[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12171
Non-Argument Calendar

D.C. Docket No. 6:15-cv-02011-JA-DCI

WILLIE PALMER,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

(August 15, 2019)

Before MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

Willie Palmer, a Florida state prisoner, appeals the district court's denial of his *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his conviction for robbery with a deadly weapon.[1] Palmer, who is now represented by counsel, argues that his trial counsel was ineffective for failing to request a special jury instruction on Palmer's defense that he abandoned the theft before displaying a weapon. The district court denied Palmer's petition after concluding that there was no evidence supporting an abandonment instruction, and therefore, he failed to show his counsel's performance was deficient and prejudiced his defense. We affirm.

I.

Palmer was charged with robbery with a deadly weapon and grand theft of more than $300 but less than $20,000. At trial, the state explained in its opening statement that on November 28, 2011, Palmer entered a Walmart store and began filling a cart with various household items. After filling the cart, Palmer moved to leave the store, walking past the checkout stands without paying for the items in the cart. Mercy Morgan, a Walmart loss prevention officer, called 911, approached

[1] "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1). "If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in § 775.082, § 775.083, or § 775.084." Fla. Stat. § 812.13(2)(a).

Palmer, asked him to come with her, and radioed David Fournier, another Walmart employee. Palmer did not comply with Morgan's request to come with her and "walk[ed] away from the cart," trying to get out of the store. Fournier then confronted him. Palmer became "aggressive" and tried to get around Fournier. Morgan then saw Palmer reach into his pocket and pull out what she believed to be a small pocketknife. Morgan yelled "knife." Palmer then told Fournier that he "better move," and Fournier backed away to let Palmer pass. Palmer left the store without the shopping cart or the merchandise inside it.

Palmer's counsel stated in his opening statement that "[t]his is not an armed robbery case or a Robbery with a Deadly Weapon case. This is shoplifting." He argued that, once Morgan approached, Palmer "immediately abandoned everything he [had]" by leaving the shopping cart and attempting to walk away. Counsel maintained that Palmer had stolen the items in the shopping cart by deception, not by force. Palmer's counsel also stated that the Walmart surveillance video would show that Palmer did not have a knife in his hand, did not make any physical contact with Morgan or Fournier, and did not make any gestures with his hands.

Morgan testified that when she approached Palmer, he was "really angry," refused to go with her, and tried to side-step her and Fournier. She stated that as she and Fournier were trying to get Palmer to go back into the main area of the store, she looked down and saw a black item with silver around it that looked like a

knife in Palmer's hand. She then told the 911 dispatcher that she thought Palmer had a knife, and the dispatcher told her to back off. Morgan said that Palmer held the knife as if to warn them that he had it but that he did not point it at anyone and the blade of the knife was not out. Morgan and Fournier then stepped out of Palmer's way, and he left the store without the cart or any of the items in it. On cross-examination, Morgan stated that Palmer had not abandoned the merchandise when she first approached him and still "had a hold of the cart" when Morgan asked him to come with her. She then said that Palmer abandoned the cart "at one point" before he left the store.

Fournier's testimony generally aligned with Morgan's. Fournier stated that he held on to Palmer's cart and told him to go with Morgan while attempting to prevent Palmer from leaving. He testified that he heard Morgan shout "knife," heard Palmer tell him "you better move," and saw Palmer holding a black folding knife. Fournier confirmed it was at that point he let Palmer go and that everything happened very quickly. During cross-examination, Palmer's counsel played the Walmart surveillance video and Fournier indicated the point at which Palmer still had his hand on the cart and the point at which he had abandoned the cart.

After the close of evidence, Palmer moved for judgment of acquittal, arguing that he could not be convicted of robbery because he did not use the knife "in the course of committing the theft" since he abandoned the property before he showed

the knife. The court denied Palmer's motion, concluding that the jury could find that the total incident, which lasted "60 or 90 seconds," was "one continuous series of events without any break." If so, the jury could conclude that he had committed robbery if the jury determined his flight and showing of the weapon were "contemporaneous with the act." The parties discussed with the judge the proposed jury instructions—which included the elements of robbery but no language on abandonment—and Palmer's counsel did not object to the instructions. The jury found Palmer guilty of robbery with a deadly weapon and theft of at least $300 worth of property. On direct appeal, Florida's Fifth District Court of Appeal summarily affirmed.

Palmer then moved the Eighteenth Judicial Circuit for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure, alleging five grounds for relief. In relevant part, Palmer's *pro se* petition argued that his trial counsel was ineffective for failing to request a special jury instruction on abandonment because his alleged use of force occurred after he abandoned the cart. He also stated that the video surveillance would show that he did not use the knife and that he abandoned the shopping cart. The court denied Palmer's 3.850 motion, finding that Palmer "passed all points of sale with the shopping cart, then he displayed the knife, and then he left the store without the merchandise." Because the evidence did not support an instruction on abandonment, Palmer did not therefore receive

ineffective assistance of counsel. The Fifth District Court of Appeal summarily affirmed.

Palmer then filed a *pro se* petition under 28 U.S.C. § 2254 in the district court.[2] As in his 3.850 motion, Palmer argued that his counsel provided ineffective assistance by failing to request a jury instruction on abandonment, among other claims. The § 2254 petition did not, however, make any argument concerning the evidence on the Walmart surveillance video. The district court denied Palmer's § 2254 petition. In relevant part, the district court explained that the evidence did not indicate any break in the chain of events because "the theft, threat, and attempted use of force constituted a continuous series of acts or events." Palmer's counsel thus was not deficient in failing to request an abandonment instruction to which he was not entitled, and such failure did not result in prejudice. The court also concluded that the state court's denial of relief was neither contrary to, nor an unreasonable application of, clearly established federal law. Palmer timely filed an

---

[2] Pursuant to § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may grant habeas relief on claims previously adjudicated in state court only if the adjudication:

> (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).

appeal, and this Court granted a certificate of appealability ("COA") on the following issue:

> Whether the state court's denial of Palmer's claim of ineffective assistance of trial counsel for failure to request a special jury instruction on abandonment was based on an unreasonable determination of facts, where the state court determined that counsel's performance was not deficient because the trial evidence did not support a special instruction on abandonment.

We then appointed counsel to represent Palmer and brief this appeal.

II.

When reviewing the district court's denial of a writ of habeas corpus under § 2254, we review mixed questions of law and fact, including claims of ineffective assistance of counsel, *de novo*, and review findings of fact for clear error. *Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1098 (11th Cir. 2009).

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI. To succeed on an ineffective assistance claim, the movant must show: (1) that the attorney made errors so serious that he ceased to function as the counsel that the Sixth Amendment guarantees; and (2) that the errors prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court's review of an attorney's performance is highly deferential, and it must employ a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. A habeas petitioner claiming ineffective assistance of

counsel bears the burden of proof and must prove both prongs of the *Strickland* test. *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001).

Under AEDPA, a habeas petitioner raising ineffective assistance of counsel must establish not only that his counsel was ineffective, but also that the state court's application of *Strickland* in concluding otherwise was unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). Our review under § 2254 of a state court's decision denying an ineffective assistance claim is thus "doubly" deferential. *Id.* This Court will affirm the denial of relief if "there is any reasonable argument that counsel" acted pursuant to prevailing professional standards. *See id.* Only in a "rare case" will an ineffective assistance claim denied on the merits in state court warrant relief in a federal habeas proceeding. *Johnson v. Sec'y, DOC*, 643 F.3d 907, 911 (11th Cir. 2011).

III.

Palmer's claim concerns his counsel's failure to request a special jury instruction. Under Florida law, a defendant is entitled to a special jury instruction if (1) the instruction is supported by the evidence; (2) the standard instruction does not adequately cover the theory of defense; and (3) the instruction is a correct statement of the law and not misleading or confusing. *Peterson v. State*, 24 So. 3d 686, 689 (Fla. 2d Dist. Ct. App. 2009).

Florida courts have recognized that providing the jury with an instruction on abandonment is appropriate in robbery cases when supported by the evidence. *See id.* at 690. "Robbery" is defined as taking property with the intent to either permanently or temporarily derive the owner of the property, when "in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1). "An act shall be deemed 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts of events." *Id.* § 812.13(3)(a), (3)(b). Put simply, a defendant is not guilty of robbery if he abandoned the stolen property before using force to flee. *See Rockmore v. State*, 140 So. 3d 979, 982–83 (Fla. 2014). Accordingly, Florida courts have recognized that a special instruction on abandonment is appropriate in a robbery case only if there is some evidence that the defendant "abandoned the property and thus broke the chain between the taking and the use of force." *Id.* at 984.[3] There must be "evidence that it was the thief who abandoned the property and thus broke the chain." *Id.*[4] However, if the "theft and threatened use of force constituted a

[3] For example, the instruction the court endorsed in *Peterson* read, "[i]f it is established that the property was abandoned prior to the use of force then you must find the Defendant not guilty of robbery." 24 So. 3d at 689.

[4] The state of Florida suggests that Florida courts thus distinguish between voluntary and involuntary abandonment. Because we find that the state court reasonably determined there was no evidence of abandonment here, we need not decide this issue.

continuous series of acts or events under Florida's robbery statute" as a matter of fact, the abandonment defense does not apply as a matter of law. *Id.*

Our review in a habeas appeal is limited to the issues specified in the COA. *Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 702 (11th Cir. 2004). Accordingly, we only assess whether the state court's decision to deny Palmer's petition was based on an unreasonable determination of the facts: that is, whether the trial evidence supported, as a matter of fact, the special instruction on abandonment.[5] "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance," and "evidence that may plausibly be read as inconsistent with the finding" may still not establish that the finding was unreasonable. *Wood v. Allen*, 558 U.S. 290, 301, 302–03 (2010).

The state court denied Palmer's Rule 3.850 motion after it found that the trial evidence showed that Palmer "passed all points of sale with the shopping cart, then he displayed the knife, and then he left the store without the merchandise." We conclude that this finding was not an unreasonable determination of the facts, as it is consistent with the testimony of both Morgan and Fournier. Although

[5] The Florida Fifth District Court of Appeal summarily affirmed the trial court's decision that Palmer was not entitled to post-conviction relief under Rule 3.850. When a state appellate court does not explain its decision to affirm the trial court, we "look through" that decision to the last reasoned decision and presume that the unexplained decision adopted the reasoning in the decision by the lower state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). We thus look to the reasoning of the Eighteenth Judicial Circuit's opinion.

Palmer argues that "[Morgan] testified, on one hand, that Mr. Palmer had not abandoned the merchandise, but, on the other hand she conceded that he had abandoned the stolen goods prior to fleeing the store," Morgan's testimony does not establish that that Palmer abandoned the merchandise before showing her the knife. Her testimony that he abandoned the cart "at one point" before leaving the store, although ambiguous, is reasonably read to mean that he abandoned the cart shortly before leaving. Further, on cross-examination, Morgan responded "no" when asked if Palmer had abandoned the merchandise upon her confronting him. Similarly, Fournier testified that Palmer did not abandon the cart when he initially approached him and that he saw the knife while he and Morgan were still walking with Palmer in the store.[6] Based on this testimony, the state court's finding was reasonable.

Palmer further argues that the Walmart surveillance video "clearly showed that [he] abandoned the merchandise before he threatened security personnel." Although Palmer raised this argument before the state court, he did not raise it before the district court, and the district court did not have an opportunity to view the video and consider this argument. "[I]ssues not raised in the district court in the

[6] Palmer correctly points out, however, that the state court misstated his argument by stating that he "claim[ed that] he abandoned the merchandise after he displayed the knife" because he instead argued that he abandoned the cart immediately after Morgan and Fournier approached him. But it is clear that the state court did not rely on Palmer's argument in reaching its decision; it instead relied on the evidence of Morgan and Fournier's testimony.

first instance are forfeited." *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1150 (11th Cir. 2017) (quoting *Maradiaga v. United States*, 679 F.3d 1286, 1293 (11th Cir. 2012)). Accordingly, Palmer forfeited any argument that the surveillance video provides evidence of abandonment by not raising that argument before the district court.[7]

In sum, the state court's decision that Palmer failed to show ineffective assistance of counsel was not based on an unreasonable determination of the facts. Morgan and Fournier's testimony do not provide evidence that Palmer abandoned the shopping cart before displaying a knife such that the chain between the taking and the use of force was broken. Accordingly, we affirm the district court's denial of Palmer's § 2254 petition for habeas relief.

AFFIRMED.

[7] Palmer also argues that his counsel's actions could not have been the result of reasonable trial strategy because his counsel argued the defense of abandonment throughout trial. This argument exceeds the scope of the COA because it concerns whether the state court's decision was an unreasonable application of federal law, not whether the state court's decision was based on an unreasonable determination of facts. Accordingly, we do not consider it. *See Diaz*, 362 F.3d at 702.

APPENDIX B

Order from the United States District Court for the Middle District of Florida, denying Petitioner's petition for writ of habeas corpus and request for an evidentiary hearing; dated April 26, 2018.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

WILLIE PALMER,

Petitioner,

v. CASE NO. 6:15-cv-2011-Orl-28DCI

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to Petition ("Response," Doc. 15) in accordance with this Court's instructions. Petitioner filed a Reply (Doc. 16) and an Amended Reply. (Doc. 18). Petitioner alleges four claims for relief. For the reasons set forth herein, the Petition is due to be denied.

I. PROCEDURAL HISTORY

Petitioner was charged by amended information with robbery with a deadly weapon (Count One) and grand theft (Count Two). (Doc. 15-1 at 7). After a jury trial, Petitioner was convicted as charged. (*Id.* at 497-98). The trial court sentenced Petitioner to a term of life imprisonment for Count One as a prison releasee reoffender and to a concurrent five-year sentence for Count Two. (*Id.* at 518-19). Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam*. (*Id.* at 768).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the

Billable Pages:	3	**Cost:**	0.30

Florida Rules of Criminal Procedure. (*Id.* at 583-600). The trial court summarily denied the motion. (*Id.* at 603-10). The Fifth DCA affirmed *per curiam*. (*Id.* at 610). Petitioner subsequently filed a second Rule 3.850 motion, which the trial court denied as successive. (*Id.* at 779-86; 790-91). The Fifth DCA affirmed *per curiam*. (*Id.* at 873).

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; 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). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.* Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*); *cf. Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's

performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*,

---

[1] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Claim One

Petitioner alleges trial counsel was ineffective for failing to request a jury instruction on abandonment. (Doc. 1 at 4). Petitioner contends that he abandoned his attempt to commit robbery, and had the jury been properly instructed, he would have been acquitted. (*Id.*). Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim, concluding that the evidence did not support a special jury instruction on abandonment. (Doc. 15-1 at 605). The Fifth DCA affirmed *per curiam*. (*Id.* at 768).

Mercy Morgan ("Morgan"), an employee of a Wal-Mart store in Viera, Florida, testified that she observed Petitioner select various types of merchandise including shirts, pants, underwear, a tote bag, and pillows and place them in his shopping cart (Doc. 15-1 at 74-75). Petitioner did not pay for the items, and instead he passed the point of sales and tried to exit the store. (*Id.* at 75-76). Morgan requested the assistance of another employee, and called the Brevard County Sheriff's Office. (*Id.* at 76).

Morgan then approached Petitioner as he exited the door, and she identified herself as security. (*Id.* at 77). Petitioner walked backwards into the store, and employee David Fournier ("Fournier") requested that Petitioner follow them to Morgan's office. (*Id.* at 77-78). Morgan stated that Petitioner did not abandon the items, appeared angry, and had his hand on the cart as he tried to leave. (*Id.* at 119). Morgan observed a black object

with silver in Petitioner's hand and believed it was a knife. (*Id.* at 79). Morgan was very scared, and stepped out of Petitioner's way. (*Id.* at 80-82). Petitioner subsequently left the store and drove away. (*Id.* at 88-89).

Fournier testified that he went to the entrance of the store and waited until Petitioner had passed the points of sale, at which time he approached Petitioner and stopped his shopping cart. (*Id.* at 147-48). Petitioner attempted to leave the store and appeared aggravated. (*Id.* at 149). Morgan yelled to Fournier that Petitioner had a knife, and Petitioner said to him, "You better move." (*Id.* at 150). Fournier then observed a black folding knife in Petitioner's hand. (*Id.* at 150-51). Fournier testified that Petitioner held the knife out, and Fournier perceived the statement, "You better move" as a threat. (*Id.* at 151). Fournier immediately backed away and was in fear. (*Id.* at 151-52). Petitioner then exited the store. (*Id.* at 153).

Florida law provides that a when requesting a special jury instruction, a defendant must demonstrate "(1) the special instruction is supported by the evidence; (2) the standard instruction does not adequately cover the theory of defense; and (3) the special instruction is a correct statement of the law and not misleading or confusing." *Peterson v. State*, 24 So. 3d 686, 689 (Fla. 2d DCA 2009). Petitioner contends that he was entitled to a special jury instruction on abandonment because he abandoned the stolen property before he used force to leave the scene of the crime. Florida courts have held that an abandonment defense and jury instruction applies when a defendant has used force after abandoning stolen property and thus has broken the chain between the taking and the

use of force. *Rockmore v. State*, 140 So. 3d 979, 982-83 (Fla. 2014) (noting that the theft of property and use of force must be a continuous series of acts or events); *Peterson*, 24 So. 3d at 688 (citations omitted).

In this case, Petitioner attempted to leave the Wal-Mart store with property he had not paid for; however, he was stopped by two employees. The trial testimony reflects that Petitioner had his hand on the shopping cart and attempted to leave the store without paying for the items in the cart. When approached by Fournier and Morgan, Petitioner verbally threatened Fournier while holding a knife. The evidence does not indicate that there was a break in the chain between the taking and the use of force. Instead, the theft, threat, and attempted use of force constituted a continuous series of acts or events. Therefore, defense counsel did not act deficiently and counsel's failure to request an instruction on abandonment did not result in prejudice because Petitioner was not entitled to such an instruction. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner argues that trial counsel was ineffective for failing to call Karen Mills ("Mills") as a witness. (Doc. 1 at 7). Petitioner states that Mills would have testified that the total of the stolen merchandise was not $310.27 because two pillows had been counted twice, and therefore, the total of the merchandise was under $300. (*Id.*). Petitioner asserts that if this evidence had been presented, he would not have been convicted of grand theft.

(*Id.*). Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim pursuant to *Strickland*, noting that two witnesses testified regarding the total price of the stolen merchandise. (Doc. 15- at 606-07). The Fifth DCA affirmed *per curiam*. (*Id.* at 768).

"[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted); *Dottin v. Sec'y Dep't of Corr.*, No. 8:07-cv-884-T-27MAP, 2010 WL 376639, at *6 (M.D. Fla. Sept. 16, 2010). Petitioner's claim is speculative because he has not presented an affidavit from Mills. Therefore, Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel.

Alternatively, the Court concludes that this claim is without merit. Deputy Thomas Walter ("Deputy Walter") testified that he responded to the scene of the crime, where he inventoried each stolen item (Doc. 15-1 at 250). Deputy Walter stated that a Wal-Mart employee provided him with a sales receipt to determine the total price or amount of the stolen items. (*Id.*). Deputy Walter testified that he went through each stolen item and checked it off the receipt to ensure that the items matched. (*Id.* at 251). Additionally, Morgan testified regarding the accuracy of the receipt and the total amount of the stolen property. (*Id.* at 89, 121).

Petitioner has not demonstrated that counsel's failure to call Mills as a witness resulted in prejudice. Petitioner merely speculates that Mills would have testified that the receipt and total price of the stolen items was inaccurate. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating vague, conclusory, speculative and unsupported claims cannot support relief for ineffective assistance of counsel). Petitioner has not provided the Court with any evidence demonstrating that two pillows were counted twice in the total price of the stolen items. A reasonable probability does not exist that but for counsel's actions, the result of the proceeding would have been different. Accordingly, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner asserts that trial counsel was ineffective for advising him not to testify. (Doc. 1 at 8). Petitioner states that counsel told him not to testify because "the State would eat him up on the stand and there was nothing [he] could testify to in this case that counsel had not said." (*Id.*). In his Reply, Petitioner also contends that counsel improperly told him that if he testified, the jury would hear about the nature of his prior convictions. (Doc. 18 at 15). Petitioner states that he would have testified that the alleged knife Morgan and Fournier saw was "simply a key chain pouch" and he had no intent to harm anyone. (*Id.* at 17-18). Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied relief pursuant to *Strickland*. (Doc. 15-1 at 608). The Fifth DCA affirmed *per curiam*. (*Id.* at 768).

Criminal defendants have a right to testify on their own behalf. *Rock v. Arkansas*,

483 U.S. 44, 50-51 (1987); *Harris v. New York*, 401 U.S. 222, 230 (1971). To protect a defendant's right to testify, defense counsel must inform the defendant that he has a right to testify or not to testify, the strategic implication of each choice, and that the defendant must ultimately decide for himself whether to testify. *See Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992).

The trial court discussed with Petitioner his right to testify, and Petitioner stated that he understood his rights. (Doc. 15-1 at 300-03). The trial court gave Petitioner additional time to speak with his attorney about the matter, after which Petitioner told the court that he was waiving his right to testify. (*Id.* at 304-05). Even assuming that defense counsel improperly advised Petitioner regarding his rights, he cannot demonstrate prejudice.

Morgan and Fournier both testified that Petitioner wielded a knife. (Doc. 15-1 at 79, 150-51). Further, Deputy Walter testified that he collected a black pocketknife that another officer had found on Petitioner when he was arrested. (*Id.* at 244). The pocketknife was offered into evidence and reviewed by the jury. (*Id.* at 246). Consequently, even if Petitioner had testified that he did not threaten Fournier with a knife and merely held a key chain pouch, a reasonable probability does not exist that he would have been acquitted in light of the evidence presented. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim three is denied pursuant to § 2254(d).

D. Claim Four

Petitioner alleges that the trial court erred by denying his motion for judgment of acquittal with regard to the robbery with a deadly weapon charge. (Doc. 1 at 10). Respondents argue that this claim is unexhausted. (Doc. 15 at 7-9).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

The instant claim was raised on direct appeal in appellate counsel's *Anders*[2] brief and Petitioner's *pro se* initial brief (Doc. 15-1 at 532-48, 557-74). However, these briefs did not cite to any federal case law or the federal constitutional provisions. (*Id.*). In the *Anders* brief, appellate counsel merely relied upon state law, and therefore, did not apprise the state court of the federal constitutional issue. Similarly, Petitioner's *pro se* brief merely

---

[2] *Anders v. California*, 386 U.S. 738 (1967).

argued that under Florida law, he had abandoned the stolen property before he used force. (*Id.* at 565-67). Therefore, this claim is unexhausted. *See Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457-58 (11th Cir. 2015) (holding that a habeas petitioner failed to exhaust his sufficiency of the evidence claim because he did not cite to any federal cases or federal constitutional provisions and only relied upon Florida case law to argue his claim).

Moreover, the Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. "[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Id.* at 736. Petitioner could not return to the state court to raise this ground because he has already filed a direct appeal. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner states that appellate counsel's failure to raise the federal constitutional basis of the claim amounts to cause for the procedural default. (Doc. 18 at 4). A claim of ineffective assistance of appellate counsel can be cause for procedural default if that claim also was exhausted in the state court. *See Brown v. United States*, 720 F.3d 1316, 1333 (11th Cir. 2013); *Dowling v. Sec'y for Dep't of Corr.*, 275 F. App'x 846, 847-48 (11th Cir. 2008) (*citing Edwards*

v. Carpenter, 529 U.S. 446, 450-51 (2000)). However, Petitioner did not raise this specific claim in the state court. Therefore, this is a not basis to overcome the procedural default.

Petitioner has neither alleged nor shown any cause or prejudice to excuse the procedural default. Likewise, Petitioner has not demonstrate that he is actually innocent. Accordingly, the Court is procedurally barred from reviewing this claim.

Alternatively, the Court concludes that Petitioner's claim fails on the merits. To convict Petitioner of robbery with a deadly weapon, the State had to prove that (1) Petitioner took money or property from the person or custody of another, (2) the taking was with the intent to permanently or temporarily deprive the person of the money or property, (3) the property had some value; (4) in the course of the taking, Petitioner used force, violence, assault, or fear, and (5) Petitioner carried a deadly weapon. § 812.13(1) and (2)(a), Fla. Stat. The robbery statutes defines the phrase "in the course of the taking" to mean acts occurring prior to, contemporaneous with, or subsequent to the taking if the taking and the act "constitute a continuous series of acts or events." § 812.13(3)(b), Fla. Stat. Furthermore, an act is deemed to have been committed "in the course of the taking" if it occurs in flight after the attempt or commission. § 812.13(3)(a), Fla. Stat.

Petitioner essentially argues that he did not use force during or subsequent to the taking of the property and asserts that he abandoned his attempt to steal the items. (Doc. 18 at 19-20). Petitioner also states that there is no evidence that he used a weapon to commit the crime. As the Court noted *supra*, Petitioner's act of force was committed subsequent to the taking of the Wal-Mart property; however, the taking and the threat of

force or violence constituted a continuous act. *See Rockmore,* 140 So. 3d at 982. Additionally, Morgan and Fournier testified that Petitioner wielded a knife, and Fournier stated that Petitioner threatened him. Police officers found a pocketknife on Petitioner's person when he was arrested.

Based on the testimony presented at trial, there was sufficient evidence for the trial court to present the case to the jury and for the jury to determine that Petitioner committed robbery with a deadly weapon. Upon viewing the evidence in a light most favorable to the prosecution, the Court concludes that any rational trier of fact could have found Petitioner guilty. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The trial court did not err by denying Petitioner's motion for judgment of acquittal. Accordingly, claim four is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.,* 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate

of appealability should issue only when a Petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." (*Id.*); *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **DENIED** a certificate of appealability.

3. The Clerk of the Court is directed to enter judgment and close this case.

DONE AND ORDERED in Orlando, Florida, this 26 day of April, 2018.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Unrepresented Party

APPENDIX C

Order of the United States Court of Appeals for the Eleventh Circuit Denying Motion for Rehearing, dated November 1, 2019.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

11/1/19

No. 18-12171-EE

WILLIE PALMER,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

BEFORE: MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Willie Palmer is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41