APPENDIX – C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEVEN TURBI,

Petitioner,

v. Case No. 18-cv-40-T-33CPT

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Steven Turbi, a Florida inmate, timely filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 1) and supporting memorandum (Doc. 2) challenging his Polk County convictions. Respondent filed a response (Doc. 8) and Turbi filed a reply (Doc. 12). Upon review, the petition is DENIED.

Procedural History

Turbi was convicted after a jury trial of burglary while armed and with an assault and battery; robbery with a deadly weapon; possession of cannabis; and possession of drug paraphernalia. (Doc. 11, Ex. 3). The state trial court sentenced him to 20 years in prison. (Doc. 11, Ex 4). The state appellate court affirmed the convictions and sentences in a written opinion. *Turbi v. State*, 171 So.3d 787 (Fla. 2d DCA 2015). Turbi filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. (Doc. 11, Ex. 11).

The state postconviction court summarily denied the motion, and the state appellate court *per curiam* affirmed the denial of relief. (Doc. 11, Exs. 12, 14).

Turbi's second postconviction motion, filed while his initial collateral appeal was pending, was dismissed by the state postconviction court. (Doc. 11, Exs. 16, 17). The state appellate court *per curiam* affirmed the dismissal. (Doc. 11, Ex. 19). Turbi's third postconviction motion was denied as successive. (Doc. 11, Exs. 21, 22). The state appellate court *per curiam* affirmed the denial. (Doc. 11, Ex. 23).

Facts[1]

Atiya Sampson-Davis managed a restaurant inside the Stonegate Golf Club. On the night of December 7, 2012, she was counting money in her office after closing. She heard a knock at the office's exterior door. Expecting the banquet manager to bring her cash, Sampson-Davis replied for the person at the door to come in. When no one entered, she opened the door to find two masked men with firearms. They came into the office, where one man held a gun to her head while the other took money from her desk and a safe. After they left, she called 911.

Sampson-Davis told police that she recognized a tattoo on the arm of the man who took the money. She said a former employee, Steven Turbi, had the same tattoo. During his employment, she had asked Turbi about the tattoo and, as his supervisor, had admonished him to cover it in accordance with the restaurant's policies. She further told police that both perpetrators were dressed in black clothing.

Police established a perimeter around the area. Deputy Kevin Schuttler saw Turbi

[1] The factual summary is based on the trial transcript.

walking approximately one to two miles away from the restaurant. He was wearing black clothing, appeared sweaty, and had vegetation stuck to his pants legs. After obtaining Turbi's name and observing the tattoo on his arm, Deputy Schuttler detained Turbi and found a bag containing marijuana on his person. After Turbi's apprehension, police continued to search for his accomplice. A police dog tracked about half a mile from the restaurant before losing the scent. Turbi's accomplice was never arrested.

Standard Of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1364 (11th Cir. 2009). Habeas relief can only be granted if a petitioner is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(d) provides that federal habeas relief cannot be granted on a claim adjudicated on the merits in state court unless the state court's 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.

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). A decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably

Ground Two

Turbi contends that his conviction and sentence for burglary are illegal because the charging document referenced "the previous statutory language of Section 810.02", Fla. Stat. (Doc. 1, p. 5). The charging document alleges that:

> STEVEN TURBI on or about December 7, 2012, in the County of Polk and State of Florida, did knowingly enter *or remain in* a structure, the property of ATIYA SAMPSON-DAVIS, while armed with a handgun, a dangerous weapon, or in the course of committing the burglary made an assault or battery upon ATIYA SAMPSON-DAVIS with the intent to commit an offense therein, contrary to Florida Statute 810.02.

(Doc. 11, Ex. 1, p. 12) (emphasis added).

Turbi claimed in his postconviction motion that "[t]he above statutory language *or remain in* does not apply to Turbi because the language is only applicable to crimes of burglary committed on or before July 1, 2001." (Doc. 11, Ex. 11, p. 19) (emphasis in original).[2] The state court denied Turbi's claim, finding that "[t]he alleged error does not

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[2] Florida's burglary statute provides:

> (1)(a) For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter.
>
> (b) For offenses committed after July 1, 2001, "burglary" means:
>
> 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
>
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
>
> a. Surreptitiously, with the intent to commit an offense therein;
>
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
>
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

element of the crime.").

The information also contains the required oath of the Assistant State Attorney certifying that the allegations in the information "are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged," and that "testimony under oath has been received from the material witness or witnesses for the offense." (Doc. 11, Ex. 1, p. 14). *See* Fla. R. Crim. P. 3.140(g) (setting forth requirements of the oath). Turbi has not established that the testimony presented to the prosecutor was insufficient to support the charging document. Therefore, he does not show any defect in the charging document that deprived the state court of jurisdiction so as to raise a cognizable claim on federal habeas review. Turbi is not entitled to relief on Ground Two.

Ineffective Assistance Of Counsel

The rest of Turbi's claims allege ineffective assistance of counsel. These claims are analyzed under the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Turbi must demonstrate that his counsel performed deficiently in that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Turbi must also show that he suffered prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Obtaining relief on a claim of ineffective assistance of counsel is difficult because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). *See also Burt v. Titlow*, 571 U.S. 12, 15 (2013) (this doubly deferential standard of review "gives both the state court and the defense attorney the

In moving for a judgment of acquittal, counsel challenged the sufficiency of the evidence, arguing that the State had not established Turbi's identity and had not presented a *prima facie* case of guilt. (Doc. 11, Ex. 2, Vol. I, pp. 111-20). And counsel argued in the motion for new trial that the verdict was contrary to the weight of the evidence. (Doc. 11, Ex. 12, p. 48). Accordingly, counsel did challenge the State's evidence, as the state court found. Turbi has not shown that counsel was ineffective in failing to more expressly allege that the State failed to overcome Turbi's reasonable hypotheses of innocence, or that the jury would be required to impermissibly stack inferences in order to convict him.

> A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis of innocence except that of guilt. *See Wilson v. State*, 493 So.2d 1019, 1022 (Fla. 1986). Consistent with the standard set forth in *Lynch* [*v. State*, 293 So.2d 44 (Fla. 1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45. The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla.R.Crim. P. 3.380.

State v. Law, 559 So.2d 187, 188-89 (Fla. 1989).

Turbi alleged that he was not one of the perpetrators. He was arrested a short distance from his home, and claimed that he was merely walking outside to smoke a cigarette when he encountered Deputy Schuttler. However, the State presented evidence of Turbi's identity from which the jury could exclude his hypothesis of innocence. Sampson-Davis stated that the man who took money from her office had a tattoo consistent with Turbi's tattoo. (Doc. 11, Ex. 2, Vol. I, p. 44). She also testified that Turbi knew of the safe in the office. (*Id.*, p. 47). She explained that to get his tips, he had come to the office and see a supervisor, who retrieved the money from the safe. (*Id.*, pp. 47-48). Further,

basis of little more than speculation with slight support."); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim).

Turbi has not shown that the state court's denial of his claim involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts. He is not entitled to relief on Ground One.

Ground Three

Consistent with the standard instruction for burglary, the jury was instructed that they could "infer that the defendant had the intent to commit a crime inside the structure if the entry or attempted entry of the structure was done stealthfully and without the consent of the owner or occupant." (Doc. 11, Ex. 2, Vol. II, pp. 199-200). *See* Fla. Std. Jury Inst. (Crim.) 13.1. Turbi argues that trial counsel was ineffective in failing to object to the stealthy entry instruction because it involved "an uncharged theory of prosecution." (Doc. 1, p. 6). The state court denied Turbi's claim:

> Claim 3 alleges trial counsel was ineffective for failing to object to a jury instruction of "stealth[ ]y entry". As discussed above and even in the Defendant's own motion, this case was one of identification. It was never argued to the jury that the Defendant's intent in committing an offense was implied through any stealthy entry. In fact, the evidence and the jury verdict is to the contrary. In count 2 the Defendant was charged with Robbery with a Deadly Weapon. This robbery occurred after the burglary, as the Defendant stole money off the desk and in the safe of the office. There was no need to imply any intent to commit an offense, as the jury found beyond a reasonable doubt that the Defendant committed the robbery. Claim 3 is DENIED.

(Doc. 11, Ex. 12, p. 42).

Turbi has not established prejudice as a result of counsel's failure to object to the stealthy entry instruction. As the state court's order indicates, a jury will likely discount an

> Defendant was detained and the marijuana and paraphernalia discovered because he had matched the description given by the victim of the burglary and robbery, was close in the area, and appeared to have been sweating as if he was running. Therefore, claim 4 is DENIED.

(Doc. 11, Ex. 12, pp. 42-43).

It appears that in his postconviction motion, Turbi referred to Florida Rule of Criminal Procedure 3.152(a)(2)(A), which provides that a defendant may obtain severance of charges of related offenses upon showing "that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense." "In determining whether severance is warranted, a court must consider several factors, including the temporal and geographic association of the crimes, the nature of the crimes, and the manner in which the crimes were committed." *Bell v. State*, 33 So.3d 724, 725 (Fla. 1st DCA 2010).

Whether severance would have been appropriate involves an application of Florida law. This Court must defer to the state court's finding that severance was not appropriate. Although Turbi's ineffective assistance of counsel claim is a federal constitutional claim, when "the validity of the claim that [counsel] failed to assert is clearly a question of state law, . . . we must defer to the state's construction of its own law." *Will v. Sec'y, Dep't of Corr.*, 278 Fed. App'x 902, 908 (11th Cir. 2008) (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984)). *See also Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1354-55 (11th Cir. 2005) ("The Florida Supreme Court already has told us how the issues would have been resolved under Florida state law had [petitioner's counsel] done what [petitioner] argues he should have done . . . It is a 'fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them

(Doc. 11, Ex. 12, p. 44).

The state court did not unreasonably deny relief. As the court noted, the plea form attached to Turbi's postconviction motion was dated after his trial had concluded, and Turbi fails to show that the State prepared it pursuant to an offer that was in fact presented to defense counsel. (Doc. 11, Ex. 11, p. 35). Further, defense counsel did not object when the prosecutor stated on the record that no plea offers had been made in Turbi's case. (Doc. 11, Ex. 12, p. 102). Accordingly, Turbi's unsupported claim that counsel failed to communicate a plea offer is too speculative to warrant relief. *See Bartholomew*, 516 U.S. at 8; *Tejada*, 941 F.2d at 1559. Turbi has not shown that the state court's denial of his claim involved an unreasonable application of *Strickland* or was based on an unreasonable determination of fact. He is not entitled to relief on Ground Seven.

Grounds Eight Through Eleven

In Grounds Eight through Eleven, Turbi alleges ineffective assistance of trial counsel. Turbi presented these claims in a successive postconviction motion, which the state court dismissed as "an unauthorized successive motion." (Doc. 11, Ex. 22).

If a state court's rejection of a federal constitutional claim is based on an "independent and adequate" state procedural ground, federal review of the claim is barred. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). *See also Caniff v. Moore*, 269 F.3d 1245, 1247 (11th Cir.2001) ("[C]laims that have been held to be procedurally defaulted under state law cannot be addressed by federal courts."). A state court's procedural ruling constitutes an independent and adequate state rule of decision if (1) the last state court rendering a judgment in the case clearly and expressly states that it is relying on a state procedural rule to resolve the federal claim without reaching the merits of the claim, (2) the

state court's decision rests solidly on state law grounds and is not intertwined with an interpretation of federal law, and (3) the state procedural rule is not applied in an "arbitrary or unprecedented fashion" or in a "manifestly unfair manner." *Judd*, 250 F.3d at 1313 (citing *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990)).

Further, to be considered adequate, a rule must be firmly established and regularly followed. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). In Florida, a second or successive postconviction motion is an "extraordinary pleading." Fla. R. Crim. P. 3.850(h)(2).

> Accordingly, a court may dismiss a second or successive motion . . . if new and different grounds are alleged, [if] the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of discretion or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion.

Id.

Florida decisions also address the dismissal of successive postconviction motions. *See Owen v. State*, 854 So.2d 182, 187 (Fla. 2003) ("A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. . . . [C]laims that could have been raised in a prior postconviction motion are procedurally barred."); *Christopher v. State*, 489 So.2d 22, 24 (Fla. 1986) (recognizing that Rule 3.850 allows a court to summarily deny a successive postconviction relief that raises new grounds).

The state court's reliance on an independent and adequate state bar to dispose of Turbi's claims results in a procedural default. Therefore, the claims can only be considered if Turbi establishes that either the cause and prejudice or fundamental miscarriage of justice exception applies to overcome the default. *See Harris v. Reed*, 489 U.S. 255, 262

a burglary in the manner charged in the information." (Doc. 2, p. 3).

Turbi does not establish a substantial claim of ineffective assistance of trial counsel. The information charged him with either entering *or* remaining in the structure. (Doc. 11, Ex. 1, p. 12). As he concedes, the State presented evidence that he unlawfully entered the structure. Accordingly, Turbi fails to show a reasonable probability that the outcome would have been different had counsel objected on the basis alleged. Turbi has not overcome the procedural default of Ground Eight.

Ground Nine

Sampson-Davis testified at trial that both perpetrators carried handguns. (Doc. 11, Ex. 2, Vol. I, p. 38). She did not recall telling police that only one of the perpetrators had a gun but agreed that she might have done so:

> Q. And you gave a statement to Detective Radabaugh on the early morning hours of, I guess, December 8th after that. Was that at the scene or was that at the police station?
>
> A. No, that was at the scene.
>
> Q. That was at the scene?
>
> A. Yes.
>
> Q. Okay. Do you recall - - well, first off, do you recall giving that statement?
>
> A. I do.
>
> Q. Okay. Do you recall stating that it was only one individual that had a gun?
>
> A. I may have. That was a terrifying night - -
>
> Q. Sure.
>
> A. - - you know, so I may have. I don't recall if I said one or if I said two. I don't recall.

the intent to commit an offense therein. § 810.02, Fla. Stat. These elements are not contained in the robbery statute. § 812.13, Fla. Stat. However, robbery requires proof of a taking, which is not an element of burglary. *See id.* Therefore, the offenses are not different degrees of the same crime, and one is not subsumed by the other. *See McAllister v. State*, 718 So.2d 917, 918 (Fla. 5th DCA 1998). Because Turbi does not show that his convictions for burglary and robbery violate double jeopardy, he cannot establish a substantial claim of ineffective assistance of trial counsel for failing to raise a double jeopardy objection. Turbi has not overcome the default of Ground Ten.

Ground Eleven

A person is liable as a principal if he "aids, abets, counsels, hires, or otherwise procures [any criminal offense] to be committed." § 777.011, Fla. Stat. In accordance with Florida's standard instructions, the jury was instructed:

> [I]f the defendant helped another person commit a crime, then he's deemed a principal, [and] must be treated as if he had done all the things that the other person or persons did if: First, he had a conscious intent that the criminal act be done. And, second, that he did some act or said some word, which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit the crime.

(Doc. 11, Ex. 2, Vol. II, p. 210).

Turbi argues that trial counsel was ineffective in failing to object to this instruction because the State did not cite the principals statute in the charging information. Turbi has not shown that this was a meritorious basis for objection. "Under Florida law, a person who is charged in an indictment or information with commission of a crime may be convicted on proof that she aided or abetted in the commission of such crime." *State v. Larzelere*, 979 So.2d 195, 215 (Fla. 2008). Accordingly, "if an information charges a defendant with a

substantive crime, . . . and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilt as charged should be sustained." *Watkins v. State*, 826 So.2d 471, 474 (Fla. 1st DCA 2002). *See also State v. Roby*, 246 So.2d 566, 571 (Fla.1971) ("Under our statute, . . . a person is a principal in the first degree whether he actually commits the crime or merely aids, abets, or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute.").

The principals instruction may be given if supported by the evidence adduced at trial. *See Roberts v. State*, 813 So.2d 1016, 1017 (Fla. 1st DCA 2002) ("There was sufficient evidence adduced in the state's case-in-chief to support [the principals] instruction; accordingly, the trial court did not err in granting the request for such an instruction, despite the fact that Roberts was not specifically charged with aiding and abetting.").

The State argued that the principals theory was relevant to show that Turbi was guilty of battery and assault during the burglary. (Doc. 11, Ex. 2, Vol. I, pp. 174-75). Turbi's accomplice held Sampson-Davis at gunpoint, putting a hand on her shoulder to keep her from moving and placing a gun to the back of her head. (*Id.*, pp. 39-43). The State also argued that, even if the jury did not believe Turbi carried a weapon, he was still guilty as a principal of burglary while armed and robbery with a deadly weapon because his accomplice carried a weapon. (Doc. 11, Ex. 2, Vol. II, p. 194).

Turbi fails to argue that the evidence did not support giving the principals instruction. Furthermore, the State's evidence was sufficient to show that Turbi intended that burglary and robbery be committed, and that his actions encouraged his accomplice enter the office

not made the requisite showing. Finally, because Turbi is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

ORDERED at Tampa, Florida, on August 9, 2018.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Steven Turbi
Counsel Of Record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13985-E

STEVEN TURBI,

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

ORDER:

Steven Turbi is a Florida prisoner serving a 20-year sentence after a jury convicted him of armed burglary, robbery with a deadly weapon, and possession of cannabis and drug paraphernalia. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), to challenge the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus.

The district court denied Claims 1-7 on the merits, thus, to warrant a COA, Turbi must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the

decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

In Claim 2, Turbi asserted that his burglary conviction was illegal due to a defective Information. However, the sufficiency of a state Information "is not properly the subject of federal habeas corpus relief unless" it "is so deficient that the convicting court is deprived of jurisdiction." *DeBenedictis v. Wainwright*, 674 F.2d 841, 842-43 (11th Cir. 1982). Turbi's Information included details that put him on notice of the charges and included all of the elements of the offense, so any error in the Information did not render it fatally defective.

Turbi's remaining claims asserted ineffective assistance of trial counsel. In Claim 1, Turbi asserted that counsel was ineffective for failing to argue, in the motion for judgment of acquittal, insufficiency of the evidence to support the burglary and robbery convictions. However, counsel did make such an argument, and, thus, was not deficient. In Claim 3, he asserted that counsel failed to object to the jury being instructed on stealthy entrance. However, the State did not rely on a stealthy entrance theory of guilt, and it is not reasonable to conclude that any superfluous jury instruction had an effect on the outcome of the trial.

In Claim 4, Turbi asserted that counsel failed to move to sever his burglary and robbery charges from his drug charges. However, whether Turbi's charges should have been severed is an issue of state law, and this Court should not second-guess the state court's determination on that issue. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005). Moreover, it is not likely that the evidence that Turbi had marijuana in his pocket when arrested contributed to the jury's verdict on the burglary and robbery charges.

from the motion for judgment of acquittal, asserting. For Claim 8, the State did not have to prove the "remaining in" element, as the Information charged that Turbi remained in *or* entered a structure, and the State clearly proved that he entered the restaurant. For Claim 9, whether one or both men carried a gun was inconsequential to Turbi's guilt, as there was no question that at least one of the burglars was armed.

In Claim 10, Turbi asserted that counsel should have objected that Counts 1 and 2 violated double jeopardy. However, burglary and robbery each have elements that the other does not, and there was no double jeopardy violation. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). Finally, in Claim 11, Turbi asserted that counsel failed to object to the inclusion of the principal jury instruction. However, Florida law does not require that the principal theory be charged in order for the defendant to be convicted in that way. *See Watkins v. State*, 826 So.2d 471, 474 (Fla. Dist. Ct. App. 2002). Accordingly, Claims 8-11 were not substantial, and their procedural default is not excused by *Martinez*.

In conclusion, Turbi's motion for a COA is DENIED IN PART and GRANTED IN PART. Further, Turbi also has shown that his appeal is not frivolous, and his motion for IFP status is GRANTED. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13985
Non-Argument Calendar

D.C. Docket No. 8:18-cv-00040-VMC-CPT

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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

(January 28, 2020)

Before MARTIN, ROSENBAUM and MARCUS, Circuit Judges.

PER CURIAM:

Steven Turbi, a Florida prisoner proceeding pro se, appeals the district court's denial of his pro se 28 U.S.C. § 2254 habeas corpus petition. We granted Turbi a certificate of appealability ("COA") on one issue: whether the district court erred in

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concluding that the state court reasonably rejected Turbi's claim that counsel failed to relay a plea offer to him. After thorough review, we affirm.

We review a district court's denial of a § 2254 petition de novo. Bester v. Warden, 836 F.3d 1331, 1336 (11th Cir. 2016). We generally will not consider arguments raised on appeal that were not raised before the district court. See Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1272 n.1 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, after a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) 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)(1), (2). A state court decision is an unreasonable application of Supreme Court precedent if it identifies the correct governing legal principle but unreasonably applies that principle to the facts of the petitioner's case. Davis v. Sellers, 940 F.3d 1175, 1185 (11th Cir. 2019). Our review is limited to the record before the state court, and focuses on what the state court "knew and did" at the time it rendered its decision. Id. at 1187. Before a petitioner may be entitled to a federal evidentiary hearing, he must establish § 2254(d)(1) or (2) based solely on the state court record. Landers v. Warden, Att'y Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015).

Under AEDPA, a state court's factual determinations are presumed correct, and the petitioner must rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This standard requires proof that a claim is highly probable. Pittman v. Sec'y, Fla. Dep't of Corrs., 871 F.3d 1231, 1244 (11th Cir. 2017). That reasonable minds reviewing the record might disagree about the finding in question does not suffice, on habeas review, to supersede the state court's determination. Id. Where a state-court decision does not explain its reasons, a federal habeas court should "look through" the unexplained decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

In Florida, a court may deny a Rule 3.850 motion without an evidentiary hearing if it finds that all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case. See Fla. R. Crim. P. 3.850(f)(5). Federal courts may not second-guess state courts on matters of state law. Landers, 776 F.3d at 1296. In Landers, we held that we could not reexamine the state court's decision not to hold an evidentiary hearing in the petitioner's state habeas proceeding unless the state fact-finding procedure itself violated federal law. Id. Further, we held that an evidentiary hearing in state court was not a requirement for § 2254(d)(2) deference. Id. at 1297. However, we noted the possibility that a state court's fact-finding procedure could be "so deficient and wholly unreliable as

to result in an unreasonable determination of the facts under § 2254(d)(2) and to strip its factual determinations of deference." Id.

To succeed on a claim of ineffective assistance of counsel, a petitioner must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Sixth Amendment's guarantee of effective assistance of counsel extends to plea bargaining. Lafler v. Cooper, 566 U.S. 156, 162 (2012). As a general rule, defense counsel has a duty to communicate formal offers from the prosecution of a plea with terms and conditions that may be favorable to the accused, and failure to do so is deficient performance. Missouri v. Frye, 566 U.S. 134, 145 (2012). To establish prejudice in the context of a failed plea bargain, the petitioner must show a reasonable probability that: (1) the plea offer would have been presented to the court; (2) the court would have accepted its terms; and (3) the conviction or sentence under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler, 566 U.S. at 163-64.

The question before us today is whether the state court unreasonably denied Turbi's original Rule 3.850 motion based on the facts before it when it decided that motion. See Davis, 940 F.3d at 1187.[1] In evaluating this issue, we look to the state

[1] To the extent Turbi now challenges the state trial court's dismissal of his second Rule 3.850 motion, we will not consider this issue because Turbi did not raise it in district court. See Samak, 766 F.3d at 1272 n.1.

trial court's opinion, because the state appellate court affirmed without an opinion. Wilson, 138 S. Ct. at 1192. The state trial court found that Turbi's counsel was not ineffective for failing to inform Turbi of the state's plea offer because the record showed that while the state may have contemplated a plea deal in Turbi's case, it did not actually offer one. In reaching this conclusion, the state court noted that: (1) the plea agreement Turbi submitted to the state habeas court was dated by the Assistant State Attorney as October 5, 2015, while Turbi's jury trial was held on January 7, 2014, and he was sentenced on March 13, 2014; and (2) the prosecutor stated at the sentencing hearing "[a]nd I would just like to put on the record an offer was never made in this case."

Turbi has not shown by clear and convincing evidence that the state court's decision was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2), (e)(1). The record reflects that: (1) the plea form that Turbi attached to his Rule 3.850 motion was provided to him by the state attorney's office, not his defense counsel; (2) the form was dated a year after Turbi's trial and sentencing, which suggests that the date was entered when the state provided the document to Turbi; and (3) at sentencing, the prosecutor stated that a plea offer was never made, and, notably, defense counsel did not object to this statement. Because the record indicates, at most, that the state had contemplated giving a plea offer to Turbi, but never formally extended it to him, the state court's determination that the

prosecuting attorney did not extend a plea deal to Turbi's defense counsel was a reasonable one.

Turbi attached a different copy of the plea agreement -- one that he obtained from his defense counsel -- in a later Rule 3.580 motion he submitted to the state court, but still, that document does not render the state court's decision unreasonable. For starters, we cannot consider the document because we cannot consider evidence that was not before the state court in Turbi's original Rule 3.850 proceedings. Davis, 940 F.3d at 1187. But even if we did so, the fact that that his defense counsel had a copy of the contemplated plea agreement does not render the state court's decision unreasonable. Rather, it can reasonably be interpreted to show that counsel took part in the bargaining of an agreement that, ultimately, was not formally extended. This is especially true in light of defense counsel's failure, at sentencing, to object to the prosecutor's statement that a plea offer had never been made. In other words, even if reasonable jurists could disagree about the significance of defense counsel's possession of the plea document, that disagreement is insufficient to overcome the state court's finding that a plea agreement was contemplated, but not extended. See Pittman, 871 F.3d at 1244.

As for Turbi's argument that defense counsel's copy of the plea agreement might have been discovered earlier if the state court in the original Rule 3.850 proceedings had held an evidentiary hearing on the matter, its decision not to do so

was a matter of state law, which we may not second-guess. See Landers, 776 F.3d at 1296; Fla. R. Crim. P. 3.850(f)(5). Moreover, we cannot say that the state court's fact-finding procedure, based on the pleadings and the trial record, was "so deficient and wholly unreliable as to result in an unreasonable determination of the facts." See Landers, 776 F.3d at 1297.

In short, the state court's finding that the state contemplated, but did not actually extend, a plea offer to Turbi was reasonable in light of the facts before it. Because the state court reasonably found that the state did not extend a plea offer, its conclusion that Turbi's counsel was not ineffective was a reasonable application of Strickland. As we've said, defense counsel's duty to communicate plea negotiations extends only to formal offers from the prosecution. See Frye, 566 U.S. at 145. Because a formal offer was not made, defense counsel did not have a duty to communicate any offer and therefore was not ineffective. See id. Accordingly, the district court did not err in concluding that the state court reasonably rejected Turbi's claim that counsel was ineffective for failing to relay a plea offer.

AFFIRMED.

APPENDIX-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13985-EE

STEVEN TURBI,

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, ROSENBAUM and MARCUS, Circuit Judges.

PER CURIAM:

The motion for reconsideration, construed as a Petition for Panel Rehearing, filed by the Appellant is DENIED.

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Additional material from this filing is available in the Clerk's Office.