No. 20-6712

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ARTHUR LEE SANFORD,
(State Prisoner: 1113860),

Petitioner-Appellant,

v.

HAROLD W. CLARKE, Director, Virginia DOC,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEE

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December 20, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 20-6712 Caption: Arthur Sanford v. Harold Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Harold W. Clarke
(name of party/amicus)

who is Respondent-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Leanna C. Minix Date: 12/20/2021

Counsel for: Harold W. Clarke

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INTRODUCTION

In asking this Court to interpret basic tenets of federal habeas corpus law, Petitioner-Appellant Arthur Sanford conflates procedural rules with constitutional principles. In so doing, he has urged this Court to expand the holding in *Thompson v. Greene*, 427 F.3d 263 (4th Cir. 2005), and augment the requirements of Rule 5 of the Rules Governing § 2254 Cases to the point of contravening decades of precedent and conferring unprecedented constitutional rights on petitioners in collateral proceedings.

But to decide this appeal, this Court need not broaden the holding in *Thompson* or the requirements of Habeas Rule 5. To rule that the district court did not abuse its discretion under Habeas Rule 5, this Court need not look further than the record before it. This Court need only consider evidence in the record on appeal and the district court's express factfinding to conclude that the district court properly received and reviewed the state court habeas record. And while this Court should find that the district court neither abused its discretion under Habeas Rule 5 nor permitted a due process violation, this Court need not reach Sanford's constitutional claims because it should conclude that the district court did not err in denying Sanford's Rule 60(b) motion.

Despite Sanford's attempt to press his procedural and constitutional arguments into this Court's ruling in *Thompson*, Sanford's position falls beyond the

bounds of this Court's precedent. Moreover, this Court has never held that Habeas Rule 5 creates any constitutional right for the petitioner or that a petitioner has an independent constitutional right to secure state court records during a collateral proceeding without showing that the records are necessary to his claims.

Finally, although Sanford asks this Court to reject the district court's express fact-finding about its own review of the record because the state habeas records are now missing from the record on appeal, Sanford has overlooked distinct evidence that supports the district court's statements. He has failed to rebut the presumption of regularity that shields the district court's findings, and he has not shown any constitutional violation in the district court's treatment of the state court records. At base, Sanford has disregarded commonsense inferences apparent from the record on appeal, inferences which conclusively decide this appeal in the Director's favor.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Sanford's habeas petition and Federal Rules of Civil Procedure Rule 60(b) motion under 28 U.S.C. § 2254. Sanford appealed the district court's denial of the Rule 60(b) motion. This Court granted a certificate of appealability and therefore has jurisdiction under 28 U.S.C. §§ 1291, 2253(c).

ISSUES PRESENTED

1. Whether Sanford has shown that he was entitled to a complete copy of the state court records pursuant to Habeas Rule 5 or due process principles.

2. Whether the district court abused its discretion by relieving the Director of strict compliance with Habeas Rule 5(c) when Sanford and the district court indicated they had copies of the relevant transcripts.

3. Whether the Director substantially complied with Habeas Rule 5(d) by providing an excerpt of Sanford's petition for state habeas appeal as an exhibit to the district court, and if not, whether the district court abused its discretion by not requiring strict compliance with the rule when Sanford authored the petition and the district court reviewed the state court records.

4. Whether the absence of paper records from the record on appeal rebuts the presumption of regularity and compels this Court to reject as false the district court's statement that it reviewed the complete state court record prior to dismissing Sanford's habeas petition, when the record on appeal contains evidence supporting the district court's representation about its own actions.

5. Whether Sanford was denied due process when the district court did not enter publicly viewable docket entries reflecting receipt of the state court records or upload the records to the public docket sheet.

STATEMENT

A. State Court Proceedings

On November 1, 2012, a jury sitting in the Circuit Court for the City of Newport News, Virginia, found Sanford guilty of second-degree murder for the 2003 killing of his girlfriend, Towanna Brinkley. SJA 3 (Case No. CR11-78).[1] In accordance with the jury's verdict, the circuit court ("trial court") sentenced Sanford to 40 years' imprisonment on January 11, 2013. SJA 3. The Court of Appeals of Virginia twice denied Sanford's petition for appeal and affirmed the murder conviction. SJA 6, 12 (Record No. 0139-13-1). The Supreme Court of Virginia denied Sanford's petition for appeal. SJA 16 (Record No. 131824).

Sanford timely filed a petition for a writ of habeas corpus in the Newport News Circuit Court ("state habeas court"). *See* JA 117 (Case No. CR15H00553-00). The state habeas court dismissed Sanford's petition, finding that four claims were procedurally defaulted because they could not be raised in habeas corpus and that the remaining claims were meritless. JA 162.[2]

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[1] References to the Joint Appendix filed by Sanford are cited as "JA." References to the Supplemental Joint Appendix filed by the Director are cited as "SJA."

[2] Because the merits of Sanford's claims are not before the Court at this juncture, the Director does not recite the lengthy claim history but does reference these claims as relevant to the issues before this Court.

The Supreme Court of Virginia denied Sanford's petition for appeal from the state habeas court's ruling. JA 211 (Case No. 170318).

B. Federal Court Proceedings

After the Supreme Court of Virginia denied his habeas appeal, Sanford timely filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia ("district court"), in which he raised 21 claims. JA 1 (Case No. 1:18-cv-303).[3] On March 28, 2018, the district court ordered the respondent, the Director of the Virginia Department of Corrections, to file a responsive pleading to show cause why the writ should not issue. JA 60. The order to show cause stated: "Respondent is to treat this Order as a request that the records of the state criminal trial and habeas corpus proceedings, if pertinent and available, be forwarded to the Clerk's Office in Alexandria, Virginia. These records will be returned to the proper repository upon conclusion of the federal proceedings[.]" JA 60.

On April 2, 2018, the Director, by counsel, mailed or delivered letters to the Newport News Circuit Court, the Court of Appeals of Virginia, and the Supreme Court of Virginia requesting that those clerk's offices "forward a certified copy" of

[3] Prior to the conclusion of his state habeas proceedings, Sanford filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in the district court, which the district court dismissed without prejudice because Sanford had failed to exhaust his state remedies. (Case No. 1:17-cv-1064, ECF Nos. 1, 6).

the respective state court records directly to the federal district court. *See, e.g.*, SJA 13 (letter filed in the Court of Appeals of Virginia).

On May 3, 2018,[4] a deputy clerk of the Supreme Court of Virginia certified that she mailed "true copies of the pleadings filed in and orders entered by [the Supreme Court of Virginia] in the cases of *Arthur Lee Sanford v. Commonwealth of Virginia*, Record No. 131824, and *Arthur Lee Sanford v. Harold W. Clarke, Director, Department of Corrections*, Record No. 170318. (Civil Action No. 1:18cv303)." SJA 18. The Table of Contents generated by the deputy clerk, attached to the transmitted record, provided that Pages 1–68 were filings in the direct appeal (Record No. 131824) and that Pages 69–116 were filings in the habeas corpus appeal (Record No. 170318). SJA 19. The certificate was stamped as "filed" in the United States District Court in Alexandria, Virginia, on May 7, 2018. SJA 18.

The Director filed a Motion to Dismiss/Rule 5 Answer and Brief in Support, accompanied by a *Roseboro* notice. JA 62, 65. The Director attached five exhibits to his Brief in Support: Exhibit A was the Court of Appeals of Virginia's *per curiam* order denying Sanford's petition for appeal, JA 111; Exhibit B was Sanford's petition for a writ of habeas corpus filed in the state habeas court, JA 117; Exhibit C

[4] The certification signed by the Supreme Court of Virginia deputy clerk states "Given under my hand and seal of said Court this 3rd day of May, 2017." SJA 18. The year "2017" is plainly a clerical error meant to state "2018."

was the state habeas court's final order denying and dismissing the habeas corpus petition, JA 162; Exhibit D was 24 pages of Sanford's petition for appeal to the Supreme Court of Virginia from the state habeas court's decision, JA 187; and Exhibit E was the Supreme Court of Virginia's order denying Sanford's habeas appeal, JA 211. At the conclusion of the Motion to Dismiss, the Director stated: "Pursuant to this Court's order dated March 28, 2018, the Director has requested that Sanford's criminal and habeas records be transferred to this Court." JA 109.

Sanford filed a Response to the Motion to Dismiss, in which he claimed that the Director "fail[ed] to comply fully [with] Rule 5(b), (c), & (d) Governing § 2254 cases." JA 212. Sanford asserted that the Director failed to "comply fully [with] Rule 5(c) & (d)" by submitting 24 pages of Sanford's petition for habeas appeal, which Sanford stated was an incomplete copy, and by not providing exhibits that Sanford attached to his petition for habeas appeal. JA 213. Sanford further stated that "[n]one of petitioner's opposition motion [sic] were sent . . . as requested by Rule 5(c) & (d)." JA 213. Sanford asserted the Director had purposefully omitted the Table of Contents to deceive the district court about the length of the petition for appeal. JA 213, 221. Sanford attached to his Response a copy of the Table of Contents from his state habeas petition for appeal, but he did not provide a copy of the petition itself or the exhibits that he had referenced.

Sanford then filed a Motion to Order Records. JA 224. Sanford stated that the Director had failed to "comply fully" with Habeas Rule 5 and asked the district court to "order the state's trial records." JA 224. Sanford claimed that "the respondent's violation of Rule 5 foreclose[d] [the] development of a complete factual record[.]" JA 224.[5] The district court denied Sanford's requests without prejudice. JA 234.

The district court granted the Director's Motion to Dismiss, and denied and dismissed Sanford's habeas corpus petition, finding that the claims were either procedurally barred or meritless. JA 235. The district court's opinion acknowledged Sanford's Response to the Motion to Dismiss. JA 235.

Sanford appealed to this Court, which denied a certificate of appealability and dismissed the appeal. JA 273.

Sanford next filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b) in the district court. JA 277. Citing Rule 60(b)(3), (4), and (6), Sanford claimed that the Director "failed to supply a complete copy of the petitioner's brief on appeal submitted to the Supreme Court of Virginia along with his submitted exhibits and motions in opposition[,]" which he asserted were

[5] In conjunction with his Request for Subpoena Duces Tecum, ECF No. 17, Sanford asked the district court to subpoena the transcript from a true-crime documentary called *Fatal Attraction*, which Sanford alleged contained statements made by a detective and one of the prosecutors in his case. (Case No. 1:18cv303, ECF No. 17 at 1).

"materially relevant." JA 277–78. He also claimed that the Director failed to include copies of exhibits to the state habeas corpus petition. JA 278. Sanford asserted that he "was denied a fair opportunity to have his case reviewed on the true material factual record that was before the state court that adjudicated his claims" and that the district court's "account of the evidence was not viewed on the state habeas record in its entirety." JA 279. He again stated that the absence of the Table of Contents established a "prima facie case of the Attorney General's deliberate intent to deceive[]" the district court about the petition for habeas appeal. JA 278.

In denying Sanford's Rule 60(b) Motion, the district court acknowledged Sanford's complaints that the Director had not attached the complete copy of the petition for habeas appeal or a complete copy of state habeas records. JA 286. The district court ruled that "the record does not support petitioner's claim about an incomplete record" and made the following express findings of fact:

> On March 2[8], 2018, the respondent was ordered to forward to the court "the records of the state criminal trial and habeas corpus proceedings." [Dkt. No. 3 at 1]. In response, the record of the direct appeal and the habeas appeal was filed by the Clerk of the Supreme Court of Virginia on May 7, 2018[,] and the records of petitioner's criminal trial and the circuit court level habeas proceedings were filed on May 10, 2018[,] by the Clerk of the Newport News Circuit Court. [Dkt. Nos 10 and 11]. The Court, therefore, was in possession of and considered all the records of the petitioner's state trial, appellate, and habeas proceedings before ruling on the motion to dismiss.

JA 286. The district court concluded that "the instant motion is wholly without merit and is essentially a request for the Court to change its mind." JA 287.

Sanford appealed to this Court. JA 288. The Clerk's Office of this Court sent five follow-up records requests to the district court to secure the complete transmittal of records. JA 290–94. In the fourth request, the Clerk's Office of this Court noted that the "[h]abeas appeal record (No. 170318) at pages 69–116 from the Supreme Court of Virginia and the state habeas proceeding in the circuit court" had not been transmitted. JA 293.

This Court granted a certificate of appealability as to the "whether the district court erred in denying Sanford's Rule 60(b) motion when he was not provided notice of the district court's receipt of state court records or served with complete copies of relevant state court documents that were relied on or referenced in his § 2254 proceedings," "in violation of due process and procedural rules." JA 313. In its order, this Court noted that the district court did not file publicly viewable docket entries reflecting receipt of the state court records. JA 313 n.1. After reviewing the district court's internal docket sheet, this Court concluded that these docket entries were marked as "court only," so that the parties could not view them. JA 313 n.1. This Court further observed that, despite requesting the habeas records be transmitted from the district court, this Court was "unable to locate the habeas records" and the district court had "confirmed it had sent all that was received." JA 313 n.2.

SUMMARY OF ARGUMENT

As an initial matter, a government respondent in a Section 2254 case provides state court records to a federal district court in two forms. The first is as an attachment of documents as exhibits to a responsive pleading, required by Habeas Rule 5, which the respondent serves on the petitioner.

The second manner of providing records to the district court is through the transmittal of the entire state court record, in which case respondent's counsel acts as an officer of the court performing a ministerial function. In its show cause order, the district court directed respondent's counsel to provide a copy of the state court record by requesting direct transfer of the state court records to the federal court.

Contrary to Sanford's argument, neither Rule 5 of the Rules Governing § 2254 Cases nor this Court's holding in *Thompson v. Greene*, 427 F.3d 263 (4th Cir. 2005), required the Director to serve a complete copy of the state court records on Sanford. The Director did not attach the entire state court record as an exhibit to the answer; rather, the Director coordinated the transmittal of the record to the district court pursuant to its order, as described in the second method above. Furthermore, under the appropriate standard, Sanford has not established that he had a constitutional entitlement to those records. *See United States v. MacCollom*, 426 U.S. 317, 325 (1976) (plurality opinion); *Jones v. Superintendent*, 460 F.2d 150, 152–53 (4th Cir. 1972).

Second, the district court did not abuse its discretion in relieving the Director of strict compliance with Habeas Rule 5(c) and (d). Sanford has not shown prejudice to his cause because he directly cited to his criminal transcripts 38 times in his federal habeas petition and he authored his petition for habeas appeal to the Supreme Court of Virginia. He has, therefore, failed to show that the district court abused its discretion, or alternatively, that any error by the district court was not harmless. He has similarly failed to establish a constitutional right linked to transmittal of the state court records under Habeas Rule 5. *Cf. Thompson*, 427 F.3d at 271.

Finally, the district court did not violate Sanford's constitutional right to due process in its treatment of the state court records. The district court's express factual findings that it received and reviewed the complete state habeas records are entitled to a presumption of regularity, and the now-missing records do not rebut that presumption or impeach the district court's findings. *See United States v. Locke*, 932 F.3d 196, 200 (4th Cir. 2019). Sanford has further failed to establish a constitutional right attached to the docketing of those records on the federal docket sheet. *Accord Lewis v. Casey*, 518 U.S. 343, 351 (1996).

STANDARD OF REVIEW

In the context of a Rule 60(b) motion in a 28 U.S.C. § 2254 case, the United States Supreme Court has held that if a Rule 60(b) claim directly attacks a prisoner's conviction or sentence, then such a motion "is in substance a successive habeas

petition" and it "should be treated accordingly." *Gonzalez v. Crosby*, 545 U.S. 524, 31 (2005). A Rule 60(b) motion containing merits challenges "in effect asks for a second chance to have the merits determined favorably" and must be dismissed. *Id.* at 532 n.5. But a Rule 60(b) motion that attacks a "defect in the integrity of the federal habeas proceeding" is jurisdictionally proper. *Id*. at 532. A true Rule 60(b) motion "asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4; *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (observing that Rule 60(b) relief is reserved "only [for] truly extraordinary circumstances" (citation and quotation marks omitted)).

This Court reviews the district court's denial of a Rule 60(b) motion for an abuse of discretion. *Aikens*, 652 F.3d at 501 (citing *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978)). But in analyzing the district court's interpretation of procedural rules, this Court reviews *de novo* the legal rulings of the district court. *See Thompson*, 427 F.3d at 267. In either instance, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder*, 434 U.S. at 263 n.7.

Additionally, the "Supreme Court has cautioned appellate courts against the reflexive inclination to reverse unpreserved error." *United States v. Carthorne*, 726 F.3d 503, 510 (4th Cir. 2013) (citation omitted). To the extent that Sanford failed to

raise several arguments below that he now raises on brief, those arguments are subject to plain error review, which is "difficult to get, as it should be." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). Sanford must show "(1) that an error was made; (2) that the error was plain; and (3) that the error affected his substantial rights." *Carthorne*, 726 F.3d at 510; *see United States v. Olano*, 507 U.S. 725, 732–35 (1993).

Finally, as the Court explained in *Thompson*, this Court only issues a certificate of appealability when a petitioner has "made a substantial showing of the denial of a constitutional right." *Thompson*, 427 F.3d at 267 (citing 28 U.S.C. § 2253(c)(2)). Once an appeal is properly before this Court, however, the Court is "obliged to resolve any non-constitutional procedural matters first, because a reviewing court should 'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.'" *Id.* (citation omitted).

ARGUMENT

I. Sanford has failed to show a violation of Habeas Rule 5 or of constitutional due process principles linked to the state court records.

A. Relevant Authorities

In Section 2254 proceedings, the Rules Governing Section 2254 Cases ("Habeas Rules"), alongside the Federal Rules of Civil Procedure ("Civil Rules"), provide the applicable procedural law for the district court. *See* Habeas R. 1(a); Fed.

R. Civ. P. 1. Both sets of rules provide that the Civil Rules apply but, if in conflict, the Habeas Rules will control. *See* Habeas R. 12; Fed. R. Civ. P. 81(a)(4)(A).

Two operative provisions of Habeas Rule 5 are at issue. Habeas Rule 5(c) provides: "The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished." Habeas R. 5(c). Habeas Rule 5(d) states in relevant part that the respondent "must also file with the answer a copy of . . . any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding." Habeas R. 5(d)(1).

This Court addressed Habeas Rule 5 requirements in *Thompson v. Greene*, 427 F.3d 263 (4th Cir. 2005), the seminal opinion about compliance with Habeas Rule 5 in this Circuit. The narrow issue in *Thompson* was "whether the Attorney General was obliged to serve Thompson with the Exhibits contained in the Answer." 427 F.3d at 267. This Court held that "the applicable rules mandate that an answer in a habeas corpus proceeding, along with all of its exhibits, must be served on a petitioner." *Id.* at 269. In reaching this conclusion, this Court relied in part on Civil Rule 10(c) and Civil Rule 5(a) for service requirements. *Id.* at 268–69 (quoting Fed. R. Civ. P. 10(c) (providing that a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes") and Fed. R. Civ. P. 5(c) (requiring

service of "every pleading subsequent to the original complaint")). This holding simply requires a litigant filing a pleading to serve a copy of that pleading, and any exhibits thereto, on the opposing party.

Thompson expressly rejected three arguments. First, the Court disagreed that service of exhibits was not required because a habeas petitioner "should already possess either the documents or a general knowledge of [the exhibits'] contents." *Id.* Second, the Court was unpersuaded that a petitioner had to show a "particularized need" and secure a court order to obtain exhibits filed as part of the respondent's answer. *Id.* ("It is irrelevant whether a petitioner can demonstrate need to the court, or whether he already has the documents."). And finally, the Court ruled that it was not within the purview of the respondent to "unilaterally decide" the volume of exhibits that rose to the level of "unduly burdensome." *Id.*

In concluding that failure to provide service of attached exhibits required reversal, the Court noted that its holding was consistent with "the interpretive rule that courts should construe statutes and rules so as to avoid raising constitutional questions." *Id.* at 269 n.7. By finding that the *rule* required service of those exhibits, this Court avoided the question of whether the *Constitution* required such service. *Id.* at 267 ("Because we resolve this appeal on non-constitutional grounds, we need not reach Thompson's constitutional claims.").

The Fifth Circuit followed *Thompson* in *Sixta v. Thaler*, 615 F.3d 569, 572 (5th Cir. 2007). In *Sixta*, the respondent did not attach records, or any exhibits, to the answer. *Id.* at 572. Instead, the respondent provided the complete set of state records to the federal district court prior to filing the answer. *Id.* In its decision to affirm the district court, the Fifth Circuit implicitly ruled that filing the state record in the district court did not require service of the record on the petitioner under Habeas Rule 5. *Id.* at 573.[6]

More recently, the Eleventh Circuit followed this Court's ruling in *Thompson*, holding that the respondent was required to serve an appendix of exhibits on the petitioner. *See Rodriguez v. Florida Dep't of Corr.*, 748 F.3d 1073, 1076 (11th Cir. 2014) (citing *Sixta*, 615 F.3d at 572, and *Thompson*, 427 F.3d at 268–69). In response to a court order for "a comprehensive appendix," the respondent filed an appendix of fourteen exhibits under separate cover but did not serve a copy on the petitioner. *Id.* at 1074–75. The Eleventh Circuit ruled that failure to serve a copy of the appendix on the petitioner violated Civil Rule 10(c) because "service of these exhibits, like the answer itself, is procedurally required[.]" *Id.* at 1075.

[6] The *Sixta* Court expressly declined to consider, under Habeas Rule 5, "whether and to what extent the applicable procedural rules or the Constitution required the respondent to attach portions of the state court record as exhibits to his answer." 615 F.3d at 573.

Sanford now draws on these cases and these arguments to contend—for the first time—that the Director violated Habeas Rule 5 and constitutional procedural due process principles by not serving a complete copy of the state court records on him.

B. The Director did not violate Habeas Rule 5, the holding of *Thompson*, or the United States Constitution by not serving Sanford with a complete copy of the state court records.

Sanford's argument on appeal is meritless, as it does not follow this Court's ruling in *Thompson* and fails to show a violation of Habeas Rule 5 or due process principles.

1. The Director did not file the state court records as exhibits because the state court records were transmitted between clerk's offices. The Director was thus not required to serve Sanford with a copy of his state court records under Habeas Rule 5 or *Thompson*.

The district court's order to show cause instructed the Director to "treat this Order as a request that the records of the state criminal trial and habeas corpus proceedings, if pertinent and available, be *forwarded to the Clerk's Office* in Alexandria, Virginia. These records will be returned to the proper repository upon conclusion of the federal proceedings[.]" JA 60 (emphasis added).

This language is consistent with the language in § 2254(f), which requires that, for an indigent petitioner challenging the sufficiency of the evidence, "the State shall produce such part of the record and the Federal court shall direct the State to

do so by order directed to an appropriate State official." 28 U.S.C. § 2254(f) (referencing "such part" to examine sufficiency as the "pertinent part").

Pursuant to this order, counsel for the Director contacted the Newport News Circuit Court, the Court of Appeals of Virginia, and the Supreme Court of Virginia, and asked those courts to forward the relevant records directly to the district court. *See, e.g.*, SJA 13.[7] In characterizing the order to show cause in the April 2, 2018 letter to the Court of Appeals of Virginia, counsel stated that the district court "has directed this Office to arrange for the appropriate state court records to be forwarded to it." SJA 13. The letter included a copy of the order to show cause and, in bold typeface, the address for the district court in Alexandria, Virginia. SJA 13. In accordance with those record requests, the state courts forwarded the state records to the district court clerk's office in Alexandria, not to the Office of the Attorney General.

Sanford now mistakenly asserts that the Director filed the state court records as part of the responsive pleading in the district court, but the Director never

[7] As discussed *infra*, the record establishes that the Director made these requests of the state courts because this Court is now in possession of paper records forwarded from all three state courts. While the Court of Appeals of Virginia's record is the only file now in this Court's possession that contains the Attorney General's request letter, the transmittal of the records from the other two courts axiomatically indicates they processed the same requests. The Director further addresses the question of the missing habeas corpus records *infra*.

purported to attach those records as exhibits. The Director only attached five enumerated exhibits, which were served on Sanford. In addition, the Director coordinated the transmittal of records *directly from the state courts to federal court*.

This practice is a matter of course for the Attorney General of Virginia, whose office represents the Department of Corrections in all federal habeas corpus actions brought under § 2254. In fact, the Virginia General Assembly, in recognition of the Attorney General's role in the transmission of state records to federal district courts in federal habeas corpus matters, enacted Virginia Code § 8.01-667. Pursuant to that Code Section, "[w]henever any habeas corpus case is pending in a federal court, upon written request of the Attorney General or any assistant attorney general, a court of this Commonwealth shall transmit to such federal court such records as may be requested." *See* Va. Code § 8.01-667. In light of this Code Section, the district court reasonably and routinely assigns the Attorney General the ministerial task of arranging for the transmittal of state records to the federal courts, which is a process akin to the transfer of records from a trial court to an appellate court for direct appeal.

Here, Sanford argues the Director's act of arranging the transmittal constituted filing the state records as an exhibit because they were "pertinent." (Opening Br. at 16). But the district court's order for "pertinent" records merely echoes the statutory requirement that the records be transmitted. *See* 28 U.S.C. § 2254(f). That the Director provided the entire record in an attempt to comply with the district court's

order does not mean the records were filed pursuant to Habeas Rule 5 *as part of* the Director's answer. *See Thompson*, 427 F.3d at 268–69 (explaining that exhibits are part of the pleading and citing Fed. R. Civ. P. 10(c)); *cf. Rodriguez*, 748 F.3d at 1079 (ruling that appendix of fourteen selected records required service); *Sixta*, 615 F.3d at 572–73 (implicitly finding that respondent was not required to serve state court records that were filed separately from answer and not attached as exhibits).

Moreover, considering the sensitive and gruesome evidence of Towanna Brinkley's murder, the Director would not purport to file and serve as an exhibit the complete state court record pursuant to Habeas Rule 5 without first redacting the record in accordance with the Rule 5.2 of the Federal Rules of Civil Procedure and Local Civil Rule 7 of the Eastern District of Virginia. *See* Fed. R. Civ. P. 5.2(a); Local Civ. R. 7(c).

For these same reasons, Sanford incorrectly relies on the Court's observation in *Thompson* that permitting a respondent to exclude a petitioner from receipt of exhibits amounts to an *ex parte* communication. *Thompson*, 427 F.3d at 269 n.7 ("As a general rule, *ex parte* communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." (quoting *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977))). In *Thompson*, the records at issue were attached to the pleading as exhibits, and therefore comprised part of the answer. 427 F.3d at 269–70. But the mere

transmittal of records between clerk's offices does not amount to a party communication with the court. Attorneys in both public and private sectors regularly correspond with clerk's offices to secure copies of records. That the Attorney General arranged, in his role as an officer of the court, for the transmittal of these records between courts—at the direction of the district court and consistent with the governing statutes—is far from an *ex parte* communication. *See* 28 U.S.C. § 2254(f); Va. Code § 8.01-667.

Accordingly, as neither *Thompson* nor Habeas Rule 5 require that a respondent serve a petitioner with copies of documents not filed as exhibits, and the state records were not filed as exhibits, Sanford has failed to show that the Director violated Habeas Rule 5 or the holding of *Thompson* as to this broad claim.

2. Sanford does not have a constitutional right to obtain copies of all his state court records to support a collateral attack against his conviction. Under the proper standard, he failed to make a particularized showing of necessity.

Sanford uses his Habeas Rule 5 argument as an impetus to argue that the Director's failure to serve a complete copy of the records amounted to a procedural due process violation, an intersection that this Court did not reach in *Thompson*. *See* 427 F.3d at 267 (avoiding constitutional question).

But Sanford's argument contravenes well-established federal precedent. First, the United States Supreme Court has upheld the constitutionality of a congressional

limitation on providing free transcripts to indigent petitioners in collateral proceedings brought under the closely related habeas statute in 28 U.S.C. § 2255. *See United States v. MacCollom*, 426 U.S. 317, 325 (1976) (plurality opinion) (noting that petitioner must show his claim is not frivolous and a transcript is needed). The Supreme Court explained that in collateral proceedings, "[t]he usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript." *Id.* at 327–28 (quoting *United States v. Shoaf*, 341 F.2d 832 (4th Cir. 1964)).

This Court has similarly, and repeatedly, ruled that "[c]opies of transcripts and court records may be provided to an indigent litigant at government expense upon a showing by the litigant of a particularized need for the documents." *United States v. Burgess*, 788 F. App'x 185, 185 (4th Cir. 2019) (citing *Jones v. Superintendent*, 460 F.2d 150, 152–53 (4th Cir. 1972) ("It is settled in this circuit that an indigent is not entitled to a transcript at government expense without a showing of the need, merely to comb the record in the hope of discovering some flaw.'" (internal citation omitted))); *see also United States v. Parker*, 273 F. App'x 243, 244 (4th Cir. 2008); *United States v. Glass*, 317 F.2d 200, 202 (4th Cir. 1963); *accord Shoaf*, 341 F.2d at 836. And consistent with that principle, "the state may

constitutionally decline to furnish an indigent with a transcript until a need for it is shown, even though the transcript is already in existence." *Jones*, 460 F.2d at 153; *see also* 28 U.S.C. § 2250 (providing that district court has discretion to direct clerk to provide free copies).[8]

This narrower standard is applicable to Sanford because he has failed to show that he is otherwise entitled to a copy of the complete state court record pursuant to Habeas Rule 5 and *Thompson*. *Cf. Thompson*, 427 F.3d at 271 (rejecting notion that petitioner must make particularized showing to obtain copies of *exhibits* under Habeas Rule 5). Here, Sanford has failed to make a particularized showing that he required a copy of the entire state court record to reply to the Director's responsive pleading in the district court. *Accord Glass*, 317 F.2d at 203 n.4 (noting a particularized showing is "some indication that a transcript would disclose matter

[8] These cases are not in tension with established precedent that a petitioner is entitled to free transcripts at other stages, such as on direct appeal or for an appeal from collateral proceedings where he received a hearing. *See, e.g.*, *Lane v. Brown*, 372 U.S. 477 (1963); *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958). Sanford cites *Gardner v. California*, 393 U.S. 367 (1969), to assert that a habeas petitioner is entitled to transcripts from all prior proceedings. (Opening Br. at 30). But *Gardner* is distinguishable because Virginia's abuse of the writ statute, Code § 8.01-654(B)(2), prevents a procedural posture like that in *Gardner*. Furthermore, it merits mention that 28 U.S.C. § 2250, which provides the mechanism through which the district court may, in its discretion, order that copies be provided to habeas petitioners with non-frivolous claims, would be rendered meaningless if all habeas petitioners were entitled to free copies of all records. *See Anderson v. Gillis*, 236 F. App'x 738, 739 (3d Cir. 2007) (no abuse of discretion in denying habeas petitioner free copies of all records requested under § 2250).

relevant to the questions sought to be raised"). Even on brief, where Sanford makes this far-reaching argument for the first time, he has failed to explain *why* he needed all the state court records. Indeed, Sanford cited to specific pages of the criminal transcripts 38 times in his federal habeas corpus petition underlying this appeal, indicating that he had transcripts in his possession to support his claims.

Additionally, among Sanford's claims were challenges to conversations and investigations that occurred outside the courtroom, legal arguments about his success on appeal, allegations about interactions with his attorney, and arguments on state law grounds not reviewable in federal habeas, none of which reasonably required a complete set of records to respond to the Director's answer. *See, e.g.*, 28 U.S.C. § 2254(a) (requiring federal or constitutional question or unreasonable determination of facts by the state court). And Sanford never alleged that he needed the complete state court record to address the merits of his claims. *See Olano*, 507 U.S. at 732 (holding petitioner must show plain error affected substantial rights under plain error review); *Carthorne*, 726 F.3d at 510.

Sanford has thus failed to show a need for the entire state court record, which would be antithetical to the particularized showing required by this Court. *See Jones*, 460 F.2d at 152–53; *Glass*, 317 F.2d at 202.

C. Because Sanford cited transcripts throughout his own pleadings, the district court did not err in relieving the Director of compliance

with Habeas Rule 5(c). And any error would be harmless error based on this record.

The Director admits that he did not attach transcripts to the responsive pleading filed in the district court, as required by Rule 5(c), but the district court did not err in relieving the Director of this requirement. Sanford ignores the 38 transcript citations in his own federal petition, which reflected his possession of transcripts, and the district court expressly stated that it had the complete set of state court records in its possession, including transcripts. JA 286. Furthermore, Sanford does not acknowledge that he never suggested below that the Director's failure to provide him with the transcripts negatively impacted his ability to reply to the Motion to Dismiss. Accordingly, while the Director did not comply with Habeas Rule 5(c), Sanford has not shown that the trial court abused its discretion in relieving the Director of strict compliance with the rule. And for the same reason, any error in the trial court's ruling is harmless and fails under plain error review because Sanford has not shown that he was prejudiced by not receiving service of transcripts already in his possession.

Habeas Rule 5(c) provides in relevant part that "[t]he respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished."

The district court has discretion to enforce strict compliance with the Habeas Rules and other procedural rules. *See, e.g.*, *United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) (reviewing for abuse of discretion court's denial of motion to amend § 2255 petition under Fed. R. Civ. P. 15); *Bullard v. Chavis*, 153 F.3d 719, 1998 WL 480727, at *2 (4th Cir. 1998) (finding petitioner substantially complied with Habeas Rule 2(c) and district court erred in enforcing strict compliance); *Peyatt v. Holland*, 811 F.2d 1505, 1987 WL 35854, at *1 (4th Cir. 1987) (noting that although district court could have accepted petitioner's form under Habeas Rule 2(c), "it was not required" to accept a petition that did not comply with the court's prior order); *see also United States v. Moon*, 228 F. App'x 133, 136 (3d Cir. 2007) (substantial compliance with Habeas Rule 2(c) sufficient); *cf.* Habeas R. 2(c) (stating substantial compliance adequate for habeas corpus petition).

The abuse of discretion standard "mandates a significant measure of appellate deference to the judgment calls of trial courts." *Pittman*, 209 F.3d at 316 (citation omitted). The district court retains broad discretion in determining whether a party has substantially complied with a procedural rule, whether strict compliance with a rule is required, or whether a party should be relieved from compliance with a rule. *See, e.g.*, *id.*; *Bullard*, 153 F.3d 719, 1998 WL 480727, at *2; *see also Portley-El v. Brill*, 380 F. App'x 744, 746 (10th Cir. 2010) (reviewing for abuse of discretion district court's enforcement of Habeas Rules).

Here, it was not an abuse of discretion for the district court to relieve the Director of compliance with Habeas Rule 5(c) because Sanford cited transcripts 38 times throughout his federal petition, indicating that he was already in possession of transcripts. To support the bulk of his claims, Sanford repeatedly cited the February 2012 jury trial transcript, after which the trial court declared a mistrial, and the October 2012 trial transcript, at which the jury convicted Sanford of second-degree murder.

Moreover, after Sanford complained that *the district court* had an incomplete record before it but did not argue that *he* did not possess a complete record, the district court expressly stated that it had received and reviewed the records from Sanford's state court proceedings. JA 286.[9] Accordingly, the district court did not abuse its discretion in relieving the Director of compliance with Habeas Rule 5(c), as both Sanford and the district court indicated they were in possession of relevant state court transcripts.[10]

Sanford presses this Habeas Rule 5(c) question into a constitutional framework by claiming that the Director deprived Sanford of his due process right

[9] To the extent Sanford challenges the missing habeas records, none of the habeas records included transcripts because Sanford did not receive a habeas hearing in state court.

[10] For the same reasons, this Court can conclude that the Director did not intend to deceive the district court, as Sanford claims, or to prejudice Sanford.

to receive a complete set of transcripts with the responsive pleading. But *Thompson* did not consider a constitutional aspect of Habeas Rule 5 or adopt a standard for relevant portions of the transcripts, as *Thompson* only reached the service requirement for *exhibits* to pleadings under Habeas Rule 5. *Thompson*, 427 F.3d at 270; *accord Sixta*, 615 F.3d at 573 (declining to consider extent of compliance with Habeas Rule 5 and ruling that respondent had no obligation to serve exhibits on petitioner because no exhibits were attached to pleading).

While this Court need not reach the constitutional question to affirm, it merits mention that Sanford still does not have a constitutional blanket entitlement to transcripts without a showing of necessity. *See MacCollom*, 426 U.S. at 325; *Parker*, 273 F.3d at 244; *Jones*, 400 F.2d at 152; *Glass*, 317 F.2d at 202; *Schoaf*, 341 F.2d at 836. Regardless of how Sanford characterizes his constitutional claim to records, his argument that he is entitled to a complete set of transcripts without a particularized showing fails.

For these same reasons, even if the district court erred in not requiring the Director to strictly comply with Habeas Rule 5(c), such error would be non-constitutional and harmless. *See Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 314 (4th Cir. 2012) (explaining that Fed. R. Civ. P. 61 dictates that "'courts . . . disregard any error or defect in the proceeding' unless the error is 'prejudicial: It must have affected the outcome of the district court

proceedings.'" (quoting *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 168 (D.C. Cir. 2007), and *Olano*, 507 U.S. at 734)). Sanford indicated that he possessed the transcripts. Moreover, despite complaining that the *district court* did not have a complete record before it, Sanford never alleged that *he* did not have a copy of transcripts for his own review. And the district court had before it the complete record of proceedings below. JA 286.

Accordingly, Sanford has failed to show how he was prejudiced by not receiving service of all the transcripts from his trial proceedings, such that this Court can conclude any error in the district court's treatment of Habeas Rule 5(c) was harmless and did not affect his substantial rights. *See Olano*, 507 U.S. at 734; *Tire Eng'g & Distrib.*, 682 F.3d at 314.

D. The Director substantially complied with Habeas Rule 5(d) by providing an excerpt of Sanford's state habeas appeal petition. And any error in district court's refusal to enforce strict compliance with the rule was harmless.

Sanford likewise has not shown that the Director did not substantially comply with Habeas Rule 5(d) or that the district court erred by not enforcing strict compliance. The Director admits that he attached only a portion of Sanford's petition for habeas appeal as an exhibit to the answer filed in the district court. JA 187. But Sanford, as the author of the petition for appeal, was aware of its contents, including the part that was not attached. When the district court expressly stated that it had the complete set of state court records before it, those findings included the state petition

for habeas appeal.[11] JA 286. For these reasons, Sanford has not shown that the district court erred, nor that any error was not harmless.

First, the Director acted consistently with Habeas Rule 5(d) and provided a large portion of the petition for habeas appeal, which substantially complied with the rule. While Sanford argues Habeas Rule 5(d) required the Director to submit a complete copy of Sanford's 33-page petition for habeas appeal, plus numerous unidentified exhibits that he appended to that petition, Sanford has failed to show that the Director did not act in substantial compliance with the rule. *See, e.g.*, *Bullard*, 153 F.3d 719, 1998 WL 480727, at *2.

Second, even if the Director did not comply with Habeas Rule 5(d), the district court did not err by not requiring strict compliance. *See Pittman*, 209 F.3d at 316 (reviewing for abuse of discretion). Sanford authored his petition for state habeas appeal and selected any exhibits attached to it. JA 187. As the author, Sanford was aware of the petition's contents and which claims he exhausted in the state's highest court, and he thus was aware of the contents of any missing pages in the Director's Exhibit D. *Cf. Thompson*, 427 F.3d at 270 (finding that petitioner's authorship or possession of records insufficient reason to not provide service of *exhibits* but not addressing records not filed as exhibits). And here, the district court expressly stated

[11] For discussion of the district court's fact-finding about the now-missing habeas records, *see* Section II, *infra*.

that it received and reviewed the habeas appeal documents from the Supreme Court of Virginia on May 7, 2018. JA. 286. Accordingly, Sanford has failed to show how he was prejudiced, and he has thus failed to show that the trial court abused its discretion in not strictly enforcing Habeas Rule 5(d).

As to his constitutional claim, Sanford has no constitutional right to obtain copies of his own pleadings. An indigent petitioner in a federal habeas case does not have a constitutional right to free copies of self-drafted documents. *Cf. Anderson*, 236 F. App'x at 739 ("While indigent prisoners in a habeas case who have been granted *in forma pauperis* status are entitled to obtain certain documents without cost, . . . copies of documents generated by the petitioner and filed by him previously in the case would not be included.").

For the same reasons, and as argued above, any error in the district court's decision to not enforce strict compliance with Habeas Rule 5(d) is harmless error. *See Tire Eng'g & Distrib.*, 682 F.3d at 314 (citing Fed. R. Civ. P. 61). Moreover, Sanford has not argued on brief that he in fact *did exhaust* in the Supreme Court of Virginia the claims that the district court found were unexhausted, and thus procedurally defaulted. *See* JA 246–47. Sanford, therefore, has not shown that he was prejudiced or how the outcome of his case was unfavorably affected by the

Director attaching an incomplete copy of the petition for habeas appeal. This Court can conclude that any error is therefore harmless.[12]

II. The district court received and considered the complete record from the state courts. Its findings are entitled to a presumption of regularity. Furthermore, the district court's docketing of those records did not violate due process principles.

Sanford raises two broad challenges to the district court's treatment of the state court records. Both of his challenges fail on legal grounds and further overlook the pragmatic consequences of adopting his position.

A. Missing records alone are insufficient to rebut the presumption of regularity and to impeach the district court's express factual findings about its own review of the record. Moreover, the district court's affirmation of its receipt and review of the state court records is supported by the record on appeal.

The Director agrees that the state court habeas record from the Newport News Circuit Court and the habeas appeal record from the Supreme Court of Virginia are not currently lodged with the record on appeal before this Court. But a missing record on appeal, on its own, is insufficient to impeach a district court's express finding that it considered such record. Moreover, there is evidence before this Court that supports the district court's statement that it received the habeas appeal record

[12] Alternatively, the Director notes that the district court granted the Motion to Dismiss when it denied and dismissed Sanford's habeas corpus petition. JA 268. The district court thus could have concluded that enforcement of strict compliance with Habeas Rule 5 as to the Director's Rule 5 Answer was unnecessary because it granted the Motion to Dismiss. (*Compare* Case No. 1:18-cv-303, ECF No. 7 *with* ECF No. 12 *and* ECF No. 20).

on May 7, 2018, and the state habeas record on May 10, 2018. JA 286. To his error, Sanford overlooks the likelihood that the missing records were inadvertently misplaced after review by the district court.

First, in response to Sanford's complaints in the Rule 60(b) motion that the district court had an incomplete record, the district court made the following express factual findings:

> On March 2[8], 2018, the respondent was ordered to forward to the court "the records of the state criminal trial and habeas corpus proceedings." [Dkt. No. 3 at 1]. In response, the record of the direct appeal and the habeas appeal was filed by the Clerk of the Supreme Court of Virginia on May 7, 2018[,] and the records of petitioner's criminal trial and the circuit court level habeas proceedings were filed on May 10, 2018[,] by the Clerk of the Newport News Circuit Court. [Dkt. Nos 10 and 11]. The Court, therefore, was in possession of and considered all the records of the petitioner's state trial, appellate, and habeas proceedings before ruling on the motion to dismiss.

JA 286. The district court's findings about its receipt, review, and consideration of evidence deserve acceptance by this Court, even more so when those findings were made in response to Sanford's allegation that the district court had not considered the complete state court record. *See, e.g.*, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346–47 (2016) (deferring to district court's explanation of weighing sentencing factors); *see also United States v. Ravenell*, No. 20-4160, 2021 U.S. App. LEXIS 30541, at *10 (4th Cir. Oct. 13, 2021) (unpub.) (stating this Court "can take [the district] court at its word" as to how it weighed evidence).

The district court is entitled to a presumption of regularity that "every act of a court of competent jurisdiction shall be presumed to have been rightly done, [until] the contrary appears." *Voorhees v. Jackson*, 35 U.S. 449, 472 (1836). As this Court has noted, the presumption "has long been understood to shield every judgment or decree from searching inquiry by later courts." *United States v. Locke*, 932 F.3d 196, 200 (4th Cir. 2019) (quoting *Voorhees*, 35 U.S. at 472). The Supreme Court, in expressly applying the presumption of regularity in collateral proceedings akin to this case, stated: "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights." *Parke v. Raley*, 506 U.S. 20, 30 (1992) (holding that "even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant").[13]

Similarly, the absence of records now does not rebut the presumption of regularity. This is not a silent record and the district court's findings are not

[13] Sanford does not allege that the unavailability of the records is due to governmental misconduct. *See Parke*, 506 U.S. at 30.

impeached solely by absent records. *Parke*, 506 U.S. at 30; *see Molina-Martinez*, 136 S. Ct. 1338 at 1346–47 (considering different treatment for silent record).[14]

Moreover, the district court's factual findings are supported by evidence that *is* before this Court. First, on April 2, 2018, the Attorney General hand-delivered a letter to the Court of Appeals of Virginia requesting that court "forward a certified copy" of the direct appeal record to the district court for filing in this case. SJA 13. The lodging of that record on appeal confirms that the same was lodged with the district court. Next, this Court is also in possession of the record from Sanford's Newport News Circuit Court murder trial and the direct appeal record in the Supreme Court of Virginia. The lodging of those records with this Court again confirms the district court's receipt of the same. This Court can thus conclude that, although the record on appeal does not have copies of the letters from the Attorney General requesting that Newport News and the Supreme Court of Virginia transfer those respective records pursuant to Code § 8.01-667, such letters were sent and caused the lodging of the present records.

Second, the Supreme Court of Virginia generated two documents that support the conclusion that the habeas appeal record was transmitted with the direct appeal

[14] Additionally, this Court considered Sanford's direct appeal from the district court's dismissal of his habeas petition. JA 272, 275. This Court's ruling is also entitled to a presumption of regularity that it considered the complete record prior to denying Sanford's direct appeal.

record to the district court. This Court can rely on the Certificate of Transmittal, signed on May 3, 2018,[15] which provided the following:

> I, Lesley K. Smith, Deputy Clerk of the Supreme Court of Virginia, do hereby certify that attached hereto are true copies of the pleadings filed in and orders entered by this Court in the cases of *Arthur Lee Sanford v. Commonwealth of Virginia*, Record No. 131824, and *Arthur Lee Sanford v. Harold Clarke*, Director, Department of Corrections, Record No. 170318. (Civil Action No. 1:18cv303).

SJA 18. This certificate was stamped as "FILED" on May 7, 2018, in the Clerk's Office at the United States District Court in Alexandria. SJA 18. With the certificate, the state deputy clerk included a Table of Contents that referenced the direct appeal captioned "[Record No.] 131824, *Arthur Lee Sanford v. Commonwealth of Virginia*," and the habeas appeal captioned "[Record No.] 170318, *Arthur Lee Sanford v. Harold W. Clarke, Director, Department of Corrections*." SJA 19. The direct appeal contents were at pages 1 through 68 and the habeas appeal contents were at pages 69 through 116. SJA 19.

Considering this evidence, this Court can reach several reasonable inferences that Sanford overlooks. The two Supreme Court of Virginia documents establish that, in response to a letter from the Attorney General dated April 2, 2018, a deputy clerk of the Supreme Court of Virginia certified on May 3, 2018, the transmittal of the now-missing habeas appeal record with the direct appeal record to the district

[15] The certificate states it was signed on May 3, 2017, but this Court can conclude that was a typographical error.

court. *See* SJA 13, 18. Those records were filed in the district court on May 7, 2018, which is confirmed by a file stamp from the district court clerk's office. SJA18. The May 7, 2018 file stamp is consistent with the district court's express statement that it received the direct appeal and habeas appeal records from the Supreme Court of Virginia on May 7, 2018. JA 286. This Court can further conclude that, based on receipt of the trial record, the state habeas record was also transmitted by the Newport News Circuit Court and lodged with the district court, consistent with the district court's statements.

Furthermore, as the fourth record request from this Court's clerk's office made clear, the only documents not transmitted from the district court were the state habeas record and the habeas appeal record at pages 69 through 116 of the Supreme Court of Virginia record. All other records were transferred.

Accordingly, this Court can reasonably conclude that, after the habeas records were lodged with the district court clerk's office, and after the district court reviewed them for its ruling to dismiss Sanford's petition, the habeas records were misplaced.[16] Sanford, on the other hand, has offered no other explanation for how

[16] As explained in Section III, *infra*, undersigned counsel contacted the clerk's office at the Newport News Circuit Court to investigate whether the habeas file could be located. Upon confirmation that the clerk's office had the original file, undersigned counsel viewed the file in person to confirm its existence. Without representing the contents of the file, it is undersigned counsel's position that this Court can

this Court came to possess the records lodged on appeal and he has not offered another account for the evidence establishing the transmittal of these records.

Sanford not only asks this Court to unnecessarily reject the district court's statements as fabrications, but to ignore affirmative evidence in the record and to set aside the commonsense inferences. Viewing the district court's express findings in light of this evidence in the record, this Court should find that the absence of these records does not rebut the presumption of regularity that attached to the district court's judgment. *Parke*, 506 U.S. at 30; *Voorhees*, 35 U.S. at 472; *Locke*, 932 F.3d at 200.

B. Sanford's criticisms of the district court's docketing procedures fail to demonstrate a constitutional violation.

Sanford has also failed to show that the district court's docketing procedures amounted to a constitutional due process violation. On brief, Sanford raises constitutional challenges to 1) the district court's failure to upload the state court records to the "public facing docket sheet" and 2) the district court's failure to enter a public docket entry reflecting receipt of the state court records. (Opening Br. at 28–29). But Sanford has failed to show that any constitutional right attached to these docketing measures, or that he was prejudiced by the court's docketing practices. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (discussing Supreme Court

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reasonably conclude, based on the record on appeal, that the file was inadvertently returned to the Newport News Circuit Court *after* the district court's review.

precedent for inmate access to law libraries and explaining that inmates are only guaranteed tools needed "to attack their sentences, directly or collaterally, and . . . to challenge the conditions of their confinement").

1. The district court's failure to upload state records to the public docket sheet is not a constitutional violation.

As to Sanford's first claim that the failure to upload the state court records to the federal docket deprived him of access to the records and restricted his access to justice, Sanford has failed to state a constitutional violation.

The Sixth Circuit recently considered a similar claim where a petitioner alleged, in part, that the district court's docketing procedures for § 2255 petitions, which were consistent with the Rules Governing § 2255 Cases, deprived him of the ability to appeal to the United States Supreme Court because of petitioner's confusion over his case number. *See Heard v. Carr*, No. 20-6358, 2021 U.S. App. LEXIS 31297, at *4 (6th Cir. Oct. 18, 2021) (unpub.). The court ruled that "to the extent [the petitioner] sought to raise a claim that the Clerk's docketing of his § 2255 proceeding deprived him of his right to access the courts, the allegations in the complaint failed to state a plausible claim for relief." *Id.* at *5–6. The petitioner had failed to "plead and prove prejudice stemming from the asserted violation," and to "prove that he was hindered in his efforts to pursue a plausible legal claim." *Id.* at 6 (quoting *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996), and citing *Lewis*, 518 U.S. at 351, respectively).

Similarly, Sanford has not shown that the district court's procedures caused a due process violation.[17] Sanford was served with the Director's pleadings and exhibits pursuant to *Thompson*, and he had a constitutional right to copies of other records if he made a particularized showing. *See MacCollom*, 426 U.S. at 325; *Parker*, 273 F.3d at 244; *Jones*, 400 F.2d at 152; *Glass*, 317 F.2d at 202. Contrary to his argument on brief that the *records* were classified as "court only," Sanford's records remained open to the public and to him, and he was entitled to copies if he met the standards discussed above.

In light of the entire habeas corpus proceeding on the merits in the district court, the prior appeal to this Court on the merits, and the present case before this Court, Sanford has failed to plead or prove prejudice to his cause, as he has not shown that—because of the district court's procedures—he was unable to pursue his case on collateral review. *See Lewis*, 518 U.S. at 351; *Heard*, 2021 U.S. App. LEXIS 31297, at *5–6; *see also Olano*, 507 U.S. at 734; *Carthorne*, 726 F.3d at 506 (plain error review of unpreserved arguments).

[17] To the extent that Sanford suggests the docketing procedures violated the First Amendment, he has also failed to plead or show any prejudice to his case, as the records remained open to the public for review. *Cf. Company Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (collecting cases and holding that the "public and press's First Amendment qualified right of access to civil proceedings extends to docket sheets").

Moreover, Sanford's assertion that the district court's clerk's office should have uploaded all state court documents to the federal docket sheet is impracticable and overlooks the voluminous nature of habeas corpus records filed in the federal district courts. The record in this case alone was comprised of more than 17 volumes of state court records, most of which were paper records from Sanford's 2012 trial. Based on the expansive federal habeas caseload handled by the Office of the Attorney General of Virginia, the Clerk's Office in the Eastern District of Virginia does not upload the state records for each Section 2254 case into the federal docket sheet as a matter of course; indeed, it would be an unusual, if not extraordinary, occurrence. *See, e.g.*, *Hunter v. Director*, No. 3:19cv656, 2020 U.S. Dist. LEXIS 82871, at *3–4 n.5, n.6 (E.D. Va. May 11, 2020) (referencing pagination in paper record, which was not uploaded to federal docket sheet); *Holloman v. Clarke*, No. 2:18cv295, 2019 U.S. Dist. LEXIS 42269, at *2–5 n.1, n.2, n.3 (E.D. Va. Jan. 4, 2019) (same), *adopted,* 2019 U.S. Dist. LEXIS 41231 (Mar. 12, 2019); *Clark v. Clarke*, No. 2:17cv366, 2018 U.S. Dist. LEXIS 86539, at *4–5 n.1, n.2 (E.D. Va. Apr. 13, 2018) (same), *adopted,* 2018 U.S. Dist. LEXIS 85005 (May 21, 2018).

Sanford's complaints further overlook the redaction requirements imposed by the Federal Rules of Civil Procedure and local rules. *See* Fed. R. Civ. P. 5.2(a); Local Civ. R. 7(c). Under Sanford's position, the state clerk's office would be required to comb and redact all state court records in each habeas case for sensitive material,

including the names of minors, identifying information such as social security numbers and birthdates, and personal addresses.[18] The practical effects of Sanford's argument would undoubtedly overwhelm the resources of the state clerks' offices, which is unnecessary because the district courts have other mechanisms to assist petitioners with access to necessary documents. *See, e.g.*, 28 U.S.C. § 2250.

2. Docket sheet captions labeled "court only" indicated only that the captions themselves, not the documents, were restricted.

As to Sanford's second claim that he was deprived of notice that the district court had received his state court records, Sanford has similarly failed to show a violation of his constitutional rights or any prejudice to his ability to access the district court proceedings. *Accord Lewis*, 518 U.S. at 351; *Heard*, 2021 U.S. App. LEXIS 31297, at *5–6. This Court explained in its order for certificate of appealability that the district court's internal docket sheet classified the docket entries as "court only," so that neither the parties nor the public could view the entries. JA 313. The Director interprets this Court's notation as indicating that the *entry captions* were viewable by the "court only," as the captions are not viewable on the docket sheet. *See* JA 1–2.[19]

[18] The respondent assumes this responsibility of redaction when filing exhibits in CM/ECF.

[19] The docket captions are also colloquially called "minute entries" when reflecting information from the court.

Generally, a district court's docket captions reflecting receipt of state court records provide convenient confirmation to the parties of the depositing of those records with the district court. But Sanford has not shown that a court's internal docketing preference constitutes a lack of "notice" that affected his case in any notable way. In fact, after he alleged that the district court had an incomplete record before it, the district court expressly stated that it had received and reviewed the records from the Supreme Court of Virginia on May 7, 2018, and the Newport News Circuit Court on May 10, 2018. JA 279, 286. Additionally, the Director stated in his responsive pleading, a copy of which was served on Sanford, that he had requested the transfer of state court records, as the district court instructed. JA 45, 60. Accordingly, Sanford did have notice of the Director's compliance and the district court's receipt of the state court records.

Furthermore, the file stamp on the Supreme Court of Virginia's transmittal certificate establishes the record was "filed" at the clerk's office on May 7, 2018. SJA 18. As the clerk's office is an administrative arm of the district court, Sanford has failed to show that a docket entry would have altered any of his arguments or any aspect of the court's express findings about the lodging of the state court records. *See* 28 U.S.C. § 956 ("[T]he clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court."). Sanford

has thus not shown any plain error or a violation of his substantial rights. *See Olano*, 507 U.S. at 734; *Carthorne*, 726 F.3d at 510.

III. Should this Court rule that the district court's findings and procedures were in error, the remedy would be remand to the district court.

In the event this Court does not affirm, then it would be appropriate for this Court to vacate the district court's final order (JA 268) and remand to the district court for further proceedings. In that case, the Director would follow this Court's guidance about compliance with Habeas Rules 5(c) and (d) and Sanford would receive *de novo* review of his federal habeas corpus petition by the district court.

At such a proceeding, the district court could continue to rely on the state habeas corpus records because, despite their absence from the record on appeal, the Director has cause to believe those records have not been irretrievably lost or destroyed. Undersigned counsel for the Director has personally reviewed the original habeas corpus file at the Newport News Circuit Court after inquiring if the original file could be located.[20] Counsel for the Director has further confirmed that the

[20] While undersigned counsel has reviewed the file, she does not represent to this Court the contents of the file. Federal Rule of Appellate Procedure 10(e)(2) provides that, "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified" by this Court. Fed. R. App. P. 10(e)(2)(C). The Court itself could also *sua sponte* direct supplementation of the record if the materials "bear heavily on the merits of appellant's claim" and that claim was presented for the first time on appeal. *See United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980). The Director suggests that the Court could also pursue this remedy in this case.

Newport News clerk's office electronically scanned and uploaded the state habeas corpus record to the Officer of the Court Remote Access (OCRA) website, where it is accessible by registered attorneys, including undersigned counsel. The record is available, as any record, through that clerk's office even without OCRA access. Additionally, the record of the habeas appeal is stored electronically and available at the Supreme Court of Virginia.

Consistent with this inquiry, Sanford has also not established that the original state habeas record and the habeas appeal record cannot be electronically reconstructed. *See* Fed. R. App. P. 10(c), (d) (providing mechanisms for reconstruction of missing records); *see United States v. Bourque*, 157 F. App'x 646, 651 (4th Cir. 2005) ("If the record can be reconstructed by the district court or if the district court determines that the missing portions of the record are not relevant to issues the defendant wishes to raise on appeal, a new trial will not be granted." (citation omitted)); *see also Roberts v. Ferman*, 826 F.3d 117, 124 (3d Cir. 2016) (explaining that district court may use Rule 10(c) "as a guide" to reconstruct record).

In accordance with Federal Rule of Appellate Procedure 10(c) and (d), the Director is in a position to assist with judicially supervised reconstruction of the state habeas corpus record in the district court. *See United States v. Savage*, 970 F.3d 217, 241 (3d Cir. 2020) (requiring "a collaborative reconstruction effort").

For this reason, should Sanford not seek to recreate the record with the tools at his disposal, he would be unable to seek further review on the merits of his case.[21] *See Roberts*, 826 F.3d at 124 (collecting cases in agreement). The district court can entertain arguments from Sanford that such record is insufficient, and thereby prejudicial, only after he has attempted to recreate it. *See Roberts*, 826 F.3d at 124; *Bourque*, 157 F. App'x at 651.

CONCLUSION

Accordingly, the district court did not abuse its discretion when it denied Sanford's Rule 60(b) motion. The judgment of the district court should be affirmed. In the alternative, the district court's judgment should be vacated and the case remanded to the district court for further proceedings.

[21] Sanford notably already received merits review from this Court prior to filing his Rule 60(b) Motion. JA 272, 275.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Respondent-Appellee agrees that oral argument may aid in the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,045 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Counsel