APPENDIX

District Court Order

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6620

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIE M. HARDY, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:18-cr-00077-AWA-DEM-1; 4:22-cv-00084-AWA)

Submitted: July 24, 2025 Decided: July 28, 2025

Before NIEMEYER, AGEE, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Willie M. Hardy, Jr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Willie M. Hardy, Jr., 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 Hardy 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

FILED: July 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6620
(4:18-cr-00077-AWA-DEM-1)
(4:22-cv-00084-AWA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIE M. HARDY, JR.

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

FILED: July 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6620, US v. Willie Hardy, Jr.
4:18-cr-00077-AWA-DEM-1, 4:22-cv-00084-AWA

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's website, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: September 23, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6620
(4:18-cr-00077-AWA-DEM-1)
(4:22-cv-00084-AWA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIE M. HARDY, JR.

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc and the motion to appoint counsel.

For the Court

/s/ Nwamaka Anowi, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA

v.

WILLIE M. HARDY, JR.,

Defendant-Petitioner.

Criminal No. 4:18cr77
Civil No. 4:22cv84

ORDER

Pending before the Court is a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (the "Motion") by Defendant-Petitioner Willie M. Hardy, Jr. ("Mr. Hardy"). Mot. Vacate, ECF No. 116. For the following reasons, Mr. Hardy's Motion (ECF No. 116) is **DENIED**.

I. BACKGROUND

A. Facts

On May 9, 2018, in relation to information received from a confidential source, officers executed a search warrant for an apartment on Marshall Avenue, where they found Mr. Hardy and several other individuals. PSR ¶ 16, ECF No. 97. Officers discovered evidence of drug distribution and multiple firearms, including marijuana, a digital scale with marijuana residue, packaging material, heroin, a black Ruger .22 caliber magazine, a Glock 27 .40 caliber firearm loaded with a magazine containing nine cartridges, multiple cellular phones, and a sawed-off Remington .35 caliber rifle model 760. *Id.* Mr. Hardy personally possessed 215 grams of marijuana and 4.77

grams of heroin. *Id.* Officers arrested Mr. Hardy based on an outstanding arrest warrant for federal probation violations. *Id.* ¶¶ 8, 16.

Mr. Hardy spoke with Detectives Kempf and Cline after being taken into custody. Trial Tr. at 240:24–241:21, ECF No. 102. Detective Kempf advised Mr. Hardy of his *Miranda* rights, and Mr. Hardy admitted to distributing marijuana and possessing both the Glock 27 .40 caliber firearm and the Remington .35 caliber rifle model 760. *Id.* at 241:13–15; PSR ¶ 17, ECF No. 97. Law enforcement then transported Mr. Hardy back to headquarters, where they took possession of his cell phone. PSR ¶ 18, ECF No. 97. Mr. Hardy signed a consent form to allow officers to search his cell phone but wrote that he was signing the form under duress. *Id.* Because of his statement, the officers did not download his phone. *Id.* When questioned about the Glock 27 .40 caliber firearm, Mr. Hardy stated that he gave an individual named "Q" a ride and that "Q" left the firearm in the vehicle under the mat. *Id.* ¶ 19. He indicated that he never shot the Glock but did have access to it. *Id.* When asked about the rifle, he stated that an individual named "Chico" gave it to him and denied altering the rifle. *Id.*

While in custody, Mr. Hardy made several recorded phone calls to his son. *Id.* ¶¶ 20–22. On May 11, 2018, he told his son to have Kenneth Boswell take his gun charge. *Id.* ¶ 20. He stated, "Little Kenny might gotta take that gun charge. That gun charge. Cause it's a different gun. He ain't no convicted felon. You see what I'm saying? . . . They charged me with the um-one gun, possession of a firearm by a convicted felon, and possession of 'smoke'. You nah mean?" *Id.* On May 15, 2018, Mr. Hardy

called his son again and stated, ". . . That's why I would do it a million and one times again. Only thing I'm mad . . . I ain't kill nobody. For real." *Id.* ¶ 21. He then repeated his request for "Little Kenny" to take the gun charge and even suggested that "Little Kenny" write an affidavit. *Id.* He contacted his son a final time on May 15, 2018. *Id.* ¶ 22. During that call, his son offered to claim the drugs, and Mr. Hardy responded, "Ok yea . . . you can if you want to . . . The . . . The thing about . . . you weren't there." *Id.* Prior to the instant offense, Mr. Hardy already had state and federal felony convictions for Second Degree Murder and Maiming, Possession with Intent to Distribute Marijuana, and Felon in Possession of a Firearm. *Id.* ¶ 7.

B. Procedural History

On October 15, 2018, a grand jury returned a three-count Indictment charging Mr. Hardy with drug distribution and firearm offenses. *See generally* Indictment, ECF No. 1. Pursuant to the Criminal Justice Act, this Court appointed Laura P. Tayman to represent Mr. Hardy in the instant case and for a supervised release violation hearing before Judge Morgan in a separate case. Tayman Aff. at 1, Resp. Opp'n, ECF No. 127-1. Mr. Hardy pleaded not guilty and filed a Motion to Dismiss Indictment for duplicity. Minute Entry, ECF No. 10; Mot. Dismiss, ECF No. 13. In response, the Government sought a Superseding Indictment, which corrected the defect and added two charges. Superseding Indictment, ECF No. 21. On December 19, 2018, a grand jury returned a five-count Superseding Indictment charging Mr. Hardy with the following:

> Count One: Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

> Count Two: Possession with Intent to Distribute Marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D);
>
> Count Three: Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (B)(i);
>
> Count Four: Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1); and
>
> Count Five: Possession of an Unregistered Firearm, in violation of 26 U.S.C. §§ 5861(d) and 5845(a)(4).

Id. at 1. Again, Mr. Hardy pleaded not guilty to the charges in the Superseding Indictment. Minute Entry, ECF No. 26.

On March 8, 2019, after a four-day trial, a jury found Mr. Hardy guilty of Counts Two, Three, and Four and not guilty of Counts One and Five. Redacted Jury Verdict, ECF No. 61. Based on this verdict, the Court sentenced Mr. Hardy to a total of 300 months' imprisonment, followed by 5 years' supervised release. J. at 1–3, ECF No. 90. The term of imprisonment consists of 120 months each for Counts Two and Four, to run concurrently to each other, and 180 months for Count Three, to run consecutively to Counts Two and Four. *Id.* at 2. The term of supervised release consists of 4 years on Count Two, 5 years on Count Three, and 3 years on Count Four, all to run concurrently. *Id.* at 3.

On October 29, 2019, Mr. Hardy filed a Notice of Appeal. ECF No. 92. He argued on appeal that the district court plainly erred in failing to provide a specific jury instruction required under 18 U.S.C. § 3501(a). *United States v. Hardy*, 999 F.3d 250, 253 (4th Cir. 2021). The Fourth Circuit found that even if the district court plainly erred in failing to give the jury instruction, the error did not affect Mr. Hardy's substantial rights. *Id.* at 254–57. Thus, the Fourth Circuit affirmed the judgment. *Id.* at

257. Mr. Hardy later filed a petition for a writ of certiorari, which the Supreme Court denied on October 12, 2021. ECF No. 113.

C. Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence

On August 5, 2022, Mr. Hardy filed the instant Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Mot. Vacate, ECF No. 116. He moves to vacate his convictions and sentence pursuant to 28 U.S.C. § 2255 due to ineffective assistance of counsel. *Id.* at 4. He argues that his defense counsel, Laura P. Tayman, violated his right to effective counsel in the following ways: (1) counsel failed to meaningfully challenge the voluntariness of Mr. Hardy's confession at trial or argue that the detectives did not give *Miranda* warnings; (2) counsel failed to meaningfully challenge the veracity of Mr. Hardy's confession at trial; (3) counsel failed to seek a jury instruction on the voluntariness or veracity of the defendant's confession; and (4) counsel failed to file a motion to suppress the confession. Mem. Supp. Mot. Vacate at 4–9, ECF No. 117.

The Government filed a Response in Opposition on August 31, 2023. Resp. Opp'n, ECF No. 127. It argues that Mr. Hardy's defense counsel had provided effective assistance and attached a declaration from defense counsel discussing her litigation strategy. *Id.* at 1; Tayman Aff. at 3–6, Resp. Opp'n, ECF No. 127-1. The Government also contends that Mr. Hardy's claim about defense counsel's failure to seek a specific jury instruction was raised on direct appeal and therefore may not be relitigated through a collateral attack. Resp. Opp'n at 8–9, ECF No. 127. Mr. Hardy filed a Reply on September 18, 2023 (ECF No. 128) and a supplement on December 19,

2023 (ECF No. 129). He disputes the Government's contention that he suffered minimal prejudice from the lack of a jury instruction on the voluntariness of his confession at trial. Reply at 1, ECF No. 128. He further argues that he is not merely relitigating a claim raised on direct appeal because he is raising an ineffective assistance of counsel claim. *Id.* at 1–2. Finally, he states that he is entitled to suppression of his incriminating statements because law enforcement officers failed to provide clear evidence of *Miranda* warnings prior to his custodial interrogation. *Id.* at 2.

II. TIMELINESS

Mr. Hardy's § 2255 Motion is timely. 28 U.S.C. § 2255(f)(1) provides a one-year statute of limitations that runs from "the date on which the judgment of conviction becomes final." Such finality occurs when "the availability of appeal [is] exhausted." *United States v. Salas*, 807 F. App'x 218, 222 n.6 (4th Cir. 2020). Where the defendant timely files a direct appeal, the judgment becomes final when the Supreme Court denies a petition for a writ of certiorari or when the ninety-day deadline for filing the petition expires. *Clay v. United States*, 537 U.S. 522, 525 (2003); Sup. Ct. R. 13.1.

After this Court sentenced Mr. Hardy on October 24, 2019 (ECF No. 89), Mr. Hardy timely filed a Notice of Appeal on October 29, 2019. Notice of Appeal, ECF No. 92. On June 9, 2021, the Fourth Circuit affirmed the judgment of this Court. *See Hardy*, 999 F.3d at 257. Mr. Hardy then filed a petition for a writ of certiorari on September 9, 2021 (ECF No. 112), and the Supreme Court denied the petition on October 12, 2021 (ECF No. 113). Defendant filed the instant Motion on August 5,

2022—within one year of finality. Mot. Vacate, ECF No. 116. Accordingly, the Motion is timely, and it is appropriate for the Court to proceed to the merits.

III. LEGAL STANDARDS

A. 28 U.S.C. § 2255

A federal prisoner may move to vacate, set aside, or correct his sentence on four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court lacked jurisdiction, (3) the sentence imposed was in excess of the maximum amount authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). The sentencing court must "grant a prompt hearing" to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless the record conclusively shows that the prisoner is entitled to no relief.[1] 28 U.S.C. § 2255(b). A petitioner "bears the burden of proving his grounds for collateral attack by a preponderance of the evidence." *Siers-Hill v. United States*, 467 F. Supp. 3d 406, 414 (E.D. Va. 2020); *see also United States v. Cronic*, 466 U.S. 648, 658 (1984) (stating that the defendant has the burden of proof when claiming a denial of effective assistance of counsel).

[1] *See* R. Governing § 2255 Procs. 8(a) ("If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted."). Here, the record conclusively demonstrates that Mr. Hardy is entitled to no relief. An evidentiary hearing is therefore unnecessary. *See Sanders v. United States*, 373 U.S. 1, 6 (1963) (holding that sentencing court has discretion to ascertain whether a § 2255 claim is substantial before granting evidentiary hearing).

B. The *Strickland* Ineffective Assistance of Counsel Test

The Sixth Amendment to the Constitution of the United States guarantees a defendant the right "to have the Assistance of Counsel." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A Sixth Amendment ineffective-assistance-of-counsel claim within a § 2255 motion is thus an "attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* at 697.

Strickland established a two-prong inquiry to determine whether an attorney's deficient performance has deprived a defendant of effective counsel. *Id.* at 687. To succeed, a petitioner must show (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[2] *Id.* at 687–88, 694. A fair assessment of attorney performance requires that "every effort be made to . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Similarly, the petitioner must also overcome the presumption that the challenged action "might be considered sound trial strategy." *Id.* Accordingly, a court "must indulge a strong presumption that counsel's conduct falls within the

[2] Here, "reasonable probability" means "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694; *see also id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

wide range of reasonable professional assistance" under the circumstances.[3] *Id.* In other words, until the petitioner demonstrates otherwise, the Court shall presume that the acts under review were strategic choices that counsel made in what they determined to be the best interests of the petitioner's case. *See Spencer v. Murray*, 18 F.3d 229, 233–34 (4th Cir. 1994) (citing *Strickland*, 466 U.S. at 689). Furthermore, *Strickland* imposes no distinct standard regarding investigation and supports extending deference to counsel's decision whether to investigate just the same as to any other act or omission. *Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]").

C. Procedural Default

Habeas review is "an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation marks omitted). A claim that could have been raised on direct appeal is procedurally defaulted when raised for the first time in a § 2255 motion. *Gao v. United States*, 375 F. Supp. 2d 456, 465 (E.D. Va. 2005).[4] In such circumstances, the claim

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[3] An attorney's deficient representation in this context is not "merely below-average performance"; it requires a showing that counsel's representation fell "below the wide range of professionally competent performance." *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992); *see also Springer v. Collins*, 586 F.2d 329, 332 (4th Cir. 1978) ("[E]ffective representation is not synonymous with errorless representation."); *Lawrence v. Branker*, 517 F.3d 700, 708–09 (4th Cir. 2008) (noting that this is a "difficult" showing for a petitioner to make).

[4] Ineffective-assistance-of-counsel claims are usually not subject to procedural default, as they cannot generally be raised on direct appeal. *See United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997) (stating that a claim for ineffective assistance of

may be raised in habeas only if the defendant can "first demonstrate either cause and actual prejudice, or that [the defendant] is actually innocent." *Bousley*, 523 U.S. at 622 (internal quotation marks omitted). "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." *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999). As for the prejudice prong, it is not enough for a petitioner to demonstrate that the circumstances created a "possibility of prejudice"; rather, the petitioner has to show that they worked to his "actual and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170 (1982). Finally, to excuse a procedural default by actual innocence, a "petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623. In this context, actual innocence means "factual innocence, not mere legal insufficiency." *Id.* at 623–24.

IV. PETITIONER'S CLAIMS

In the Motion, Mr. Hardy argues that his defense counsel, Laura P. Tayman, violated his right to effective assistance of counsel in the following ways: (1) counsel failed to meaningfully challenge the voluntariness of Mr. Hardy's confession at trial or argue that the detectives did not give him *Miranda* warnings; (2) counsel failed to meaningfully challenge the veracity of Mr. Hardy's confession at trial; (3) counsel failed to seek a jury instruction on the voluntariness or veracity of the defendant's

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counsel is properly "raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal").

confession; and (4) counsel failed to file a motion to suppress the confession. Mem. Supp. Mot. Vacate at 4–9, ECF No. 117. This Court does not find Mr. Hardy's position persuasive. All of Mr. Hardy's ineffective-assistance-of-counsel claims fail the *Strickland* test,[5] and no claim warrants an evidentiary hearing by the Court. Accordingly, the Court dismisses these claims.

A. Petitioner's claim that counsel failed to challenge the voluntariness of his confession at trial is without merit.

Mr. Hardy first argues that defense counsel deprived him of his right to effective counsel when she failed to meaningfully challenge the voluntariness of his confession at trial or argue that the detectives did not give him *Miranda* warnings. Mem. Supp. Mot. Vacate at 4, ECF No. 117. Mr. Hardy must demonstrate by a preponderance of the evidence that counsel's performance fell below an objective standard of reasonableness and overcome the strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687–89. "Once counsel conducts a reasonable investigation of law and facts in a particular case, [her] strategic decisions are 'virtually unchallengeable.'" *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009) (citing *Strickland*, 466 U.S. at 690).

Contrary to what Defendant's allegations suggest, his counsel did not neglect the argument that his confession was not voluntary. In fact, defense counsel thoroughly investigated the facts of the case by meeting with Mr. Hardy at least sixteen

[5] A court is not required to address both prongs of the *Strickland* test if a petitioner fails to satisfy one. *Strickland*, 466 U.S. at 697; *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004) (citing *Williams v. Kelly*, 816 F.2d 939, 946–47 (4th Cir. 1987)).

times before trial and reviewing the voluminous discovery materials. Tayman Aff. at 2, Resp. Opp'n, ECF No. 127-1. She also met with Government counsel and detectives on December 6, 2018 and expressed her concern that Detective Cline did not capture any advisement of Mr. Hardy's *Miranda* rights nor Mr. Hardy's waiver of such rights on his body-worn camera. *Id.* at 3. Detectives Cline and Kempf assured defense counsel that Detective Kempf properly advised Mr. Hardy of his *Miranda* rights in Detective Cline's presence and that he waived these rights prior to the custodial interview. *Id.* She further understood that they would testify to such waiver at trial. *Id.* Defense counsel carefully reviewed the audio and video records of the post-arrest interview and found no indication that any detective applied undue pressure on Mr. Hardy. *Id.* at 4. Instead, the recordings demonstrated that the detectives wanted Mr. Hardy to cooperate, and Mr. Hardy sought to explore the benefits of cooperation. *Id.* During the interview, Mr. Hardy was provided with food, drinks, and medical care as well. *Id.* She also considered Mr. Hardy's education level—he had earned a GED—and substantial experience with the criminal legal system, which included at least ten different arrests, when evaluating whether any aspect of the interview was involuntary. *Id.* Based on her thorough investigation, defense counsel concluded that any challenge to the voluntariness of Mr. Hardy's confession would likely be unsuccessful and made the well-reasoned decision to focus on other legal arguments.

Additionally, had defense counsel pursued the argument that Mr. Hardy's confession was not voluntary, she likely would have needed Mr. Hardy to testify that he never received any *Miranda* warnings, thus opening him to severe impeachment.

Given the evidence that Mr. Hardy considered having two other individuals falsely take on his drug and gun charges, defense counsel could reasonably conclude that pursuing this line of argument would not have been successful due to Mr. Hardy's credibility issues. Instead, she meaningfully addressed the issue of *Miranda* warnings in several lines of questioning, such as the following cross examination of Detective Cline:

> Q. And while you were walking, before the sun was even up, supposedly Detective Kempf gave him the *Miranda* warnings, correct?
>
> A. Not supposedly, he did.
>
> Q. You were wearing the body camera, but you just didn't turn the audio on.
>
> A. Yes, ma'am.
>
> Q. And you've seen it. You reviewed it, right?
>
> A. Yes, ma'am, I've watched it numerous times.
>
> Q. And you've seen the two of you walking, and you know that the audio, which you could have turned on just by double-clicking, would have captured it, correct?
>
> A. It would have captured it, yes.
>
> Q. But you did not capture it, correct?
>
> A. Yes, ma'am, I did not capture it.

Trial Tr. at 268:18–269:7, ECF No. 102.

Because defense counsel conducted an extensive investigation of the case and reasonably concluded that any argument about the involuntary nature of Mr. Hardy's confession would not have been successful, Mr. Hardy has not overcome the strong presumption "that counsel's conduct falls within the wide range of reasonable

professional assistance." *Strickland*, 466 U.S. at 689. Mr. Hardy fails to show that defense counsel provided deficient representation.

B. Petitioner's claim that counsel failed to challenge the veracity of his confession at trial is without merit.

Next, Mr. Hardy asserts that defense counsel did not adequately challenge the veracity of Mr. Hardy's confession. Mem. Supp. Mot. Vacate at 4, ECF No. 117. This argument is not persuasive either. Defense counsel indicates that there was no evidence in this case suggesting that Mr. Hardy's statements were false. Tayman Aff. at 4, Resp. Opp'n, ECF No. 127-1. In fact, the physical evidence that law enforcement recovered during a contemporaneous search of the residence was consistent with Mr. Hardy's confession. *Id.* Prior to trial, Mr. Hardy also reviewed all the audio and video recordings in the presence of defense counsel and did not provide any reason for defense counsel to question the veracity of his statements. *Id.* at 4–5. Defense counsel's own investigation, as described in the preceding section, similarly did not suggest that Mr. Hardy's confession was false. *Id.* at 5. Based on her extensive investigation and discussions with Mr. Hardy, defense counsel reasonably concluded that any challenge to the veracity of Mr. Hardy's confession would lack merit and pursued other arguments instead. *Powell*, 562 F.3d at 670 (noting that defense counsel's strategic decisions are "virtually unchallengeable" after a reasonable investigation of the law and facts). As such, Mr. Hardy fails to demonstrate that defense counsel's performance was deficient.

C. Petitioner's claim that counsel failed to seek a jury instruction under 18 U.S.C. § 3501(a) is barred and without merit.

Mr. Hardy also argues that defense counsel deprived him of effective assistance of counsel when she failed to seek a jury instruction on the voluntariness or veracity of his confession, as required by 18 U.S.C. § 3501(a)[6]. Mem. Supp. Mot. Vacate at 4, ECF No. 117. This argument fails for two reasons—because the Fourth Circuit already addressed this issue on direct appeal and because of a lack of prejudice against Mr. Hardy. *See Hardy*, 999 F.3d at 255.

First, "[i]f an issue was raised on direct appeal, it cannot form the basis of a claim of ineffective assistance of counsel on collateral review." *Stitt v. United States*, 369 F. Supp. 2d 679, 686 (E.D. Va. 2005); *see also United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009) ("[A party] may not circumvent a proper ruling . . . on direct appeal by re-raising the same challenge in a § 2255 motion."). Mr. Hardy argued on direct appeal that this Court plainly erred by failing to provide a jury instruction required under 18 U.S.C. § 3501(a). *Id.* at 253. The Fourth Circuit held that even if the Court erred in failing to give the jury instruction, any error did not affect Mr. Hardy's substantial rights. *Id.* at 254. This exact issue forms the basis of Mr. Hardy's ineffective assistance of counsel claim on collateral review. *See* Mem. Supp. Mot. Vacate at 4, ECF No. 107. Because the Fourth Circuit already addressed this issue on

[6] 18 U.S.C. § 3501(a) provides that in any federal criminal prosecution involving the admission of a confession as evidence at trial, the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

direct appeal, its findings bar Mr. Hardy's ineffective assistance of counsel claim on the same issue. *See Stitt*, 369 F. Supp. 2d at 686 (finding that an ineffective assistance of counsel claim based on failing to give a jury instruction is barred because defendant raised the same jury instruction issue on direct appeal).

Moreover, even if the Court reached the merits of Mr. Hardy's claim, the Fourth Circuit's findings would prevent a showing of prejudice. *See id.* at 686 n.4. Under the second prong of *Strickland*, "[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." *Strickland*, 466 U.S. at 694. Here, Mr. Hardy is unable to show that any perceived error from counsel's failure to seek a § 3501(a) jury instruction resulted in substantial prejudice against him. In reviewing for prejudice, the Fourth Circuit stated that the Court instructed the jury that they should "use [their] good sense in considering and evaluating the evidence," "weigh all of the evidence," and act as the "sole judges of the evidence received in this case" and "of the credibility of each of the witnesses and the weight their testimony deserves." *Hardy*, 999 F.3d at 254. It determined that these jury instructions minimized any prejudice Mr. Hardy may have suffered. *Id.* at 254–55. The Fourth Circuit also found that the lack of any meaningful challenge at trial to the voluntariness or veracity of Mr. Hardy's confession—which defense counsel reasonably declined to pursue given the scant evidence to support this challenge—meant that Mr. Hardy suffered "minimal" prejudice from the Court's failure to give the § 3501(a) instruction. *Id.* at 255.

Additionally, as described by the Fourth Circuit on direct appeal, there is "overwhelming" evidence establishing Mr. Hardy's guilt, including Mr. Hardy's confessions and the physical evidence to corroborate them. *Id.* For Count Two, "[e]xtensive evidence tied Hardy to the marijuana." *Id.* at 256. On the date of his arrest, Mr. Hardy told law enforcement that he had seven to eight ounces of marijuana in a black bag at the apartment, and law enforcement subsequently found the black bag with the described marijuana during their search of the apartment. *Id.* The bag also included a digital scale with marijuana residue on it and hair clippers, which aligned with Mr. Hardy's statement that he worked as a barber. *Id.* Mr. Hardy also admitted that he was a "two ounce" man, meaning he bought two ounces of marijuana at a time, divided it, and sold it. *Id.* This evidence tied Mr. Hardy to the marijuana and showed that he intended to distribute the marijuana. *Id.*

With respect to Counts Three and Four, the Fourth Circuit also characterized the evidence supporting these convictions as "overwhelming."[7] *Id.* The parties stipulated that Mr. Hardy was a felon, and he admitted that he kept the Glock for eight months in a car he was driving and knew the gun's caliber. *Id.* ("This control is the essence of possession."). The police found the Glock near Mr. Hardy's cell phone, further tying him to the weapon. *Id.* Mr. Hardy's recorded phone calls also included conversations where he tried to persuade Little Kenny to claim ownership of the gun. *Id.* Such "false exculpatory statements are evidence—often strong evidence—of guilt."

[7] The Court notes that the Fourth Circuit's opinion appeared to have mixed the charges for Counts Three and Four, though this mistake does not affect the substance of the analysis. *See Hardy*, 999 F.3d at 256–57.

Baxter v. Comm'r of Internal Revenue Serv., 910 F.3d 150, 167 (4th Cir. 2018) (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010)). The evidence "amply" supports Mr. Hardy's conviction for Count Four's felon in possession charge. *Hardy*, 999 F.3d at 256. For Count Three, in addition to the previously described evidence for Count Four, law enforcement found Mr. Hardy in a house with drugs that belonged to him, his phone near a loaded Glock, and his bag containing marijuana, plastic baggies, and a scale with marijuana residue. *Id.* at 256–57. Mr. Hardy's important personal documents, including his social security card, employment offer, and mail, further connected him to the items in the vicinity. *Id.* at 257. Evidence also indicated that Mr. Hardy did not live at the searched residence, which suggests that he brought the Glock to further his drug distribution and did not merely store the Glock at his residence. *Id.* The evidence "strongly suggests that he possessed the guns 'in furtherance' of his drug crimes," as charged in Count Three. *Id.*

Based on the jury instructions that the Court gave, the lack of any meaningful challenge to the voluntariness or veracity of Mr. Hardy's confession, and the overwhelming evidence of his guilt, a § 3501(a) jury instruction would not have affected the trial's outcome. *Id.* ("The physical and confession evidence against Hardy was substantial, and a § 3501(a) instruction would not have affected the proceedings given the instructions provided and Hardy's failure to meaningfully challenge the truth of his confessions."). For these reasons, Mr. Hardy's ineffective assistance of counsel claim based on counsel's failure to seek a jury instruction under 18 U.S.C. § 3501(a) is without merit.

D. Petitioner's claim that counsel failed to file a motion to suppress his confession is without merit.

Finally, Mr. Hardy argues that defense counsel denied him effective assistance of counsel when she failed to file a motion to suppress his confession. Mem. Supp. Mot. Vacate at 9, ECF No. 117. For an ineffective assistance of counsel claim based on counsel's failure to file a motion to suppress, the Fourth Circuit applies a "refined" version of the *Strickland* analysis. *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 524 (4th Cir. 2016); *see also Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998) (stating that counsel may determine "what pre-trial motions should be filed" without obtaining the defendant's consent as a matter of trial strategy). First, under the deficient performance prong of *Strickland*, a petitioner must show that an unfiled motion to suppress would have had "some substance." *Grueninger*, 813 F.3d at 524–25 ("[I]t is enough to call into question counsel's performance that an unfiled motion would have had 'some substance.'" (quoting *Tice v. Johnson*, 647 F.3d 87, 104 (4th Cir. 2011))). Second, to satisfy the prejudice prong, the petitioner must show "both (1) that the [suppression] motion was meritorious and likely would have been granted, and (2) a reasonable probability that granting the motion would have affected the outcome of his trial." *Id.* at 525 (citations omitted).

Here, the Court finds that Mr. Hardy fails to meet the prejudice prong, as required under *Strickland*, because he has not provided sufficient evidence that the motion to suppress was meritorious and likely would have been granted. *See id.* A defendant is entitled to the suppression of any incriminating statements if law enforcement officers failed to provide *Miranda* warnings prior to a custodial

interrogation. *See United States v. Colonna*, 511 F.3d 431, 434–35 (4th Cir. 2007). Mr. Hardy claims that his post-arrest confession should have been suppressed because the detectives did not provide him with the requisite *Miranda* warnings prior to his questioning. Mem. Supp. Mot. Vacate at 6, ECF No. 117. However, as discussed in the preceding Section IV(A), defense counsel conducted a thorough investigation and reasonably determined that any challenge premised on a lack of *Miranda* warnings or the involuntary nature of Mr. Hardy's confession would have been frivolous.

First, the outcome of the proposed motion to suppress would likely depend, in part, on a credibility determination from this Court. Defense counsel indicated that Detectives Cline and Kempf assured her that Detective Kempf properly advised Mr. Hardy of his *Miranda* rights in Detective Cline's presence and understood that they would testify that Mr. Hardy waived such rights.[8] Tayman Aff. at 3–4, Resp. Opp'n, ECF No. 127-1. By contrast, Mr. Hardy argues that he never received any *Miranda* warnings, and it appears that his testimony would have formed the only piece of evidence to support his claim. Mem. Supp. Mot. Vacate at 6–8, ECF No. 117. Given Mr. Hardy's criminal record, which includes multiple felony convictions, and the jail call recordings where he considered having other individuals falsely take the blame for his charges, the Court finds that any motion to suppress would have involved significant concerns about the credibility of Mr. Hardy's testimony, particularly when

[8] Although the Court does not find a credibility determination necessary to decide the issue of prejudice, the Court notes that it observed both detectives' testimonies, which included substantial discussion on Detective Kempf's advisement of Mr. Hardy's *Miranda* rights and Mr. Hardy's waiver of those rights, during trial and found both detectives credible.

compared to the testimonies of two experienced detectives. *See Scott v. United States*, No. 2:13cr164, 2018 WL 1545586, at *5 (E.D. Va. Mar. 29, 2018) (finding without a hearing that defendant could not show that the proposed motion to suppress defendant's confession was "meritorious and likely would have been granted" given agent's anticipated testimony that the defendant received *Miranda* warnings, which directly contradicted defendant's sole basis for suppression—his own testimony); *United States v. Wilson*, 146 F. Supp. 3d 472, 478–79 (E.D.N.Y. 2015) (finding without a hearing that defense counsel's decision to not file a motion to suppress defendant's confession did not prejudice defendant given the agent's trial testimony that defendant received *Miranda* warnings and knowingly waived such rights); *see also United States v. Mason*, 774 F.3d 824, 830 (4th Cir. 2014) ("We have consistently made clear that we do not penalize attorneys for failing to bring novel or long-shot contentions.").

Second, outside of any potential testimony, the evidence does not suggest that Mr. Hardy's confession was involuntary or that officers applied undue pressure in any way. Defense counsel evaluated the audio and video records of Mr. Hardy's confession and also reached this conclusion. Tayman Aff. at 4, Resp. Opp'n, ECF No. 127-1. The recordings showed that the detectives wanted Mr. Hardy to cooperate, and Mr. Hardy expressed interest in the benefits of cooperation. *Id.* Mr. Hardy also received food, drinks, and medical care during the custodial interview. *Id.* When Mr. Hardy backtracked on his prior consent to a phone search and wrote that his consent was "under duress," the detectives declined to open his phone. *Id.* at 5. Additionally, Mr. Hardy has had extensive contact with the criminal legal system, including a 2009

federal conviction, which suggests a familiarity with his constitutional rights. *Id.* However, at no point during the interview did Mr. Hardy indicate that he wanted to stop the interview nor express that he wanted an attorney. *Id.* Based on the totality of the evidence, the Court does not find it likely that the motion to suppress would have been granted and finds that defense counsel reasonably reached this conclusion as well after extensive investigation of the facts and law. *See* Tayman Aff. at 6, Resp. Opp'n, ECF No. 127-1.

Moreover, defense counsel indicates that she had advised Mr. Hardy of her assessment that there was no non-frivolous basis for filing a motion to suppress and Mr. Hardy had no objection to this decision. Tayman Aff. at 6, Resp. Opp'n, ECF No. 127-1. She attests that Mr. Hardy did not raise any concern that he had not been advised of his *Miranda* rights until the middle of trial when the detectives indicated during cross-examination that they purposely did not record the *Miranda* warnings. *Id.* Mr. Hardy does not dispute the timing of these events in his filings. Given that Mr. Hardy did not even mention the alleged lack of *Miranda* warnings until the middle of trial, defense counsel would not have had any opportunity to file a motion to suppress. *See* Minute Entry, ECF No. 26 (listing a pretrial motions deadline of January 11, 2019—nearly two months prior to trial). These circumstances further bolster the Court's view that defense counsel provided effective assistance and that she reasonably determined, after extensive investigation, that any motion to suppress Mr. Hardy's confession would have been frivolous. *See Sexton*, 163 F.3d at 885. For these

reasons, the Court concludes that Mr. Hardy's ineffective assistance of counsel claim based on the failure to file a motion to suppress is without merit.

V. CONCLUSION

For the foregoing reasons, Mr. Hardy's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 116) is **DENIED**. The Court **DENIES** a certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure because Petitioner has failed to demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003). Petitioner is **ADVISED** that if he intends to appeal and seek a certificate of appealability from the United States Court of Appeals for the Fourth Circuit, he must forward a written Notice of Appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510 within sixty days from the date of this Order.

The Clerk is **REQUESTED** to forward a copy of this Order to Petitioner and the Assistant United States Attorney.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

June 5, 2024
Norfolk, Virginia