Exhibit A 1/6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CRIM ACTION NO. 4:16-CR-00215-1
	§	CIVIL ACTION NO. 4:22-CV-2961
	§	APPEAL NO. 24-20241
	§	
v.	§	
	§	
ERIC BEVERLY	§	

ORDER

The Fifth Circuit remanded this case to provide the District Court the opportunity to rule on Eric Beverly's "Testimony Under God" (Doc. No. 330), construed as a motion for reconsideration of the judgment under Federal Rule of Civil Procedure 59(e). *See* Doc. No. 334. Based on Beverly's representations in his motion that he did not receive the Memorandum and Recommendation of the Magistrate Judge before the Court adopted those findings, the Court ordered Beverly to file any objections to the Memorandum and Recommendation within fourteen days. *See* Doc. No. 345. In response, Beverly filed a motion to supplement his certificate of appealability (Doc. No. 346) and motion to object to all court filings and withdraw consent (Doc. No. 348). The motions are **DENIED** for the reasons that follow.

I. Motion for Reconsideration under Rule 59(e)

Rule 59(e) motions "serve the narrow purpose of allowing a party 'to correct manifest errors of law or fact or to present newly discovered evidence.'" *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citations omitted). Rule 59(e) cannot be

used to introduce evidence that was available prior to the entry of judgment, nor should it be employed to relitigate old issues, advance new theories or arguments that could have been raised before the entry of judgment, or secure a rehearing on the merits. *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004) (citation omitted); *see also Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) (holding that a party cannot attempt to obtain "a second bite at the apple" by presenting new theories or re-litigating old issues that were previously addressed). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Templet*, 367 F.3d at 479.

Liberally construed, Beverly argues that he did not receive the Memorandum and Recommendation of the Magistrate Judge, and, therefore, was unable to file objections. He asks the Court to reconsider his claims under *de novo* review. Doc. No. 330 at 2-3.

The Court reopened the time to file objections for fourteen additional days, and Beverly filed a motion to supplement a certificate of appealability and a motion to object to withdraw consent, but did not raise additional objections to the Memorandum and Recommendation other than those stated in his Rule 59(e) motion.[1]

Beverly primarily challenges the Magistrate Judge's treatment of his Fourth Amendment claim. *See* Doc. No. 330 at 2-3. He alleges that the Memorandum and Recommendation did not address that claim, and he further claims that the Magistrate was incorrect that the issue had already been litigated. Doc. No. 330 at 2. A careful review of

[1] Beverly separately seeks to supplement his request for a certificate of appealability on a claim regarding whether his underlying crime of armed federal bank robbery is a crime of violence, which is treated separately below.

the record and the Memorandum and Recommendation reflects that Beverly had full opportunity to present his Fourth Amendment claims on pre-trial motion and appeal, and the Fifth Circuit has already held that the Government's search of his cell phone data was permissible under the Fourth Amendment. *See* Doc. No. 323 at 14-16 (explaining that where, as here, the defendant had a "full and fair opportunity to litigate their Fourth Amendment claim in pre-trial proceedings and on direct appeal is subsequently barred from collateral review of a Fourth Amendment claim") (citing *United States v. Ishmael*, 343 F.3d 741, 742 (5th Cir. 2003)). The Court has carefully reviewed the record and the law and finds, on *de novo* review, that Beverly's Fourth Amendment claim is barred from collateral review because it has been litigated and decided by the Fifth Circuit.

Beverly does not otherwise raise any specific objections to the Memorandum and Recommendation of the Magistrate Judge; his other allegations are vague and conclusory. *See* Doc. No. 330 at 2-3. A party objecting to a Magistrate Judge's Report must specifically identify those findings to which he objects; a district judge need not consider frivolous, conclusory objections like the ones Beverly advances here. *See Nettles v. Wainwright*, 677 F.2d 404, 410 & n.8 (5th Cir. 1982) (*en banc*) (overruled on other grounds by *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996)). In addition, objections that simply rehash or mirror the underlying claims addressed in the Memorandum and Recommendation are not sufficient to entitle the party to *de novo* review. *See United States v. Morales*, 947 F.Supp.2d 166, 171 (D.P.R. 2013) ("Even though timely objections to a report and recommendation entitle the objecting party to *de novo* review of the findings,

'the district court should be spared the chore of traversing ground already plowed by the Magistrate.'") (internal citations omitted). Beverly does not show a manifest error of law or fact or present new evidence to show that the Court was wrong in adopting the Memorandum and Recommendation of the Magistrate Judge. He does not show that he is entitled to relief under Rule 59(e) or that a certificate of appealability is warranted in this case. Therefore, his motion for reconsideration (Doc. No. 330) must be **DENIED**.

II. Motion to Supplement Certificate of Appealability

In his motion to supplement his request for a certificate of appealability, Beverly cites a recent case from the United States Court of Appeals for the District of Columbia Circuit, *Burwell v. United States*, to argue that his conviction for carrying a firearm during a crime of violence should be vacated because that circuit recently held that federal armed robbery under 18 U.S.C. § 2113(a) is not a crime of violence under 18 U.S.C. § 924(c). 122 F.4th 984, 997 (D.C. Cir. 2024).

Beverly's argument is foreclosed by Fifth Circuit precedent in *United States v. Brewer*, 848 F.3d 711, 713–16 (5th Cir. 2017), and *United States v. Pervis*, 937 F.3d 546, 552–53 (5th Cir. 2019) (holding that § 2113(a) is a crime of violence under 18 U.S.C. § 924(c)(3)(A)). *See also United States v. Butler*, 949 F.3d 230, 234-36 (5th Cir. 2020) (holding that § 2113(a) is divisible as applied to the Armed Career Criminals Act). A panel in the Fifth Circuit is bound by circuit precedent and cannot overrule a prior panel's decision "in the absence of an intervening contrary or superseding decision by this court sitting *en banc* or by the United States Supreme Court." *Burge v. Parish of St. Tammany*,

187 F.3d 452, 466 (5th Cir. 1999). Where a party claims that an intervening Supreme Court decision overrules Fifth Circuit precedent, that decision must "unequivocally overrule prior precedent; mere illumination of a case is insufficient." *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) (internal quotation marks and citations omitted).

Beverly does not show that *Brewer*, *Pervis*, or *Butler* has been overruled. Instead, he argues that the Court should adopt the recent holding from the District of Columbia Circuit, but this Court is bound by Fifth Circuit precedent. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 377-78 (5th Cir. 2008). Therefore, Beverly does not show that he would be entitled to relief in the Fifth Circuit, and his motion to supplement his request for a certificate of appealability (Doc. No. 346) is **DENIED**.

III. Motion to Object to All Courts Reports, Orders, and Judgments

Beverly also filed a "Motion to Object to all Courts Reports, Orders, and Judgments [and] to Motion the Court to withdraw his Consent from Their Jurisdiction." Doc. No. 348 (emphases and capitalization in the original). Although not entirely clear, Beverly apparently argues that the Court lacks subject-matter and personal jurisdiction over him because he does not consent to that jurisdiction. *Id.* at 1. He "objects to all codes, rules, regulations, and orders" and contends that "all reports, judgments, and rulings [] are all void and unconstitutional." *Id.* at 2. He informs the Court that he withdraws his consent and maintains that the Court would need to prove consent and contractual obligation. *Id.* at 2-4. He purports to void all jurisdiction by withdrawing his consent and declares that this case is over and that the Court must "release the body." *Id.* at 5-6.

These claims are "indisputably meritless" and frivolous, having no basis in law. *Westfall v. Davis*, Civ. A. No. 7:18-cv-00023-BP, 2018 WL 24222058, at *2 (N.D. Tex. May 4, 2018) (explaining that a reliance on the Uniform Commercial Code or sovereign-citizen-type arguments to avoid prosecution and the court's jurisdiction is frivolous and routinely rejected by courts) (citing and discussing cases). Therefore, his motion to object and withdraw consent to jurisdiction is **DENIED**.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. Beverly's motion under Rule 59(e) (Doc. No. 330) is **DENIED**.
2. Beverly's motions to supplement his request for a certificate of appealability (Doc. No. 346) and to object and withdraw consent (Doc. No. 348) are **DENIED**.
3. All other pending motions, if any, are **DENIED**.
4. A certificate of appealability is **DENIED**.

The Clerk shall send a copy of this Order to the parties and shall return this case to the Fifth Circuit in Appeal No. 24-20241.

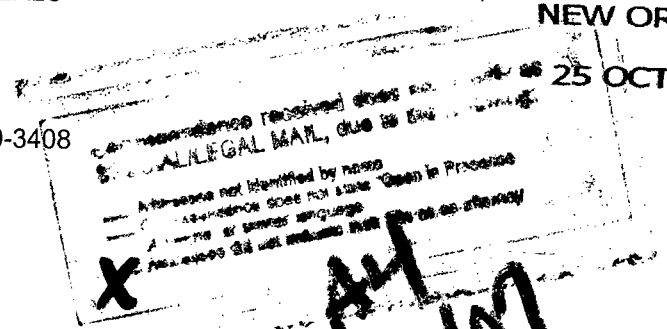
SIGNED on this 13th day of March 2025.

ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE

Exhibit B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
F. EDWARD HEBERT BUILDING
600 S. MAESTRI PLACE
NEW ORLEANS, LOUISIANA 70130-3408

OFFICIAL BUSINESS



NEW ORLEANS LA 700
quadient
25 OCT 2025 AM 10/24/2025
FIRST-CLASS MAIL
IMI
US POSTAGE $000.74
ZIP 70130
041M11471134

SPECIAL MAIL
Open only in the
presence of Inmate

Mr. Eric Beverly
#13934-479
USP Pollock
P.O. Box 2099
Pollock, LA 71467-2099

71457-209999

Case # 24-20241

24-20241

Mr. Eric Beverly
#13934-479
USP Pollock
P.O. Box 2099
Pollock, LA 71467-2099

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 23, 2025

Mr. Nathan Ochsner
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 24-20241 USA v. Beverly
USDC No. 4:22-CV-2961

Dear Mr. Ochsner,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: Rebecca Andry
Rebecca Andry, Deputy Clerk
504-310-7638

cc w/cncl:
Mr. Eric Beverly
Ms. Carmen Castillo Mitchell

United States Court of Appeals for the Fifth Circuit

No. 24-20241
CONSOLIDATED WITH
No. 25-20120

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ERIC BEVERLY,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC Nos. 4:22-CV-2961, 4:16-CR-215-1

ORDER:

Eric Beverly, federal prisoner # 13934-479, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, challenging his several bank robbery and firearm convictions, and the denial of his motion for reconsideration under Federal Rule of Civil Procedure 59(e). In his COA pleadings, Beverly contends that (i) the district court lacked jurisdiction over his case because, inter alia, he never consented to its jurisdiction or withdrew his consent and the district court failed to establish the requisites for an enforceable contract; (ii) his Fourth

Amendment rights were violated in connection with the Government's acquisition of certain cell-site location information that was used at trial; and (iii) his 18 U.S.C. § 2113(a) robbery convictions were, respectively, not crimes of violence that could be used to support his 18 U.S.C. § 924(c) convictions.

As a preliminary matter, Beverly fails to reprise any of the claims that he raised in his § 2255 motion and brief or challenge the district court's reasons for rejecting them. As such, those claims are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Additionally, because Beverly's claim that he should only have been sentenced for a single § 924(c) offense under *Hewitt v. United States*, 145 S. Ct. 2165 (2025), is raised for the first time in his COA pleadings, this court lacks jurisdiction to consider it. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

A COA may issue only if the movant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court denies relief on the merits, a movant must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies relief on procedural grounds, a COA should issue if a movant establishes, at least, that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Id.* Furthermore, because Beverly also seeks a COA to appeal the denial of his Rule 59(e) motion, he must show that reasonable jurists could conclude that the district court's denial of his motion was an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Beverly fails to meet the requisite standards. His motion for a COA therefore is DENIED.

EDITH H. JONES
United States Circuit Judge

10/23/2025	362	Order of USCA (copy) as to Eric Beverly ; USCA No. 24-20241. COA is DENIED,filed. (edg1) (Entered: 10/23/2025)

Never Recieved Mail of Actual copy.

Exhibit

C

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 16, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 24-20241 USA v. Beverly
USDC No. 4:22-CV-2961
USDC No. 4:22-CV-2961

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

Mr. Eric Beverly
Ms. Carmen Castillo Mitchell

United States Court of Appeals for the Fifth Circuit

No. 24-20241
CONSOLIDATED WITH
No. 25-20120

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ERIC BEVERLY,

Defendant—Appellant.

Appeals from the United States District Court
for the Southern District of Texas
USDC Nos. 4:22-CV-2961; 4:16-CR-215-1

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before JONES, RICHMAN, and RAMIREZ, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R.40 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active

service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERIC BEVERLY	§	
	§	
VS	§	CRIMINAL ACTION NO. H-16-215-1
	§	CIVIL ACTION NO. H-22-2961
UNITED STATES OF AMERICA	§	

OPINION AND ORDER ADOPTING
MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

Pending before the Court in the above referenced proceeding is Movant Eric Beverly's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Doc. 301); the United States' Response (Doc. 309); and Magistrate Judge Sheldon's Memorandum and Recommendation that the Court deny the § 2255 Motion and dismiss with prejudice the corresponding civil action. Also pending is Movant's Motion for rule 59(e) Reconsideration on Bond Pending Habeas Corpus (Doc. No. 320) and Movant's Motion of Habeas Corpus ad Subjiciendum (Doc. No. 322) and Motion to Compel Judgment Pursuant to Federal Rule of Civil Procedure Rule 12(c) (Doc. No. 324). No objections were filed to the Memorandum and Recommendation and the time for doing so has passed.

Standard of Review

Where no party objects to the Magistrate Judge's Memorandum and Recommendation, the Court is not required to perform a *de novo* review of the Magistrate Judge's determination, but need only review it to decide whether it is clearly erroneous or contrary to law. *Gamez v. United States*, No. SA-06-CR-401-XR, 2014 WL 2114043, at *2 (W.D. Tex. May 20, 2014) (citing *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989)). Once a defendant has been convicted and has exhausted or waived his- or her right to appeal, a Court may presume that he or she "stands fairly

and finally convicted." *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Therefore relief under § 2255 is limited to "transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996). The court's ability to reduce or modify a sentence of imprisonment once it has been imposed is restricted. *United States v. Lopez*, 26 F.3d 512, 515 (5th Cir. 1994) (per curiam). There are four grounds on which a defendant may move to vacate, set aside, or correct his or her sentence under § 2255: (1) "the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "the [district] court was without jurisdiction to impose such sentence"; (3) "the sentence was in excess of the maximum authorized by law"; and (4) the sentence was "otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "A defendant can challenge [his or her] conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude . . . and may not raise an issue for the first time on collateral review without showing both 'cause' for his[or her] procedural default and 'actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (citations omitted).

The Court has carefully reviewed the filings, the Magistrate Judge's Memorandum and Recommendation, and the applicable law and finds the Memorandum and Recommendation is not erroneous in its factual findings nor contrary to law. Accordingly, the Court hereby adopts the Magistrate Judge's Memorandum and Recommendation as its own.

Finally, under 28 U.S.C. § 2253(c)(1)(B), "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255." *See also* Fed. R. App. P. 22(b)(1) ("In a habeas corpus proceeding in which the detention complained of arises from . . . a 28 U.S.C. § 2255 proceeding, the

applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).").

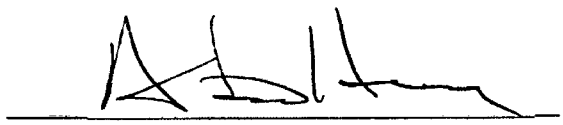
Furthermore, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his[or her] constitutional claims or that jurists could conclude the issue presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), *citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court denies a § 2255 motion on the merits, to warrant an certificate of appealability a movant must be able to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003), *citing Slack*, 529 U.S. at 484. A district court may deny a certificate of appealability *sua sponte*. *Haynes v. Quarterman*, 526 F.3d 189, 193 (5th Cir. 2008) (citing *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam)). Accordingly, it is hereby

ORDERED that the Movant Eric Beverly's § 2255 Motion is **DENIED**. It is further

ORDERED that Movant's Motion for rule 59(e) Reconsideration on Bond Pending Habeas Corpus (Doc. No. 320), Movant's Motion of Habeas Corpus ad Subjiciendum (Doc. No. 322) and Motion to Compel Judgment Pursuant to Federal Rule of Civil Procedure Rule 12(c) (Doc. No. 324) are hereby **DENIED as MOOT**. It is further

ORDERED that a certificate of appealability is **DENIED**.

SIGNED at Houston, Texas, this 13th day of May 2024.



ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERIC BEVERLY,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:22-CV-2961**
	§	
	§	**CRIMINAL ACTION NO. 4:16-CR-215-1**
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.		

MEMORANDUM AND RECOMMENDATION

Petitioner, Eric Beverly ("Petitioner"), has filed a motion *pro se* under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct his sentence. (Dkt. No. 301.) The United States of America ("Respondent") filed a response. (Dkt. No. 309.) Based on a thorough review of the motions, arguments, and relevant law, the Court[1] **RECOMMENDS** Petitioner's Motion be **DENIED**. The Court further **RECOMMENDS** that the corresponding civil action be **DISMISSED WITH PREJUDICE** and an order of final judgment be separately entered. Also pending before the Court is Petitioner's Motion for Rule 59(e) Reconsideration on Bond Pending Habeas Corpus and Petitioner's Motion of Habeas Corpus ad Subjiciendum. (Dkt. Nos. 320, 322.) The Court recommends Petitioner's Motions (Dkt. Nos. 320, 322) be **DENIED AS MOOT**.

[1] This motion was referred to the Undersigned Magistrate Judge on May 24, 2023, pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. (Dkt. No. 319.)

I. BACKGROUND

In 2014 and 2015, Petitioner was involved in a series of armed bank robberies. (Dkt. No. 93.) Petitioner was charged by a superseding indictment of fourteen counts arising from the armed bank robberies. (*Id.*) On February 26, 2020, at the conclusion of a jury trial, Petitioner was convicted of twelve counts including five counts of armed bank robbery (Counts 1S, 5S, 7S, 9S, and 13S), one count of attempted armed bank robbery (Count 11S), and six counts of brandishing a firearm during a crime of violence (Counts 2S, 6S, 8S, 10S, 12S, and 14S). (Dkt. Nos. 93, 254.) Petitioner was sentenced to imprisonment for a total of 504 months. (Dkt. No. 254 at 3.)

Petitioner filed an appeal to the Fifth Circuit Court of Appeals. (Dkt. No. 257.) The Fifth Circuit affirmed Petitioner's convictions and sentences. (Dkt. No. 297.) Petitioner filed a writ of certiorari, which was denied. (Dkt. No. 298.)

II. LEGAL STANDARDS

A. Section 2255

"Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence." *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001) (citing *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000)). "To obtain collateral relief under 28 U.S.C. § 2255, a defendant 'must clear a significantly higher hurdle' than the standard that would exist on direct appeal." *United States v. Henry*, No. H-12-453, 2014 WL 2815486, at *1 (S.D. Tex. June 23, 2014) (citing *United States v. Frady*, 456 U.S. 152, 166 (1982)). This "provides for relief 'for errors that occurred at trial or sentencing.'" *United States v. Sample*, No. H-16-219-2, 2020 WL 4042967, at *1 (S.D. Tex. July 17, 2020) (citation omitted).

"To prevail, [Petitioner] must show that: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the court lacked jurisdiction to impose the sentence;

(3) the sentence exceeded the maximum allowed by law; or (4) the sentence is otherwise subject to collateral attack." *United States v. Gibson*, No. H-12-600-1, 2021 WL 4295129, at *1 (S.D. Tex. Sept. 21, 2021) (citing *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995)). "Conclusory allegations do not state a claim for relief" under § 2255. *United States v. Williams*, No. H-03-221-S-11, 2014 WL 12825370, at *2 (S.D. Tex. Apr. 15, 2014). Further, "[i]ssues raised and rejected on direct appeal cannot be raised in a § 2255 motion." *Id.* (citing *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986)). "Any claims for relief that . . . could have [been] raised on direct appeal, but [were] not, are procedurally defaulted." *Gibson*, 2021 WL 4295129, at *4. "To obtain relief on these claims, [Petitioner] must show cause for his default and actual prejudice." *Id.*

The denial of a § 2255 motion cannot be considered on appeal unless the district court or the appeals court issues a certificate of appealability ("COA"). *United States v. Fields*, 761 F.3d 443, 451 (5th Cir. 2014), *as revised* (Sept. 2, 2014). To obtain a COA, Petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *United States v. Fisch*, No. H-11-722-1, 2021 WL 2396435, at *11 (S.D. Tex. Mar. 12, 2021), *certificate of appealability denied*, No. 21-20301, 2022 WL 2073087 (5th Cir. Apr. 6, 2022).

B. Pro Se

Petitioner proceeds *pro se* and his pleadings are construed liberally and reviewed under a less stringent standard than those drafted by an attorney. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (indicating that "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers"). "[H]owever, mere conclusory

allegations on a critical issue are insufficient to raise a constitutional issue." *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition [] unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

III. DISCUSSION

Petitioner brings forth four grounds for relief under § 2255. (Dkt. No. 301.) First, Petitioner claims ineffective assistance of counsel; second, the judgment is void due to constitutional violations; third, constitutional violations caused a fundamental miscarriage of justice; fourth, the Court lacks subject matter jurisdiction. (*Id.* at 4–8.) Petitioner also raises two supplemental claims arguing that character evidence was used against him and that armed bank robbery is not a crime of violence. (Dkt. Nos. 306, 315.) Respondent requests that the Court deny Petitioner's § 2255 motion because the record demonstrates that no relief is appropriate. (Dkt. No. 309.)

A. Ineffective Assistance of Counsel Claim

Petitioner sets forth multiple ineffective assistance of counsel claims that can be broken down into six main arguments, including (1) counsel failed to properly litigate illegally obtained cell-site location information; (2) counsel failed to file proper motions and appeals on behalf of Petitioner; (3) counsel failed to adequately cross-examine Respondent's witnesses; (4) counsel failed to make a claim under *Rehaif*;[2] (5) counsel made Petitioner sign documents that helped

[2] The court in *Rehaif v. United States* held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. 2191, 2200 (2019).

Respondent; and (6) counsel lied about evidence in Respondent's possession. (Dkt. No. 301 at 13; Dkt. No. 302 at 15–18.)

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The first prong of the *Strickland* test, the performance prong, requires a petitioner to demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. "The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances." *Id.* "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The Court views counsel's performance with "the strong presumption counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. The second prong, the prejudice prong, "asks whether it is reasonably likely the result would have been different," if not for counsel's deficient performance when assessing prejudice to the defendant. *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "A court need not address both components of the inquiry if the defendant makes an insufficient showing on one." *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) (citing *Strickland*, 466 U.S. at 697). Additionally, "counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990).

i. Counsel's Failure to Properly Litigate Illegally Obtained Cell-Site Location Information

Petitioner claims that counsel failed to instruct the jury that cell phone data was obtained illegally, and that Respondent lied on supporting affidavits to establish probable cause to receive a search warrant for Petitioner's cell-phone data. (Dkt. No. 301 at 13.)

"On July 8, 2015, from a magistrate judge, [Respondent] obtained an order allowing it to subpoena the cell-site location data of telephones that it thought belonged to [Petitioner] under § 2703(d) of the Stored Communications Act." *United States v. Beverly*, No. CR H-16-215-1, 2018 WL 5297817 (S.D. Tex. Oct. 25, 2018), *rev'd*, 943 F.3d 225 (5th Cir. 2019). Then on "June 22, 2018, less than two months before the start of [Petitioner's] federal trial, the Supreme Court handed down its decision in *Carpenter*, in which the Court held that obtaining [cell-site location information] constituted a 'search' under the Fourth Amendment and therefore required a valid warrant supported by probable cause." *Beverly*, 943 at 231 (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2220–21 (2018)). Respondent applied for and obtained a search warrant for Petitioner's cell phone information the same day that the *Carpenter* decision was handed down. *Id.* Petitioner moved to suppress the search warrant and the cell-site information gathered from the § 2703(d) order. *Id.* United States District Judge Lynn N. Hughes granted the motion to suppress, and the Fifth Circuit reversed the decision. *Id.* at 232–39 (holding that the cell-site location information obtained by the § 2703(d) order and the subsequent search warrant is admissible under the "good faith" exception of the exclusionary rule and Respondent's failure to disclose that it had previously obtained sell-site location information without a search warrant was not a material omission).

Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness in failing to instruct the jury that cell phone data was illegally obtained. The Fifth Circuit held that the "good faith" exception to the exclusionary rule applied to the cell-site location information that was obtained by the § 2703(d) order and subsequent search warrant. *Id.* at 235–38. It would be erroneous for counsel to instruct the jury that the cell-site location information was illegally obtained in light of the Fifth Circuit decision. Additionally, Petitioner fails to demonstrate

that Respondent lied on supporting affidavits to establish probable cause to receive a search warrant for Petitioner's cell phone data. The Fifth Circuit held that Respondent's failure to disclose that it had previously obtained sell-site location information without a search warrant was not a material omission. *Id.* at 237. As such, Petitioner's ineffective assistance of counsel claim fails. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

ii. Counsel's Failure to File Proper Motions and Appeals on Behalf of Petitioner

Petitioner claims that counsel failed to file motions and appeals on Petitioner's behalf, resulting in ineffective assistance of counsel. (Dkt. No. 301 at 13.) Petitioner argues that counsel failed to (1) file a motion to dismiss after the suppression hearing; (2) file a motion for judgment of acquittal for insufficient evidence at the close of trial; and (3) timely appeal the Fifth Circuit decision in *Beverly*, 943 F.3d 225. (*Id.*)

1. Motion to Dismiss After the Suppression Hearing

Petitioner claims that counsel's failure to file a motion to dismiss after the suppression hearing due to "heavily suppressed evidence" constitutes ineffective assistance of counsel. (*Id.*) The search warrant and order were rendered void and thus the cell-site location information was suppressed on October 25, 2018 by Judge Hughes. (Dkt. No. 131.) However, the judgment for suppression was reversed and the cell-site location information was admitted. (Dkt. No. 193.) Even with the suppression of the cell-site location information, it would not merit a dismissal of the case because Respondent had other evidence of Petitioner's involvement in the series of armed bank robberies, including bank security video footage and the statements of multiple co-conspirators. (Dkt. No. 309 at 15.) It would be futile for counsel to file a motion to dismiss after the initial suppression of the cell-site location information because Respondent filed an appeal one day after

the order on suppression was entered and other evidence showed Petitioner's involvement in the armed bank robberies. (Dkt. Nos. 131–132.) As such, Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness in failing to file a motion to dismiss after the suppression hearing. Thus, Petitioner's ineffective assistance of counsel claim fails. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

2. Motion for Judgment of Acquittal for Insufficient Evidence at the Close of Trial

Petitioner claims that counsel's failure to file a motion for a judgment of acquittal for insufficient evidence at the close of trial constitutes ineffective assistance of counsel. (Dkt. No. 301 at 13; Dkt. No. 302 at 20; Dkt. No. 314 at 6.) "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). "In a sufficiency challenge, the question [is] . . . 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Ansari*, 48 F.4th 393, 403 (5th Cir. 2022) (quoting *United States v. del Carpio Frescas*, 932 F.3d 324, 328 (5th Cir. 2019)).

Respondent provided sufficient evidence to support Petitioner's conviction, including identification of Petitioner in bank surveillance videos of the armed robberies, the testimony of two of Petitioner's accomplices stating he planned and committed the armed bank robberies, and text messages sent by Petitioner that corroborated the testimony. *Beverly*, 857 F. App'x at 808. In addition, the Fifth Circuit affirmed the convictions and held Petitioner failed to demonstrate a miscarriage of justice in light of the testimony and evidence. *Id.* The evidence of Petitioner's

involvement was sufficient to support his conviction and a motion for a judgment of acquittal would have been futile. *Id.* As such, Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness.

Even so, Petitioner fails to support his ineffective assistance of counsel claim by demonstrating prejudice. (Dkt. No. 301 at 13; Dkt. No. 302 at 20; Dkt. No. 314 at 6.) Petitioner argues that counsel's failure to file a motion for judgment of acquittal upon request constitutes ineffective assistance of counsel by erroneously relying upon *United States v. Peak*. (Dkt. No. 314 at 6.) *See* 992 F.2d 39, 41–42 (4th Cir. 1993) ("[F]ailure to file a notice of appeal when so instructed by the client constitutes ineffective assistance of counsel for purposes of § 2255."). Unlike *Peak*, Petitioner is not arguing that counsel failed to file a direct appeal, but rather that counsel failed to file a motion for a judgment of acquittal at the close of trial. (Dkt. No. 301 at 13; Dkt. No. 302 at 20; Dkt. No. 314 at 6.) Absent proof that counsel was deficient or that Petitioner was prejudiced, Petitioner's ineffective assistance of counsel claim fails.

3. Fifth Circuit Appeal

Petitioner claims that counsel failed to timely appeal the Fifth Circuit decision in *Beverly*, 943 F.3d 225. "[A] petition for a writ of certiorari to review a judgment in any case . . . entered by a . . . United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." U.S. SUP. CT. R. 13(1). Here, the Fifth Circuit decision was entered on November 14, 2020, the petition for writ of certiorari was filed on February 12, 2020, and the petition was denied on March 23, 2020. *See generally Beverly*, 943 F.3d 225, *cert. denied*, 140 S. Ct. 2550 (2020) (No. 19-7682). The petition for writ of certiorari was timely filed and Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness. *Id.* Thus, Petitioner's ineffective assistance of counsel claim fails.

iii. Counsel's Failure to Adequately Cross-Examine Respondent's Witnesses

Petitioner claims that counsel failed to adequately cross-examine the cell phone expert, Mark Sedwick ("Sedwick"), and failed to introduce inconsistencies in his Co-Defendant's, Gregory Babers ("Babers"), testimony. (Dkt. Nos. 301 at 13; Dkt. No. 302 at 19–20.)

1. Sedwick's Testimony

Petitioner claims that counsel failed to adequately cross-examine Sedwick "on why he [did not] put the charts together" because "Sedwick never said the (CAST) team plotted the charts but [Respondent] did." (Dkt. No. 302 at 19.) However, the record contradicts Petitioner's assertion because, during direct examination of Sedwick, he stated

> What I did is I took the cell phone records that I was -- that were provided to me by the prosecution for all those phone numbers. And then, I took the concurrent cell phone list of the cell towers, the cell tower list for both AT&T and T-Mobile. And then, I took and plotted on the map the location of all the cell towers and then utilized the records to show the usage of the phones and put symbology on the maps to show the approximate location and the approximate coverage area of the cell towers.

(Dkt. No. 273 at 66.) Sedwick testified that he took the cell tower list and plotted the locations on the map himself. (*Id.*) Respondent simply provided the cell phone records to Sedwick to plot the locations on a map. (*Id.*) Petitioner's claim that counsel did not adequately cross-examine Sedwick regarding the creation of charts or maps of cell tower locations is misplaced because the record shows that Sedwick plotted the locations himself. (*Id.*) As such, Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness and Petitioner's ineffective assistance of counsel claim fails. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

2. Babers' Testimony

Petitioner claims that counsel failed to introduce evidence and challenge inconsistencies in Babers' testimony. (Dkt. No. 302 at 19–20.) The inconsistency that Petitioner points to is Babers' statement that he did not participate in the April 24, 2015 robbery because he was at work and that Sedwick's cell tower location charts disprove Babers' alibi. (*Id.*) Further, Petitioner argues that counsel was deficient by not cross-examining Babers regarding his false alibi, resulting in the jury being unable to weigh Babers' credibility. (*Id.*)

The record contradicts Petitioner's claim that the jury was unable to weigh Babers' credibility. (Dkt. No. 273.) Babers testified that he was not involved in the April 24, 2015 robbery at Chasewood Bank because he was at work. (*Id.* at 28.) On cross-examination, counsel asked Babers where he was during the April 24, 2015 robbery and Babers responded that he was working for his father. (*Id.* at 59.) After Babers testified, Sedwick testified that Babers cell phone activity was in the area of the April 24, 2015 bank robbery. (*Id.* at 80–81.) On cross-examination of Sedwick, counsel made clear that the phone associated with Babers was in the area of the April 24, 2015 bank robbery. (*Id.* at 96–97.) Moreover, counsel reiterated the inconsistencies in Babers' testimony in his closing statement by stating, "as to Mr. Babers, 'I was at work with my dad on the 24th,' but his phone is there. How do you explain that?" (*Id.* at 147.) Not only did counsel point out the April 24, 2015 inconsistency, he noted multiple inconsistencies between Babers' testimony and Co-Defendant Jeremy Davis. (*Id.* at 145–47.) Once counsel presents the inconsistencies in witness testimony, it is the jury that "retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses." *United States v. Abdallah*, 629 F. Supp. 2d 699, 719 (S.D. Tex. 2009) (citing *United States v. Loe*, 262 F.3d 427, 432 (5th Cir. 2001)).

Petitioner's claim that counsel was deficient for failing to challenge the inconsistencies in Babers' testimony is an inaccurate reflection of the record. As such, Petitioner fails to demonstrate that counsel's conduct fell below an objective standard of reasonableness and Petitioner's ineffective assistance of counsel claim fails. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

iv. Counsel's Failure to Make a Claim Under *Rehaif*

Petitioner argues that counsel's failure to make a claim under *Rehaif* constitutes ineffective assistance of counsel. (Dkt. No. 302 at 16–18.) The court in *Rehaif* held "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

Here, Petitioner was convicted of six counts of "brandishing a firearm during a crime of violence" under 18 U.S.C. § 924(c)(1)(A)(ii). (Dkt. No. 254 at 1–2.) *Rehaif* is not controlling because it would require Respondent to prove that Petitioner knew he possessed a firearm and that he belonged to a category of persons barred from possessing a firearm if prosecuted under 18 U.S.C. § 922(g) or § 924(a)(2), in which Petitioner has not been prosecuted. (*Id.*) As such, Petitioner's ineffective assistance of counsel claim fails because *Rehaif* is not applicable here and it would be futile for counsel to raise this issue. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

v. Counsel Made Petitioner Sign Documents That Helped Respondent

Petitioner claims that counsel made him sign documents that were supposed to help Petitioner, but instead helped Respondent. (Dkt. No. 301 at 13; Dkt. No. 314 at 5.) However, Petitioner neither states which documents he is referring to nor does he explain how counsel "made him" sign the documents. (*Id.*) "Conclusory allegations do not state a claim for relief" under § 2255. *Williams*, 2014 WL 12825370, at *2. Petitioner fails to meet his burden in proving that counsel was deficient absent evidence supporting his claim. Thus, Petitioner's ineffective assistance of counsel claim fails. *See Armstead*, 37 F.3d at 210 (citing *Strickland*, 466 U.S. at 697) ("A court need not address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

vi. Counsel Lied About Evidence in Respondent's Possession

Petitioner claims that counsel lied to him about evidence that Respondent had in their possession. (Dkt. No. 301 at 13; Dkt. No. 314 at 4–5.) However, the only evidence that Petitioner presents is that Respondent "defrauded [him] by linking him to a[n] (SUV) infinity truck . . . [and] this is evidence [counsel] could have used to prove his innocence" because Petitioner never owned an SUV. (*Id.*) Even so, Petitioner fails to meet his burden in proving that this prejudiced Petitioner because there is ample evidence of his participation in the armed bank robberies regardless of the vehicle evidence. *Beverly*, 857 F. App'x at 808. Respondent provided sufficient evidence including identification of Petitioner in bank surveillance videos of the armed robberies, the testimony of two of Petitioner's accomplices stating he planned and committed the armed bank robberies, and text messages sent by Petitioner that corroborated the testimony. *Id.* Although Petitioner argues that the vehicle evidence would "prove his innocence," he has not met his burden in showing how

it prejudiced him, especially with the other evidence stacked against him. (Dkt. No. 314 at 4.) Thus, Petitioner's ineffective assistance of counsel claim fails.

B. Void Judgment Claim

Petitioner claims that the judgment is void because Respondent committed gross negligence in applying for a search warrant, Respondent lied under oath, which denied Petitioner of a fair proceeding under the Due Process Clause, and Respondent was unreasonable, which prejudiced Petitioner. (Dkt. No. 301 at 14; Dkt. No. 302 at 20–21.) Petitioner's entire claim that the judgment is void rests upon his notion that the search warrant for cell-site location information was invalid and thus, cell-site location information presented at his trial violated his Fourth Amendment. (*Id.*)

Petitioner erroneously relies upon *Riley v. Gray*. (Dkt. No. 302 at 21.) *See* 674 F.2d 522 (6th Cir. 1982) ("[F]ederal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and unforeseeable application of a procedural rule which prevents state court consideration of the merits of the claim."). However, a defendant who had a full and fair opportunity to litigate their Fourth Amendment claim in pre-trial proceedings and on direct appeal is subsequently barred from collateral review of a Fourth Amendment claim. *United States v. Ishmael*, 343 F.3d 741, 742 (5th Cir. 2003). An opportunity for full and fair litigation plainly means "an opportunity" in which the "state provides the process whereby a defendant can obtain full and fair litigation." *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002). "[R]eview of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice." *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998).

Here, the search warrant issue was litigated on direct appeal. *Beverly*, 943 F.3d 225. On appeal, the Fifth Circuit held that the cell-site location information obtained by the § 2703(d) order and the subsequent search warrant is admissible under the "good faith" exception of the exclusionary rule and Respondent's failure to disclose that it had previously obtained cell-site location information without a search warrant was not a material omission. *Id.* at 235–38. Since the search warrant issue was already addressed on direct appeal and Petitioner was given a full and fair opportunity to litigate this issue, Petitioner cannot raise his Fourth Amendment issue in this § 2255 motion absent a showing of cause and prejudice. Thus, Petitioner's claim that the judgment is void fails.

C. Fundamental Miscarriage of Justice Claim

Petitioner claims that there was a fundamental miscarriage of justice based upon three arguments: (1) the search warrant was illegally obtained; (2) Respondent fixed the grand jury in the superseding indictment; and (3) Respondent suppressed exculpatory evidence. (Dkt. No. 301 at 14; Dkt. No. 302 at 21–24; Dkt. No. 314 at 8.)

i. Illegally Obtained Search Warrant

Petitioner claims that the search warrant was illegally obtained because: (1) Respondent applied for a warrant with evidence obtained without a warrant; (2) Respondent falsified a supporting affidavit to use evidence at trial; (3) Respondent violated Petitioner's constitutional rights, the Due Process Clause, and civil rights; (4) Respondent lied about having 2014 cell-phone evidence; and (5) Respondent introduced illegally obtained evidence. (Dkt. No. 301 at 14; Dkt. No. 302 at 21–24.)

A defendant who had a full and fair opportunity to litigate their Fourth Amendment claim in pre-trial proceedings and on direct appeal is subsequently barred from collateral review of a

Fourth Amendment claim. *Ishmael*, 343 F.3d at 742. An opportunity for full and fair litigation plainly means "an opportunity" in which the "state provides the process whereby a defendant can obtain full and fair litigation." *Janecka*, 301 F.3d at 320. "[R]eview of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice." *Cervantes*, 132 F.3d at 1109.

Here, the search warrant issues were litigated on direct appeal. *Beverly*, 943 F.3d 225. On appeal, the Fifth Circuit held that the cell-site location information obtained by the § 2703(d) order and the subsequent search warrant is admissible under the "good faith" exception of the exclusionary rule and Respondent's failure to disclose that it had previously obtained cell-site location information without a search warrant was not a material omission. *Id.* at 235–38. Since the search warrant issue was already addressed on direct appeal and Petitioner was given a full and fair opportunity to litigate this issue, Petitioner cannot raise his Fourth Amendment issue in this § 2255 motion absent a showing of cause and prejudice. (Dkt. No. 301 at 14; Dkt. No. 302 at 21–24.) *Beverly*, 943 F.3d 225. Thus, Petitioner's claim that there was a fundamental miscarriage of justice fails.

ii. Respondent Fixed the Grand Jury in the Superseding Indictment

Petitioner claims that Respondent fixed the grand jury in the superseding indictment, which resulted in a fundamental miscarriage of justice. (Dkt. No. 301 at 14; Dkt. No. 314 at 8.) Petitioner argues that there was grand jury fixing in the superseding indictment because it was "outside of the Houston Federal Court [and] was in a different jurisdiction." (Dkt. No. 314 at 8.) "Conclusory allegations do not state a claim for relief" under § 2255. *Williams*, 2014 WL 12825370, at *2. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a

critical issue in his pro se petition [] unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross*, 694 F.2d at 1011. Petitioner provides no support for his claim, and absent any supporting evidence, there is no relief available for him under § 2255. (Dkt. No. 301 at 14; Dkt. No. 314 at 8.) Thus, Petitioner's claim fails.

iii. Respondent Suppressed Exculpatory Evidence

Petitioner claims that Respondent suppressed exculpatory evidence. (Dkt. No. 301 at 14.) "Conclusory allegations do not state a claim for relief" under § 2255. *Williams*, 2014 WL 12825370, at *2. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition [] unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross*, 694 F.2d at 1011. Petitioner's claim is a conclusory allegation because he fails to state what exculpatory evidence was suppressed. (Dkt. No. 301 at 14.) Absent supporting evidence, there is no relief available for him under § 2255. (*Id.*) Thus, Petitioner's claim fails.

D. Subject Matter Jurisdiction Claim

Petitioner claims that the Court lacks subject matter jurisdiction because: (1) Respondent feigned the warrant; (2) Respondent used fabricated evidence at trial; (3) Respondent introduced inconsistent and irreconcilable evidence on counts nine and ten; (4) Respondent's cell-phone evidence was insufficient; and (5) Respondent's 2703(d) order was void. (Dkt. No. 301 at 15.)

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231. Petitioner has been charged and convicted under 18 U.S.C. §§ 2113(d) and 924(c)(1)(A)(ii), which gives this Court subject matter jurisdiction over Petitioner's action. (Dkt. No. 254.) Although Petitioner argues that the Court lacks subject matter jurisdiction, he does not offer any evidence to

support this notion. (Dkt. No. 301 at 15; Dkt. No. 302 at 24–26.) Rather, Petitioner restates his argument that the search warrant was illegally obtained and that prosecutorial misconduct warrants the Court losing subject matter jurisdiction. (*Id.*) As already established, the cell-site location information obtained by the § 2703(d) order and the subsequent search warrant was admissible under the "good faith" exception of the exclusionary rule and Respondent's failure to disclose that it had previously obtained cell-site location information without a search warrant was not a material omission. *Beverly*, 943 at 232–39. Petitioner fails to prove that the Court lacks subject matter jurisdiction and thus, Petitioner's claim fails.

E. Supplemental Claims

i. Character Evidence

Petitioner claims that "Exhibits 1, 2, 3, 4, 5" contain character evidence, violating his constitutional rights. (Dkt. No. 306 at 9–10.) Petitioner states that the character evidence "will show the government['s] personality traits and propensities, praiseworthy and blameworthy nature, [and] evidence of personal moral standard in the United States Court Community." (*Id.*) Further, Petitioner argues that the "[e]xhibits point out newly discovered evidence that ha[s] not been looked at in the light of character evidence." (*Id.*)

"[M]ere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *Pineda*, 988 F.2d at 23. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition [] unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross,* 694 F.2d at 1011. "[R]eview of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice." *Cervantes*, 132 F.3d at 1109.

Here, Petitioner claims that "Exhibits 1, 2, 3, 4, 5" contain character evidence. (Dkt. No. 306 at 9–10.) However, Petitioner fails to describe which exhibits he is referencing. (*Id.*) In an effort to liberally construe his pleading, the Court will analyze the five exhibits that are attached to the memorandum in support of his § 2255 motion. (Dkt. No. 302-1.) Petitioner's Exhibit One is a copy of Judge Hughes' Order granting suppression of Petitioner's cell phone data. (Dkt. No. 302-1 at 1–3.) Petitioner's Exhibit Two is a copy of the Fifth Circuit's reversal of the order granting suppression of Petitioner's cell phone data. (Dkt. No. 302-1 at 4–7.) Petitioner's Exhibit Three is a copy of the Fifth Circuit's Order affirming Petitioner's judgment and sentence. (Dkt. No. 302-1 at 8–10.) Petitioner's Exhibit Four is a copy of a page from Respondent's brief from *Beverly*, 856 F. App'x 807. (Dkt. No. 302-1 at 11.) Petitioner's Exhibit Five is a copy of a page from Petitioner's Rule 60(b) motion. (*Id.* at 12.)

The five exhibits do not contain character evidence and Petitioner does not cite any references to character evidence. (Dkt. No. 302-1; Dkt. No. 306 at 9–10.) Additionally, Petitioner is barred from asserting an evidentiary claim on collateral appeal because he did not raise it on direct appeal and neglected to prove how the "character evidence" gives rise to cause or prejudice. (Dkt. No. 306 at 9–10.) As such, Petitioner's character evidence claim is meritless and procedurally defaulted.

ii. Crime of Violence

Petitioner claims that aiding and abetting in armed bank robbery under 18 U.S.C. § 2113(a) and (d) is not a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). (Dkt. No. 315.)

A "crime of violence" is defined as an offense that is a felony and either "has an element the use, attempted use, or threatened use of physical force against the person or property of another" or "that is by nature, involves a substantial risk that physical force against the person

property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). The former is known as the elements clause while the latter is the residual clause. *United States v. Hill*, 63 F.4th 335, 362–63 (5th Cir. 2023). The residual clause has been rendered "unconstitutionally vague." *Id.* Armed robbery under 18 U.S.C. § 2113(a) is a crime of violence because robbery can be committed "by force and violence, or by intimidation" under the elements clause. *United States v. Pervis*, 937 F.3d 546, 552 (5th Cir. 2019); *United States v. Kieffer*, 991 F.3d 630, 637 (5th Cir. 2021).

Petitioner erroneously relies upon *Johnson v. United States*. (Dkt. No. 315); *See* 576 U.S. 591, 606 (2015) (holding "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process"). *Johnson* is not controlling because the court held that the residual clause of the Armed Career Criminal Act was vague and, therefore, unconstitutional. *Johnson,* 576 U.S. at 606. Here, the residual clause is irrelevant because the crime of armed bank robbery under 18 U.S.C. § 2113(a) and (d) has consistently been held to be a crime of violence under the elements clause. *Pervis*, 937 F.3d at 552; *Kieffer*, 991 F.3d at 637. Thus, the Court correctly used armed bank robbery as a predicate offense for a conviction of 18 U.S.C. § 924(c) and Petitioner's claim fails.

F. Certificate of Appealability

Petitioner's § 2255 motion is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2253. A COA is required before an appeal may proceed. *See Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) (noting that actions filed under either 28 U.S.C. § 2254 or § 2255 require a certificate of appealability). A COA will not be issued unless the defendant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires Petitioner to demonstrate "that reasonable jurists would find

the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

This Court has carefully reviewed the record and found that Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner is not entitled to a COA because reasonable jurists would not debate that the § 2255 motion should have been resolved in a different manner or that the issues presented were adequate to proceed forward. The Court recommends that the corresponding civil action be dismissed with prejudice and an order of final judgment be separately entered.

IV. CONCLUSION

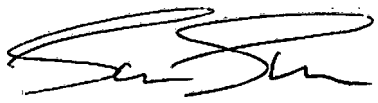
Based on the foregoing, the Court **RECOMMENDS**:

1) Petitioner's § 2255 Motion to Vacate (Dkt. No. 301) be **DENIED**,
2) Petitioner's Motion for Rule 59(e) Reconsideration on Bond Pending Habeas Corpus (Dkt. No. 320.) be **DENIED AS MOOT**,
3) Petitioner's Motion of Habeas Corpus ad Subjiciendum (Dkt. No. 322) be **DENIED AS MOOT**, and
4) A certificate of appealability be **DENIED**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the Undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas on October 24, 2023.



Sam S. Sheldon
United States Magistrate Judge