffective assistance in failing to impeach the state witness.
>
> 4. Whether the trial court erred in denying the defendant's Rule 3.850 motion for post-conviction relief on all claims when 80% of the original trial record was lost, destroyed, or unretrievable.

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[4]The Court takes judicial notice of information available at the database maintained by the Third District Court of Appeal, http://www.3dca.flcourts.org/, in Bush v. State, Case No. 3D10-3063. See Fed.R.Evid. 201.

(DE#9,App.T). Following the state's response (DE#9,App.U) and petitioner's reply thereto (DE#9,App.V), the district court, on February 22, 2012, per curiam and without written opinion, affirmed the trial court's decision. (DE#9,App.W). Petitioner's motion for rehearing (DE#9,App.X) was denied on March 21, 2013.[5] The mandate issued on April 9, 2012. (DE#9,App.Y).

While the foregoing appeal was pending, on April 13, 2011, petitioner filed a petition for writ of mandamus with the Third District Court of Appeal, case number 3D11-1020. (DE#9,Apps.Z,AA). Petitioner sought to compel the lower court to produce the transcript of the evidentiary hearing on his Rule 3.850 motion. (DE#9,App.AA). Following the state's response (DE#9,App.BB), the petitioner filed a motion to dismiss his petition (DE#9,App.CC), which was subsequently granted on May 27, 2011. (DE#9,App.DD).

Upon conclusion of the state court proceedings, petitioner came to this Court, filing the instant pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2255 on May 17, 2012.

V. Statute of Limitations

The respondent concedes the petitioner's 28 U.S.C. §2254 petition was timely filed. (DE#9:21-22).

VI. Exhaustion & Procedural Default

The Court declines to engage in an analysis of procedural bar in the interest of judicial economy and addresses the petitioner's claims on the merits. See Lambrix v. Singletary, 520 U.S. 518

[5] Id.

(1997)(although procedural issues should generally be addressed before considering the merits of a claim, the courts may reach the merits first in the interest of judicial economy); Peoples v. Campbell, 377 F.3d 1208 (11th Cir. 2004)(a habeas petition can be denied on the merits notwithstanding the applicant's failure to exhaust state-court remedies); see also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(judicial economy sometimes dictates reaching the merits if they are easily resolvable against a petitioner and the procedural bar issues are complicated).

VII. Standard of Review

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001).

A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of §2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. In the habeas context, clearly

established federal law refers to the holdings of the Supreme Court's decisions as of the time of the relevant state-court decision. Hall v. Head, 310 F.3d 683, 690 (11th Cir. 2002) (citing Williams, 529 U.S. at 412). However, in adjudicating a petitioner's claim, the state court does not need to cite Supreme Court decisions and the state court need not even be aware of the Supreme Court cases. See Early v. Packer, 537 U.S. 3, 8 (2002); Parker v. Sec'y, Dep't of Corr., 331 F.3d 764, 775-76 (11th Cir. 2003).

So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. Id. Further, a federal court must presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

Moreover, in the instant case, the Petitioner seeks habeas relief based, in part, on ineffective assistance of counsel. The United States Supreme Court clearly established the law governing such claims in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a criminal defendant to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced him. Id. at 690. As to the first prong, deficient performance means performance outside the wide range of professionally competent assistance. Id. The judiciary's scrutiny of counsel's performance is highly deferential. Id. at 689. As to the second prong, a defendant establishes prejudice by showing that, but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of

the proceedings. Id.

A defendant must satisfy both the deficiency and prejudice prongs set forth in Strickland to obtain relief on an ineffective assistance of counsel claim. Failure to establish either prong is fatal and makes it unnecessary to consider the other. Strickland, 466 U.S. at 697.

Combining AEDPA's habeas standard and Strickland's two-pronged test provides the relevant inquiry in this case. To obtain habeas relief, the petitioner must show the state court "applied Strickland to the facts of his case in an objectively unreasonable manner" when it rejected his claims of ineffective assistance of counsel. Bell v. Cone, 535 U.S. 685, 699 (2002).

VIII. Discussion

In **claim one**, petitioner asserts his 5th Amendment due process rights were violated when the trial court denied peremptory challenges, his 6th Amendment right to effective assistance of counsel were violated in that counsel failed to object to the trial court's denial of peremptory challenges and his 14th amendment right to equal protection and a fair trial was violated as a result of the claim above. (DE#1:5).

Petitioner maintains jurors Lewis and Rolle were biased against him, having a preconceived view that he was guilty because he had not testified at trial. It is axiomatic that the right to jury trial guarantees to the criminally accused a fair trial by a

panel of impartial, indifferent jurors.[6] Irvin v. Dowd, 366 U.S. 717, 222 (1961). See also Ross v. Oklahoma, 487 U.S. 81, 85 (1988)("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury.") The constitutional right to a trial by an impartial jury requires that those who serve on juries meet certain qualifications. At a minimum, juries must be comprised of competent and impartial persons. See e.g. Smith v. Phillips, 455 U.S. 209, 217 (1982)(stating that "due process means a jury capable and willing to decide the issue solely on the evidence before it"); Peters v. Kiff, 407 U.S. 493 (1972)(noting that defendants have a "due process right to a competent and impartial tribunal").

Accordingly, a state criminal defendant who can demonstrate that a member of the jury which heard his case was not impartial is entitled to federal habeas corpus relief. Petitioner has, however, made no such demonstration. The identical claim was raised and rejected by the state courts during post-conviction proceedings following an evidentiary hearing.

As found by the state courts, full review of the evidentiary hearing, since a complete transcript of the voir dire proceedings is unavailable, reveals counsel was not ineffective for allegedly failing to preserve for appellate review the denial of the peremptory challenge to a jury during voir dire.

As may be recalled, during the evidentiary hearing, trial counsel Glazer was asked about whether she had failed to object to being forced to use a peremptory challenge on one of the jurors

[6]The Sixth Amendment right to an impartial jury in all criminal prosecutions is a fundamental right applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

during the last portion of the jury selection, to which Glazer responded, under oath, that she renews all her objections at the end of jury selection. (DE#9,App.S:10). When asked to clarify she testified "I renew all jury selection peremptories. At the end of jury selection we renew everything." (Id.). Glazer recalled renewing her peremptory objections in petitioner's case. (Id.). Thereafter, on cross-examination, Glazer testified she remembered the jury selection process, although she was unable to recall a specific juror, she remembered renewing all the objections prior to the jury walking in, an act she does in every case. (Id.:21-22). While Glazer did not remember whether there were two panels or if the judge was reluctant to call a third panel, and although she did not remember if the trial court judge applied some kind of pressure to encourage her to give up her peremptory challenge, she testified that she did makes it "a habit of not responding to judges' pressures. It's kind of a PD requirement." (Id.:22).

Unfortunately, co-counsel, Toung, was unable to remember anything specific regarding jury selection or the efforts made to reconstruct the record. (DE#9,App.S:39). However, the state prosecutor, Simon, when asked whether the trial court judge told the defense to reconsider its peremptory challenge or put any pressure on the defense to have a jury selected, Simon testified that he did not recall that and added that the trial was very smooth, including jury selection. (Id.:33).

During his testimony, petitioner stated his defense counsel did not renew the objection before the jury was sworn in, a fact he recalls from his own memory of the jury selection proceedings. (DE#9,App.S:45-46). As may be recalled, petitioner testified he took notes during his trial proceedings, he does not recall either defense attorney objecting to the court's request that they

reconsider their peremptory challenge, likewise, he did nor recall defense counsel renewing her objection prior to the jury being sworn in. (Id.:46). Petitioner further testified the jury selection process went almost all the way through the second panel, the judge did not think they would be able to get another panel, the judge advised the defense not to exercise a peremptory strike and that the judge intimidated the attorneys. (Id.:47).

Even if we assume without deciding that counsel's failure to object and/or renew her objection to the trial court's denial of a peremptory challenge during voir dire constitutes deficient performance, petitioner has nonetheless failed to demonstrate he suffered any prejudice therefrom. Petitioner has made no showing that had counsel objected as suggested, the trial court would have sustained said objection. Without other than vaguely stating he was prejudiced, no showing has been made that the outcome of the proceeding would have been different and the petitioner would have been acquitted of the offenses, but for counsel's alleged deficiencies, as maintained by the petitioner in this collateral proceeding. Under these circumstances, the petitioner has failed to establish prejudice stemming from counsel's alleged deficient performance, pursuant to Strickland v. Washington, 466 U.S. 668 (1984), and is therefore entitled to no relief on this claim.

To the extent petitioner argues the trial court erroneously denied his peremptory challenge as to Juror Lewis, this claim fails at the threshold, because the Supreme Court has held that the erroneous denial of a defendant's peremptory challenge presents only an issue of state law:

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith

> error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.
>
> [T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. We have characterized peremptory challenges as a creature of statute, and have made clear that a State may decline to offer them at all. When States provide peremptory challenges (as all do in some form), they confer a benefit beyond the minimum requirements of fair jury selection, and thus retain discretion to design and implement their own systems. Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution.

Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446, 1453-54, 173 L.Ed.2d 320 (2009) (alterations, footnote, citations, and quotation marks omitted). As a result, we find no error in the district court's denial of this claim. See Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). Accordingly, this claim is also without merit.

In **claim two**, petitioner asserts he was denied effective assistance of counsel when his attorney failed to properly authenticate medical documents (X-Rays) as a matter of law pursuant to the Florida Evidence Statutes and that required chain of custody procedure which rendered the petitioner nothing less than an unfair trial under the 14th Amendment including equal protection under the law. (DE#1:7).

In essence, petitioner contends counsel was ineffective when his attorney failed to properly authenticate medical documents/X-Ray evidence pursuant to Florida Evidence Code and the required

chain of custody.

A review of the evidentiary hearing shows defense counsel, Glazer, with respect to the medical records, called an expert witness about the x-rays and agreed with petitioner that those x-rays should have been admitted into trial. (DE#9,App.S:13). However, the court denied admittance thereof under the business record exception. (Id.). The defense objected and the issue was preserved for appeal, but the trial court's decision was thereafter affirmed on appeal. (Id.). Notwithstanding the defense's inability to have the x-rays admitted at trial, the contents thereof were nonetheless introduced by way of Dr. Millheiser's testimony. (Id.:14).

On cross-examination, Glazer admitted she did not have the records custodian for those x-rays nor did she subpoena the x-ray technician who actually took the x-rays. (DE#9,App.S:14-15). Instead, counsel tried to get the x-rays admitted by way of Dr. Millheiser's testimony. (Id.:15-17).

Counsel's testimony further revealed on the day of the offense, petitioner was located on a rooftop, by a helicopter, in an area where a police perimeter had been established and at the base of a house to which a K-9 police dog had been alerted. (DE#9,App.S:23-24). In hopes of rebutting the foregoing evidence introduced by the state, Glazer tried to introduce petitioner's x-rays to indicate he had an injured ankle that would have precluded him from acting as suggested by the state witnesses. (Id.). Glazer also confirmed that there was no physical or testimonial evidence that the petitioner was not on the roof. (Id.). Moreover, she was unable to recall whether petitioner ever informed her how he got on the roof. (Id.:24).

During his testimony, Simon confirmed the x-rays had not been admitted into evidence; there was no record of custodian presented; and the records had not been authenticated. (DE#9,App.S:31-32). Simon was unable to recall whether the defense, prior to trial, offered him any other medical record or asked for a stipulation; however, he stated that fortunately for the defense, they were able to discuss the records; i.e, x-rays, through their witness, Dr. Millheiser. (Id.:32).

Once again, even if counsel was deemed deficient for failing to subpoena the records custodian of the x-rays and/or authenticate the records pursuant to Florida law, petitioner nonetheless has been unable to demonstrate he suffered any prejudice as a result thereof. First, the uncontroverted testimony from the evidentiary hearing clearly shows that although the x-rays were not admitted at trial, the defense was nonetheless able to introduce their contents through the defense's expert witness, Dr. Millheiser. Second, like with his first claim, petitioner has failed to show how the outcome of the guilt phase portion of the trial would have been different had the x-rays been introduced and/or authenticated. Nothing of record in the state forum or this federal habeas corpus proceeding establishes a Strickland violation. Thus, he is entitled to no relief as to this claim.

In **claim three**, petitioner asserts he was denied effective assistance of counsel when his attorney failed to impeach the state witness when inconsistent testimony of that witness would compel the jury to acquit the accused as enough reasonable doubt became obvious. (DE#1:9).

In this claim, petitioner asserts counsel was ineffective for failing to impeach state witness, Officer Lee's testimony at trial

when he stated the helicopter pilot searching for petitioner spotted petitioner's leg and foot with his pre-trial statement at deposition wherein Lee allegedly stated the helicopter pilot saw no evidence of anyone on the roof during the aerial surveillance. (DE#1:9).

During the motion to suppress hearing and at trial, Ofc. Lee testified he received a dispatch at around 2:45 a.m., informing him there was a subject that was involved in riding a bicycle and running on foot. (DE#9,App.E:23-25;Trial Transcript:240,245). After a perimeter was established, Lee received the subject's description; male wearing a red shirt and dark colored pants. (Id.:24-25). Soon after being dispatched and receiving the suspect's description, Lee arrived within minutes at the perimeter. (Id.:25). About 45 minutes passed before the subject was located. (Id.). Ofc. Lee explained that once the subject, fitting the description, was seen running, the area was surrounded to assure no one entered or left the perimeter. (Id.:26). Once Lee entered the yard of a house, his canine began to alert him indicating it had picked up some human scent. (Id.; Trial Transcript:246-247). The dog then started jumping to the side of the residence and continuously looked up. (Id.). Ofc. Lee looked up but he did not see anyone on the roof. (Id.:26-27;Trial Transcript:247). Because there was a helicopter unit circling the perimeter, Lee advised the pilot of the alert on the house, at which time the helicopter flew over the house, shined the spotlight and stated he did not see anyone on the roof. (Id.:27;Trial Transcript:247).

Since Lee noticed there was a tree next to the roof, he began shining his light up to make sure the subject was not hidden therein. (DE#9,App.E:27;Trial Transcript:248-49). At that point, Lee took a step back providing him a better visual of the roof.

(Id.). After stepping back, Ofc. Lee saw the side of a sneaker hanging over the side of the roof. (Id.). Ofc. Lee explained, because the branches of the tree actually covered the side of the roof where the subject was hiding, the helicopter pilot was unable to identify the subject since the branches covered where the subject was located. (Id.). Petitioner was thereafter arrested. (Id.:27-28;Trial Transcript:249).

At trial, Ofc. Lee once again reiterated that at first he did not see anything to where his canine was alerting, so he requested the helicopter pilot to survey the roof of the house. (Trial Transcript:247). After illuminating the roof, neither the helicopter pilot nor Lee saw anything. (Id.). However, because the canine gave Lee a strong indication that the subject was hiding, Ofc. Lee moved to get a better view of a tree; having taken the helicopter pilot's word that there was no one on the roof, Lee began to look at the tree next to the roof. (Id.:248). When he looked up, he saw what appeared to be the side of a shoe, leading him to believe there was someone on the roof. (Id.). Lee radioed the helicopter pilot to advise him that the subject was on the roof, which the pilot then kept lit. (Id.:248-249).

During cross-examination, Lee testified that initially the helicopter pilot did not see anything or anyone on the roof. (Trial Transcript:251-252). However, Lee subsequently spotted a shoe on the roof. (Id.:252). Prior to concluding his questioning, co-counsel Toung asked Ofc. Lee "And the roof area was lit not once, but twice, by this helicopter, and they saw nothing on the roof both times?" Lee responded "The first time he did not. After I advised him I saw a shoe and asked him to come in on a different angle, that underneath the big tree branch there was a subject. I did see him from there the second time." (Id.:255).

Evident from the foregoing, no where, not during the motion to suppress hearing, nor thereafter at trial, did Lee testify that the helicopter pilot spotted a leg and foot on the roof. Rather, the evidence is clear the pilot did not see the subject on the roof. Rather, it was Ofc. Lee himself who, after being informed by the helicopter pilot there was no one on the roof, persisted in searching the area around the roof, including a tree that partially covered the roof, to then discover the side of a shoe, leading to the subject's arrest.

Moreover, a comparison of the Ofc. Lee's trial testimony with his deposition statements, clearly indicate no inconsistent statements were made. (See DE#10,Supp.App.A:9). A review of the deposition unequivocally shows Lee notified the helicopter pilot to light the roof of the house; however, the pilot did not see anything. (Id.). Because there was a large tree in the front yard of the house, Lee began looking up at it. (Id.). Although the canine continued alerting Lee towards the side of the house; the pilot again said he did not see anything on the roof or the tops of the trees. (Id.). Ofc. Lee then backed up and shined his flashlight up the tree and saw a foot hanging over the side of the house, the subject was right on top of the roof hidden by a tree that blocked the spotlight on the helicopter. (Id.).

Thus, contrary to petitioner's allegations asserted herein, counsel cannot be deemed ineffective for failing to impeach Ofc. Lee's testimony at trial with his testimony at the deposition when it is clear the trial testimony is consistent with petitioner's description of Lee's deposition statements. Consequently, the movant cannot establish either deficient performance or prejudice pursuant to Strickland.

However, even if we assume counsel was deficient for failing to impeach Ofc. Lee as petitioner suggests, it is objectively reasonable to conclude there was no reasonable probability that impeaching Ofc. Lee with his relatively minor inconsistent statements regarding whether the helicopter pilot spotted a leg and a foot on the roof would have changed the outcome of the trial. Petitioner fails to establish that he was prejudiced by any alleged error regarding a failure to impeach Officer Lee with these relatively minor inconsistent statements. See Pittman v. Florida, 2008 WL 2414027 (M.D. Fla. 2008).

In **claim four**, petitioner asserts he has a constitutional right under the Fifth Amendment and Fourteenth Amendments to the guarantee of due process and fundamental right to access the courts through a complete record on appeal which is indispensable to the realization of this constitutional right. (DE#1:11).

In essence, he argues his due process rights were violated as portions of the trial transcript are missing, denying him the right to meaningful appellate review, thereby requiring a reversal of the trial court proceedings and remand for a new trial. (DE#1:11-12). In support of this, petitioner argues the record was scant; the court at the evidentiary hearing speculated about the trial judge's reasons, the court's arguments were unsupported and based on conjecture; the witnesses at the evidentiary hearing were unprepared; and petitioner was the only person prepared. (Id.).

The Supreme Court has recognized that substantive due process includes access to the courts and also a criminal defendant's right to obtain a trial transcript for purposes of appeal. Mayer v. Chicago, 404 U.S. 189, 193-95 (1971). If state law does permit direct appeals of criminal convictions, due process and equal

protection require that indigent criminal defendants be provided with free transcripts for use in the appeal, or other effective means of obtaining adequate appellate review. Britt v. North Carolina, 404 U.S. 226, 227 (1971); See Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (per curiam). A court need only provide an indigent defendant with a 'record of sufficient completeness' to prepare an appeal; irrelevant or extraneous portions of the transcript may be omitted. Mayer, 404 U.S. at 194-95 (citation omitted). Statutes or rules requiring an indigent defendant to show a specific need for an entire trial transcript do not run counter to clearly established federal law. See Boyd v. Newland, 467 F.3d 1139, 1150-51 (9th Cir.2006).

There is no constitutional right to a totally accurate transcript of a state criminal trial. Tedford v. Hepting, 990 F.2d 745, 747 (3d Cir.1993). A constitutional violation would occur only if the inaccuracies in the transcript adversely affected appellate review in the state courts. Id. A petitioner "must point to specific errors alleged to have occurred during the unrecorded portions to support a claim that the absence of a complete transcript resulted in prejudicial error requiring a new trial." Bergerco, U.S.A. v. Shipping Corp. of India, Ltd., 896 F.2d 1210, 1215 (9th Cir.1990). In assessing whether hardship or prejudice results from a trial court's failure to record every statement made in "open court", the reviewing court must consider all the circumstances in the record surrounding the omission. United States v. Gallo, 763 F.2d 1504, 1531 on reh'g in part sub nom. United States v. Graewe, 774 F.2d 106 (6th Cir.1985).

Here, petitioner's rights would be violated if inaccuracies in the transcript adversely affected the outcome of the criminal proceeding. Since the jury which convicted petitioner acted on the

basis of the evidence they saw and heard, rather than on the basis of the written transcript of the trial, which was, of course, non-existence until after the trial was completed, this means that a constitutional violation would occur only if the inaccuracies in the transcript adversely affected appellate review in the state courts. See Tedford, 990 F.2d at 747. The principal question, therefore, is whether petitioner has alleged deficiencies in the trial transcript substantial enough to call into question the validity of the appellate process in the state courts.

Petitioner has failed to show specific errors to have occurred during the unrecorded portions to support a claim that the absence of a complete transcript resulted in prejudicial error requiring a new trial. In order to demonstrate denial of a fair appeal, petitioner must show prejudice resulting from the missing or incomplete transcript. Bransford v. Brown, 806 F.2d 83, 86 (6th Fir. 1986). 'Gross speculation' that the missing portions of the transcript reflect reversible error is not enough to show the trial court's determination was clearly erroneous. Id.; see United States v. Anzalone, 886 F.2d at 232. Instead, petitioner must present "some modicum of evidence [to] support such a conclusion." Id. Petitioner has not met his burden in this case. Moreover, he has failed to show what additional value a complete transcript would have had for appealing his conviction or moving for a new trial. Petitioner's conclusory allegations do not merit relief. Absent supporting evidence in the record, a court cannot consider a habeas petitioner's mere assertions on a critical issue in his pro se petition to be of probative value. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted)). See

also Ross v. Estelle, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

Nor has petitioner shown that the statement of proceedings, as adopted by the court, was an inadequate alternative for effecting an appeal. Petitioner's general assertions that the reconstructed transcript was unreliable do not warrant habeas relief.

IX. Evidentiary Hearing

Lastly, to the extent the petitioner appears to argue that he is entitled to a federal evidentiary hearing on his claims, that claim also warrants no habeas corpus relief here. If a habeas corpus petitioner "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of the claim." Holmes v. United States, 876 F.2d 1545, 1552 (11th Cir. 1989), quoting Slicker v. Wainwright, 809 F.2d 768, 770 (11th Cir. 1987). However, no hearing is required where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous. Holmes, supra at 1553. Here, for the reasons which have been discussed, the petitioner's claims are all affirmatively contradicted by the existing record, so no federal hearing is necessary or warranted.

X. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 1st day of April, 2013.

UNITED STATES MAGISTRATE JUDGE

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