APPENDIX "A"

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10990

CHRISTOPHER L. TAKHVAR,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:21-cv-00207-RBD-PRL

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Christopher Takhvar has failed to make the requisite showing, his motion for a certificate of appealability is DENIED, and his motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

Finally, Takhvar's motion for leave to file "motion for relief from judgment or order" in the district court is DENIED. To the extent that he wishes to file a Fed. R. Civ. P. 60(b) motion for reconsideration in the district court, he does not need this Court's permission to do so. To the extent that he seeks to raise a new claim based on new evidence, he would need to proceed through this Court's process for successive applications.

/s/ Robert J. Luck

UNITED STATES CIRCUIT JUDGE

Appendix "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHRISTOPHER L. TAKHVAR,

Petitioner,

v. **Case No: 5:21-cv-207-RBD-PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner seeks a Writ of Habeas Corpus ("Petition," Doc. 1) under 28 U.S.C. § 2254. Respondents filed a Response. ("Response," Doc. 13). Petitioner replied ("Reply," Doc. 15), moved to supplement the Petition (Doc. 18), moved to supplement the record (Doc. 19), and moved to strike the Response (Doc. 20).[1] The Petition is ripe for review.

Petitioner asserts thirteen[2] grounds for relief. The Petition and supplemental claims are denied.

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[1] Petitioner also moved for reconsideration of the Order denying his motion to recuse the magistrate judge. (Doc. 28).

[2] The Petition contains ten grounds, and the supplement contains three additional grounds. *See* Docs. 1, 18.

I. Procedural History

The State Attorney's Office for the Fifth Judicial Circuit in and for Marion County Florida charged Takhvar with one count of murder in the second degree (Count I) and one count of grand theft (Count II). ("Appendix," Doc. 13-6 at 2–3). On April 18, 2019, a jury found Takhvar guilty on both counts as charged. (Doc. 13-5 at 157–58; Doc. 13-7 at 14–15). He was sentenced to life in prison on Count I, and to a consecutive term of five years on Count II. (Doc. 13-7 at 20–24). Takhvar appealed. (Doc. 13-7 at 29–56, 74–81). The Fifth District Court of Appeal ("Fifth DCA") *per curiam* affirmed and issued mandate. (Doc. 13-7 at 83, 85); *Takhvar v. State*, 301 So. 3d 235 (Fla. 5th DCA 2020) (Table).

Takhvar moved for postconviction relief under Rule 3.850, Fla. R. Crim. P., on August 13, 2020, and filed an amended motion on September 18, 2020. The amended motion was stricken as legally insufficient and he was given sixty days to amend. *See* Doc. 13-7 at 152. On November 4, 2020, Takhvar filed his (second) amended Rule 3.850 motion. (Doc. 13-7 at 87–146). The state court denied the motion. (Doc. 13-7 at 148–65). Takhvar appealed. (Doc. 13-7 at 167–200). The Fifth DCA *per curiam* affirmed (Doc. 13-7 at 206), denied his motion for rehearing (*Id.* at 208), and mandate issued on May 10, 2021 (*Id.* at 210). *Takhvar v. State*, 315 So. 3d 1217 (Fla. 5th DCA 2021) (Table). Takhvar sought review in the Florida Supreme Court, which dismissed the case on May 18, 2021. (Doc. 13-7 at 212).

On October 29, 2020, Takhvar petitioned for a writ of habeas corpus under Rule 9.141(d), Fla. R. App. P. and Article V, Section 4(b)(3) of the Florida Constitution, alleging ineffective assistance of appellate counsel. (Doc. 13-7 at 215–62). The Fifth DCA denied the petition (Doc. 13-7 at 313) and denied his motion for rehearing, motion for issuance of written opinion, and rehearing en banc. (Doc. 13-7 at 315). Takhvar sought review in the Florida Supreme Court, which dismissed the case on April 8, 2021. (Doc. 13-7 at 317–18).

Takhvar moved for postconviction relief under Rule 3.850(h), filing a second or successive motion on March 29, 2021. On April 21, 2021, the state court denied the motion, finding it was successive and an abuse of the procedure. Petitioner appealed. The Fifth DCA *per curiam* affirmed and issued mandate on October 29, 2021. *See* 5D21-1244; *Takhvar v. State*, 326 So. 3d 697 (Fla. 5th DCA 2021) (Table). Takhvar sought review in the Florida Supreme Court, which dismissed the case on October 25, 2021. *See Takhvar v. State*, Case No. SC21-1463, 2021 WL 4944829 (Fla. Oct. 25, 2021).

On March 8, 2022, Takhvar moved to correct an illegal sentence under Rule 3.800(a), Fla. R. Crim. P. On March 30, 2022, the state court denied motion finding the claim raised was not cognizable in a Rule 3.800(a) motion and successive. Takhvar appealed and the Fifth DCA *per curiam* affirmed. *Takhvar v. State*, 345 So. 3d 879 (Fla. 5th DCA 2022).

On September 18, 2022, Takhvar moved for postconviction relief under Rule 3.850(b)(1), Fla. R. Crim. P. On November 21, 2022, the state court denied the motion. Takhvar's appeal is currently pending in the Fifth DCA. *See* Case No. 5D22-2898.

On April 5, 2021, Takhvar filed his Petition. (Doc. 1).

II. Legal Standards

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

Under the AEDPA, federal habeas relief may not be granted on 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 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 that [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 finds that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[3] *Id.* 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, will be presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

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[3] In considering the "unreasonable application" inquiry, the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. 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).

B. Exhaustion

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)). The 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 (11th Cir. 1998). In addition, a federal habeas court is precluded from considering unexhausted claims that would clearly be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

If a petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994). Therefore, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750.

A petitioner can avoid the application of procedural default by establishing: (1) objective cause for failing to properly raise the claim in state court; and (2)

actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478 (1986). To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. *Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

A second exception, known as the fundamental miscarriage of justice, only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray*, 477 U.S. at 479-80. Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

C. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test

for determining whether a convicted person may have relief because his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner must "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

Petitioner's burden to show *Strickland* prejudice is also high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that

counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. So, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

D. Standard for Ineffective Assistance of Appellate Counsel

The two-part *Strickland* standard is also applicable to claims of ineffective assistance of appellate counsel. *Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016). The Eleventh Circuit describes Strickland's governance of this type of claim:

> To prevail on a claim of ineffective assistance of appellate counsel, a habeas petitioner must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013) ("Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under Strickland.") (quotation marks omitted). Under the deficient performance prong, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064.

Rambaran v. Sec'y, Dep't of Corr., 821 F.3d 1325, 1331 (11th Cir. 2016), cert. denied, 137 S. Ct. 505 (2016).

As with a claim of ineffective assistance of trial counsel, the combination of Strickland and § 2254(d) requires a doubly deferential review of a state court

decision. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). When considering deficient performance by appellate counsel:

> a court must presume counsel's performance was "within the wide range of reasonable professional assistance." *Id.* at 689, 104 S. Ct. 2052. Appellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments. *See Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *see also Burger v. Kemp*, 483 U.S. 776, 784, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (finding no ineffective assistance of counsel when the failure to raise a particular issue had "a sound strategic basis").

Overstreet, 811 F.3d at 1287; *see also Owen v. Sec'y, Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009) (footnote omitted) (since the underlying claims lack merit, "any deficiencies of counsel in failing to raise or adequately pursue [meritless issues on appeal] cannot constitute ineffective assistance of counsel"), cert. denied, 558 U.S. 1151 (2010).

To satisfy the prejudice prong, a petitioner must show "but for the deficient performance, the outcome of the appeal would have been different." *Black v. United States*, 373 F.3d 1140, 1142 (11th Cir. 2004) (citations omitted), cert. denied, 543 U.S. 1080, (2005); *see Philmore v. McNeil*, 575 F.3d 1251, 1264–65 (11th Cir. 2009) (per curiam) ("In order to establish prejudice, we must first review the merits of the omitted claim. Counsel's performance will be deemed prejudicial if we find

that 'the neglected claim would have a reasonable probability of success on appeal.'") (citations omitted), cert. denied, 559 U.S. 1010 (2010).

To prevail on a claim of ineffective assistance of appellate counsel, the burden is heavy. The petitioner must:

> first show that his counsel was objectively unreasonable, see *Strickland*, 466 U.S. at 687–91, in failing to find arguable issues to appeal — that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [a petitioner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. *See id.* at 694 (defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Smith v. Robbins, 528 U.S. 259, 285–86 (2000).

III. Analysis

A. Ground One

Takhvar asserts the "probable cause arrest affidavit" was not an affidavit by definition because the date was invalid. (Doc. 1 at 10–12). Due to this "invalid" date, he appears to claim his arrest was improper.

Takhvar first raised this claim in his pretrial "Habeas Corpus Motion to Dismiss." (Doc. 13-6 at 133–37). The state court denied this claim:

> In his Motion, Defendant moves to dismiss the amended information charging him with murder in the second degree and grand theft because, according to Defendant, the original arrest affidavit prepared by Detective Aaron Levy contains an incorrect date

> and, therefore, the information alleged in the affidavit is not true and correct. The Court notes that the date contained in the arrest affidavit, upon which Detective Levy swore to the facts contained in the affidavit, is clearly a scrivener's error. Moreover, the Court finds Defendant's claim is not appropriately raised in a motion to dismiss. *See State v. Esqueff*, 468 So. 2d 395 (Fla. 3d DCA 1985) (Trier of fact must resolve credibility questions relating to affidavits supporting arrest warrant at trial rather than on a motion to dismiss information.).

(Doc. 13-6 at 139). Takhvar did not raise this issue on direct appeal but presented it in a Rule 3.850 motion. *See* Doc. 13-7 at 92–97. The state court found the claim was procedurally barred:

> In Ground B, Defendant alleges that "the document the state alleged to be a probable cause arrest affidavit, is not an arrest affidavit by definition as required by law" and the Court erred in denying his motion to dismiss on the issue of an incorrect arrest affidavit. More specifically, Defendant alleges the date listed on the probable cause arrest affidavit was incorrect and thus failed as a matter of law pursuant to Florida Criminal Rules of Procedure 92.50. Once again, Defendant asserts a ground that is procedurally barred. *See Ramon* [*v. State*, 209 So. 3d 204, 205 (Fla. 5th DCA 2017) (A defendant is procedurally barred from raising a claim of trial court error in a postconviction relief motion.)] Therefore, Ground B of Defendant's motion is procedurally barred.

(Doc. 13-7 at 149). The Fifth DCA *per curiam* affirmed. (Doc. 13-7 at 206).

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. *See Alderman*, 22 F.3d at 1549 (a state prisoner seeking federal habeas corpus relief who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court). Federal habeas courts may not review the merits of procedurally

defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey v. Nagle*, 172 F.3d 1299, 1302, 1306 (11th Cir. 1999). Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

Finally, *Martinez v. Ryan*, 566 U.S. 1 (2012) does not apply to this claim to excuse the procedural default. In *Martinez*, the Supreme Court held that ineffective assistance of counsel, or lack of counsel, during collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial may establish cause for a prisoner's procedural default of a claim of ineffective assistance of trial counsel. 566 U.S. at 9, 13–14. In these instances, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." *Id.* at 14.

Here, Takhvar represented himself at trial. *See* Doc. 13-6 at 9; *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) ("Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."). To the extent Takhvar claims his appellate

counsel was ineffective for failing to raise this claim on direct appeal, *Martinez* does not excuse that default. *See Davila v. Davis*, 137 S. Ct. 2058, 2065–66 (2017) (*Martinez* recognized a narrow exception that applies only to claims of ineffective assistance of counsel at trial and only when, under state law, those claims must be raised in an initial-review collateral proceeding).

B. Ground Two

Takhvar asserts his appellate counsel was ineffective for failing to raise "meritoriously preserved claims." (Doc. 1 at 12). He does not list the alleged "meritoriously preserved claims" that were not presented on direct appeal.

Takhvar challenged the effectiveness of his appellate counsel by filing a petition for writ of habeas corpus in the Fifth DCA. (Doc. 13-7 at 215–62). The State, in response argued:

> In his first ground for relief, Takhvar claims that appellate counsel was ineffective for failing to challenge the trial court's denial of his petition for writ of habeas corpus to dismiss the information. Respondent would first point out that Takhvar already filed a petition in this court based on the same grounds alleged in the trial court, and it was dismissed. *Takhvar v. State*, Case No. 5D19-1221. Takhvar sought review in the Florida Supreme Court, which declined review. *Takhvar v. State*, 2019 WL 2482345 (Fla. 2019). In any event, appellate counsel was not ineffective for failing to raise this meritless claim.
>
> The thrust of Takhvar's claim is that the information charging him with second degree murder should have been dismissed because the probable cause affidavit was incorrectly dated. First, Takhvar has neither alleged nor demonstrated why this claim provides a basis for the dismissal of the information. Further, as the trial court found in denying the petition, this was clearly a scrivener's error. It did not affect the fact that the affiant was sworn. "No indictment or

information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses **or for any cause whatsoever,** unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense." Fla. R. Crim. P. 3.140(o). Further, section 924.33, Florida Statutes, states that "[n]o judgment shall be reversed unless the appellate court is of the opinion, after an examination of all of the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."

Takhvar has neither alleged nor demonstrated how he was in any way prejudiced by the typographical error in the year on the affidavit. The facts alleged in the affidavit all contained the correct dates, as did the charging document, and clearly were sufficient to establish probable cause. Takhvar also appears to claim that appellate counsel should have challenged the admission of evidence at trial because of the affidavit, but Takhvar never sought exclusion of evidence on this basis in the trial court, and as stated, appellate counsel cannot be ineffective for failing to raise a claim that was not preserved. [*Evans v. State*, 995 So. 2d 933, 954 n.29 (Fla. 2008).] Further, Takhvar has neither alleged nor demonstrated why this would have provided a basis for the exclusion of evidence. Appellate counsel was not ineffective for failing to raise this unpreserved and meritless claim.

Takhvar next appears to claim that the State did not establish all of the elements of grand theft. As set forth previously, the victim's mother allowed Takhvar to use the van, but told him to return it before dark, and when he did not do so, she sent him a message that she was going to report the van as missing. Takhvar was never given permission to take the van to Orlando and leave it there. As such, the evidence showed that Takhvar intended to deprive the victim of the use of the property. *See* § 812.014, Fla. Stat. (2018). Appellate counsel was not ineffective for failing to raise this meritless claim.

Takhvar also appears to claim that evidence was illegally seized from the victim's home prior to a warrant being issued, and that appellate counsel was ineffective for failing to raise this issue.

> Takhvar did not move to suppress any such evidence prior to trial, nor were their [sic] any objections below on this basis, so appellate counsel cannot be ineffective for failing to raise this unpreserved issue. Respondent would also note that Takhvar has neither alleged nor demonstrated that he had standing to challenge the entry into the victim's home, or the seizure of any evidence therefrom.
>
> Takhvar's final claim is that appellate counsel failed to raise a claim that the trial judge was biased against him. In support of this claim Takhvar cites to several statements made by the trial judge when the judge was discussing the disadvantages of self representation with Takhvar. These statements do not show bias, but rather a concern on the part of the judge that Takhvar was proceeding without counsel, which could be very detrimental to his case. A review of the rest of that hearing, as well as the entire transcript, shows that the trial judge was very patient with Takhvar, and fair to both parties. For example, when the State rested its case, the trial judge assured that Takhvar moved for a judgment of acquittal on the charges, and preserved any issues pertaining thereto for appeal (T 596-600). Takhvar also relies on the fact that he was given a life sentence, but there is no indication that this was based on anything but the facts of this case, which involved a brutal murder by chainsaw, an attempted cover up by dismemberment of the body and concealment of the parts in different locations, and flight. Appellate counsel was not ineffective for failing to raise this meritless claim.

(Doc. 13-7 at 276-80). The Fifth DCA denied the petition. (Doc. 13-7 at 1250).[4] A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits - warranting deference. *Ferguson v. Culliver*, 527 F.3d

[4] The Supreme Court instructs that where a state court decision does not provide an explanation "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). And "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Takhvar has failed to meet his burden.

1144, 1146 (11th Cir. 2008).

The state court's conclusion was reasonable, in accord with, and not contrary to *Strickland*, and was not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2).

C. Ground Three

Takhvar asserts the State committed a *Giglio* violation[5] by not correcting false evidence at trial. (Doc. 1 at 13–14). This ground appears to refer to the admission of the probable cause affidavit that contained the scrivener's error. In his Reply, Takhvar states that this "ground is moot as the warrant the Petitioner has recently recieved [sic] from the F.B.I. shows that the testimony during the trial about cases of Mauiwowie seized from the US Mail is accurate (regarding the Federal warrant)." (Doc. 15 at 32). Therefore, Takhvar has abandoned this claim.

D. Ground Four

Takhvar asserts that the trial judge was biased, and the judge's statements and actions compromised Takhvar's right to due process. (Doc. 1 at 15). Takhvar points to the judge's comments during the hearing to determine if he was competent to proceed *pro se*, and to adverse rulings made by the judge. (Doc. 15 at 17–19; Doc. 18 at 3–5).

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[5] *Giglio v. United States*, 405 U.S. 150 (1972)

Takhvar raised this ground in his Rule 3.850 motion. (Doc. 13-7 at 101-02). The state court ruled this claim was procedurally barred:

> In Ground F, Defendant asserts that the Honorable Steven Rogers, the predecessor trial court judge, was biased and made several errors throughout the proceedings of the case. Ground F of Defendant's motion for relief is procedurally barred. *See Ramon*, 219 So. 3d at 205.

(Doc. 13-7 at 151). Takhvar did not appeal the ruling on this claim to the Fifth DCA. *See* Doc. 13-7 at 167-74.

Takhvar then presented a version of this claim in his Petition for Writ of Habeas Corpus Alleging Ineffective Assistance of Appellate Counsel. (Doc. 13-7 at 238-39. The State argued that the judge's "statements did not show bias, but rather a concern on the part of the judge that Takhvar was proceeding without counsel, which could be very detrimental to his case." (Doc. 13-7 at 279). The State refuted Takhvar's claims, stating the judge was very patient with Takhvar and was fair to both parties. *Id.* The Fifth DCA denied the petition. (Doc. 13-7 at 313).

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and

prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

E. Ground Five

Takhvar claims the trial court erred in denying the pretrial habeas corpus motion to dismiss without having a mandatory preliminary hearing as required by the Florida Statutes and Florida rules of procedure. (Doc. 1 at 16–17). Takhvar's pretrial habeas corpus motion to dismiss sought a hearing to challenge "the information, indictment, or Affidavit" based on the date of the oath. *See* Doc. 13-6 at 133–36. Now, he claims that the trial court failed to conduct a "mandatory preliminary hearing as stated by the Fla. R. Crim. P. 907.045 rule for defendants in custody for 30 days or longer." (Doc. 1 at 16). This claim was not presented in any pretrial motion in the trial court, nor was it presented on direct appeal.

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 13-7 at 91). The state court ruled this claim was procedurally barred:

> In Ground A, Defendant attacks the Court's denial of his "Pre-Trial Habeas Corpus Motion to Dismiss" claiming the Court did not hold the mandatory preliminary hearing as required under Florida Statute § 907.045. On April 8, 2019, the Defendant filed a "Habeas Corpus Motion to Dismiss" stating the information alleged in the arrest affidavit was incorrect. The Court, through predecessor judge, the Hon. Steven G. Rogers, entered an Order Denying Defendant's Motion to Dismiss on April 10, 2019. *See, Exhibit E attached, Order Denying Defendant's Motion to Dismiss.* A defendant is procedurally barred from raising a claim of trial court error in a postconviction relief. *See Ramon v. State*, 219 So. 3d 204, 205 (Fla. 5th DCA 2017). Ground A of the Defendant's motion is procedurally barred.

(Doc. 13-7 at 149). Takhvar did not appeal the ruling on this claim to the Fifth DCA. *See* Doc. 13-7 at 167–74.

Petitioner failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Petitioner failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

Further, this claim is predicated on the assertion that the trial judge (and the Fifth DCA) misinterpreted and/or misapplied Florida law. As such, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). It is "a fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." *Herring v. Sec'y, Dep't of COrr.*, 397 F.3d 1338, 1355 (11th Cir. 2005).

F. Ground Six

Takhvar asserts he was denied standby counsel during pretrial, trial, and sentencing. (Doc. 1 at 18). He claims the trial court erred by "continuing to deny

the Petitioner's request for standby counsel to help in the court proceedings." *Id.*

Petitioner raised this claim on direct appeal. (Doc. 13-7 at 53-55). In response, the State argued:

> Takhvar claims that the trial court erred in denying his request for standby counsel. A defendant has no constitutional right to standby counsel, and no constitutional right to proceed pro se and with legal representation, also know as "hybrid representation." *Paul v. State*, 152 So. 3d 636 (Fla. 4th DCA 2015); *Jones v. State*, 449 So. 2d 253, 258 (Fla. 1984); *Sheppard v. State*, 17 So. 3d 275, 279-80 (Fla. 2009). If a trial court finds that a defendant has properly invoked the right to self representation, it may appoint standby counsel, but it is not required to do so. *Jones* at 258. Takhvar had no right to standby counsel or hybrid representation, so there was no abuse of discretion in not providing standby counsel.

(Doc. 13-7 at 71). The Fifth DCA *per curiam* affirmed. (Doc. 13-7 at 83). Petitioner also raised this claim in his Rule 3.850 motion. (Doc. 13-7 at 108). The state court ruled the claim was without merit and was procedurally barred:

> In Ground I, Defendant alleges the Court erred by denying him the assistance of standby counsel on April 9, 2019, at a hearing on a motion to suppress, during his trial, and at sentencing. Florida law establishes that "[a] defendant has no constitutional right to standby counsel, but the trial court has the discretion to appoint standby counsel." *Paul v. State*, 152 So. 3d 635 (Fla. 4th DCA 2014). Furthermore, such a claim, as raised by Defendant, should have been raised on direct appeal and thus is procedurally barred.

(Doc. 13-7 at 152).

There is no Supreme Court precedent clearly establishing a constitutional right to standby counsel. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (*Faretta* does not require a trial judge to permit "hybrid" representation...); *see also Simpson v.*

Battaglia, 458 F.3d 585, 597 (7th Cir. 2006), quoting *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) ("This court knows of no constitutional right to effective assistance of standby counsel."). Once a defendant elects to proceed pro se, he gains sole responsibility of his own defense. *Faretta*, 422 U.S. at 835 n.46 ("a defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.'"). Thus, the state court's findings and conclusions on this claim, were reasonable, in accord with, and not contrary to federal law as determined by the Supreme Court of the United States; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2).

F. Ground Seven

Takhvar asserts that the trial court erred by permitting a Fourth Amendment violation to occur related to an alleged "invalid probable cause arrest affidavit..." (Doc. 1 at 19-20). This claim is based on the typographical error on the probable cause arrest affidavit. *Id.* at 19. Takhvar claims that this typographical error "demands the invoking of the exclusionary rule of evidence tangible and intangible evidence gained incident to the arrest of the petitioner." *Id.*

Petitioner moved to suppress evidence related to his statements in interviews conducted in Texas and Marion County, Florida, to exclude physical

evidence found at the victim's residence after a search warrant found items referenced in first statement, and to suppress statements he made to another inmate. *See* Doc. 13-6 at 11-17. However, Petitioner did not raise this claim-to suppress evidence based on the "invalid probable cause arrest affidavit"-prior to his trial or on direct appeal. Petitioner raised a version of this claim in his Rule 3.850 motion. (Doc. 13-7 at 93-97). The state court found this claim to be procedurally barred:

> In Ground B, Defendant alleges that "the document the state alleged to be a probable cause arrest affidavit, is not an arrest affidavit by definition as required by law" and the Court erred in denying his motion to dismiss on the issue of an incorrect arrest affidavit. More specifically, Defendant alleges the date listed on the probable cause arrest affidavit was incorrect and thus failed as a matter of law pursuant to Florida Criminal Rules of Procedure 92.50. Once again, Defendant asserts a ground that is procedurally barred. *See Ramon*, 219 So. 3d at 205. Therefore, Ground B of Defendant's motion is procedurally barred.

(Doc. 13-7 at 149). The Fifth DCA *per curiam* affirmed. (Doc. 13-7 at 206).

Takhvar then presented a version of this claim in his Petition for Writ of Habeas Corpus Alleging Ineffective Assistance of Appellate Counsel. (Doc. 13-7 at 225). In response, the State argued that because Takhvar never sought exclusion of evidence on this basis in the trial court, appellate counsel cannot be ineffective for failing to raise a claim that was not preserved. (Doc. 13-7 at 278). The Fifth DCA denied the petition. (Doc. 13-7 at 313).

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

G. Ground Eight

Takhvar asserts that evidence collected from the victim's residence violated his Fourth Amendment rights. (Doc. 1 at 21-22). He claims that the victim's residence was searched, and evidence was collected, before a search warrant was issued. *Id.*

Takhvar did not move to suppress evidence on this basis in the trial court prior to or during trial. He presented this claim in his Rule 3.850 motion. (Doc. 13-7 at 99). The state court found the claim to be procedurally barred:

> In Ground D, Defendant alleges that "[e]vidence collected from victim residence on June 14, 2018 was in violation of the fourth amendment [sic] US [sic] Constitution." Defendant states that several individuals were not fingerprinted. Once again, such a claim should have been raised on direct appeal and thus Ground D is procedurally barred in a motion for post-conviction relief.

(Doc. 13-7 at 150). Takhvar did not appeal the trial court's ruling on this issue. *See* Doc. 13-7 at 167–200.

Takhvar then presented this claim in his Petition for Writ of Habeas Corpus Alleging Ineffective Assistance of Appellate Counsel. (Doc. 13-7 at 226, 235–36). In response, the State argued that because Takhvar did not move to suppress any such evidence prior to trial, nor did he raise any objections at trial, the issue was unpreserved. (Doc. 13-7 at 279). Appellate counsel cannot be ineffective for failing to raise an unpreserved issue on appeal. The State further argued that Takhvar neither alleged nor demonstrated that he had standing to challenge the entry into the victim's home, or the seizure of any evidence therefrom. *Id.* The Fifth DCA denied the petition. (Doc. 13-7 at 313).

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

H. Ground Nine

Takhvar asserts the trial court erred by denying his pretrial motion to suppress statements he made to law enforcement. (Doc. 1 at 23–24). He claims that during his custodial interrogation he told the detective "I think I need a lawyer" and then later stated "I probably need to talk to a lawyer." *Id.* at 23. The detective "ignored" his request, and Takhvar made inculpatory statements later in the interview.

This issue was first presented in a motion to suppress evidence. (Doc. 13-6 at 11–17). A hearing was held on April 9, 2019. (Doc. 13-6 at 31–129). The trial court denied the motion:

> Based upon the evidence presented at the hearing conducted on April 9, 2019, and the arguments of the defendant and the State of Florida, it is therefore ORDERED the Defendant's Motion to Suppress is DENIED. *See, Joseph v. State*, 259 So. 3d 123, 127 (4th DCA 2018); *Walker v. State*, 957 So. 2d 560 (Fla. 2007).

(Doc. 13-6 at 131). Takhvar then raised this issue on direct appeal. (Doc. 13-7 at 47–52). The State argued in response:

> This Court set forth the applicable law for determining whether a suspect has made an unequivocal request for counsel in [*State v.] Carter*, 172 So. 3d [538, 540 (Fla. 5th DCA 2015)], as follows:
>
> > Police are not required to stop a custodial interrogation when a suspect has made an equivocal or ambiguous request for counsel. *State v. Owen*, 696 So. 2d 715, 717-18 (Fla. 1997). Thus, where the statement made by the suspect is such that a 'reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel' the

> termination of questioning is not required. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 126 L.Ed.2d 362 (1994). In *Davis*, a suspect's statement 'maybe I should talk to a lawyer' was held to *not* constitute a request for counsel. *Id.* at 462, 114 S. Ct. 2350.

The *Carter* Court first determined that the recording there reflected a casual, non-confrontational discussion in which Carter was initially uncertain whether he should talk to the detective prior to meeting with a lawyer. The detective attempted several times to have Carter give a definitive answer as to whether he wanted to give a statement without counsel present. Carter first said that he thought he should wait for his public defender, because he wanted to tell the truth. The detective again advised Carter he was not obligated to talk to her, and she would end the interview at any time. Carter said he wanted to talk, but did not think that he should talk, then spontaneously asked if police had found the other guy. The detective answered in the affirmative and Carter began to discuss the case. The detective interrupted him to confirm that he wanted to proceed, and readvised Carter of his Miranda rights. Carter agreed to waive those rights and give a statement. This Court concluded that Carter's statement that he "should" wait to talk to his attorney followed immediately by his assertion that he wanted to tell the 'whole truth' was not an unequivocal request for counsel. *Id.* at 540.

Likewise, the recording in this case reflects a casual, non-confrontational discussion in which Takhvar expressed uncertainty as to whether he should speak without consulting an attorney. Takhvar's statements that he "thought" he was "going to need a lawyer," and he "probably" needed to talk to an attorney were not unequivocal requests for counsel. Rather, Takhvar was contemplating his situation, and did not request an attorney or refuse to answer questions without an attorney. The trial court correctly denied the motion to suppress. *Id. See also Davis v. United States*, 512 U.S. 452, 462 (1994) (suspect's statement "maybe I should talk to a lawyer" was held to *not* constitute a request for counsel); *Joseph v. State*, 259 So. 3d 123 (Fla. 4th DCA 2018) (the defendant's musings amounted to thinking out loud about "maybe" retaining an attorney, not an unequivocal request for a lawyer that would have required the interrogation to cease); *Walker v. State*, 957 So. 2d 560, 571 (Fla. 2007) (suspect's statement "I think I may need a lawyer," and subsequent question asking detectives whether he needed counsel, were not

> unequivocal requests for counsel); *Long v. State*, 517 So. 2d 664, 667 (Fla. 1987) (the statement "I think I might need an attorney" was equivocal). *See also Spivey v. State*, 45 So. 3d 51, 54-55 (Fla. 1st DCA 2010) (statement, "I mean if I am being held and I'm being charged with something I need to be on the phone calling my lawyer," was not an unequivocal request for counsel because it "did not clearly indicate that [he] wanted counsel present at that time or that he would not answer any further questions without counsel.").

(Doc. 13-7 at 67–70). The Fifth DCA *per curiam* affirmed. Takhvar then raised this claim in his Rule 3.850 motion. The trial court denied the claim as procedurally barred. (Doc. 13-7 at 152).

On August 21, 2018, Takhvar was interviewed by a detective. (Doc. 13-7 at 364). Takhvar was informed of his *Miranda* rights prior to being asked any questions concerning any crimes. *Id.* at 369. After being informed that the detective was investigating a murder, Takhvar stated, "I think I need a lawyer." *Id.* at 409. The detective sought clarification from that statement and asked, "Are you saying you do not want to talk to me anymore, or do you want to hear what I have to say." *Id.* Takhvar responded, "I will hear what you have to say." *Id.* A few minutes later, Takhvar stated, "I probably need to talk to a lawyer." *Id.* at 411. The detective explained that he cannot ask him any more questions based on that request, but Takhvar continued to talk to the detective and asked questions about the case. *Id.* at 411–12. The detective told Takhvar that if he was asking for an attorney, he was going to respect the request and not ask any more questions, but if he changes his mind Takhvar can reach out to him and talk to him about it. *Id.* at 412–13. Takhvar

continued to asked questions and talk, saying that he wanted to talk but he wants to understand the consequences. *Id.* at 413–16. The detective responded to Takhvar's questions, until Takhvar made the unsolicited statement, "It was self-defense bro." *Id.* at 416. The detective interrupted Takhvar and reminded him that he had previously requested an attorney and left the room to allow Takhvar to make sure he wanted to continue the interview. *Id.*

After the detective returned, he reminded Takhvar that he had equivocated regarding his request for counsel and reread the *Miranda* warnings. *Id.* at 416-17. Takhvar stated he understood his rights and began to talk about the situation. *Id.* at 417. The detective again interrupted Takhvar to confirm he wanted to talk about the events. *Id.* at 417-18. Takhvar confirmed and the detective then proceeded to ask questions about the events. *Id.* at 418. After that, Takhvar did not mention needing an attorney again during that interview.

In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States*, 512 U.S. 452, 459 (1994), held that a suspect must do so "unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, *Davis*, 512 U.S. at 459, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights, 512 U.S. at 461–62. None of Takhvar's

statements regarding his right to counsel were unequivocal or unambiguous. Therefore, the state court findings and conclusions on this claim were reasonable, in accord with, and not contrary to, clearly established Federal law as determined by the Supreme Court; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2).

I. Ground Ten

Takhvar asserts the prosecution failed to establish all the statutory elements of grand theft auto. (Doc. 1 at 25-26). He claims that he had permission to use the vehicle at issue. *Id.* at 25. Takhvar presented this claim in a motion for judgment of acquittal (Doc. 13-5 at 22-23), but did not raise this on direct appeal. He presented it in his Rule 3.850 motion. (Doc. 13-7 at 100). The state court found the claim was procedurally barred:

> In Ground E, Defendant avers that the State failed to establish the elements needed for a conviction of Grand Theft/Auto. Again, matters cannot be raised in a motion pursuant to Fla. R. Crim. P. 3.850 if they could have been, or should have been, raised on direct appeal. Ground E of Defendant's motion for relief is procedurally barred.

(Doc. 13-7 at 150-51). Takhvar did not appeal the trial court's ruling on this issue. *See* Doc. 13-7 at 167-200.

Takhvar then presented this claim in his Petition for Writ of Habeas Corpus Alleging Ineffective Assistance of Appellate Counsel. (Doc. 13-7 at 226, 237). In response, the State argued:

> Takhvar next appears to claim that the State did not establish all of the elements of grand theft. As set forth previously, the victim's mother allowed Takhvar to use the van, but told him to return it before dark, and when he did not do so, she sent him a message that she was going to report the van as missing. Takhvar was never given permission to take the van to Orlando and leave it there. As such, the evidence showed that Takhvar intended to deprive the victim of the use of the property. *See* § 812.014, Fla. Stat. (2018). Appellate counsel was not ineffective for failing to raise this meritless claim.

(Doc. 13-7 at 278). The Fifth DCA denied the petition. (Doc. 13-7 at 313).

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

IV. Motion to Supplement

On March 8, 2022, Takhvar moved to supplement his Petition by adding three additional claims. (Doc. 18). As an initial matter, the Court finds the supplemental claims were timely filed under 28 U.S.C. § 2244(d)(1)-(2). Takhvar's judgment and sentence became final on August 11, 2020, following the Fifth DCA's *per curiam* affirmance of his judgment and sentence. Petitioner then had ninety

days, or through November 9, 2020, to petition the Supreme Court for certiorari. *See Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006) (holding that entry of judgment and not the issuance of the mandate starts the clock running for time to petition the Supreme Court for certiorari). Thus, Takhvar's conviction became final on November 9, 2020. Therefore, under § 2244(d)(1)(A), Petitioner had through November 9, 2021, absent any tolling to file a federal habeas petition.

Under § 2244(d)(2), the one-year period would be tolled during the pendency of any properly filed state postconviction proceedings. Petitioner filed his Amended Rule 3.850 motion on November 4, 2020, prior to the running of the limitations period. The limitations period was tolled until May 10, 2021, the date the mandate issued on appeal from the denial of the Amended Rule 3.850 motion. Only 302 days elapsed before Takhvar filed his motion to supplement. (Doc. 18). Thus, the motion to supplement will be granted and three supplemental claims will be addressed below.

A. Ground Eleven

Takhvar asserts the State committed a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide a copy of a search warrant for Mauiwowie rolling papers that were seized from the U.S. Mail. (Doc. 18 at 6-11). He claims that because the search failed to find anything "inculpatory" he was denied his right

to confront witnesses. *Id.* at 8. Takhvar admits that he has failed to exhaust this claim in State court. *Id.* at 9.

To prevail under *Brady*, a petitioner must show that the prosecution suppressed evidence favorable to the defense, either willfully or inadvertently, and that the suppression of the evidence prejudiced the defense. *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1054 (11th Cir. 2017). Takhvar has failed to show that the existence of this search warrant was favorable to his defense or that the failure to provide this evidence prejudiced his defense. Notably, this search warrant was related to unrelated federal controlled substance violations, not the murder and grand theft charges brought by the State. *See* Doc. 15-1 at 66.

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

B. Ground Twelve

Takhvar asserts that the State committed prosecutorial misconduct during

closing arguments by making statements that "improperly shifted the burden of proof onto the defendant." (Doc. 18 at 12–17). Takhvar raised this claim in a Second or Successive Motion for Post-Conviction Relief, provided for filing on March 28, 2021. *See State of Florida v. Christopher Takhvar*, Case No. 42-2018-CF-3532, Doc. 476 ("Criminal Case"). The state court dismissed the motion:

> Defendant claims the State committed prosecutorial misconduct and failed to establish all elements of second-degree murder. These are claims that should have been raised on direct appeal. *See Henry v. State*, 933 So. 2d 28 (Fla. 2d DCA 2006) ("[C]laims of prosecutorial misconduct . . . should have been raised on direct appeal."); *Childers v. State*, 782 So. 2d 946 (Fla. 4th DCA 2001) ("[C]hallenge to the sufficiency of the evidence was an issue for direct appeal, and therefore not cognizable under rule 3.850.").
>
> Additionally, as Defendant has previously filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850 which this Court denied, the Court finds this Motion to be successive and an abuse of the procedure.

See Criminal Case, Doc. 478. Tahkvar did not raise this claim in his petition alleging ineffective assistance of appellate counsel. *See* Doc. 13-7 at 215–62.

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and

prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

C. **Ground Thirteen**

Takhvar asserts the prosecution failed to establish all the statutory elements of second degree murder. (Doc. 18 at 18–22). He specifically claims the State failed to establish "the element of ill will, hatred, spite or evil intent showing a depraved mind regardless of human life." *Id.* at 19. Takhvar claims the evidence "showed a clear case of self defense and accidental death." *Id.* Takhvar raised this claim in a motion for judgment of acquittal (Doc. 13-5 at 22–25), but he did not raise this on direct appeal. He did present it in the Second or Successive Rule 3.850 motion. *See* Criminal Case, Doc. 476. The state court dismissed the motion:

> Defendant claims the State committed prosecutorial misconduct and failed to establish all elements of second-degree murder. These are claims that should have been raised on direct appeal. *See Henry v. State*, 933 So. 2d 28 (Fla. 2d DCA 2006) ("[C]laims of prosecutorial misconduct . . . should have been raised on direct appeal."); *Childers v. State*, 782 So. 2d 946 (Fla. 4th DCA 2001) ("[C]hallenge to the sufficiency of the evidence was an issue for direct appeal, and therefore not cognizable under rule 3.850.").
>
> Additionally, as Defendant has previously filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850 which this Court denied, the Court finds this Motion to be successive and an abuse of the procedure.

See Criminal Case, Doc. 478. Tahkvar did not raise this claim in his petition alleging ineffective assistance of appellate counsel. *See* Doc. 13-7 at 215–62.

Takhvar failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey*, 172 F.3d at 1302, 1306. Takhvar failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

V. Certificate of Appealability

This Court should grant an application for certificate of appealability only if 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). But a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not shown that reasonable jurists would find the district court's assessment of the constitutional claims and procedural rulings debatable or wrong. Petitioner has failed to make a substantial showing of the denial of a

constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

VI. Motion to Strike Respondents Response and Motion to Expedite

Takhvar moves to strike Respondents' Response. (Doc. 20). He alleges that the Response contains a "false statement" in the "Statement of Judicial Involvement" section. *Id.* The Response noted:

> Based upon the records, no United States District Court Judge or United States Magistrate Judge currently assigned to this case was involved in any of petitioner's state court proceedings.

(Doc. 13 at 1). Petitioner states this is false because U.S. Magistrate Judge Philip R. Lammens signed a federal search warrant. A review of the Application for Search Warrant, attached to this Motion, shows that the search warrant was related to violations involving controlled substances, not the underlying state criminal charges. *See* Doc. 20 at 9–15. Therefore, because Response did not contain a false statement, the motion will be denied. Further, the motion expedite will be denied as moot.

VII. Motion for Reconsideration

Takhvar moves for reconsideration of his motion to recuse magistrate judge. (Doc. 28). By Order dated October 31, 2022, Takhvar's motion was denied under 28 U.S.C. § 445(a) because he failed to demonstrate that any reasonable individual

could entertain significant doubt about the impartiality of the magistrate judge, and therefore, he had not shown that recusal was warranted. *See* Doc. 27.

There are three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice. *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994) (citations omitted). The Court notes that reconsideration of a previous order is an extraordinary remedy to be employed sparingly. *See id.* (citations omitted).

However, upon review of the motion, Takhvar simply rehashes arguments that the Court has already considered and rejected. Therefore, the Court finds that reconsideration is not warranted. *See Allaben v. Howanitz*, 579 Fed. Appx. 716, 719 (11th Cir. 2014) (stating that a motion for reconsideration should not be used to simply rehash arguments that were previously made).

VIII. Conclusion

It is **ORDERED** and **ADJUDGED**:

1. The Motion to Supplement the Petition (Doc. 18) and Motion to Supplement the Record (Doc. 19) are **GRANTED**.
2. The Petition for Writ of Habeas Corpus (Doc. 1) and the Supplemental claims are **DENIED**, and the case is **DISMISSED** with prejudice.
3. Petitioner is **DENIED** a certificate of appealability.

4. The Motion to Strike (Doc. 20) is **DENIED**, and the Motion to Expedite is **DENIED** as moot.
5. The Motion for Reconsideration (Doc. 28) is **DENIED**.
6. The Clerk of Court shall enter judgment for Respondents and close this case.

DONE and **ORDERED** in Orlando, Florida on March 1, 2023.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHRISTOPHER L TAKHVAR,

Petitioner,

v. **Case No: 5:21-cv-207-RBD-PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Order of the Court entered on March 1, 2023, Judgment is entered in favor of the Respondents, Secretary, Department of Corrections and Florida Attorney General and against the Petitioner, Christopher L Takhvar and this case is hereby dismissed.

ELIZABETH M. WARREN, CLERK

s/L. Burget, Deputy Clerk

Appendix "C"

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10990

CHRISTOPHER L. TAKHVAR,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:21-cv-00207-RBD-PRL

Before NEWSOM and LUCK, Circuit Judges.

BY THE COURT:

Christopher Takhvar has filed a motion for reconsideration of this Court's February 13, 2024, order denying a certificate of appealability, leave to file a "motion for relief from judgment or order" in the district court, and leave to proceed *in forma pauperis* on appeal from the district court's denial of his 28 U.S.C. § 2254 petition. Upon review, Takhvar's motion is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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