

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-61055-CIV-SEITZ/WHITE

ROBERT BROWN,
Petitioner,

v.

WALTER A. MCNEIL,
Respondent.

**ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION
AND DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY**

THIS MATTER is before the Court on the Report and Recommendation [DE 15] of the Honorable Patrick A. White, United States Magistrate Judge, to which no party filed objections.¹ Magistrate Judge White recommends that Petitioner Robert Brown's Petition for Writ of *Habeas Corpus* filed pursuant to 28 U.S.C. § 2254 [DE 1] be denied because the state court's denial of his claims for relief is not contrary to or an unreasonable application of clearly established federal law. Judge White based his recommendation on the following findings and facts and conclusions of law: (1) Petitioner's trial counsel was not ineffective for failing to suppress his post-*Miranda* warnings statements to police because (a) no "question first" tactic was used by the police to obtain Petitioner's confession, and (b) the *Miranda* warnings were not defective under then controlling law; (2) Petitioner's counsel was not ineffective for failing to call an exculpatory witness at trial because the testimony would have been cumulative to that which was presented at trial; (3) there was no prosecutorial misconduct because the trial record supports the statements made by the prosecutor during closing arguments; (4) there was no violation of *Giglio* because there is no evidence that a witness's trial testimony was false; (5) the state trial court's denial of post-conviction relief without holding an evidentiary hearing does not provide a basis for federal habeas

¹Judge White issued his Report on July 12, 2010. [DE 15]. On or about July 21, 2010, Petitioner, who is proceeding *pro se*, filed a Notice of Change of Address indicating that he was transferred to a transitional center. [DE 16]. It is not clear whether Petitioner received a copy of the Report that was mailed on July 12, 2010, so, in an abundance of caution, the Court directed the Clerk of Court to mail the Report to Petitioner's updated address and allowed Petitioner until December 3, 2010 to file an objection. [DE 17].

relief; and (6) there was competent substantial evidence from which a rational jury could have found Petitioner guilty beyond a reasonable doubt. The Court has conducted a *de novo* review of the record and finds that Judge White's factual determinations are not clearly erroneous and he correctly applied the law to the facts. Therefore, the Court will accept Judge White's recommendation and deny the Petition.

Additionally, the Court will deny issuance of a certificate of appealability. In order to obtain a certificate of appealability, Petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Jones v. Secretary*, 607 F.3d 1346, 1349 (11th Cir. 2010) (quotation omitted); *see Lott v. Attorney Gen.*, 594 F.3d 1296, 1301 (11th Cir. 2010). Here, Petitioner has not made a substantial showing of the denial of a constitutional right.

Upon review, it is

ORDERED that

(1) Judge White's Report and Recommendation [DE 15] is AFFIRMED and ADOPTED.

(2) Petitioner Robert Brown's Petition for Writ of *Habeas Corpus* [DE 1] filed pursuant to 28 U.S.C. § 2254 is DENIED.

(3) A Certificate of Appealability is DENIED.

(4) All pending motions not otherwise ruled upon are DENIED AS MOOT.

(5) This CASE IS CLOSED.

DONE and ORDERED in Miami, Florida, this 29^R day of March, 2011.


PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge White
Counsel of Record/*Pro Se* Party