**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 22-7458**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH KENNEDY SHANNON, a/k/a James Smith, a/k/a Kevin Sanders,

Defendant - Appellant.

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Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:13-cr-00977-DCN-8; 2:19-cv-02888-DCN)

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Submitted: July 30, 2024 Decided: August 1, 2024

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Before NIEMEYER, AGEE, and HEYTENS, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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Kenneth Kennedy Shannon, Appellant Pro Se. Sean Kittrell, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth Kennedy Shannon seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Shannon has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*DISMISSED*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

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| UNITED STATES OF AMERICA,<br><br>Respondent,<br><br>vs.<br><br>KENNETH KENNEDY SHANNON,<br><br>Defendant. | ) | No. 2:13-cr-00977-DCN-8<br><br>**ORDER** |

This matter is before the court on defendant Kenneth Kennedy Shannon's ("Shannon") motion to vacate, set aside, or correct his federal sentence pursuant to 28 U.S.C. § 2255, ECF No. 1275. It is also before the court on respondent the United States of America's (the "government") motion to dismiss. ECF No. 1353. For the reasons set forth below, the court grants the government's motion to dismiss and denies Shannon's motion to vacate, set aside, or correct. Also before the court are Shannon's motion for default judgment, ECF No. 1334, and his motion to appoint counsel, ECF No. 1412, which were filed in relation to his motion to vacate, set aside, or correct, ECF No. 1275. Accordingly, the court dismisses those motions as moot.

## I. BACKGROUND

On March 12, 2014, the government named Shannon in a single-count indictment in Criminal Case No. 2:14-cr-00213-DCN. United States v. Shannon, No. 2:14-cr-00213-DCN-1, ECF No. 26. Subsequently, the government added him to an already existing indictment that had been returned on November 12, 2013, in Criminal Case No. 2:14-cr-00977-DCN, but the indictment was sealed, and warrants were not served. See USCA4 Appeal No. 17-4500, Dkt. No. 45-1 at 105, Joint App'x. On August 12, 2014,

the government named Shannon in a single-count superseding indictment charging him and seven other defendants with conspiracy to possess with intent to distribute and to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1). ECF No. 28. On September 10, 2014, a grand jury further charged Shannon and his co-defendants in a second superseding indictment with possession of heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and use of a communication facility in the commission of a felony in violation of 21 U.S.C. §§ 841(a)(1) and 846. ECF No. 51.

Shannon pled not guilty, but after a three-day trial beginning on July 27, 2016, a jury found Shannon guilty of seven offenses related to the possession and distribution of heroin, a Schedule I controlled substance. ECF No. 671. Specifically, the jury found Shannon guilty of the following offenses:

> **Count 1**: violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A), 851: knowingly, intentionally, and unlawfully possess with intent to distribute and distribute heroin, a Schedule I controlled substance in an amount of one kilogram or more of heroin.
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> **Count 2:** violation of 21 U.S.C. §§ 841(a), 841(b)(1)(C), 851: knowingly, intentionally, and unlawfully did possess with intent to distribute and did distribute a quantity of heroin, a Schedule I controlled substance.
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> **Count 20:** violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 851: that in the District of South Carolina Shannon knowingly, intentionally, and unlawfully did possess with intent to distribute heroin, a Schedule I controlled substance, in the quantities or weights specified, namely 100 grams or more
>
> **Counts 32, 39, 30, 47:** violation of 21 U.S.C. §§ 841(a)(1), 846; knowingly and intentionally use a communication facility, namely a telephone, to facilitate the commission of a felony under the Controlled Substances act, to wit: conspiracy to distribute, possession with intent to distribute, and distribution of heroin, a Schedule I controlled substance. Each count under this statute represents a distinct occasion and date where Shannon was found guilty of violating this statute.

ECF No. 915. Sentencing enhancements were applied to his conviction. On August 1, 2017, the court sentenced Shannon to life in prison. ECF No. 915.

Shannon appealed his conviction to the Fourth Circuit Court of Appeals, and the Fourth Circuit affirmed the result on June 6, 2018, ECF No. 62, which took effect on September 26, 2018. ECF No. 1123; United States v. Shannon, 725 F. App'x 243 (4th Cir. 2019). He raised four grounds for relief.[1] Shannon filed a petition for certiorari in the United States Supreme Court on the same grounds and the Supreme Court denied that petition on October 9, 2018. ECF No. 1123.

Shannon filed the motion to vacate, set aside, or correct his federal sentence pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, 28 U.S.C. § 2255, on October 10, 2019. ECF No. 1275. Shannon filed a second brief and supplement to the motion on January 8, 2020, ECF No. 1305, and on

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[1] Shannon raised four issues for the Fourth Circuit's review, which he raised again in his petition for writ of certiorari at the Supreme Court:

> (1) Did the trial court err in denying the Appellant's Motion for Verdict of Acquittal and for New Trial, because the evidence taken in the light most favorable to the Government does not support a verdict as to Count 1 for a quantity of heroin in excess of 1 kilogram?
>
> (2) Did the trial court err in failing to timely grant an en [sic] camera hearing concerning the Appellant's request to discuss the issue of effective assistance of counsel, and for failure to grant a mistrial when the Appellant raised the matter before the court?
>
> (3) Did the trial court err in denying the Appellant's motion to suppress evidence seized as a result of the Title III wiretap?
>
> (4) Did the trial court err in denying the Appellant's motion to suppress evidence seized at 210 [sic] Compton Court?

USCA4 Appeal No. 17-4500, Dkt. No. 44 at 7–8.

March 16, 2020, Shannon filed a third pleading or supplemental motion, ECF No. 1325. In all, Shannon has raised or made allegations, or claimed, approximately eighty issues for consideration. See ECF No. 1353 at 6–14 (listing the purported claims)[2]; ECF Nos. 1275, 1305, 1325. Many are repetitive or variations of the same claims. The government responded in opposition on September 11, 2020, moving to dismiss under Federal Rule of Civil Procedure 12(b)(1). ECF No. 1353. Shannon replied to that motion on January 29, 2021. ECF No. 1377. As such, the motion has been fully briefed and is now ripe for review.

## II. STANDARD

### A. Pro Se Litigants

Federal district courts are charged with liberally construing petitions filed by pro se litigants to allow the development of a potentially meritorious case. See Hughes v. Rowe, 449 U.S. 5, 9–10 (1980). Pro se petitions are therefore held to a less stringent standard than those drafted by attorneys. See Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). Liberal construction, however, does not mean that a court may ignore a clear failure in the pleading to allege facts that set forth a cognizable claim. See Weller v. Dep't of Soc. Servs., 901 F.3d 387, 390–91 (4th Cir. 1990).

### B. Rule 12(b)(1)

Dismissal under Federal Rule of Civil Procedure 12(b)(1) examines whether the pleading fails to state facts upon which jurisdiction can be founded. It is the petitioner's burden to prove jurisdiction, and the court is to "regard the pleadings' allegations as mere

[2] Shannon objects to this characterization, and instead asserts he only filed thirty claims. ECF No. 1377 at 43. Regardless of the number, many claims were filed.

evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

To resolve a jurisdictional challenge under Rule 12(b)(1), the court may consider undisputed facts and any jurisdictional facts that it determines. The court may dismiss a case for lack of subject matter jurisdiction on any of the following bases: "(1) the [pleading] alone; (2) the [pleading] supplemented by undisputed facts evidenced in the record; or (3) the [pleading] supplemented by undisputed facts plus the court's resolution of disputed facts." Johnson v. United States, 534 F.3d 958, 962 (8th Cir. 2008) (quoting Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)).

### C. 28 U.S.C. § 2255(a)

Petitioner proceeds under 28 U.S.C. § 2255(a), which provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

The petitioner must prove the grounds for collateral attack by a preponderance of the evidence. See King v. United States, 2011 WL 3759730, at *2 (D.S.C. Aug. 24, 2011) (citing Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958)). In deciding a § 2255 petition, the court shall grant a hearing, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

In evaluating the constitutional error, a petitioner must prove an error of constitutional magnitude that "had a substantial and injurious effect or influence in

determining the jury's verdict." United States v. Smith, 723 F.3d 510, 512 (4th Cir. 2013) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). Where an error is neither constitutional nor jurisdictional, a district court lacks authority to review it unless it amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974). For example, "the Supreme Court has held that a district court's failure to follow procedural rules does not amount to a complete miscarriage of justice where there is no evidence the defendant was prejudiced." United States v. Foote, 784 F.3d 931, 937 (4th Cir. 2015) (citing Peguero v. United States, 526 U.S. 23, 24 (1999)).

**1. Statute of Limitations**

Under § 2255, a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Section 2255(f) provides a one-year limitations period, which generally runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). A judgment is final for purposes of § 2255's one-year statute of limitations "when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for writ of certiorari, or when the time for filing a petition expires." Clay v. United States, 537 U.S. 522, 527 (2003). The petition for certiorari ordinarily must be filed within ninety days of the Court of Appeal's judgment, calculated from the denial of rehearing. Sup. Ct. R. 13(1), (3). Where the § 2255 motion involves a right newly recognized by the Supreme Court that is made retroactively applicable to cases on collateral review, the one-year limitations period

begins to run from "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3).

By statute, Congress provided that a habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The Civil Rule on amended pleadings, Rule 15 of the Federal Rules of Civil Procedure, instructs: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(C)(2). "The Supreme Court has held that an amended habeas petition does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Mayle v. Felix, 454 U.S. 644, 650 (2005). Further, if the District Court grants leave to amend the petition after the one-year period, the court may upon later review of the amended petition find any new claims asserted after AEDPA's limitations period has run to be time-barred. See id. at 663.

**2. Procedural Default**

Even if a petitioner has a claim that fits one of the five categories in § 2255(a), several procedural hurdles may preclude relief.

First, failure to raise certain issues on direct appeal renders them procedurally defaulted on review of a § 2255 motion.

> In order to collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must show cause and actual prejudice resulting from the errors of which he complains or he must demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack. The existence of cause for a procedural default must turn on something external to the

> defense, such as the novelty of the claim or a denial of effective assistance of counsel. And, in order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and convincing evidence.

United States v. Mikalajunas, 186 F.3d 490, 492–93 (4th Cir.1999) (emphasis added) (citations omitted). To show actual prejudice, a petitioner must demonstrate that errors in the proceedings "worked to his actual and substantial disadvantage" and were of constitutional dimension. See United States v. Frady, 456 U.S. 152, 170 (1982). To show actual innocence, a petitioner must demonstrate that he "has been incarcerated for a crime he did not commit." United States v. Jones, 758 F.3d 579, 584 (4th Cir. 2014), cert. denied, 135 U.S. 1467 (2015).

Second, if the petitioner previously and unsuccessfully raised the issue on appeal, he is generally barred from relitigating that same issue in a § 2255 motion. United States v. Linder, 552 F.3d 391, 396 (4th Cir. 2009); see also Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curium) (explaining that § 2255 movant is not permitted "to recast, under the guise of collateral attack, questions fully considered" on direct appeal). This is based on the principle of collateral estoppel, and concern for the limited resources of the judiciary.

Third, if a defendant had a full and fair opportunity to litigate a Fourth Amendment claim, he cannot assert that claim in a § 2255 filing. See Stone v. Powell, 428 U.S. 465, 494 (1976) (establishing this holding for state prisoners who had an opportunity for full and fair litigation of their Fourth Amendment challenges); United States v. Johnson, 457 U.S. 537, 562 n.20 (1983) (same). While the Supreme Court has not yet addressed this issue, the Fourth Circuit has found that petitioners convicted of federal crimes cannot raise Fourth Amendment claims in § 2255 hearings if they were

provided a full and fair opportunity to litigate that claim previously. United States v. Schulte, 230 F.3d 1356 (4th Cir. Sept. 26, 2000) (unpublished table opinion) (internal citation omitted); Roberts v. United States, 2015 WL 3619545, at *6 (M.D.N.C. June 9, 2015); Christian v. United States, 2014 WL 4444555, at *4 (E.D. Va. Sept. 9, 2014); United States v. Kelley, 2019 WL 6718103, at *2 (W.D. Va. Dec. 10, 2019). Indeed, most circuits have held that this rule applies to petitioners convicted of federal crimes who raise Fourth Amendment claims in § 2255 motions. See, e.g., United States v. Ishmael, 343 F.3d 741, 742–43 (5th Cir. 2003); Ray v. United States, 721 F.3d 758, 762 (6th Cir. 2013); Brock v. United States, 573 F.3d 497, 500 (7th Cir. 2009); United States v. Faulk, 5 F. App'x 580, 581–82 (9th Cir. 2001); United States v. Cook, 997 F.2d 1312, 1317 (10th Cir. 1993) (collecting cases); but see Baranski v. United States, 515 F.3d 857, 860 (8th Cir. 2008) (holding that Stone does not bar consideration of the Fourth Amendment issue certified by the district court). The court may address Fourth Amendment claims in § 2255 proceedings only if the petitioner did not have a full and fair opportunity to raise the claims at trial and on direct appeal.

**3. Ineffective Assistance of Counsel**

To bring an ineffective assistance of counsel claim, a petitioner must assert conduct by his counsel that was so egregious and utterly ineffective that the Constitution was violated. The Supreme Court has held that failure to raise an ineffective assistance of counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255. Massaro v. United States, 538 U.S. 500, 509 (2003).

A petitioner asserting ineffective assistance of counsel must demonstrate that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential[,] and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. To establish prejudice, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The right to effective assistance of counsel extends to require such assistance on direct appeal of a criminal conviction. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). In order to establish the claim that appellate counsel was ineffective for failing to pursue a claim on direct appeal, the applicant must meet the same two prongs of Strickland: (1) "counsel's representation fell below an objective standard of reasonableness" in light of the prevailing professional norms, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694.

**4. Prosecutorial Misconduct**

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). To establish prosecutorial misconduct, a petitioner must show (1) that the conduct of the United States was improper, and (2) that the improper conduct prejudicially affected his substantial rights so as to deprive him of a fair trial. United States v. Bereano, 161 F.3d 3, 9 (4th Cir. 1998) (quoting United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993)). "Prosecutorial misconduct warrants the reversal of a conviction only in rare and egregious cases." Id.

The use of testimony that the prosecution knows is perjured or false may constitute prosecutorial misconduct. See Giglio v. United States, 405 U.S. 150, 153 (1972). In Napue v. Illinois, the Supreme Court held that due process is generally denied if the government knowingly uses perjured testimony against the accused to obtain a conviction. 360 U.S. 264, 269 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. To meet his burden of proof, a defendant must show that (1) perjured testimony was presented; (2) the prosecution knew the evidence was false; and (3) there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd v. French, 147 F.3d 319, 330 (4th Cir. 1998) (internal quotation marks and citations omitted).

## III. DISCUSSION

Shannon's petition raises four broad grounds for relief, each including multiple claims. The general categories can best be described as claims for: (1) ineffective

appellate counsel; (2) ineffective trial counsel; (3) prosecutorial misconduct; and (4) abuse of judicial discretion. He brings these claims pursuant to 28 U.S.C. § 2255, alleging various actions violated his Fourth, Fifth, Sixth, and Fourteenth Amendment Rights.[3] Shannon at no point specifically explains how the alleged actions violate each of these constitutional rights, but rather alleges facts and thereafter asserts a violation. See, e.g., ECF No. 1275 at 8 ("Its [sic] clear that Petitioner['s] Fifth, Sixth and Fourteenth Amendments has [sic] been violated."). A defendant may also be entitled to relief under § 2255 if his custody results from a violation of federal law. 28 U.S.C. § 2255(a). Shannon also alleges two statutory violations: an improper sentencing enhancement (21 U.S.C. § 851) and failure to recuse (28 U.S.C. § 455). Finally, Shannon also brings claims that are neither constitutional nor statutory—the court construes these as falling under the category of "is otherwise subject to collateral attack" as set forth by 28 U.S.C. § 2255(a). Shannon filed his petition pro se and the court liberally construes his claims, where possible, to set out the alleged violations as permitted by 28 U.S.C. §

[3] The United States Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government. U.S. Const. amend. IV. Presumably the relevant clause from the Fifth Amendment that Shannon refers to is that no person shall "be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Similarly, the due process clause of the Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Shannon's Sixth Amendment claims likely implicate the clauses that provide criminal defendants with "compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

2255. But, it is important to recognize that "[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants." Pliler v. Ford, 542 U.S. 225, 231 (2004).

In response to Shannon's petition, the government outlines the procedural and factual background of the case from the initiation of the investigation through the original appeals "in order to address the majority of the issues raised." ECF No. 1353-1 at 5. The government argues that this summary is necessary to demonstrate that "the presented evidence overwhelmingly established the guilt of [Shannon] beyond any reasonable doubt." Id. The government then argues that under the Strickland standard, there could have been no prejudice as Shannon did not and could not prove to a reasonable probability that, but for trial and appellate counsels' unprofessional errors, the result of the proceeding would have been different. Id. The government also argues that Shannon cannot show that his attorneys' conduct was so far below the objective standard that he was deprived of counsel guaranteed to Shannon by the Sixth Amendment. Id. The government then attempts to bracket Shannon's claims that do not implicate ineffective assistance of counsel into viable grounds for relief available to a defendant under 28 U.S.C. § 2255, as well as the defenses negating those claims. Finally, the government asserts that the claims asserted by Shannon in his two supplemental filings, ECF Nos. 1305, 1325, are time barred and successive because those filings were filed past the one-year statute of limitations.

Shannon replied to the government's response on January 29, 2021 with a comprehensive 178-page long brief. ECF No. 1377. Despite the length of the brief, Shannon spends most of his argument either disagreeing with the government on factual determinations (e.g., "I disagree with respondent that Petitioner Kenneth Kennedy

Shannon was originally arrested on a complaint filed on March 12, 2014, by the federal government," ECF No. 1377 at 5), or reiterating the same points he made in his earlier petition. See generally id. However, where Shannon made relevant responses to the government's assertions, the court considers those in its determination. To the extent Shannon makes new arguments in his reply, the court disregards them as time-barred and beyond the statute of limitations.

The court first examines the relevant statute of limitations claims, then claims that are procedurally defaulted, and thereafter turns to the merits of Shannon's remaining claims for relief under § 2255.

**A. Statute of Limitations**

The enactment of AEDPA amended § 2255 by imposing a one-year statute of limitations period for the filing of any motion under this Section. Accordingly, the one-year period of limitation begins to run from the latest of the following four dates:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Here, the relevant standard is informed by § 2255(f)(1), "the date on which the judgment of conviction becomes final," because none of the other three potential triggering dates set forth in 28 U.S.C. § 2255(f) apply to this case. See Whiteside v. United States, 775 F.3d 180 (4th Cir. 2015).

In determining finality, the Fourth Circuit held that "absent the issuance of a suspension order by [the Supreme Court] . . . the judgment of conviction of a prisoner who has petitioned for certiorari becomes final for purposes of the one year period of limitation in § 2255 ¶6(1) when the Supreme Court denies certiorari after a prisoner's direct appeal." United States v. Segers, 271 F.3d 181, 186 (2001). The prisoner in that case tried to distinguish his case from cases decided by other circuits by emphasizing that he petitioned for rehearing from the denial of certiorari, unlike the other prisoners. Id. at 186 n.4. Nevertheless, the Fourth Circuit still held that the applicable date was the date of the denial of certiorari, not the date of the denial of his petition for rehearing. Id. at

186; see also Clay v. United States, 537 U.S. 522, 527 (2003) (holding that finality attaches when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires).

The Supreme Court denied Shannon's petition for writ of certiorari on October 9, 2018. ECF No. 1164. The Supreme Court then denied his petition for rehearing on January 7, 2019. USCA4 Appeal No. 17-4500, Dkt. No. 72. Shannon first filed his motion to vacate under 28 U.S.C. § 2255 on October 10, 2019, one-year and one day after the Supreme Court's denial of his petition for writ of certiorari. ECF No. 1275. Thus, the court finds Shannon's petition to be time-barred.

In appropriate cases, the Supreme Court has determined that the time limit for the filing of a habeas corpus petition is subject to equitable tolling. Holland v. Florida, 560 U.S. 631 (2010). A movant is entitled to equitable tolling only if he shows, "(1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Whether a circumstance warrants equitable tolling is made on a case-by-case basis. Holland, 560 U.S. at 649–50 (quoting Baggett v. Bullitt, 377 U.S. 360, 375 (1964)). Shannon has failed to demonstrate any basis, much less a sufficient basis, to warrant equitable tolling. See id. at 651 (holding that a garden variety claim of excusable neglect such as a simple miscalculation that leads a lawyer to miss a filing deadline does not warrant equitable tolling).

Consequently, the court dismisses Shannon's motion to vacate in its entirety as untimely. Notwithstanding this clear bar to relief, the court considers Shannon's substantive claims and finds them to also be without merit.

**B. Collateral Estoppel**

If the petitioner previously and unsuccessfully raised the issue on appeal, he is generally barred from relitigating that same issue in a § 2255 motion. Linder, 552 F.3d at 396; see also Boeckenhaupt, 537 F.2d at 1183 (explaining that § 2255 movant is not permitted "to recast, under the guise of collateral attack, questions fully considered" on direct appeal). This is based on the principle of collateral estoppel, and concern for the limited resources of the judiciary.

Shannon raised four issues for the Fourth Circuit's review, which he raised again in his petition for writ of certiorari to the Supreme Court. USCA4 Appeal No. 17-4500, Dkt. No. 44 at 7–8. First, did the trial court err in denying the Appellant's Motion for Verdict of Acquittal and for New Trial, because the evidence taken in the light most favorable to the Government does not support a verdict as to Count 1 for a quantity of heroin in excess of 1 kilogram? Id. Second, did the trial court err in failing to timely grant an en [sic] camera hearing concerning the Appellant's request to discuss the issue of effective assistance of counsel, and for failure to grant a mistrial when the Appellant raised the matter before the court? Id. Third, did the trial court err in denying the Appellant's motion to suppress evidence seized as a result of the Title III wiretap? Fourth, did the trial court err in denying the Appellant's motion to suppress evidence seized at 210 [sic] Compton Court? Id. To the extent that he now raises these claims again, they are barred by collateral estoppel.

Specifically, Shannon claims that his trial counsel failed to properly contest the drug weights attributed to him. He argues that it was improper for the government to use evidence of weights that did not originate from trial testimony. He further asserts that the government committed misconduct by basing the Presentencing Report ("PSR") on weights that came from witnesses who did not testify at trial. In his reply, Shannon reiterates these arguments and further asserts that even though his appellate counsel raised these arguments in her brief, that argument was nevertheless defective because she plagiarized from the trial counsel's motion for acquittal and new trial. ECF No. 1377 at 104 (referencing ECF No. 686). But even if plagiarized, the issue of the weight of drugs attributable to Shannon was argued on appeal where he claimed there was insufficient trial evidence to support a finding that he distributed one kilogram or more of heroin. The Fourth Circuit found that the government had presented evidence sufficient to show Shannon distributed more than one kilogram of heroin during the course of the conspiracy. United States v. Shannon, 725 F. App'x 243, 243 (4th Cir. 2019). Therefore, Shannon is barred by collateral estoppel from relitigating this issue in his § 2255 petition.

**C. Procedurally Defaulted Claims for Failure to Appeal**

Failure to raise certain issues on direct appeal renders them procedurally defaulted on review of a § 2255 motion. The Fourth Circuit recently summarized the principles of procedural default:

> Generally speaking, habeas proceedings are not the time to raise arguments a prisoner could have made, but did not, in the proceedings culminating in his conviction. Principles of procedural default sharply limit a prisoner's ability to raise on collateral review claims not raised in his initial criminal proceeding or on direct appeal.

Marlowe v. Warden, FCI Hazelton, 6 F.4th 562, 571 (4th Cir. 2021). A procedurally defaulted claim "may be raised in habeas only if the defendant can first demonstrate

either cause and actual prejudice, or that he is actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted).

Shannon's arguments related to admissibility of evidence, improper sentencing enhancement in violation of 21 U.S.C. § 851, and the court's alleged violations of Shannon's Fifth Amendment rights to a fair trial were not raised in the initial case, nor its direct appeal, and therefore the court finds these arguments procedurally barred. In his reply, Shannon regurgitates each of these arguments, but fails to explain why the arguments are not procedurally barred—he shows neither cause nor actual prejudice. See ECF No. 1377 at 97–103.

Shannon makes a number of claims based on admissibility of evidence, asserting that various items of evidence were wrongly admitted without evidence of a proper chain of custody or authentication, or because they were improperly marked. Evidentiary claims must be argued on direct appeal. Shannon is barred from pursuing these claims as they were not addressed in his direct appeal, and he has not pled facts that demonstrate either cause or actual prejudice. These evidentiary claims are therefore waived in this collateral attack.

Shannon also claims that the sentencing enhancement under 21 U.S.C. § 851 was improper. He alleges that the government's finding regarding the weight of drugs was not from the testimony or evidence at trial, but from "what they make up outside of the jury." Id. at 16. Specifically, he argues that the government used statements from individuals that did not testify in front of the jury. He also argues that the government used improper documents to enhance his sentence—namely, fingerprint cards used to identify a conviction. He asserts that the government did not comply with the

requirements of 21 U.S.C. § 851. These allegations lack specificity and are generally conclusory, thus they can be dismissed for failure to state a claim. But, even if the court were to find them sufficiently specific, this issue was not preserved on appeal, nor was an objection lodged at trial. Consequently, this claim is clearly procedurally barred.

**D. Fifth Amendment Claims**

Finally, Shannon also claims several ways that this court erred in its rulings, its conduct, and in the admission of evidence, in violation of his Fifth Amendment right to a fair trial. For example, Shannon claims that since the undersigned signed both the wiretap application and the search warrant, he should not have been permitted to preside over the suppression hearing. ECF No. 1275 at 21; 28 U.S.C. § 455. Further, Shannon alleges that the court's refusal to provide the jurors with a weather report from March 2, 2014 "clearly prejudice[d] juror reasonable doubt," and consequently, Shannon concludes that he "could not receive a fair trial." Id. These claims were available at the time of the trial and the appeal, were neither objected to nor appealed, and therefore the court finds these claims defaulted. In order to proceed on a § 2255 motion "based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 167–68. Here, Shannon provides no evidence to support the assertion that his Fifth Amendment claims were unavailable because of cause or actual prejudice. Thus, even if not time-barred, these claims are procedurally barred.

**E. Fourth Amendment Claims**

Shannon alleges several claims as violations of his rights under the Fourth Amendment—all relating to the allegedly defective search warrant and the later denial of his request for a Franks hearing.[4] This court now reviews whether those claims are barred on collateral appeal.

If a defendant had a full and fair opportunity to litigate a Fourth Amendment claim, he cannot assert that claim in a § 2255 filing. See Stone, 428 U.S. at 494; Johnson, 457 U.S. at 562 n.20). As the court explained before, while the Supreme Court has not yet addressed this issue, the Fourth Circuit has found that petitioners convicted of federal crimes cannot raise Fourth Amendment claims in § 2255 hearings if they were provided a full and fair opportunity to litigate that claim previously. Schulte, 230 F.3d 1356. Thus, the court can address Fourth Amendment claims in § 2255 proceedings only if the petitioner did not have a full and fair opportunity to raise the claims at trial and on direct appeal.

Shannon alleges that the government violated the Fourth and Fourteenth Amendment when it obtained "the wiretap application and search warrant without probable cause." ECF No. 1275 at 15. He alleges that the government misled the judges by intentionally making false statements to establish probable cause. Specifically, Assistant United States Attorney ("AUSA") Sean Kittrell ("Kittrell") stated that he discussed all of the circumstances with Task Force Officer ("TFO") Hurshel Tanner

[4] Franks v. Delaware, 438 U.S. 154 (1978) (holding that where a defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included in a search warrant affidavit, and if that allegedly false statement is necessary to find probable cause, then the Fourth Amendment requires that a hearing be held at the defendant's request).

("Tanner"), the Drug Enforcement Agency ("DEA"), and other law enforcement agents, and that he reviewed the affidavit of Tanner prior to submitting the application for interception of wire. Based on those assertions, he stated there was probable cause for the wire application. But, Shannon asserts that Tanner was never involved in this investigation, and therefore that it was impossible to find the existence of probable cause based on his statements. He states that the later search warrant affidavit, written by TFO Michael Laird ("Laird"), had lies throughout it, which undermines the finding of probable cause, because it conflicts with the affidavits of North Charleston police department ("NCPD") officers. Shannon asserts that at the motion to suppress hearing, Laird explained "how he mislead [sic] judge on the phone by tellin[g] her a whole different story than what he written [sic] an [sic] affidavit." Id. at 16. He explains that he requested a Franks hearing based on these facts, and that this should establish government misconduct that violated his Fourth and Fourteenth Amendment rights.

Shannon further alleges that he was denied due process of law under the Fourteenth and Fourth Amendment when the court failed to provide the requested Franks hearing. He clarifies that he requested the hearing because "[t]he search warrant affidavit written by TFO Michael Laird was intentionally and knowingly reckless disregard for the truth." ECF No. 1275 at 21.

Shannon did not present this issue on direct appeal; therefore, it is waived as procedurally defaulted. Even if it were not waived on those grounds, it would be found to be waived because he had a full and fair opportunity to have a hearing on this issue in the original trial. The court is required to provide a Franks hearing if (1) the defendant produces affidavits or other strong evidence beyond a conclusory claim to demonstrate

falsity in the affidavit; (2) the false statement was made intentionally or with reckless disregard for the truth; and (3) the false statements were necessary to the finding of probable cause. Franks, 438 U.S. at 156, 170–71.

Shannon's trial attorney filed a suppression motion and, in that motion, specifically asked for a Franks hearing on these facts. See ECF No. 943. The court held a full suppression hearing and the government called Laird and other relevant witnesses, who Shannon's trial counsel then cross-examined. Shannon's trial attorney examined and questioned all the witnesses about the alleged discrepancies between Laird's testimony and the police reports, and presented allegations regarding defects in the chain of custody. The court considered Shannon's arguments and ruled that the alleged discrepancies did not rise to the level required for a mandatory Franks hearing. As the government explains, it does not matter to the finding of probable cause who saw Shannon toss the heroin out of the window—whether it was a private citizen who told Officer Steinbrunner ("Steinbrunner") or if it was Steinbrunner herself who saw it occur. ECF No. 1353-1 at 72 n.15. The court found no evidence that suggested, much less supported, a finding that Laird's statement was knowingly and intentionally false, nor that it was made with reckless disregard for the truth. Further, Shannon has not produced any evidence that demonstrates that the error was material—Shannon has not alleged any facts that show the failure to provide a Franks hearing altered the outcome of his conviction.

Given that Shannon had a full and fair opportunity to litigate his Fourth Amendment claim in the original trial, Shannon is barred from raising that claim once

again in a § 2255 motion. Even if the claims were not time-barred, Shannon's Fourth Amendment claims would be dismissed.

**F. Ineffective Assistance of Counsel**

Shannon challenges the adequacy of both his trial counsel and his appellate counsel. Though these claims are time-barred, the court considers each in turn.

**1. Trial Counsel**

Shannon alleges his trial counsel failed to adequately represent him. Specifically, he challenges seven omissions by that counsel, saying that he failed to: (1) challenge the validity of the indictment; (2) investigate and prepare for trial; (3) file a motion for severance; (4) object to government witnesses; (5) challenge the government's motion to amend their indictment; (6) object to testimony as inappropriate since the witness was not an expert; and (7) challenge the pre-sentence report. See ECF No. 1275 at 7–13.

A petitioner asserting ineffective assistance of counsel must demonstrate that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the petitioner. Strickland, 466 U.S. at 687. Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential[,] and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. To establish prejudice, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

**a. Failures to Challenge the Validity of Indictment**

Shannon alleges that his counsel failed to file a motion of dismissal for the defective second superseding indictment issued by the grand jury—he alleges it is defective for failing to name the government as a party. ECF No. 1275 at 8 (citing ECF No. 51). Shannon alleges that he was not indicted on a government initial indictment on November 12, 2013, in Criminal Case No. 2:13-cr-00977-DCN ("Indictment I"), but that he was indicted on April 9, 2014, in Criminal Case No. 2:14-cr-00213-DCN ("Indictment II"), for one count that was unrelated to the prior indictment. He then alleges that the government filed a superseded indictment in Criminal Case No. 2:13-cr-00977-DCN ("Superseded Indictment I"), on August 12, 2014, and used the word "incorporated" to include Shannon's pending indictment, Indictment II. Shannon argues that the pending unrelated indictment, Indictment II, should have been resubmitted to a grand jury before being incorporated in Superseded Indictment I. Shannon argues that it is clear from the different indictments that the charges against Shannon and the charges against the co-defendants were not based on the same acts or transactions and the proof of the substantive charges were not related. ECF No. 1275 at 8. Shannon's supports this allegation by arguing that at trial, DEA Agent James Duffy testified regarding the November 12, 2013 indictment, Indictment I, that they had an indictment but "didn't have a strong enough case to stick on him." ECF No. 1275 at 8. Shannon does not

clarify the antecedent to "him," nor does he provide where in the testimony that quote comes from, but presumably the DEA Agent is referencing Shannon.

But, Shannon fails to acknowledge that the amendment was for a clerical error that did not affect the charges in the case. Federal courts follow the settled rule that unless the change is simply a matter of form, an amendment to an indictment requires resubmission to the grand jury. Russell v. United States, 369 U.S. 749, 770 (1962). But, where an amendment does not change essential or material elements, the amendment or variance will stand. See United States v. Floresca, 38 F.3d 706, 709 (4th Cir. 1994); United States v. Bledsoe, 898 F.2d 430, 432–33 (4th Cir. 1990). The charges in this case were not affected by the amendment. Trial counsel's failure to make an argument that would have lacked merit is not deficient performance. See, e.g., Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) ("It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled [the defendant] to abandon a claim that stood almost no chance of success."). Accordingly, Shannon cannot establish the first prong of Strickland because his counsel was not deficient for failing to object, and therefore this claim must fail.

**b. Failure to Investigate and Prepare for Trial**

Shannon alleges that his trial counsel never called any witnesses for the suppression hearing or trial, nor did counsel prepare a defense strategy for trial. ECF No. 1275 at 9. He argues that trial counsel's alleged errors resulted from neglect or ignorance, rather than from informed, professional deliberation. For example, at the suppression hearing, counsel failed to call NCPD officers as witnesses—NCPD officers had written incident reports from the high speed chase. Had counsel called the NCPD

officers, he would have been able to show that the reports contradicted Laird's affidavit regarding the search warrant. One report, dated March 3, 2014, stated "an unnamed concerned citizen reported having seen an object being tossed from the window," and another report, dated February 28, 2014, stated an "officer observe[d] petitioner threw [sic] softball sized clear plastic baggie out of the driver's side window." ECF No. 1275 at 9. Shannon alleges that his counsel failed to call Laird as a witness at trial and that the government did not call Laird as a witness to testify "because of his dishonesty and perjurious statements at [the] motion suppression hearing," and Shannon further explains, "[t]hat's why [the] Government never had [the] search warrant authenticated at trial." Id. He indicates his counsel failed to call NCPD officer Steinbrunner who had allegedly retrieved drug evidence from the scene and wrote an incident report that contradicted Laird's affidavit. Shannon goes on to allege that this omission denied him his Fifth, Sixth, and Fourteenth Amendment rights.

As examined more fully in the Fourth Amendment section above, the court finds that Shannon's trial counsel challenged and pursued Shannon's claims regarding discrepancies in the affidavit and police reports that were used to establish probable cause for the search warrant. Shannon has not adequately alleged facts to show that his trial counsel's actions were deficient. See Strickland, 466 U.S. at 687. Rather, his trial counsel fully and comprehensively sought to challenge the government on this exact issue during a suppression hearing where he cross-examined all witnesses. The court finds that Shannon has not alleged facts that support a finding of ineffective assistance of

counsel in violation of the Sixth Amendment for his trial counsel's alleged failure to investigate and prepare for trial.

**c. Failure to File Motion for Severance**

Shannon alleges that his counsel failed to sever Counts 2 and 20 from the indictment. He argues they should have been severed because there is no connection to the initial indictment, Indictment I. He argues that these two counts are outside the scope of the initial indictment, Indictment I, and that it was improper joinder of unrelated offenses. Shannon argues that he discussed this with counsel on multiple visits, and that his counsel ignored his request to have the counts severed. Shannon told his counsel that the only reason the government was using Count 2 was to prejudice the jury and show criminal activity. Shannon argues that since he was not under any government surveillance nor at any of the controlled buys with any of his alleged co-defendants, it was improper to join the offenses to his indictment. He further objects to the prosecutors' use of testimony and video tape evidence of an alleged drug transaction that happened in 2010. Shannon appears to argue that even though his counsel submitted a motion to exclude the testimony of Shawn Blount ("Blount") and Jermaine Bailey ("Bailey") pursuant to rules 403 and 404(b) of the Federal Rules of Evidence two days before trial started, ECF No. 659, trial counsel still demonstrated neglect and ignorance. ECF No. 1275 at 10.

Specifically, Shannon alleges that "the Government was tryin[g] to use two incarcerated federal informants from [a] 2010 investigation that resulted in[] United States v. Smith, 2:11-cr-00472-DMD, ECF No. 1187." ECF No. 1275 at 10. Shannon argues that their testimony was outside of the scope of the 2014 conspiracy, just as Count

2 was outside the scope of the conspiracy. Shannon argues that this is clear evidence that his counsel was ineffective for not having Count 2 severed or, presumably, for failing to win his motion under Federal Rules of Evidence 404(b) to exclude evidence related to Count 2. Shannon reiterates these arguments in his reply, saying Counts 2 and 20 are "years apart, but also from different geographical areas and different federal districts." ECF No. 1377 at 91. He further asserts the joinder was improper "under 8(a) where there is no substantial overlap in evidence and particularly where the evidence necessary to prove each of the offenses would be inadmissible in a trial of the other." Id. at 91–92. Shannon alleges that he was therefore denied his Sixth Amendment rights.

Again, under the deferential standard established by Strickland, for Shannon to successfully bring this claim he must show that his "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. To do this he must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. Id. at 687. The court emphasizes that under Strickland, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

It is reasonable to find that Shannon's trial counsel made a tactical decision as to whether to object, and upon examination of the relevant laws, decided he did not wish to. An indictment may charge a defendant in separate counts with two or more offenses, if the offenses charged are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. Fed. R. Crim. P. 8(a). In other words, the rule permits a very broad joinder "because the prospect of duplicating witness testimony, impaneling additional jurors, and wasting

limited judicial resources suggests that related offenses should be tried in a single proceeding." United States v. Mir, 525 F.3d 351, 357 (4th Cir. 2008). "Thus, joinder is the rule rather than the exception because of the efficiency in trying the defendant on related counts in the same trial." United States v. Hawkins, 775 F.3d 200, 206 (4th Cir. 2015) (internal quotation marks omitted). Count 1, Count 2, and Count 20 all dealt with the knowing, intentional, and unlawful possession with intent to distribute heroin. It is reasonable for his trial counsel to have not objected to the inclusion of Counts 2 and 20 in the indictment notwithstanding the difference in time and geography, given the permissive joinder rules. Therefore, Shannon has not met his burden to demonstrate his trial counsel was deficient or unreasonable for failing to file a motion for severance.

**d. Failure to Object to Government Witnesses**

Shannon argues, yet again, that his counsel was ineffective because he failed to object to testimony from TFO Charles J. Grill ("Grill") and Lawrence Middleton regarding Count 2 as inadmissible under Federal Rule of Evidence 404(b). He argues that their testimonies were never linked or connected to the 2014 conspiracy. Further, he asserts that any evidence admitted was too tenuous and remote because "it dealt with alleged drug transactions that took place nearly five years before the charged conspiracy." ECF No. 1275 at 11.

Further, Shannon argues that his counsel failed to object to government witnesses NCPD officers Jason Dandridge and Steinbrunner. He also argues that his counsel failed to object to the government's introduction and use of a videotape, exhibit 56. Shannon explains that because he was never indicted or convicted by the state or federal government of any wrongdoing for the high-speed chase (the alleged state charges were

dismissed Aug. 27, 2014), the videotape should have been deemed inadmissible evidence. Further, the videotape (exhibit 56) was not included in Shannon's discovery. Consequently, he argues that his Sixth and Fourteenth Amendment rights were denied.

Shannon has failed to explain with clarity why trial counsel should have objected to the testimony of these witnesses, much less how the testimony would have changed the outcome of the trial. Under Strickland, the court "must indulge a strong presumption . . . that, under the circumstances, the challenged action might be considered sound trial strategy." United States v. Terry, 366 F.3d 312, 317 (4th Cir. 2004) (quoting Strickland, 466 U.S. at 689). Again, the jury convicted Shannon of seven counts: Counts 1, 2, and 20 dealt with knowingly, intentionally, and unlawfully possessing with intent to distribute various quantities of heroin, whereas Counts 32, 39, 30, and 47 dealt with his use of interstate communication (i.e., a telephone) in furtherance of a commission of a felony. The government's evidence and witnesses that Shannon now objects to were clearly admissible as relevant under the Federal Rules of Evidence. See Fed. R. Evid. 401. Grill's testimony offered information that he obtained during the investigation, and the video of the car chase was part of the ongoing crime and intrinsic evidence of both Counts 1 and 2. Trial counsel's failure to object to the government witnesses' testimony was not unreasonable under the circumstances. The court declines to find counsel's failure to object to be an error that rises to the level of ineffective assistance of counsel in violation of the United States Constitution.

**e. Failure to Challenge Government Motion to Amend**

Shannon alleges that his counsel failed to challenge the government's motion to amend/correct the second superseding indictment that was submitted to the court on June

10, 2016, ECF No. 613, just one month before Shannon's trial date of July 26, 2016. ECF No. 1275 at 12. He alleges that his counsel never informed him about the motion or tried to dismiss the motion. Shannon received the docket sheet in 2019, and requested and received the information about this motion, ECF No. 613, 613-1, 613-2, on April 1, 2019. He alleges that the government's motion contained a "clerical error" because it did not list the United States of America as a party. But Shannon says that the omission of a party cannot be corrected by amendment without resubmission to a grand jury—he alleges that since his counsel consented to this and did not challenge the motion, it "show[s] that counsel was workin[g] with the government[,] clearly inappropriate conduct from petitioner['s] counsel." ECF No. 1275 at 12. Shannon alleges there are additional issues with the amendment of the second superseding indictment: there is no signature of a grand jury foreperson or United States Attorney, the order was never signed by a judge, and it "is clearly not a true bill indictment." ECF No. 1275 at 12 (referencing ECF No. 613-1).

This issue is examined more fully in the court's consideration of Shannon's Fourth Amendment claims above. The court finds Shannon's argument that his counsel was ineffective for failing to object to the amendment of the second indictment to be without merit—trial counsel is not deficient for failing to object with a meritless claim. See, e.g., Knowles, 556 U.S. at 123. Nor has Shannon pled any facts that demonstrate prejudice because of the alleged deficient performance. See Strickland at 687.

**f. Failure to Object to Expert Witness Testimony**

Shannon alleges that his counsel failed to object to Grill's testimony as a "chemist" expert on the weight of drugs. ECF No. 1275 at 13. He argues that Grill was

not sworn in at trial as a "chemist" expert, and therefore his testimony regarding the measurement of drugs should have been inadmissible. Id. He argues that his counsel failed to object to this testimony and, further, that the testimony only confused the jury as to what they already heard from the government's expert chemist Elisabeth Adkins, who testified that the weight in the bags was .0148. He argues that from her testimony, there was no way that the weight of the heroin added up to a kilogram or more. Consequently, he asserts that his Sixth and Fourteenth Amendment rights were denied by this "sham prosecution." ECF No. 1275 at 13.

Trial counsel's decision to not object to Grill's testimony as to the weight of the drugs was not deficient. Federal Rule of Evidence 701 permits a lay witness to give opinion testimony that is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within he scope of Rule 702." Fed. R. Evid. 701. Lay witness testimony must be based on personal knowledge. Id.

Testimony from the pretrial hearing itself shows that Shannon's trial counsel considered Shannon's objections regarding Grill, but that the counsel "did not think that was appropriate, and that [he] would not include [Grill's alleged statement discrepancies] in a motion." ECF No. 942 at 5. Further, in the transcript from the sentencing hearing, Grill's testimony that "a gram cost $150" and "the average weight is .03" is reasonably interpreted as coming from his personal knowledge. ECF No. 943 at 16. Shannon's counsel objected to Grill's testimony immediately after those statements, as being improper extrapolation from one transaction. Id. at 18. These events show that the

decision to not object to Grill's testimony was a reasonable judgment call made by Shannon's trial counsel. Consequently, the court finds that trial counsel's actions with regards to Grill's testimony was not deficient and that this claim is therefore meritless.

**g. Failure to Challenge Pre-Sentence Report**

Shannon asserts that his counsel allowed the government to use prior conduct that consisted of one drug transaction that occurred almost five years before the indictment. He argues that "[t]he only similarity between the offenses of the indictment was that they involved possession with intent to distribute heroin." ECF No. 1275 at 13. Shannon argues that his counsel let the government use the weight from the statement made by Blount and Bailey, who never testified at trial because of a motion brought under Federal Rules of Evidence 403 and 404(b), "for more added weight of drug quantity." Id. It is unclear what Shannon finds wrong about the inclusion of this evidence, but presumably he objects to it.

The court reiterates that in evaluating an ineffective assistance of counsel claim, Shannon must meet the Strickland standard—to first show that counsel's decision was objectively unreasonable, and then to show that the outcome of the case was unfairly prejudiced by that deficiency. See Strickland, 466 U.S. at 687. The PSR included testimony from Bailey and Blount, but their testimony was not used to establish the weight of the drugs—rather, their testimony supports the assertion that Shannon was known in the community as a source for drugs. See ECF No. 914, PSR ¶¶ 42–48. The court finds under Strickland's deferential standard, it was not unreasonable for Shannon's trial counsel to fail to object to the PSR. But, even if the court were to find counsel's failure to object unreasonable—which this court does not—Shannon has failed to allege

facts that support his assertion that Bailey and Blount's testimony impacted the weight of the drugs attributed to Shannon. Consequently, the court finds this claim without merit.

**2. Appellate Counsel**

Shannon asserts that his appellate counsel (1) failed to adequately represent him on appeal, (2) failed to submit adequate briefs, and (3) neglected to raise arguments related to the search warrant. ECF No. 1274 at 4–6.

The right to effective assistance of counsel extends to require such assistance on direct appeal of a criminal conviction. See Evitts, 469 U.S. at 396. To establish the claim that appellate counsel was ineffective for failing to pursue a claim on direct appeal, the applicant must meet the same two prongs of Strickland: (1) "counsel's representation fell below an objective standard of reasonableness" in light of the prevailing professional norms, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694.

The court provides appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc) (quoting Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993)). "Winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (internal quotation marks omitted). Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent."

Smith v. Robbins, 528 U.S. 259, 288 (2000) (holding that a habeas applicant must demonstrate that "counsel was objectively unreasonable" in failing to file a merits brief addressing a nonfrivolous issue and that there is "a reasonable probability that, but for his counsel's unreasonable failure . . ., he would have prevailed on his appeal"). As a general matter, "only when ignored issues are clearly stronger than those presented" should we find ineffective assistance for failure to pursue claims on appeal. United States v. Mason, 774 F.3d 824, 829 (4th Cir. 2014) (quoting Robbins, 528 U.S. at 588).

**a. Adequate Representation on Appeal**

Shannon alleges several examples to show that his appellate counsel's performance was deficient. First, he alleges that his appellate counsel failed to research or review pretrial and trial transcripts. He also avers that she did not conduct appropriate factual and legal investigation for Shannon's appeal. He claims that she only conferred with him after undue delay and did not confer as often as necessary to advise him of his rights for appeal—despite Shannon and his family trying to contact counsel by telephone and mail. After the Fourth Circuit affirmed the lower court's decision, Shannon alleges that his counsel contacted him to try to explain that she did not have enough time to research his case because of the caseload she had at the time the case was assigned to her. She told Shannon that she had asked for another extension from the court, but that extension was not granted. He alleges that she will send a letter to him attesting to these facts—though he has not provided any evidence of this letter beyond his assertion of her future intent to send it. Consequently, he alleges that her performance was deficient and that Shannon's due process rights and rights to effective counsel were denied.

Shannon fails to explain with specificity how these failings, even if true, affected his appeal. Moreover, under Strickland, Shannon must clearly show that (1) counsel's representation fell below an objective level of reasonableness considering professional norms, and (2) there is a reasonable chance that but for counsel's ineffectiveness, the outcome of the appeal would be different. Strickland, 466 U.S. at 688, 694. He has shown neither.

In contrast, the government argues that the affidavit from Shannon's appellate counsel indicates that she did adequately research and review the relevant materials, and she did consult with Shannon. ECF No. 1353-1 at 60; ECF No. 1353-3, Moore Aff. at 1–2. Further, appellate counsel indicated that her communication to Shannon regarding her lack of time related only to consultations with Shannon—which is not required input for an appellate brief—but confirmed she did adequately have time to prepare and research the brief. ECF No. 1353-3 at 2. Appellate counsel also reiterated the point that "Shannon has not identified any aspect of the case that [she] overlooked that would have altered the conviction or sentence." Id. at 3. Importantly, appellate counsel attested that she "reviewed the entirety of the trial transcript, including jury selection and charges after the presentation of the evidence," she also "reviewed all sentencing documents," and "consulted with his trial counsel." Id. at 2. Shannon's reply objects to her attestation, but declaring appellate counsel was "not truthful" in her affidavit is conclusory and unsupported by any evidence. ECF No. 1377 at 54–55.

The governments asks the court to find that Shannon's appellate counsel's performance did not fall below an objective standard of reasonableness. ECF No. 1353-1 at 60. The court agrees. Shannon's claims that his counsel was ineffective are

unsupported by the facts; moreover, under the deferential Strickland standard of review, Shannon has alleged no facts that support the allegation that his appeal would be different but for actions of his appellate counsel.

**b. Failure to Research for Briefs**

Shannon alleges that appellate counsel's appeal brief was a "carbon copy of [the] motion for acquittal and new trial (Dkt. No. 686) that was filed in district court by trial counsel." ECF No. 1275 at 5. He indicates that the appeal brief was identical including the inaccurate address 210 Compton (meant to be 201 Compton), and the inaccurate drug weight found at 201 Compton (189.4 and 129.6 grams). Shannon argues this is evidence that the appellate counsel never researched or reviewed the transcripts of his case. Additionally, the court has incorporated Shannon's argument in his second amendment to his petition and further examines his claims that what his appellate counsel submitted in her brief was frivolous and prejudiced. ECF No. 1325 at 3. Shannon reiterates this argument in his reply, saying that his appellate counsel's plagiarism is evidence of her incompetence and ineffectiveness. ECF No. 1377 at 46.

Once again, the court reiterates that under Strickland, Shannon must show that (1) counsel's representation fell below an objective level of reasonableness considering professional norms, and (2) there is a reasonable chance that but for counsel's ineffectiveness, the outcome of the appeal would be different. Strickland, 466 U.S. at 688, 694. With regards to this claim, appellate counsel submitted an affidavit explaining that she relied on the materials prepared by trial counsel because they presented viable arguments, which she determined after she performed her own independent research. ECF No. 1353-3 at 3. Further, after comparing appellate counsel's brief with trial

counsel's motion for verdict of acquittal and for new trial, the court finds the briefs are not in fact "carbon copies" of one another. Compare USCA4 Appeal No. 17-4500, Dkt. No. 44, with ECF No. 686-1. Though there are similarities, that is not unexpected since the briefs were submitted for different stages of the same case. The specific errors that Shannon identifies—the inaccurate weight of drugs and the incorrect address—are not clearly shown to have had an impact on the appeal.

Further, the court finds that Shannon has not adequately shown that appellate counsel's reliance on trial counsel's arguments was unreasonable or contrary to professional norms. Appellate counsel has alleged that she reviewed trial counsel's arguments and found them "sound and timely." ECF No. 1353-3 at 3. Reliance on viable legal arguments is not an error, but even if it were, Shannon has not and cannot show that such reliance "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Mickens v. Taylor, 240 F.3d 348, 356 (quoting Frady, 456 U.S. at 170). The court finds that Shannon's appellate counsel did not in fact submit a carbon copy of his trial counsel's brief. To the extent there are similarities, the court finds that such similarities are not uncommon in the practice of law and therefore Shannon has not adequately demonstrated that his appellate counsel acted unreasonably with respect to reusing viable arguments made by his trial counsel.

**c. Failure to Challenge the Validity of the Search Warrant**

Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. As a general matter, "only when ignored issues are clearly

stronger than those presented" should we find ineffective assistance for failure to pursue claims on appeal. Mason, 774 F.3d at 829.

Shannon alleges that "had [the appellate attorney] read and review[ed] the [transcript from the] motion to suppress [hearing], [she] would had [sic] challenge[d] more than the typographical error and nexus," she would have challenged "the validity of [the] search warrant itself." ECF No. 1275 at 6. He argues that the date of the search warrant's signing and date of execution would make it stale. Further the address in the search warrant was in Orangeburg County and there is no record in Dorchester County Court that shows this search warrant was filed.

However, the court finds it difficult to demonstrate that counsel was incompetent for failure to challenge the validity of the search warrant. As the court has explained at length, Shannon's trial counsel requested and fully participated in a suppression hearing related to this search warrant, and Shannon's appellate counsel did in fact challenge the conclusions of that hearing on appeal. USCA4 Appeal No. 17-4500, Dkt. No. 44 at 7–8 ("Did the trial court err in denying the Appellant's motion to suppress evidence seized as a result of the Title III wiretap? Did the trial court err in denying the Appellant's motion to suppress evidence seized at 210 [sic] Compton Court?"). But, the Fourth Circuit held that "[their] review of the record convinces [them] that the district court correctly concluded that there was sufficient evidence to believe that the items to be seized would be found in the place to be searched." Shannon, 725 F. App'x at 244. Shannon has failed to explain how these particular allegations—that the search warrant was stale and perhaps never filed in Dorchester County Court—are clearly stronger than the arguments made by

his appellate counsel such that she was incompetent. See Mason, 774 F.3d at 829. Rather, after examining each claim, the court finds them to be without merit.

It appears that Shannon's claim that the warrant was stale is based on his assertion that he was in jail at the time the search warrant was sought—saying, the "date that it was sign[ed] and [the] date of excuting [sic] will make it stale." ECF No. 1275 at 6. He further confuses the standard in his reply, asserting, the "state search warrant is not related to federal indictment . . . because its outside the scope of the indictment." ECF No. 1377 at 56. But, that is not the standard for finding a warrant to be stale.

"A valid search warrant may issue only upon allegations of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" United States v. Blizzard, 313 F. App'x 620, 620 (4th Cir. 2009) (internal quotation marks omitted). Stale search warrants arise in two situations: (1) the government waited an extended period of time between the information provided and the execution of the warrant; and (2) the information supporting the search warrant was too old to provide "present" probable cause. Id. at 620–21. The fact that Shannon was in jail at the time of the search warrant's issuance is irrelevant. Further, Shannon has alleged no facts that show the government waited an extended period of time before executing the warrant. Rather, the government sought the warrant after Shannon's arrest for fleeing from police at a high speed with a child in his car and seen tossing heroin out of his car window. The government asserts that it sought the search warrant immediately after the chase out of concern for the safety of the child. ECF No. 1353-1 at 59. The evidence in this case tends to show that his counsel was not incompetent for failing to allege the search warrant was stale because the facts clearly demonstrate the warrant was not stale.

Moreover, in review of South Carolina law, the court finds that in the state of South Carolina, the circuit courts are "vested with general original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts." State v. Harrison, 854 S.E.2d 468, 478 (S.C. 2021) (citing S.C. Const. art. V, § 11). Both Dorchester and Orangeburg County are in the First Judicial Circuit, and consequently a circuit court judge in Dorchester County has general jurisdiction to issue a search warrant for a property in Orangeburg County. See S.C. Code Ann. § 14-5-610. Therefore, the fact that the warrant was not filed in Dorchester County is irrelevant to its validity and Shannon's counsel was not incompetent for failing to raise a meritless claim.

Shannon has failed to allege facts that support a finding that his appellate counsel was incompetent for failing to challenge the search warrant based on its staleness or location of execution since those claims are unsupported by the facts. Therefore, the court finds that Shannon's appellate counsel was not ineffective for failing to raise those arguments in the appeal.

**G. Prosecutorial Misconduct in Violation of the Fifth Amendment**

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). To establish prosecutorial misconduct, a petitioner must show (1) that the conduct of the United States was improper, and (2) that the improper conduct prejudicially affected his substantial rights so as to deprive him of a fair trial. United States v. Bereano, 161 F.3d 3, 9 (4th Cir. 1998) (quoting United States v. Mitchell, 1 F.3d

235, 240 (4th Cir. 1993)). "Prosecutorial misconduct warrants the reversal of a conviction only in rare and egregious cases." Id.

Shannon has alleged a number of constitutional claims based on allegations of government misconduct. Shannon's petition sets out facts and thereafter declares those facts to violate his rights under multiple constitutional provisions. See, e.g., ECF No. 1275 at 18 (claiming "Fifth and Fourteenth Amendment violated"). The court mentions this because many of these claims have already been examined and shown to be meritless in prior sections of this order. However, the court examines them once again to determine if the alleged actions of prosecutorial misconduct rose to the level as to deprive him of a fair trial. See Bereano, 161 F.3d at 9. Shannon alleges there was government misconduct that violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution. ECF No. 1275 at 14–18. Many of these allegations parallel the allegations of ineffective counsel where his attorney failed to object to government actions—he then explains under Ground Three that those government actions constituted prosecutorial misconduct.

The court finds that many of these actions are not misconduct, much less misconduct that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. For example, the Second Superseded Indictment, which omitted the United States of America as a party before the government then corrected it, did not constitute misconduct but rather a clerical error. Shannon also argues that the government improperly joined Counts 2 and 20 to Indictment I, which violated his Fifth Amendment right to a fair trial and prejudiced him. But, as the court has explained above, joinder is permissive, especially on facts such as

these where the offenses are clearly related—thus, there is no misconduct by joining related offenses. See Mir, 525 F.3d at 357. Shannon also claims the government's failure to sequester key witnesses denied him his due process rights and right to a fair trial and "was part of [the] government['s] sham prosecution." ECF No. 1275 at 18. But, beyond identifying that DiKetta Williams was present during Edward Singleton's testimony, Shannon fails to explain how she was affected, much less how misconduct could have occurred. These claims fail to show any misconduct and therefore are dismissed.

Shannon only alleges two actions that might possibly rise to the level to establish prosecutorial misconduct, but even those two allegations fail to demonstrate that the errors were so unfair as to deprive him of a fair trial. First, Shannon alleges that the government improperly failed to disclose exculpatory evidence. Namely, he asserts that the government failed to disclose the precise terms of an agreement between a key witness and the government. ECF No. 1275 at 18. But Shannon does not identify the witness, much less that witness's testimony, and therefore cannot show that a failure to disclose, if any, deprived him of a fair trial. Second, Shannon alleges that the probable cause used to justify the search warrant and resulting evidence was based upon intentional false statements from AUSA Kittrell.

The use of testimony that the prosecution knows is perjured or false may constitute prosecutorial misconduct. See Giglio, 405 U.S. at 153. In Napue, the Supreme Court held that due process is generally denied if the government knowingly uses perjured testimony against the accused to obtain a conviction. 360 U.S. at 269. "The same result obtains when the State, although not soliciting false evidence, allows it to go

uncorrected when it appears." Id. To meet his burden of proof, a defendant must show that (1) perjured testimony was presented; (2) the prosecution knew the evidence was false; and (3) there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd, 147 F.3d at 330 (citations and internal quotations omitted).

Shannon alleges that the government violated the Fourth and Fourteenth Amendment when they got the wiretap application and search warrant without probable cause. ECF No. 1275 at 15. He alleges that the government misled the judges by intentionally making false statements to establish probable cause. He further states that the later search warrant affidavit, written by TFO Laird, had lies throughout it, which undermines the finding of probable cause because it conflicts with the affidavits of NCPD officers. Shannon asserts that at the motion to suppress hearing, Laird stated "how he mislead judge on the phone by tellin[g] her a whole different story than what he written [sic] an [sic] affidavit." Id. at 16.

The court has already examined the issue of defective probable cause in the context of Shannon's claims under the Fourth Amendment and for ineffective assistance of counsel. It was found to be meritless on both counts. This time, the court finds that Shannon cannot meet his burden to demonstrate that any perjured testimony was presented and the prosecution knew the evidence was false, much less that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. See Boyd, 147 F.3d at 330. The court reiterates that in the original trial, a full suppression hearing was held on the issue of discrepancies, where Shannon's attorney was able to cross-examine and question all relevant officers. See ECF No. 943. The

court found no evidence that suggested, much less supported, a finding that TFO Laird's statement was knowingly and intentionally false, nor that it was made with reckless disregard for the truth.

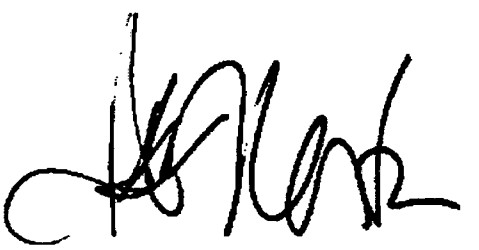
Consequently, the court finds that Shannon has not pled facts sufficient to find any prosecutorial misconduct, much less misconduct that rises to the level warranting the reversal of a conviction. See Bereano, 161 F.3d at 9. Thus, even if the claims were not time-barred—which they are—Shannon's claims for relief are without merit.

## IV. CONCLUSION

For the foregoing reasons the court **DENIES** Shannon's motion to vacate under 28 U.S.C. § 2255 and **GRANTS** the government's motion to dismiss. The court **DISMISSES AS MOOT** Shannon's motion for default judgment and his motion to appoint counsel.

**AND IT IS SO ORDERED.**

**IT IS FURTHER ORDERED** that a certificate of appealability is denied because petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).



**DAVID C. NORTON**
**UNITED STATES DISTRICT JUDGE**

**October 26, 2022**
**Charleston, South Carolina**

FILED: November 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 22-7458
(2:13-cr-00977-DCN-8)
(2:19-cv-02888-DCN)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KENNETH KENNEDY SHANNON, a/k/a James Smith, a/k/a Kevin Sanders

Defendant - Appellant

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ORDER

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The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Agee, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix C

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