

No. 26-

IN THE
Supreme Court of the United States

JASON M. SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2026

QUESTION PRESENTED

Petitioner presents the following question for review:

Where a criminal defendant provides competent evidence that trial counsel omitted to raise a meritorious issue in suppression of evidence that, if raised, would have made acquittal reasonably probable, does § 2255 require the court to order an evidentiary hearing?

When a Court of Appeals denies an application for certificate of appealability, is it obligated to explain the basis for its decision on sufficient detail to allow for meaningful appellate review?

PARTIES TO THE PROCEEDING

Petitioner Jason M. Smith and the United States of America are parties to the proceeding.

RELATED CASES

Jason M. Smith was convicted and sentenced in *United States v. Jason M. Smith*, Case No. 1:15-cr-00002-WMS-JJM (W.D.N.Y.), by a *Judgment in a Criminal Case* (Dkt. 61) entered February 7, 2017.

His conviction was upheld in *United States v. Smith*, Case No. 17-508 (2d Cir.) in a *Summary Order and Judgment* (Dkt. 90) entered April 25, 2018. The same court denied rehearing *en banc* by an *Order* (Dkt. 102), entered June 26, 2018.

This Court denied Mr. Smith's writ of certiorari in *Jason M. Smith v. United States*, Case No. 18-6030, on October 15, 2018.

Mr. Smith's *Petition to Vacate, Set Aside, or Correct Sentence By A Person in Custody Pursuant to 28 U.S.C. § 2255* was denied in *Jason M. Smith v. United States*, Case No. 1:19-cv-1365S (W.D.N.Y.) by a Decision and Order (Dkt. 88), entered September 16, 2021.

Mr. Smith's appeal of the September 16, 2021, denial was granted, and the case remanded in *Jason M. Smith v. United States*, Case No. 21-2681 (2d Cir.) by an *Order* (Dkt. 167) entered February 15, 2024.

Mr. Smith's *Petition to Vacate, Set Aside, or Correct Sentence By A Person in Custody Pursuant to 28 U.S.C. § 2255* was again denied in *Jason M. Smith v. United States*, Case No. 1:15-cr-2 (W.D.N.Y.) by a Decision and Order (Dkt. 111), entered April 9, 2025.

Mr. Smith's appeal of the April 9, 2025, denial was upheld in *Jason M. Smith v. United States*, Case No. 25-1458 (2d Cir.) by an *Order* (Dkt. 28.1) entered January 13, 2026. The same court denied rehearing by an *Order* (Dkt. 40.1), entered April 22, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason M. Smith, proceeding by and through Counsel, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit, so that this Court may review the judgment below.

OPINIONS BELOW

This matter seeks discretionary review of the United States Court of Appeals for the Second Circuit's denial of Smith's *Application for a Certificate of Appealability*.

The text of the Court of Appeals' *Order* denying reconsideration of Smith's *Application for a Certificate of Appealability* entered April 22, 2026, appears at Appendix A. The text of the Court of Appeals' *Order* denying Smith's *Application for a Certificate of Appealability* entered January 13, 2026, appears at Appendix B.

The *Decision and Order* of the United States District Court for the Western District of New York denying Smith's *Motion to Vacate, Set Aside, or Correct Sentence Filed By a Person in Custody Pursuant to 28 U.S.C. § 2255*, entered April 9, 2025, is attached as Appendix C.

These opinions are unreported, although the Court of Appeal's *Order* denying Smith's *Application for a Certificate of Appealability* entered January 13, 2026 (Appendix B) is reported unofficially at *Smith v. United States*, Case No. 25-1458, 2026 U.S. App. LEXIS 17055, 2026 WL 1691157 (2d Cir. Jan. 13, 2026). The *Decision and Order* of the United States District Court for the Western District of New York denying Smith's *Motion to*

Vacate, Set Aside, or Correct Sentence Filed by a Person in Custody Pursuant to 28 U.S.C. § 2255, entered April 9, 2025 (Appendix C) is unofficially reported at *Smith v. United States*, Case No. 15-CR-2S, 2025 U.S. Dist. LEXIS 68104, 2025 WL 1071145 (W.D.N.Y. Apr. 9, 2025).

JURISDICTION

Smith seeks review of the United States Court of Appeals for the Second Circuit's *Order* denying his *Application for a Certificate of Appealability* entered January 13, 2026. This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal statutory provisions addressed by the issue raised in this *Petition* include 28 U.S.C. § 2255:

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

- (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
- (c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
- (d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
- (e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it

appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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

- (g) Except as provided in section 408 of the [Controlled Substances Act](#), in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by [section 3006A of title 18](#).
- (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
 - (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
 - (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

and 28 U.S.C. § 2253:

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject

to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
- (c)
 - (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
 - (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
 - (3) The certificate of appealability under paragraph (1) shall indicate which

specific issue or issues satisfy the showing required by paragraph (2).

The principal constitutional provision addressed by the issue raised herein is the Sixth Amendment, which holds that

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On January 7, 2015, Jason Smith was indicted on two counts of producing child pornography (Counts 1 and 2) and four counts of possessing child pornography (Counts 3-6). About 18 months later, he entered a plea of guilty to both counts of producing child pornography in violation of 18 U.S.C. § 2251(a), pursuant to a plea agreement. The two counts of 18 U.S.C. § 2251 had a statutory sentencing range of 15 to 30 years each.

In the plea agreement, Smith waived his right to appeal and collaterally attack any component of a sentence imposed by the Court, but he reserved his right pursuant to Rule 11(a)(2) of the *Federal Rules of Criminal Procedure*

to appeal the denial of the defendant's motion for suppression of physical evidence seized by way of a search warrant executed on 42 Byron Avenue, Tonawanda, New York, pursuant to the report and recommendation of the Honorable Jeremiah J. McCarthy, United States Magistrate Judge, entered on November 3, 2015, and the decision and order of the District Court entered on January 5, 2016. appeal the denial of his suppression motion, and to withdraw his guilty pleas if his appeal was successful.

Id. at ¶28. The District Court found that Smith's Total Offense Level under the Sentencing Guidelines was 43, yielding an advisory sentencing range of life imprisonment. The District Court sentenced Smith to 240 months (20 years) imprisonment on each of the two counts, to run consecutively, for a cumulative sentence of 480 months (40 years).

Smith appealed his conviction and sentence. On April 25, 2018, the United States Court of Appeals for the Second Circuit affirmed Smith's conviction and sentence. *United States v. Smith*, 720 Fed.Appx. 647 (2d Cir. 2018). The Court held that one issue raised in Smith's appeal – a challenge to the reasonableness of his sentence – was barred by the waiver provisions of the *Plea Agreement* because his waiver was knowing and voluntary. As to the other issue, Smith's claim that he received ineffective assistance of counsel at the suppression stage, the Court declined direct review, finding that such a claim was better suited for review through a *habeas corpus* petition to the district court.

On October 4, 2019, Smith timely filed a *Motion to Vacate, Set Aside, or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255*. In that *Motion*, Smith argued that he received ineffective assistance of counsel during the pre-plea suppression of the search warrant, the change-of-plea phase, and sentencing.

The District Court held that the appellate waiver in Smith's *Plea Agreement* was enforceable because Smith entered into the Plea Agreement intelligently, knowingly, and voluntarily and received consideration for agreeing to do so. Appendix E. Thus, the District Court ruled that the collateral attack waiver barred Smith from challenging counsel's effectiveness during the pre-plea suppression hearing and at sentencing. *Id.*

On appeal, the United States Court of Appeals for the Second Circuit ruled that the collateral attack waiver did not bar Smith from proceeding on the issues he had raised. The government urged the Court to reject Smith's allegations on the merits, but the Court declined, holding that "'mindful that we are a court of review, not of first view,' we decline to consider those arguments for the first time on appeal." *Smith v. United States*, Case No. 21-2681, 2024 U.S. App. LEXIS 4090, at *1-2, 2024 WL 675355 (2d Cir. Feb. 15, 2024), quoting *Hunter v. McMahon*, 75 F.4th 62, 73 n.15 (2d Cir. 2023) and *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The case was remanded to the United States District Court for the Western District of New York.

After a supplemental briefing on the remaining issue of whether Smith received ineffective assistance of counsel within the meaning of *Strickland v. Washington* during

proceedings on his suppression motion, the District Court denied Smith's § 2255 motion. The Court held that Smith's "trial counsel mounted an objectively reasonable challenge to the search warrants, albeit one that did not include the colorable particularity argument that Smith now presses," a claim the trial court all but conceded was meritorious. *Smith v. United States*, Case No. 15-CR-2S (W.D.N.Y. Apr. 9, 2025), 2025 U.S. Dist. LEXIS 68104, at *23-25, 2025 WL 1071145. Even if the particularity argument omitted by Trial Counsel had been raised, the District Court held, suppression of the evidence would still have been denied under *United States v. Leon*, 468 U.S. 897, 909 (1984).

Smith filed a timely notice of appeal and applied for a certificate of appealability. The Court of Appeals denied the certificate of appealability without explanation (Appendix B) and also denied a motion for reconsideration (Appendix A).

STATEMENT OF FACTS

On February 16, 2014, the Lancaster, New York, Police Department received a report that a 15-year-old female, S.J., had been missing for several hours. Later that day, her legal guardian called the police to report that S.J. had returned home.

When Lancaster Police detectives met with S.J., she told them she had been corresponding with a man online for several months through a social networking website. S.J. told the detectives the man was known to her as a 17-year-old named "MixedMaster:D." After she agreed to meet him, he picked her up in his car on February 16, 2014, after she attended a birthday party. According to

S.J., the man introduced himself as “James.” He appeared older than 17. She and James then went to his residence “somewhere in Tonawanda,” where they consumed alcohol, smoked marijuana, and had sex.

The detectives obtained Smith’s telephone number, residence address, and the IP address assigned by his Internet provider, and linked him to the social media platform where he communicated with S.J. After that, S.J. selected Smith’s photo from a photo array of eight pictures prepared by the detectives.

A detective sought a warrant to search Smith’s home for evidence of Rape in the Third Degree in violation of *New York Penal Law* 130.25.2 and Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law 235.22-2. He detailed information S.J. had provided about how she initially met “James” online and later in person, and how that meeting led to her having sex with him. He linked “James” to Jason Smith and stated that Smith was 34 years old.

The warrant established probable cause to believe that Smith committed Rape in the Third Degree and that he used the Internet to commit that offense. The warrant authorized law enforcement to seize physical evidence that might corroborate S.J.’s account of what occurred, including bed sheets, marijuana, and rum. The warrant also authorized a search of “computers, computer systems, tablets, data storage devices, including but not limited to compact discs, DVDs, flash drives, thumb drives, hard drives....” However, although the search warrant application also requested authority to look for evidence of the specified offense of Disseminating Indecent Material

to Minors in the First Degree, the Judge struck that from the search warrant, thereby denying law enforcement the right to look for child pornography for lack of any evidence that such existed at the residence.

On April 11, 2014, the Tonawanda Police executed the warrant. Officers seized computer equipment, a bottle of rum, and bed sheets. They also seized a broad array of storage media and other devices that could not have contained evidence of Rape in the Third Degree and then searched that media in an attempt to find evidence of child pornography, which they believed, without foundation, Smith might possess (despite the Court's denial of authorization to do so).

After seizing the electronics, the detectives transported "all electronics and media cards" from the search to the Western New York Regional Computer Forensics Laboratory (WNYRCFL). Before giving those items to the lab, and in fact before forensic images of the computers, hard drives, or discs were made, the detectives themselves "went through" three thumb drives, an SD card, and a 32 GB Lexar thumb drive, devices that could not have recorded Internet communication between S.J. and Smith. Their actions were inconsistent with any suggestion that they intended to look only for evidence that Smith communicated with S.J. online, but their expansive search was consistent with the detectives' search warrant affidavit, which revealed suspicions (without any factual support) that Smith may have sent indecent material to S.J.

Thirteen days after the electronics were sent to the WNYRCFL, the Judge issued a second search warrant

authorizing the lab to search the “computers and hard drives” seized under the earlier warrant. The second warrant did not establish any additional probable cause to justify a general search of any of the computers or drives.

Two months later, the detectives learned from the forensics lab that it had found evidence of suspected child pornography. They then sought an amended search warrant to authorize searching the remaining computers and hard drives for child pornography images, videos, or downloads, and the judge issued it. The lab turned over the evidence it found to federal authorities.

State authorities never charged Smith with violating the *New York Penal Code*. However, on September 18, 2014, he was arrested on a complaint charging possession and production of child pornography in violation of 18 U.S.C. §§ 2251(a) and 2252A(a)(5)(b). All of the evidence supporting the *Complaint* came from the forensic search of Smith’s electronic devices.

Smith’s trial counsel moved to suppress the physical evidence seized from Smith’s home pursuant to the warrants. He did not request a *Franks v. Delaware* hearing,¹ but his claim clearly sounded in *Franks*. In investigating S.J.’s case, the Police sought to corroborate her account of traveling with Smith to his residence on the night in question. She told them that she and Smith had stopped en route at a Depew, New York, Burger King and then at either a Dollar Store or Dollar General somewhere between Lancaster and the Buffalo airport. Investigators reviewed surveillance videos from the Burger King and

1. *Franks v. Delaware*, 438 U.S. 154 (1978).

two stores in the area matching S.J.'s description but could find no video evidence that Smith or S.J. visited any of the locations.

Additionally, the affidavit supporting the search warrant was inconsistent with information in the police reports prepared immediately after the incident. The initial report, based on the detectives' interview of S.J., noted that she was "very vague in describing everything (the car, description of James or the route they traveled)." Yet the later affidavit supporting the search warrant – when the particular fact was needed to support the crime the detectives suspected Smith had committed – stated that S.J. believed that James "looked older than 17 years old maybe around 30 years old." S.J.'s surprising perception, inconsistent with her obliviousness to everything else, established a necessary element for probable cause that Smith committed Rape in the Third Degree, namely that the alleged perpetrator was 21 years of age or older.

The affidavit also described the car "James" drove to pick up S.J., a description that flatly contradicted the initial police report. The initial police report stated that S.J. described the vehicle's color as silver but provided no additional information about the car. In the affidavit, however, the detective asserted that the "female victim stated the subject arrived in a gray 4-door small vehicle." *Id.* This description more closely matched a vehicle the police knew was registered to Smith: "a 2005 Mazda 4dr sedan, grey[.]" The affidavit also recited that S.J. told the police that James' house had red carpets in the living room, although the police report did not note that. The affidavit – but not the police report – noted an instance in which one detective purportedly communicated with the

“subject” by assuming S.J.’s identity on her social media account. The subject asked to meet her again and told her that he was sexually aroused.

Most tellingly, nowhere does the affidavit mention that any of the Internet-based communications between S.J. and Smith (in words or images) included actual or simulated nudity, sexual conduct, or sadomasochistic abuse intended to induce S.J. to meet with Smith. In fact, the affidavit contains no assertion that Smith sent communications of this nature to S.J. via the Internet at all.

Smith’s trial counsel argued in his motion that the police were required to disclose these inconsistencies and false statements to the state judge when seeking the warrant. Counsel contended that the detective omitted material information from his April 8th affidavit, information essential to the Court’s determination of whether probable cause existed to support a search warrant, and that the *Leon* good-faith exception did not apply because the affidavit’s omissions and shading were intentional.

A warrant that fails to link the evidence sought to the criminal activity for which probable cause has been established fails the particularity test. *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013), quoting 2 W. LaFare, SEARCH AND SEIZURE, §4.6(a) (5th ed. 2012) (an otherwise “unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based”); *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (warrant lacked particularity where nothing on the face

of the warrant advised the searching officers of the crime for which the search was being conducted: “A failure to describe the items to be seized with as much particularity as the circumstances reasonably allow offends the Fourth Amendment because there is no assurance that the permitted invasion of a suspect’s privacy and property are no more than absolutely necessary”) (cleaned up).

Where, as in this case, the property to be searched contains digital information, the particularity requirement “assumes even greater importance[.]” given the volume of private information such devices can hold. *See Galpin, supra*, at 720 F.3d 446 (the threat of privacy violation is compounded by the nature of digital storage); *see also United States v. Rosa*, 626 F.3d 26, 61-62 (2d Cir. 2011) (the warrant’s authorization of an “uncircumscribed search” of the defendant’s electronic equipment violated the Fourth Amendment’s core protection against general searches because it provided the government with unrestrained access to electronic records of his daily activities and private affairs).

“[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). But a tribunal must always determine that there is a “fair probability that contraband or evidence of a crime will be found” in the place searched. *Id.*, at 462 U.S. 238. That means determining, to the requisite “fair probability,” both that the place searched will have the materials sought and that those materials will contain evidence “aid[ing]” in a criminal’s “apprehension or conviction.” *Messerschmidt v. Millender*, 565 U.S. 535, 551, 552, n. 7 (2012); *see Zurcher v. Stanford Daily*, 436

U.S. 547, 556 (1978) (“The critical element” is whether there is the requisite “cause to believe that the specific ‘things’ to be searched for and seized are located” in the targeted place).

The particularity requirement, for its part, ensures that the search will be of an appropriate scope — that it is “carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). That requirement typically turns on factors such as the geographic and temporal scope of the search. See *id.*, at 480 U.S. 84-85; *Chatrie v. United States*, -- U.S. --, ---, 146 S. Ct. 2193, 2215-16, 225 L. Ed. 2d 793, 819 (2026), and *United States v. Karo*, 468 U.S. 705, 718 (1984).

By not limiting the scope of the search to devices or storage media that could contain evidence of Internet communication between S.J. and Smith — which could have been used to support a charge of Rape in the Third Degree (the only charge for which probable cause had been established and the only offense listed in the first search warrant) — the state judge authorized a search that was insufficiently particularized, rendering the original search warrant invalid. If the first state warrant lacked the constitutionally mandated particularity (and it did), the second state warrant was therefore facially invalid. The third state warrant and the federal warrant were built on this house of cards, both based on evidence seized as a result of the invalid first warrant.

Defense counsel made none of these meritorious challenges to the first warrant’s particularity, the second

warrant's lack of probable cause, or the taint on any subsequent warrants arising from the first warrant's invalidity. Instead, counsel launched a *Franks* attack on the warrant (without even citing *Franks*). Counsel also failed to detail the many inconsistencies between the police report and the detectives' warrant affidavit. Counsel's only two grounds for his *Franks* argument were his assertion that S.J. must have been "lying" because the police could not corroborate lesser aspects of her account and his contention that, by conflating two different telephone numbers in the affidavit, the detectives must have been trying to mislead the judge.

The government argued that Smith had not made the preliminary showing required to merit a *Franks* hearing. What was more, the government said, the omission of the fact that the investigating officers hadn't been able to verify S.J.'s version of events did not demonstrate bad faith, given the poor quality of the video and S.J.'s lack of specificity about where she and Smith had stopped before arriving at his home. Additionally, the government contended, even if the affidavit had disclosed the lack of video corroboration, probable cause would still have been established because the officers had tied the social media account to Smith at the search address, and S.J. had selected Smith's picture from a photo array.

The Magistrate Judge found no basis to suppress the evidence seized from Smith's home and recommended that the District Court deny the motion. The District Court adopted that recommendation.

In his § 2255 *Motion*, Smith argued that Trial Counsel rendered ineffective assistance in investigating

and arguing the suppression motion. The District Court essentially agreed that the particularity objection Trial Counsel failed to raise was meritorious. However, the Court ruled that Trial Counsel was not ineffective for omitting the particularity objection because he had the right to select which colorable pretrial claims to raise, he argued the issues he did raise competently, and a grant of the particularity objection would not have led to suppression (because law enforcement was proceeding in good faith under *Leon*).

The District Court agreed that the “face of the [April 8th] search warrant arguably lacks particularity because it does not expressly limit the search for computer-related items to those that could contain online communications between Smith and S.J. That limitation is contained only in Detective Kerl’s affidavit, which the search warrant references but does not appear to sufficiently incorporate by reference.” § 2255 Order, *supra* at 2025 U.S. Dist. LEXIS 68104, *21-22, citing *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (stating that the Fourth Amendment’s particularity requirement must be satisfied “in the warrant, not in the supporting documents”); *650 Fifth Ave. v. Alavi Foundation*, 830 F.3d 66, 100 (2d Cir. 2016) (“Language in a warrant that simply references an underlying affidavit does not incorporate the affidavit so as to allow the documents together to satisfy the particularity requirement”).

Without expanding the record to add evidence explaining why Trial Counsel omitted a particularity argument, the District Court found that “trial counsel mounted an objectively reasonable challenge to the search warrants, albeit one that did not include the colorable

particularity argument that Smith now presses.” § 2255 *Order, supra* at 2025 U.S. Dist. LEXIS 68104, *24. The Court incorrectly held that a defense counsel is not obligated to raise every colorable issue. § 2255 *Order, supra*.

In his *Application for a Certificate of Appealability*, Smith noted that the District Court conceded the search warrant lacked particularity and implicitly acknowledged that this was a meritorious challenge to the warrant, while trial counsel’s other claims were not. While “[a]ctions and/or omissions taken by counsel for strategic purposes generally do not constitute ineffective assistance of counsel,” *Gibbons v. Savage*, 555 F.3d 112, 122 (2d Cir. 2009) (citing *Strickland, supra* at 466 U.S. 690-91), Smith argued that it was easily debatable whether counsel’s actions or omissions were undertaken for strategic reasons rather than due to tactical blunders. Resolution of the question must turn on something more than mere speculation or surmise.

Smith also argued that reasonable jurists could agree that the District Court’s holding that “counsel is not obligated to raise every colorable issue” inappropriately imported a standard for appellate counsel ineffectiveness into pretrial proceedings. § 2255 *Order, supra*. Finally, Smith contended that reasonable jurists could debate whether the District Court misapplied the “strategic” label to decisions that were merely tactical.

The Court of Appeals denied Smith’s application for a certificate of appealability in its *Order* (Appendix B), which mechanically recited the reason for denying the claim as being that “Appellant has not ‘made a substantial

showing of the denial of a constitutional right’,” citing 28 U.S.C. § 2253(c)(2) and directing the reader’s attention to *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Subsection 2253(c)(2) of Title 28 provides that “[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.” *Miller-El* repeats the language of § 2253(c)(2). Beyond that, the opinion adds guidance that the statute lacks but that the Court had previously provided on how to satisfy § 2253(c)(2):

[A] prisoner seeking a COA need only demonstrate ‘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 constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Miller-El, *supra*, quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).²

REASONS FOR GRANTING THE WRIT

Smith raises questions of substantial significance. Over the past two years, LEXIS has reported more than 6,100 federal district court cases under 28 U.S.C. § 2255 that raise ineffective assistance of counsel issues. When

2. *Slack* in turn borrowed the standard from *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)

§ 2254 cases for the same period are added, the total exceeds 13,000.

This Court could provide certainty to courts and litigants alike by revisiting the issue considered over 60 years ago in *Machibroda v. United States*, 368 U.S. 487 (1962), which set the standard § 2255 petitioners must meet to be entitled to an evidentiary hearing on post-conviction claims.³

At the same time, this Court could clarify the standard appellate courts must apply when addressing applications for certificates of appealability. The due process right to a sufficient explanation to provide “meaningful appellate review” of a trial court’s exercise of discretion is well established. *Martel v. Clair*, 565 U.S. 648, 664 (2012) (record on defendant’s request for new counsel); *United States v. Taylor*, 487 U.S. 326, 336-337 (1988)

3. In *Machibroda*, this Court roughly defined what a § 2255 motion should establish in order to justify proceeding to an evidentiary hearing. It should “not [be] a case where the issues raised by the motion were conclusively determined either by the motion itself or by the “files and records” in the trial court.” Rather, “[t]he factual allegations contained in the petitioner’s motion and affidavit, and put in issue by the affidavit filed with the Government’s response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.” *Id.* at 368 U.S. 494-95.

For six decades, *Machibroda* has been the standard, albeit an imperfect one, for determining whether a § 2255 motion is sufficient to entitle the movant to a hearing.

(requirement that the court “clearly articulate” the effect of *Speedy Trial Act* factors to permit meaningful appellate review); *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 36 (2024) (in congressional redistricting litigation, “conscientious district courts sometimes err, and appellants are entitled to meaningful appellate review”).

This Court should address whether similar minimal due process guarantees of meaningful appellate review at the appellate court petition for rehearing stage or at the Supreme Court petition for writ of certiorari stage likewise demand more than the Circuit’s cookie-cutter order that

[u]pon due consideration, it is hereby ORDERED that the motion is DENIED, and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.”

Appendix A. The language, which denies Smith’s COA in terms identical in text and brevity to language employed in countless Circuit denials of COAs, eviscerates his statutory due process right to meaningful rehearing or Supreme Court review.

Grant of *certiorari* in this case will provide guidance in thousands of federal and state criminal prosecutions and *habeas corpus* proceedings.

ARGUMENT

Where a criminal defendant provides competent evidence that trial counsel omitted to raise a meritorious issue in suppression of evidence that, if raised, would have made acquittal reasonably probable, does § 2255 require the court to order an evidentiary hearing?

Section 2255 of Title 28 enables a prisoner to exercise the writ of *habeas corpus ad subjiciendum*, a writ of “extraordinary prestige... [in] Anglo-American jurisprudence, indeed ‘the most celebrated writ in the English law.’” *Fay v. Noia*, 372 U.S. 391, 399-400 (1963), citing 3 BLACKSTONE COMMENTARIES 129. It is “a writ antecedent to statute, and throwing its root deep into the genius of our common law... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement.” *Fay, supra*, citing *Secretary of State for Home Affairs v. O’Brien*, [1923] A. C. 603, 609 (H. L.).

The early Supreme Court recognized *habeas corpus* as a “great constitutional privilege.” *Ex parte Bollman and Swartwout*, 4 Cranch 75, 95. The Supreme Court has called it “the common law world’s ‘freedom writ’ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free.” *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961). The Court has observed that “there is no higher duty than to maintain [the writ] ‘unimpaired’ and unsuspended, save only in the cases specified in our Constitution.” *Id.*, quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

In deciding a § 2255 motion, a district court must hold a hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief...” 28 U.S.C. § 2255(b). Hearings are unnecessary when a movant’s allegations are “vague, conclusory, or palpably incredible.” *Machibroda*, *supra* at 368 U.S. 494. To warrant a hearing, a motion must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact that, if proven at a hearing, would entitle the movant to relief. *Id.* at 368 U.S. 494-95.

Conversely, where facts, if true, would entitle a movant to relief and those facts are “contested,” section 2255 cases cannot be resolved on the basis of affidavits alone. *Williams v. United States*, 660 Fed. Appx. 847, 850 (11th Cir. 2016), *citing Friedman v. United States*, 588 F.2d 1010, 1015 (5th Cir. 1979) (where “allegations were reasonably specific and supported, not affirmatively contradicted by the record, and not patently frivolous, [t]he district court abused its discretion by denying [movant’s] § 2255 motion without an evidentiary hearing”). Thus, in determining whether to conduct a hearing on allegations made in support of a § 2255 motion, the Court looks to the sufficiency of the affidavits and other evidence proffered in support of the allegations. *United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974). Allegations that are “insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous” do not warrant a hearing. *United States v. Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970). Affidavits are sufficient to warrant a hearing if they proffer evidence, admissible at a hearing, that provides grounds upon which relief could be granted. *Dalli*, *supra* at 491 F.2d 760; *Machibroda*, *supra* at 368 U.S. 495.

The District Court denied Smith's § 2255 *Motion* by assuming that Trial Counsel had a strategic reason for omitting the particularity objection from his suppression motion. The Court reached this conclusion without taking any evidence from former counsel regarding the reason for the omission.

This might have been excusable if the suggestion were that omitting the argument could confer a strategic benefit. But the particularity objection was not inconsistent with the rest of the suppression argument that Counsel advanced, and nothing in the record makes it plausible that lodging a particularity objection could compromise any conceivable defense at trial.

Of course, the District Court hedged its bets by holding that even if Trial Counsel had argued the particularity objection, it still would have denied the suppression motion under *Leon* because “none of the alleged inconsistencies or omissions – relating to the description of Smith's car, S.J.'s description of Smith's house, and Detective Hockwater's undercover interactions with Smith — were material or rise to the level of bad faith.” Thus, under *Leon*, the exclusionary rule would not have been employed to suppress the evidence obtained from the search of Smith's electronic devices.

But as with Trial Counsel's failure to argue the particularity objection, jurists of reason could easily debate the good-faith and materiality of the April 8th search warrant affidavit, or – at a minimum and material to this *Petition* – debate whether the District Court should have held an evidentiary hearing.

From the earliest stages of his investigation, the detectives suspected that Smith might have disseminated indecent material to minors. In the first warrant application, they sought leave to search for such material but were denied. To bolster their chances of obtaining the search warrant they wanted, the detectives made assertions that were squarely inconsistent with information in the police report they had completed about the incident. S.J. went from “very vague in describing everything” to righteous certainty about Smith’s likely age, his vehicle, the route they traveled, the stops they made, and even the color of his carpet. The victim wasn’t the only person whose memory improved with time. The detectives described, in the affidavit but not in the prior report, vivid and lurid details about their online communications.

Finally, not even the government contests that law enforcement drafted the affidavit supporting its first search warrant specifically to seek evidence on the premises that Smith had disseminated indecent material to minors. The state judge refused to permit such a search, and the police knew that fact when they went on the premises. Nevertheless, they did not question whether they were entitled to seize every electronic item they proposed seizing when the search warrant was substantially broader. Jurists of reason could easily debate whether law enforcement agents proceeded in good faith in drafting the affidavit or in limiting their search after the Judge kicked one of the legs off their search-warrant stool. Certainly, the surprising new details in and reasonable inferences from the first search warrant mandated developing further evidence.

Once the detectives had succeeded in seizing everything they had proposed seizing before the specified

offense of Disseminating Indecent Material to Minors in the First Degree was stricken, law officers began searching those devices to find evidence of the crime they had been denied the right to search for, a crime they suspected, without basis, that Smith had committed. Their conduct was consistent with the detectives' averment in their search warrant affidavit (without any factual support) that they suspected Smith may have sent sexually explicit material to the 15-year-old victim. And certainly, their conduct in having "[gone] through" thumb drives and an SD card – devices that could not have recorded Internet communication between S.J. and Smith – before they gave those items to WNYRCFL, in fact, even before forensic images of the computers or hard drives or discs were made, only underscored their intention to conduct a search that the Judge had denied them the right to undertake.

Reasonable jurists could debate that law enforcement's decision to put its thumb on the scale began with the drafting of the first search warrant and never ended. The irony, of course, is that evidence of police good faith or bad faith would have been adduced had trial counsel raised the particularity objection as part of his suppression showing. Reasonable jurists would agree that the record would now contain evidence explaining why law enforcement drafted the affidavit as written and how the police curtailed their search (if they did so at all) after the Judge struck the dissemination allegation from the warrant.

The evidence showed that police did not act in good faith to limit their search after the Judge restricted the warrant's scope. Certainly, the quantum of evidence Smith adduced was sufficient to require an evidentiary hearing, even applying *Machibroda's* squishy standard.

Reasonable jurists could easily debate whether additional discovery was warranted to obtain evidence on the question and whether law enforcement ignored limitations on the search warrant, so that the warrant could be relied on under *Leon*. “In the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient.” *Leon, supra* at 468 U.S. 921. But this is no ordinary case.

The District Court held that “[a]t bottom, there is no persuasive evidence that Detective Kerl or any other law enforcement officer acted deliberately, recklessly, or with gross negligence to disregard Smith’s Fourth Amendment rights in securing or executing the state search warrants.” However, jurists of reason could debate and likely agree that there is sufficient evidence to suggest deliberateness, warranting further inquiry in the form of discovery and an evidentiary hearing.

This case is an excellent vehicle for this Court to underscore that while courts may rely on the entire record of the proceeding in deciding whether to collect and adduce evidence in resolving a § 2255 motion, courts may not presume that a decision was strategic – which would insulate it from any meaningful dispute – rather than a simple blunder. The Rules Governing Section 2255 Proceedings (“Habeas Rules”) afford a district court substantial discretion in the conduct of a case once it has ordered an answer. The Court may order an expanded record to facilitate a disposition on the merits without an evidentiary hearing. Habeas Rule 7. Discovery is available only if “the judge in the exercise of his discretion and for good cause shown grants leave.” Habeas Rule 6(a).

The district court is afforded discretion in determining whether to hold an evidentiary hearing. *See* Habeas Rule 8(a); *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992). Thus, the district court is afforded substantial discretion to expedite proceedings, in order to quickly dispose of meritless petitions while preserving the important right of those raising serious habeas questions to have their claims thoroughly considered by the district court. *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996).

What is needed is to refine the *Machibroda* standard (now nearly old enough to qualify for Medicare), to define the Rule 6(a) “good cause” standard in light of the constitutional right to seek a writ of habeas corpus, and to clarify the showing a § 2255 movant must make to earn the right to an evidentiary hearing.

When a Court of Appeals denies an application for certificate of appealability, is it obligated to explain the basis for its decision on sufficient detail to allow for meaningful appellate review?

Some of the difficulty in this case stems from the lamentable fact that the Second Circuit’s *Order* represents an abdication of the appellate court’s review responsibilities.

Generally, the United States courts of appeals have a duty to do more than merely correct errors. Instead, “[w]ith the courts of appeals as the last point of appellate review for the vast majority of federal cases, [federal

courts of appeals] have expanded upon their initial—but still crucial—function of error correction and [have] bec[o]me instrumental in expounding the law as well.”⁴ Indeed, the duty to “expound” is so well established as to be implicit, meriting mention by appellate courts only in passing. *See, e.g., Hill v. Kia Motors America, Inc.*, Case Nos. 20-5690/5693 (6th Cir. Feb. 24, 2022) 2022 U.S. App. LEXIS 5143, at *73 (“And our duty on appeal to consider those arguments *actually* made is only compounded by the fundamental requirement of issue preservation: If litigants want us to consider certain arguments on appeal, they must have asserted those same arguments below”); *Eastmount Construction. Co. v. Transp. Mfg. & Equip. Co.*, 301 F.2d 34, 42 (8th Cir. 1962) (“It is our duty here on appeal to review such evidence as the court received in explanation of the ambiguity appearing in the contract...”); *Brotherhood of Teamsters, Local No. 70 v. Cal. Consolidators, Inc.*, 693 F.2d 81, 82 (9th Cir. 1982) (“Congress in § 9 of the *National Labor Relations Act* entrusted the appropriateness question to the Board... It gave the Courts of Appeals the duty to review the Board’s conclusions”).

In *Buck v. Davis*, 580 U.S. 100 (2017), the Supreme Court’s detailed opinion reversing the 5th Circuit’s denial of a COA was dealing with an appellate opinion that was considerably more thorough than the cookie-cutter denial of a COA *Application* in this case. *Buck v. Stephens*, 623

4. Kobrick, Jake, *The Role of the U.S. Courts of Appeals in the Federal Judiciary* (Federal Judiciary Center, 2001), found at <https://www.fjc.gov/sites/default/files/history/paper/The%20Role%20of%20the%20U.S.%20Courts%20of%20Appeals%20in%20the%20Federal%20Judiciary.pdf> (last accessed September 18, 2026).

Fed.Appx 668, 669 (5th Cir. 2015) (the denial provided several holdings specific to the case, i.e., “[e]ven if the Texas Attorney General initially indicated to the inmate that he would have been resentenced, his decision not to follow through was not extraordinary”).

Concurring in *Sochor v. Florida*, 504 U.S. 527 (1992), Justice O’Connor wrote that

the Court does not hold that an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error... An appellate court’s bald assertion that an error of constitutional dimensions was ‘harmless’ cannot substitute for a principled explanation of how the court reached that conclusion. In *Clemons v. Mississippi*, 494 U.S. 738 (1990), for example, we did not hesitate to remand a case for ‘a detailed explanation based on the record’ when the lower court failed to undertake an explicit analysis supporting its ‘cryptic,’ one-sentence conclusion of harmless error. *Id.*, at 753. I agree with the Court that the Florida Supreme Court’s discussion of the proportionality of petitioner’s sentence is not an acceptable substitute for harmless error analysis, see *ante*, at 539-540, and I do not understand the Court to say that the mere addition of the words “harmless error” would have sufficed to satisfy the dictates of *Clemons*.

Id. at 504 U.S. 541, O’Connor, J., concurring.

The *Order* in Appendix B disserves Smith. It effectively denies him his statutory right to seek rehearing and to petition the Supreme Court to review the Circuit’s refusal to grant a certificate of appealability. Of course, Smith is entitled to file this petition for writ of certiorari, but the *Order* almost ensures that Smith can only seek reconsideration of a nullity. The Second Circuit held that something in Smith’s application for a certificate of appealability is deficient enough to deny him the right to appeal under 28 U.S.C. § 2253, but without explaining what the court believed that deficiency to be, Smith is left to recycle his entire argument. The lack of any explanation whatsoever as to the reason for denying COA means that the likelihood that Smith can make even a reasonable argument for the grant of certiorari – such as highlighting a circuit split or explaining the national significance of the holding – is practically impossible.⁵

Beyond that, the *Order* disadvantages other litigants who are proceeding on both direct appeal and collateral attack. It abrogates the Court’s important role in “expounding the law” and in developing circuit precedent that guides law enforcement on proper procedures for obtaining search warrants, defendants in determining the constitutional fences that inform search warrant affidavits and execution, and lower courts in reaching appropriate dispositions of search warrant challenges.

5. See, e.g., Kelsey Dallas, *The art of the circuit split: an explainer*, SCOTUSblog (Feb. 17, 2026), found at <https://www.scotusblog.com/2026/02/the-art-of-the-circuit-split-an-explainer/> (last accessed September 16, 2026) (explaining factors that make grant of a writ of certiorari more or less likely).

This Court can contribute to greater order, better advocacy, and even judicial efficiency by discouraging those whose cases would be clearly meritless if the appellate courts provided guidance in their decisions denying certificates of appealability. This case provides the vehicle for addressing the sufficiency of appellate final orders in *habeas corpus* cases, which currently could be written on a cocktail napkin.

CONCLUSION

The issue here is not whether Smith should have prevailed in suppressing the evidence. That decision is several steps away. Rather, the issue is whether he should have been permitted to develop the record at an evidentiary hearing to prove the detailed factual allegations he advanced in his § 2255 *Motion*. To the extent that *Machibroda* has not clearly delineated when a showing entitles a movant to an evidentiary hearing, this case provides an ideal vehicle to do so.

Likewise, the second issue is at once procedurally simple and profoundly important. Habeas litigants are entitled to an explanation why their certificates of appealability are denied sufficient for them to vindicate their right to rehearing, reconsideration, or petition to this Court.

WHEREFORE, this *Petition* should be granted.

Respectfully submitted,

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September 21, 2026

APPENDIX

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1a

**APPENDIX A — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT,
FILED APRIL 22, 2026**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand twenty-six,

Present: Barrington D. Parker,
Reena Raggi,
Michael H. Park
Circuit Judges,

Docket No. 25-1458

JASON M. SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

2a

Appendix A

ORDER

Appellant Jason M. Smith filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

**APPENDIX B — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT,
FILED JANUARY 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of January, two thousand twenty-six,

Present: Barrington D. Parker,
Reena Raggi,
Michael H. Park
Circuit Judges.

25-1458

JASON M. SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appendix B

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED, and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

/s/ Catherine O’Hagan Wolfe

5a

**APPENDIX C — DECISION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK,
FILED APRIL 9, 2025**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

15-CR-2S

JASON M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECISION AND ORDER

I. INTRODUCTION

On June 22, 2016, Petitioner Jason Smith pleaded guilty to two counts of producing child pornography, in violation of 18 U.S.C. § 2251 (a). *See* Docket Nos. 41, 42. On February 1, 2017, this Court sentenced Smith to 240 months' (20 years) imprisonment on each count, to run consecutively, for a cumulative sentence of 480 months (40 years). *See* Docket Nos. 61, 62. It further sentenced him to supervised release for life, a \$200 special assessment, and no fine, fees, or costs. *Id.*

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As relevant here, this Court subsequently denied Smith's pro se Motion to Vacate, Set Aside, or Correct his Sentence under 28 U.S.C. § 2255, on September 16, 2021. *See Smith v. United States*, 19-CV-1365S, 15-CR-2S, 2021 U.S. Dist. LEXIS 175970, 2021 WL 4225660 (W.D.N.Y. Sept. 16, 2021). Smith appealed that decision, and on February 15, 2024, the United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case for consideration of Smith's counseled claim that his trial lawyer was ineffective for failing to raise certain arguments in moving to suppress the search warrants issued for Smith's residence.¹ *See Smith v. United States*, 21-2681, 2024 U.S. App. LEXIS 4090, 2024 WL 675355 (2d Cir. Feb. 15, 2024). Familiarity with the decisions above is presumed. With briefing on remand now complete, this Court finds that Smith's motion must again be denied.

II. BACKGROUND

A. The Investigation and Search Warrant Affidavit

On January 7, 2015, a federal grand jury returned an indictment against Smith charging him with two counts of producing and four counts of possessing child pornography. *See* Docket No. 9. Much of the evidence used to secure the indictment was seized during a search of Smith's residence, the warrant for which is at issue.

According to the details set forth in the search warrant application and supporting affidavit, Detective

1. This is the only issue on remand. To the extent necessary, this Court reiterates its previous rulings as to

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Keith Kerl of the Lancaster Police Department was assigned to investigate a report of a missing child on February 16, 2014. (A102.²) The missing child was later determined to be S.J., a 15-year-old girl.³ *Id.*

Later in the day, after the report of the missing child, S.J. returned home on her own and indicated that she had been with an adult male whom she met on meetme.com, an online social-networking site. *Id.* S.J. reported that the adult male took her to a residence on Byron Avenue in the Town of Tonawanda, N.Y., and had sex with her. *Id.*

Detective Kerl and Detective Jason Batt interviewed S.J. in person on February 16, 2014. *Id.* S.J. told the detectives that the adult male identified himself as “James” on meetme.com, listed his age as 17, listed his residence as Lancaster, N.Y., and used an account called “MixedMaster D.” *Id.* S.J. reported that she listed her age as 15 on each of Smith’s other arguments raised in his initial motion. *See Smith v. United States*, 19-CV-1365S, 15-CR-2S, 2021 U.S. Dist. LEXIS 175970, 2021 WL 4225660 (W.D.N.Y. Sept. 16, 2021). meetme.com (her actual age). (A103.) “James” was later determined to be Defendant Smith.

S.J. told the detectives that she and Smith agreed over meetme.com to meet in person that day, after chatting online for several months. *Id.* As planned, Smith picked up S.J. on the corner of Broadway and Woodlawn

2. To remain consistent with the parties, this Court cites the record on appeal, which is contained at pages 51-414 of Docket No. 74.

3. S.J. is not a victim in this case.

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in Lancaster, at approximately 2:00 p.m. *Id.* He drove a small, gray, 4-door vehicle. *Id.*

Smith drove S.J. to his house in Tonawanda. *Id.* It took 30 minutes to get there. *Id.* S.J. told detectives that they stopped for food along the way at a Burger King in Depew, N.Y., and to buy drinks at a Dollar Tree or Dollar General in Cheektowaga, N.Y. *Id.*

Once they arrived at Smith's house, Smith took S.J. to his upstairs bedroom, where he gave her four alcoholic beverages and smoked marijuana with her. (A104.) Smith then had sex with S.J. *Id.* Afterwards, Smith drove S.J. back to Woodlawn Avenue in Lancaster. *Id.*

S.J. provided detectives with several details about her encounter with Smith. She stated that when she first saw Smith, he appeared to be 30 years old, not 17. (A103.) She also said that the house Smith took her to had distinctive red carpeting in the living room. *Id.* S.J. also reported that Smith had several computers in his bedroom that appeared to be linked together. (A104.)

Immediately after the interview, Detective Kerl assumed operation of S.J.'s meetme.com account. *Id.* ¶ 4. Posing as S.J., Detective Kerl asked Smith to call a telephone number assigned to a Lancaster Police Department undercover phone. *Id.* Smith did so, and subsequent investigation of the number that Smith called from revealed Smith's identity, his address in Tonawanda, and his vehicle—a small, gray, 4-door sedan. (A104-A105.) Detective Kerl then obtained transcripts of the meetme.

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com chat sessions between Smith and S.J., between December 4, 2013, and February 16, 2014, as well as the email addresses used by each of them. (A105.)

The next day, February 17, 2014, the Lancaster Police Department contacted the Buffalo FBI Violent Crimes Against Children Task Force. *Id.* Detective Michael Hockwater joined the case and subpoenaed records from meetme.com and Time Warner Cable. *Id.* From the subpoena returns, Detective Hockwater determined that Smith's email was used to open and operate his meetme.com account, and that Smith's IP address was used to communicate with S.J. (A105-A106.) Like Detective Kerl, Detective Hockwater assumed S.J.'s identity on meetme.com to contact Smith. (A106.) During the ensuing chat, Smith asked to meet S.J. again in person and discussed how sexually aroused he was while chatting with her. *Id.*

Four days later, on February 21, 2014, S.J. picked Smith out of an 8-photograph array. (A106-A107.) She also identified the exterior and interior of Smith's home from photographs that Detective Kerl discovered on Zillow.com. (A107.) S.J. specifically recalled the distinctive red carpeting in the living room and remembered the bathroom she had used. *Id.*

B. The Search Warrant Application and Search Warrant

Based on the information above, Detective Kerl maintained that probable cause existed to believe that Smith had committed rape in the third degree, in

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violation of § 130.25 of the New York Penal Law, and had disseminated indecent material to a minor in the first degree, in violation of § 235.22 of the New York Penal Law. (A110.) He further believed that evidence of these crimes was concealed at Smith's residence, including in his computers and computer equipment. (A107-A110.) Detective Kerl therefore applied for authorization to search Smith's residence for evidence of these crimes. (A110.) In particular, he sought authority for officers to conduct the following search and seizure:

It is requested that this Court allow officers to search and seize the subject's bedding, linens, any and all trace evidence, hair, fibers, blood, body fluids, etc. from the subject's upstairs bedroom. It is also requested that this Court allow officers to search for marijuana and rum as well as permission to take photographs of the residence. It is further requested that this Court allow officers to seize the subject's desktop computers to search for evidence that the subject communicated with the female victim.

(A111.)

On April 8, 2014, the Honorable Penny Wolfgang, New York State Supreme Court, authorized the search of Smith's residence. (A100.) She found probable cause to believe that evidence of the commission of rape in the third degree would be found there.⁴*Id.* Judge Wolfgang

4. Judge Wolfgang did not find probable cause as to the disseminating-indecent-material-to-a-minor charge. (A100.)

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thus authorized Detective Kerl and any other officer of the Lancaster, Cheektowaga, or Town of Tonawanda police departments to search for “marijuana, rum, computers, computer systems, tablets, data storage devices, including but not limited to compact discs, DVD’s [sic], flash drives, thumbs [sic] drives, hard drives, etc., bedding, linens, any and all trace evidence, hair, fibers, blood, saliva, bodily fluids, etc., as well permission to take photographs.” *Id.*

Officers executed the search warrant on April 11, 2014. (A112.) Among the property seized was Smith’s computer and computer equipment, including media storage devices. (A113-A114.)

On April 30, 2014, Judge Wolfgang issued an amended search warrant to authorize the Western New York Regional Forensics Laboratory to search Smith’s seized computer equipment and devices. (A48.) The amended search warrant authorized law enforcement personnel to search “[t]he computers and hard drives that were seized by authority of a search warrant issued by Judge Penny Wolfgang on April 8, 2014.” *Id.*

On July 2, 2014, Judge Wolfgang issued another amended search warrant to authorize law enforcement personnel to search the property seized for evidence of child pornography. (A49-50.) This authority was sought after initial examination of Smith’s computers revealed 1,000 images of child pornography. (A50.) Based on this information, Judge Wolfgang authorized law enforcement “to search for and seize any evidence of child pornography on any and all computers and hard drives that were seized

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under the authority of the original search warrant dated 04/8/14.”⁵ (A49.)

Subsequent searches revealed the child pornography that Smith produced using Victim 1 and Victim 2, which constitutes the offense conduct in this case.

C. The Motion to Suppress

As part of his omnibus pretrial motion, Smith moved to suppress any evidence obtained from the search of his residence. *See* Motion to Suppress, Docket No. 20, ¶¶ 65-74. He challenged the existence of probable cause and the validity of the search warrant on the basis that law enforcement personnel knew that S.J.’s account of the alleged crime contained untruths, yet applied for a search warrant anyway, and then failed to disclose the untruths to Judge Wolfgang. *Id.* ¶¶ 67-70. The alleged untruths pertained to law enforcement’s inability to corroborate S.J.’s claim that she and Smith stopped at a Burger King and a dollar store on the way to Smith’s house. Smith further argued that the warrant application contained inconsistencies and that the *Leon* good-faith exception did not apply because law enforcement intentionally misled Judge Wolfgang by not alerting her to the lack of corroboration. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

5. After Smith was indicted, a separate federal search warrant for his residence issued. (A51-A76.) That warrant is not directly at issue.

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After full briefing and oral argument, the magistrate judge recommended denial of Smith's motion in a Report, Recommendation, and Order, dated November 3, 2015. *See* Docket Nos. 26, 27, 29, 30. After neither side objected to the Report and Recommendation, this Court accepted it and denied Smith's motion to suppress on January 5, 2016. *See* Docket Nos. 36, 37.

III. DISCUSSION**A. § 2255 Proceedings**

Twenty-eight U.S.C. § 2255 allows federal prisoners to challenge the legality of their sentences. It provides, in pertinent part, that:

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

28 U.S.C. § 2255 (a).

Importantly, a § 2255 motion is not a substitute for an appeal. *See Bousley v. United States*, 523 U.S. 614, 621,

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118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (“Habeas review is an extraordinary remedy and ‘will not be allowed to do service for an appeal.’”) (quoting *Reed v. Farley*, 512 U.S. 339, 354, 114 S. Ct. 2291, 2300, 129 L. Ed. 2d 277 (1994)). Relief under § 2255 is therefore narrowly limited, with collateral attack on a final criminal judgment available “only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.” *Graziano v. United States*, 83 F.3d 587, 589-90 (2d Cir. 1996) (per curiam) (quoting *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (internal quotation marks omitted)). This narrow limitation preserves respect for finality, allows for the efficient allocation of judicial resources, and recognizes an aversion to retrying issues long after they occur. See *Bokun*, 73 F.3d at 12 (citations omitted).

To shape the narrow relief available under § 2255, two procedural rules apply to make it more difficult for a defendant to upset a final criminal judgment on collateral review. See *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010). First, the “mandate rule” bars re-litigation of issues already decided on direct appeal. See *id.*; see also *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006); *United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997) (“[I]t is well-established that issues decided on direct appeal may not be re-litigated in the context of a petition under § 2255.”) This includes “not only . . . matters expressly decided by the appellate court, but also . . . re-litigation of issues impliedly resolved by the appellate court’s mandate.” *Yick Man Mui*, 614 F.3d at

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53 (citing *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)). This rule also bars ineffective-assistance-of-counsel claims that were raised and resolved on direct appeal, as well as those involving factual predicates that while not explicitly raised on direct appeal, were impliedly rejected by the appellate court mandate. *See id.* at 53-54 (citations omitted). An exception to this rule exists for cases involving intervening changes in the law, in which case the petitioner “must show that there is new law which, when applied to their claims, would result in a different disposition.” *Chin v. United States*, 622 F.2d 1090, 1092 (2d Cir. 1980) (“Reconsideration [of claims previously raised on direct appeal] is permitted only where there has been an intervening change in the law and the new law would have exonerated a defendant had it been in force before the conviction was affirmed on direct appeal.”) (citing *United States v. Loschiavo*, 531 F.2d 659, 664 (2d Cir. 1976)).

Second, the “procedural default” rule bars the collateral review of claims that could have been raised on direct appeal, unless the petitioner shows cause for failing to raise the claims on direct review and actual “prejudice” or actual innocence. *See Bousley*, 523 U.S. at 622-23 (citations omitted); *see also Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) (“In order to raise a claim that could have been raised on direct appeal, a § 2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error.”) This rule does not apply to ineffective-assistance-of-counsel claims, which may be brought in a § 2255 motion regardless of whether they could have been raised, or were raised, on direct appeal. *See Massaro v.*

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United States, 538 U.S. 500, 508-09, 123 S. Ct. 1690, 1696, 155 L. Ed. 2d 714 (2003).

Discovery in § 2255 proceedings is governed by Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Leave of court is required to engage in discovery, which may be granted for good cause. *See* Rule 6 (a). Such discovery is conducted under the Federal Rules of Criminal or Civil Procedure, or “in accordance with the practices and principles of law.”⁶*Id.* The party requesting discovery must provide reasons for the request, which must “include any proposed interrogatories and requests for admission, and must specify any requested documents.” Rule 6 (b).

A petitioner may also be entitled to an evidentiary hearing. Section 2255 provides that a court shall hold an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” To determine whether a hearing is necessary, the court “must review the answer, any transcripts and records of prior proceedings, and any [additional materials submitted by the parties].” Rule 8 (a). If a hearing is necessary, the court must appoint an attorney to any moving party who qualifies for the appointment of counsel under 18 U.S.C. § 3006A. *See* Rule 8 (c). A hearing is generally warranted only where the petitioner establishes a plausible claim. *See Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009).

6. “If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.” Rule 6 (a).

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The Second Circuit has further described the standard for holding a § 2255 evidentiary hearing as follows:

In ruling on a motion under § 2255, the district court is required to hold a hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255; *see, e.g., Pham v. United States*, 317 F.3d 178, 185 (2d Cir. 2003) (§ 2255 does not permit summary dismissals of motions that present facially valid claims). However, the filing of a motion pursuant to § 2255 does not automatically entitle the movant to a hearing; that section does not imply that there must be a hearing where the allegations are “vague, conclusory, or palpably incredible.” *Machibroda v. United States*, 368 U.S. 487, 495, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); *see, e.g., Chang v. United States*, 250 F.3d 79, 85 (2d Cir. 2001). To warrant a hearing, the motion must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact that, if proved at a hearing, would entitle him to relief. *See, e.g., Machibroda*, 368 U.S. at 494, 82 S. Ct. 510; *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987).

Gonzalez v. United States, 722 F.3d 118, 130-31 (2d Cir. 2013).

The petitioner bears the burden of proving entitlement to relief under § 2255 by a preponderance of the evidence.

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See Galviz Zapata v. United States, 431 F.3d 395, 399 (2d Cir. 2005) (citing *Williams v. United States*, 481 F.2d 339, 346 (2d Cir. 1973)); *see also Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000).

B. Smith’s Claim

Smith maintains that he received ineffective assistance of counsel because his trial attorney failed to challenge Judge Wolfgang’s search warrant as violative of the Fourth Amendment’s particularity requirement. Had counsel pursued that issue, argues Smith, it was reasonably probable that the physical evidence would have been suppressed and the prosecution discontinued. This claim is addressed below.

The Sixth Amendment provides, in pertinent part, that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” U.S. CONST. amend VI. It is well established that “the right to counsel is the right to the effective assistance of counsel.” *Eze v. Senkowski*, 321 F.3d 110, 124 (2d Cir. 2003) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Ineffective-assistance-of-counsel claims may be brought in a collateral proceeding under § 2255 regardless of whether they could have been raised, or were raised, on direct appeal.⁷ *See Massaro*, 538 U.S. at 508-09. To succeed

7. As noted above, however, the mandate rule still applies. That is, ineffective-assistance-of-counsel claims that were raised and resolved on direct appeal, and any claims involving factual predicates that were impliedly rejected on direct appeal, are barred. *See Yick Man Mui*, 614 F.3d at 53-54 (citations omitted).

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on his ineffective-assistance-of-counsel claim, Smith must establish both prongs of the two-part test from *Strickland v. Washington*: (1) that his counsel’s performance “fell below an objective standard of reasonableness;” and (2) that “the deficient performance prejudiced” him. 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To satisfy the first *Strickland* prong, Smith must establish that his counsel’s conduct fell below “an objective standard of reasonableness” under “prevailing professional norms” such that it was “outside the wide range of professionally competent assistance.” *Id.* at 688, 690. Under this prong, the court “must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance’ and be watchful ‘to eliminate the distorting effects of hindsight.’” *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). This is because “[t]here are countless ways to provide effective assistance in any given case” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689 (internal citation omitted). The question is ultimately “whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

To satisfy the second *Strickland* prong, Smith must establish that his attorney’s “deficient performance prejudiced the defense” such that “there is a reasonable

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland*, 466 U.S. at 687, 694. The Second Circuit normally "requires some objective evidence other than defendant's assertions to establish prejudice," *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003), because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding," *Strickland*, 466 U.S. at 693. Where, as here, the failure to competently litigate a Fourth Amendment issue is the principal allegation of ineffectiveness, the petitioner must "prove that [the] Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Accordingly, to determine whether Smith received ineffective assistance of counsel, the merits of his proffered particularity challenge must be examined. This is because counsel is not ineffective for failing to raise frivolous arguments, even if requested by the client to do so. See *Weingarten v. United States*, 865 F.3d 48, 59 (2d Cir. 2017); *Thomas v. United States*, 17 Civ. 6877 (KPF), 2020 U.S. Dist. LEXIS 47020, 2020 WL 1285622, at *5 (S.D.N.Y. Mar. 18, 2020). Nor is counsel "obliged to advance every nonfrivolous argument that could be made."⁸ *Aparicio*, 269 F.3d at 95 (citing *Evitts v. Lucey*,

8. Although *Aparicio* involved the alleged ineffective assistance of appellate counsel, the observation in *Aparicio* that counsel is under no obligation to present all non-frivolous arguments that could

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469 U.S. 387, 394, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) and *Jones v. Barnes*, 463 U.S. 745, 754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)).

“It is the very function of an effective legal counselor to select among the available arguments and raise only ‘the most promising issues for review.’” *Weingarten*, 865 F.3d at 53 (quoting *Jones*, 463 U.S. at 752). For that reason, courts may not second-guess the reasonable professional judgment of counsel and impose a duty to raise every colorable claim. *See id.*; *see also United States v. Keith*, 15-cr-827 (AJN), 20-cv-4410 (AJN), 2022 U.S. Dist. LEXIS 120986, 2022 WL 2657188, at *10 (S.D.N.Y. July 8, 2022) (finding that counsel’s “decision not to advance the specificity and overbreadth arguments in his pretrial motion does not give rise to a viable claim of ineffective assistance, because ‘[c]ounsel need not pursue every possible argument, and may make reasonable decisions about which arguments present the strongest chance of success.’” (quoting *Santana v. Comm’r of Corr. Servs.*, No. 02-CV-3700 (GEL), 2003 U.S. Dist. LEXIS 10642, 2003 WL 21459569, at *2 (S.D.N.Y. June 24, 2003))).

That said, an attorney’s failure to raise an argument can constitute deficient performance. “[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly

be made has also been applied to ineffective-assistance-of-counsel claims involving trial counsel. *See, e.g., Keith*, 2022 U.S. Dist. LEXIS 120986, 2022 WL 2657188, at *10; *Thomas*, 2020 U.S. Dist. LEXIS 47020, 2020 WL 1285622, at *10.

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weaker.” *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); *see also Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000). “[R]elief may be warranted when a decision by counsel [to forgo an argument] cannot be justified as a result of some kind of plausible [litigation] strategy.” *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998).

Smith agrees that trial counsel’s decision to seek suppression of the physical evidence against him was reasonable and appropriate. *See* Memorandum of Law, Docket No. 104, ¶ 30. Indeed, trial counsel launched a multi-point attack on the validity of the search warrant that included challenging S.J.’s reliability and Detective Kerl’s candor with Judge Wolfgang. Although trial counsel’s arguments were ultimately unsuccessful, they collectively constituted a thoughtful and reasonable effort to secure suppression.

With the benefit of hindsight and the knowledge that trial counsel’s arguments were unpersuasive, Smith faults counsel for not also challenging the search warrant as violative of the Fourth Amendment’s particularity requirement. Smith maintains that the search warrant’s lack of particularity as to the electronic equipment required suppression of the physical evidence. This Court disagrees.

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

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and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

At issue is the particularity requirement, which has three components. First, a warrant must identify the offense for which probable cause has been established. *See United States v. Galpin*, 720 F.3d 436, 445 (2d Cir. 2013). Second, a warrant must describe the place to be searched. *See United States v. Voustianiouk*, 685 F.3d 206, 211 (2d Cir. 2012). Third, a warrant must specify the property to be seized and its relation to the offense for which probable cause has been found. *See Galpin*, 720 F.3d at 446.

The search warrant here identifies the offense for which probable cause has been established as rape in the third degree, in violation of § 130.25 (2) of the New York Penal Law. (A100.) It further describes the place to be searched with the street address and this descriptor: “a light blue, single family, two-story residence with dark blue trim.” *Id.* The warrant identifies the property to be seized as including “computers, computer systems, tablets, data storage devices, including but not limited to compact discs, DVD’s [sic], flash drives, thumbs [sic] drives, hard drives, etc.” that constitutes evidence or tends to demonstrate that rape in the third degree was committed. *Id.*

Judge Wolfgang’s probable-cause determination was supported by Detective Kerl’s affidavit. Along with establishing probable cause to believe that Smith committed rape in the third degree, the affidavit established probable cause to believe that Smith used

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the internet to facilitate the offense.⁹ Detective Kerl therefore requested authorization to “seize the subject’s desktop computers to search for evidence that the subject communicated with the female victim,” *see* A111, a request that Smith concedes was reasonable, *see* Memorandum of Law, Docket No. 104, ¶ 35 (noting reasonableness of request “[g]iven S.J.’s allegations and the police investigation that had confirmed contact between Smith and S.J. through MeetMe.com”).

Judge Wolfgang granted the requested authorization and additionally authorized law enforcement to search for and seize a broader class of electronic devices and equipment that could contain electronic communications between Smith and S.J.—“computers, computer systems, tablets, data storage devices, including but not limited to compact discs, DVD’s [sic], flash drives, thumbs [sic] drives, hard drives, etc.”—finding that such property constituted evidence of or tended to demonstrate that rape in the third degree was committed. (A100.)

Smith characterizes Judge Wolfgang’s itemization of the property as “a grossly-overbroad laundry list of devices having nothing to do with Internet solicitation.” *See* Memorandum of Law, Docket No. 104, ¶ 54. He further faults the search warrant for not limiting the scope of the

9. Smith concedes these points. *See* Memorandum of Law, Docket No. 104, ¶ 32 (“The affidavit was sufficient to provide probable cause that Smith had committed Rape in the Third Degree.”); *id.* ¶ 54 (“Judge Wolfgang was presented with a warrant affidavit that demonstrated probable cause to believe that Smith had committed Rape in the Third Degree and that he used the Internet to commit that offense.”).

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search on its face to devices or storage media that could contain evidence of internet communications between Smith and S.J.

Judge Wolfgang determined that the itemized list of property was “property constitut[ing] evidence or tending to demonstrate that an offense or crime was committed or that a particular person participated in the commission of an offense or crime, to wit: Rape in the Third Degree pursuant to Penal Law 130.25(2).” (A100). Such a finding is supported by the information presented to Judge Wolfgang establishing that Smith and S.J. communicated electronically through meetme.com, including to arrange their in-person encounter. Judge Wolfgang thus found probable cause to believe that the specified items could contain evidence of Smith and S.J.’s online communications that led to their meeting and the commission of the offense. Nowhere does Smith explain why the authorized items—each of which could contain stored electronic communications—could not contain evidence of communications between Smith and S.J.¹⁰

Smith’s second point is stronger. The face of the search warrant arguably lacks particularity because it does not expressly limit the search for computer-related

10. Smith contends in reply that no evidence was presented to Judge Wolfgang that he transferred any electronic communications from his computer to any storage device. *See* Memorandum of Law, Docket No. 110, ¶ 13. It is obvious, however, that electronic communications can be easily and instantly secreted onto external storage devices, such that those seized could readily have contained online communications between Smith and S.J., for which law enforcement was authorized to search.

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items to those that could contain online communications between Smith and S.J. That limitation is contained only in Detective Kerl’s affidavit, which the search warrant references but does not appear to sufficiently incorporate by reference. *See Groh v. Ramirez*, 540 U.S. 551, 557, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (stating that the Fourth Amendment’s particularity requirement must be satisfied “in the warrant, not in the supporting documents”); *650 Fifth Ave. v. Alavi Found.*, 830 F.3d 66, 100 (2d Cir. 2016) (“Language in a warrant that simply references an underlying affidavit does not incorporate the affidavit so as to allow the documents together to satisfy the particularity requirement.”). A particularity challenge to the search warrant would therefore not have been unfounded.¹¹

Even so, the particularity challenge would not have led to suppression of the evidence. Assuming that Smith could have established a constitutional infirmity in the search warrants, suppression would not have been warranted. This is because “[t]he fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies.” *Herring v. United States*, 555 U.S. 135, 140, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Exclusion, after all, is a court’s last resort, not first impulse. *See Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006).

11. Smith maintains that colorable challenges to the amended search warrants also existed. Given this Court’s finding that the good-faith exception to the exclusionary rule would have excused any technical infirmities in the warrants, those arguments need not be explored.

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The exclusionary rule contains a good-faith exception. The exception applies to prevent suppression of evidence, unless a “reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization,” *Leon*, 468 U.S. at 923 n. 23. Searches premised on faulty search warrants are therefore saved, except “(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable.” *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992) (citing *Leon*).

Smith insists that good faith is lacking because Detective Kerl suspected that Smith possessed child pornography from the start and made representations and omissions in his affidavit that were inconsistent with his police reports. The first point is speculative, the second does not establish bad faith.

Even crediting Smith’s assertions, none of the alleged inconsistencies or omissions—relating to the description of Smith’s car, S.J.’s description of Smith’s house, and Detective Hockwater’s undercover interactions with Smith—were material or rise to the level of bad faith. At bottom, there is no persuasive evidence that Detective Kerl or any other law enforcement officer acted deliberately, recklessly, or with gross negligence to disregard Smith’s Fourth Amendment rights in securing or executing the state search warrants. *See Davis v. United States*, 564 U.S. 229, 238, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011);

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see also United States v. Smith, 967 F.3d 198, 211 (2d Cir. 2020) (“[T]he exclusionary rule applies only if the police have violated the Constitution deliberately, recklessly, or with gross negligence, or if a constitutional violation is the product of recurring or systemic negligence.”). The deterrence principles underlying the exclusionary rule are therefore not implicated here. *See Leon*, 468 U.S. at 909 (noting that the exclusionary rule applies only where it results in appreciable deterrence) (citation omitted). Thus, even assuming a technical deficiency in the warrants, the government would have amply demonstrated the officers’ good-faith reliance on the search warrants, and suppression would have been denied.

Returning to the ineffectiveness claim, it is reiterated that trial counsel mounted an objectively reasonable challenge to the search warrants, albeit one that did not include the colorable particularity argument that Smith now presses. But again, trial counsel is not obligated to raise every colorable argument to avoid a finding of ineffectiveness. *See, e.g., Keith*, 2022 U.S. Dist. LEXIS 120986, 2022 WL 2657188, at *10 (finding no ineffectiveness where counsel failed to raise specificity challenge to warrant). And it cannot be said that the arguments raised by trial counsel were “clearly and significantly weaker” than the particularity argument. *See Mayo*, 13 F.3d at 533. Moreover, even if trial counsel had raised the particularity argument that Smith maintains he should have, suppression would have been denied under *Leon*. Smith therefore fails to demonstrate that trial counsel’s performance was constitutionally inadequate or actually prejudiced him. *See Mayo*, 13 F.3d

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at 533 (requiring omitted argument to be significant to implicate ineffective performance); *Benjamin v. Comm’r of Corr.*, 3:19cv1187 (MPS), 2021 U.S. Dist. LEXIS 81167, 2021 WL 1670871, at *9 (D. Conn. Apr. 28, 2021) (finding in the suppression context that a showing of prejudice under *Strickland* requires, *inter alia*, that the underlying suppression claim be meritorious); *United States v. Pierce*, 17-CR-32, 2019 U.S. Dist. LEXIS 19353, 2019 WL 468124, at *2 (W.D.N.Y. Feb. 6, 2019) (providing that “the prejudice prong of the *Strickland* test is not met if a defendant cannot show, at a minimum, that he could have prevailed on a properly pursued suppression motion) (quotation and citation omitted); *Walker v. Bennett*, 262 F. Supp. 2d 25, 40 (W.D.N.Y. 2003) (finding no prejudice where “the Court cannot say that a motion to suppress [the defendant’s] statement to the police would have been successful”).

For these reasons, Smith’s ineffective-assistance-of-counsel claim must be denied.

C. No evidentiary hearing is required.

Smith requests a hearing on his petition. *See* Memorandum of Law, Docket No. 104, ¶ 72. As indicated above, § 2255 provides that a court shall hold an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” Rule 4 (b) also provides that “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion.” Here, no evidentiary hearing is required because

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the motion and the record conclusively demonstrate that Smith is entitled to no relief under § 2255. Consequently, this Court finds that no hearing is warranted or required. *See Orbach v. United States*, 11 Cr. 111 (NRB), 2017 U.S. Dist. LEXIS 192767, 2017 WL 5632815, at *7 (S.D.N.Y. Nov. 7, 2017) (denying request for a § 2255 hearing where “[t]he existing record is conclusive that petitioner is not entitled to relief on any theory presented to [the court]”).

D. A certificate of appealability will not issue.

For a certificate of appealability to issue, a petitioner must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253 (c)(2). To make the required “substantial showing,” Smith must establish that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Rhagi v. Artuz*, 309 F.3d 103, 106 (2d Cir. 2002) (per curiam) (citations and internal quotation marks omitted). Smith has made no such substantial showing of the denial of a constitutional right in this case. A certificate of appealability will therefore not issue.

IV. CONCLUSION

Having considered Smith’s grounds for relief individually and cumulatively, and having presided over this matter, with opportunity to observe trial counsel first-hand, this Court finds that Smith has failed to carry his burden of showing “that counsel made errors so serious that counsel was not functioning as the ‘counsel’

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guaranteed [to him] by the Sixth Amendment” or to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Harrington*, 562 U.S. at 104 (quotations and citations omitted). Consequently, Smith’s § 2255 motion must be denied.

If Smith wishes to appeal, he must file a Notice of Appeal with the Clerk’s Office, United States District Court, Western District of New York, within 60 days of the date of judgment in this action. *See* Fed. R. App. P. 4 (a)(1)(B)(i). Requests to proceed on appeal as a poor person, if any, must be filed with the United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

V. ORDERS

IT HEREBY IS ORDERED, that Petitioner’s Motion to Vacate, Set Aside or Correct his Sentence and Conviction under 28 U.S.C. § 2255 (Docket No. 74) is DENIED.

FURTHER, that this Court hereby certifies, pursuant to 28 U.S.C. § 1915 (a)(3) and Rule 24 (a)(3) of the Federal Rules of Appellate Procedure, that any appeal from this Decision and Order would not be taken in good faith and therefore leave to appeal as a poor person is DENIED. *See Coppedge v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

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FURTHER, that a Certificate of Appealability under
28 U.S.C. § 2253 is DENIED.

SO ORDERED.

Dated: April 9, 2025
Buffalo, New York

s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

**APPENDIX D — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT,
FILED FEBRUARY 15, 2024**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of February, two thousand twenty-four.

Present:

Denny Chin,
Michael H. Park,
Beth Robinson,
Circuit Judges.

21-2681

JASON M. SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

*Appendix D***ORDER**

Petitioner-Appellant Jason Smith seeks review of the district court's denial of his motion under 28 U.S.C. § 2255 to vacate his conviction. Smith's motion alleged that his trial counsel was ineffective for failing to raise certain arguments about the validity of the search warrants. The district court denied that motion after concluding that Smith's plea agreement with the government barred such collateral attacks. The government now concedes that Smith's "ineffective assistance of counsel claim is not barred by his plea agreement's collateral attack waiver." Appellee's Br. at 13. The government urges us to affirm anyway and to reject Smith's arguments on the merits. But "'mindful that we are a court of review, not of first view,' we decline to consider those arguments for the first time on appeal." *Hunter v. McMahon*, 75 F.4th 62, 73 n.15 (2d Cir. 2023) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). The judgment of the district court is thus **VACATED**, and the case is **REMANDED** for further proceedings.

For The Court:

Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

**APPENDIX E — DECISION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK,
FILED SEPTEMBER 16, 2021**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

19-CV-1365S
15-CR-2S

JASON M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECISION AND ORDER

I. INTRODUCTION

Presently before this Court is Petitioner Jason Smith's pro se Motion to Vacate, Set Aside, or Correct his Sentence under 28 U.S.C. § 2255. For the reasons discussed below, Smith's motion is denied.

II. BACKGROUND

On January 7, 2015, a federal grand jury returned an indictment against Smith charging him with two

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counts of producing and four counts of possessing child pornography. *See* Docket No. 9.

On June 22, 2016, Smith pleaded guilty to both counts of producing child pornography in violation of 18 U.S.C. § 2251 (a) (Counts 1 and 2). *See* Docket Nos. 41, 42. He did so with the benefit of a plea agreement, in which he agreed that his mandatory minimum sentence by statute on each count was a 15-year term of imprisonment, with a maximum possible sentence of 30 years' imprisonment, a fine of \$250,000, a mandatory special assessment of \$100, and supervised release of at least five years and up to life. *See* Plea Agreement, Docket No. 41, ¶ 1.

Smith further agreed that his final Sentencing Guidelines calculations were dependent on whether the upward adjustment in § 4B1.5 (b)(1) the United States Sentencing Guidelines ("U.S.S.G.") applied. *Id.* ¶ 14. That section provides for a 5-level upward adjustment if the defendant's offenses are covered sex crimes and the defendant engaged in a pattern of activity involving prohibited sexual conduct. *See* U.S.S.G. § 4B1.5 (b)(1). If, as the government believed, the guideline applied, Smith agreed that he would have a total offense level of 44 and a criminal history category of I, which would yield a Guidelines sentencing range of 720 months' (60 years) imprisonment, a fine of \$25,000 to \$250,000, and supervised release of five years to life. *See* Plea Agreement, ¶¶ 15-18 (a). If, as Smith believed, the guideline did not apply, Smith agreed that he would have a total offense level of 39 and a criminal history category of I, which would yield a Guidelines sentencing range of 262-327

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months' imprisonment, a fine of \$25,000 to \$250,000, and supervised release of five years to life. *Id.* ¶¶ 15-17, 18 (b).

Notwithstanding this Court's determination concerning the applicability of U.S.S.G. § 4B1.5 (b)(1), both the government and Smith reserved their rights to recommend a sentence outside of the applicable Guidelines range. *Id.* ¶ 19. In addition, Smith waived his right to appeal or collaterally attack any sentence of 720 months' (60 years) imprisonment or less, *see id.* ¶¶ 25-26, and the government waived its right to appeal any sentence of 262 months' imprisonment or more, *see id.* ¶ 27. Smith, however, reserved his right, pursuant to Rule 11 (a)(2) of the Federal Rules of Criminal Procedure, to appeal the denial of his suppression motion, and to withdraw his guilty pleas if his appeal was successful. *Id.* ¶ 28. The government agreed to dismiss the four possession charges at sentencing. *Id.* ¶ 23.

On February 1, 2017, Smith appeared for sentencing, at which time this Court found that the 5-level upward adjustment in § 4B1.5 (b)(1) applied. *See* Docket No. 59. This Court further determined, consistent with the probation officer's findings, that Smith's total offense level was 43 and his criminal history category was I, which yielded a Guidelines range of life imprisonment. *See* Docket Nos. 59, 62. After hearing from counsel and Smith, this Court sentenced Smith to 240 months' (20 years) imprisonment on each count, to run consecutively, for a cumulative sentence of 480 months (40 years). *See* Docket Nos. 61, 62. It further sentenced him to supervised release for life, a \$200 special assessment, and no fine, fees, or

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costs. *Id.* After imposition of sentence, this Court granted the government's motion to dismiss the four remaining possession counts. *See* Docket No. 61. The Clerk of Court entered judgment on February 7, 2017. *Id.*

Smith appealed his conviction and sentence through a Notice of Appeal filed on February 21, 2017. *See* Docket No. 64. On April 25, 2018, the United States Court of Appeals for the Second Circuit affirmed Smith's conviction and sentence upon finding that his appeal was barred by the waiver provisions of his plea agreement. *See* Docket No. 73. In particular, the court rejected Smith's Rule 11 challenges to his plea proceeding and instead found that he knowingly and voluntarily waived his appeal rights. *See id.* The court then enforced the appellate waiver to bar Smith's challenge to the reasonableness of his sentence. *See id.* But as to Smith's claim that he received ineffective assistance of counsel at the suppression stage, the court declined direct review, finding that such a claim was better suited for review through a habeas petition to the district court. *See id.* The court entered its mandate on July 3, 2018. *See id.*

Smith filed the instant Motion to Vacate, Set Aside, or Correct his Sentence on October 4, 2019. *See* Docket No. 74. He contends that he received ineffective assistance of counsel during the suppression, plea, and sentencing phases of his case. After full briefing, this Court took the motion under advisement without oral argument on April 24, 2020. *See* Docket Nos. 74, 81, 87.

III. DISCUSSION

A. § 2255 Proceedings

Twenty-eight U.S.C. § 2255 allows federal prisoners to challenge the legality of their sentences. That section provides, in pertinent part, that:

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

28 U.S.C. § 2255 (a).

Importantly, a § 2255 motion is not a substitute for an appeal. *See Bousley v. United States*, 523 U.S. 614, 621, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (“Habeas review is an extraordinary remedy and ‘will not be allowed to do service for an appeal.’”) (quoting *Reed v. Farley*, 512 U.S. 339, 354, 114 S. Ct. 2291, 2300, 129 L. Ed. 2d 277 (1994)). Relief under § 2255 is therefore narrowly limited, with collateral attack on a final criminal judgment available “only for a constitutional error, a lack of jurisdiction

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in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.” *Graziano v. United States*, 83 F.3d 587, 589-90 (2d Cir. 1996) (per curiam) (quoting *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (internal quotation marks omitted)). This narrow limitation preserves respect for finality, allows for the efficient allocation of judicial resources, and recognizes an aversion to retrying issues long after they occur. *See Bokun*, 73 F.3d at 12 (citations omitted).

To shape the narrow relief available under § 2255, two procedural rules apply to make it more difficult for a defendant to upset a final criminal judgment on collateral review. *See Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010). First, the “mandate rule” bars re-litigation of issues already decided on direct appeal. *See id.*; *see also Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006); *United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997) (“[I]t is well-established that issues decided on direct appeal may not be re-litigated in the context of a petition under § 2255.”). This includes “not only . . . matters expressly decided by the appellate court, but also . . . re-litigation of issues impliedly resolved by the appellate court’s mandate.” *Yick Man Mui*, 614 F.3d at 53 (citing *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)). But an exception exists for cases involving intervening changes in the law, in which case the petitioner “must show that there is new law which, when applied to their claims, would result in a different disposition.” *Chin v. United States*, 622 F.2d 1090, 1092 (2d Cir. 1980) (“Reconsideration [of claims previously raised on direct appeal] is permitted

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only where there has been an intervening change in the law and the new law would have exonerated a defendant had it been in force before the conviction was affirmed on direct appeal.”) (citing *United States v. Loschiavo*, 531 F.2d 659, 664 (2d Cir. 1976)).

Second, the “procedural default” rule bars the collateral review of non-constitutional, non-jurisdictional claims that could have been raised on direct appeal, unless the petitioner shows cause for failing to raise the claims on direct review and actual prejudice or actual innocence. *See Bousley*, 523 U.S. at 622-23 (citations omitted); *see also United States v. Thorn*, 659 F.3d 227, 231 (2d Cir. 2011); *Brennan v. United States*, 867 F.2d 111, 117 (2d Cir. 1989) (“non-constitutional and non-jurisdictional claims are generally procedurally foreclosed to a section 2255 petitioner if not raised on direct appeal”). To satisfy the cause component, the petitioner must show circumstances “external to the petitioner, something that cannot be fairly attributed to him.” *Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993). To satisfy the prejudice component, the petitioner must demonstrate prejudice that creates an “actual and substantial disadvantage, infecting . . . error of constitutional dimensions.” *See United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). To establish actual innocence, the petitioner must show “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 (internal quotation marks and citation omitted). But this rule does not apply to ineffective-assistance-of-counsel claims, which may be brought in a § 2255 motion regardless of whether they

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could have been raised, or were raised, on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 508-09, 123 S. Ct. 1690, 1696, 155 L. Ed. 2d 714 (2003).

In addition to these two rules, waiver principles also apply. It is well established that a knowing, voluntary, and competent waiver made as part of a plea agreement is presumptively and generally enforceable. *See Sanford v. United States*, 841 F.3d 578, 580 (2d Cir. 2016) (per curiam); *see also United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001). “An enforceable waiver bars claims based on grounds that arose after, as well as before, the [plea] agreement was signed.” *Muniz v. United States*, 360 F. Supp. 2d 574, 577 (S.D.N.Y. 2005) (citing *Garcia-Santos v. United States*, 273 F.3d 506, 509 (2d Cir. 2001) (per curiam)). Thus, “[i]n no circumstance . . . may a [petitioner] who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.” *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993). Waivers, however, are strictly construed against the government due to its greater bargaining power and because it usually drafts the plea agreement. *See Yushuvayev v. United States*, 532 F. Supp. 2d 455, 468 (E.D.N.Y. 2008).

Discovery in § 2255 proceedings is governed by Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Leave of court is

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required to engage in discovery, which may be granted for good cause. *See* Rule 6 (a). Such discovery is conducted under the Federal Rules of Criminal or Civil Procedure, or “in accordance with the practices and principles of law.”¹ *Id.* The party requesting discovery must provide reasons for the request, which must “include any proposed interrogatories and requests for admission, and must specify any requested documents.” Rule 6 (b).

A petitioner may also be entitled to an evidentiary hearing. Section 2255 provides that a court shall hold an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” To determine whether a hearing is necessary, the court “must review the answer, any transcripts and records of prior proceedings, and any [additional materials submitted by the parties].” Rule 8 (a). If a hearing is necessary, the court must appoint an attorney to any moving party who qualifies for the appointment of counsel under 18 U.S.C. § 3006A. *See* Rule 8 (c). A hearing is generally warranted only where the petitioner establishes a plausible claim. *See Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009).

The Second Circuit has further described the standard for holding a § 2255 evidentiary hearing as follows:

In ruling on a motion under § 2255, the district court is required to hold a hearing “[u]nless

1. “If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.” Rule 6 (a).

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the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255; *see, e.g., Pham v. United States*, 317 F.3d 178, 185 (2d Cir. 2003) (§ 2255 does not permit summary dismissals of motions that present facially valid claims). However, the filing of a motion pursuant to § 2255 does not automatically entitle the movant to a hearing; that section does not imply that there must be a hearing where the allegations are “vague, conclusory, or palpably incredible.” *Machibroda v. United States*, 368 U.S. 487, 495, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); *see, e.g., Chang v. United States*, 250 F.3d 79, 85 (2d Cir. 2001). To warrant a hearing, the motion must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact that, if proved at a hearing, would entitle him to relief. *See, e.g., Machibroda*, 368 U.S. at 494, 82 S. Ct. 510; *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987).

Gonzalez v. United States, 722 F.3d 118, 130-31 (2d Cir. 2013).

Ultimately, the petitioner bears the burden of proving entitlement to relief under § 2255 by a preponderance of the evidence. *See Galviz Zapata v. United States*, 431 F.3d 395, 399 (2d Cir. 2005) (citing *Williams v. United States*, 481 F.2d 339, 346 (2d Cir. 1973)); *see also Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000).

*Appendix E***B. Smith knowingly, voluntarily, and competently waived his right to appeal and collaterally attack his sentence.**

A defendant's knowing, voluntary, and competent waiver of his right to appeal and collaterally attack his sentence is presumptively enforceable. *See Riggi*, 649 F.3d at 147. Because a valid waiver itself may bar a petitioner's claims, enforceability must be determined as a threshold matter.

The petitioner bears the burden of demonstrating that he did not knowingly and voluntarily waive his appeal and collateral attack rights. *See United States v. Hargrove*, Nos. 03-CV-6634T, 02-CR-6064T, 01-CR-6112T, 2004 U.S. Dist. LEXIS 29349, 2004 WL 2123497, at *2 (W.D.N.Y. Aug. 10, 2004). To determine whether a challenged waiver is enforceable, courts examine the underlying record and may rely on a defendant's sworn statements during the plea allocution, *see Salerno v. Barbary*, 389 F. Supp. 2d 480, 484 (W.D.N.Y. 2005), which statements "carr[y] such a strong presumption of accuracy that a district court does not, absent a substantial reason to find otherwise, abuse its discretion in discrediting later self-serving and contradictory testimony," *United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001).

Smith claims that his waivers and plea agreement are the product of ineffective assistance of counsel. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST.

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amend VI. It is well established that “the right to counsel is the right to the effective assistance of counsel.” *Eze v. Senkowski*, 321 F.3d 110, 124 (2d Cir. 2003) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

To succeed on his ineffective-assistance-of-counsel claim, Smith must establish both prongs of the two-part test from *Strickland v. Washington*: (1) that his counsel’s performance “fell below an objective standard of reasonableness;” and (2) that “the deficient performance prejudiced” him. 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To satisfy the first prong of the *Strickland* test, Smith must establish that his counsel’s conduct fell below “an objective standard of reasonableness” under “prevailing professional norms” such that it was “outside the wide range of professionally competent assistance.” *Id.* at 688, 690. Under this prong, the court “must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance’ and be watchful ‘to eliminate the distorting effects of hindsight.’” *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). This is because “[t]here are countless ways to provide effective assistance in any given case” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689 (internal citation omitted). The question is ultimately “whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it

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deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

To satisfy the second prong of the *Strickland* test, Smith must establish that his attorney’s “deficient performance prejudiced the defense” such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See Strickland*, 466 U.S. at 687, 694. The Second Circuit normally “requires some objective evidence other than defendant’s assertions to establish prejudice,” *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003), because “not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding,” *Strickland*, 466 U.S. at 693. Counsel’s errors must have been “so serious as to deprive the defendant of a fair trial.” *Id.* at 687.

Because both parts of the *Strickland* test must be satisfied for a petitioner to establish ineffective assistance of counsel, failure to satisfy one part of the test frees a district court from assessing whether the petitioner satisfied the other part of the test. *Strickland*, 466 U.S. at 697 (noting that a court need not “address both components of the [two-part *Strickland*] inquiry if the defendant makes an insufficient showing on one”); *see also Strouse v. Leonardo*, 928 F.2d 548, 556 (2d Cir. 1991).

Smith lodges several ineffective-assistance-of-counsel arguments concerning his entry of the plea and waivers, which this Court addresses *ad seriatim*. First, relying on

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United States v. Lutchman, Smith argues that his plea agreement is unsupported by consideration because his lawyer failed to negotiate a sentence below the statutory maximum, and therefore, his waivers are unenforceable. 910 F.3d 33 (2d Cir. 2018). As Smith puts it, his attorney was ineffective because he negotiated “no deal at all.” *See* Petition, Docket No. 74, pp. 15, 37-39.

Lutchman involved a defendant who pleaded guilty to a single-count information charging him with providing material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B (a)(1). Lutchman’s plea agreement provided that he would waive indictment, plead guilty, and waive his right to appeal any sentence lesser than or equal to the 240-month statutory maximum penalty. 910 F.3d at 37. While the government agreed to certain Guidelines reductions for acceptance of responsibility, the reductions had no practical effect because the Guidelines range exceeded the statutory maximum penalty, making the Guidelines range 240 months. *See id.* at 38. The terms of the plea agreement further provided that the government would recommend the statutory maximum penalty, and the government did not articulate or identify any other charges that it could have brought and proven at trial. *See id.*

Finding that Lutchman “received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement,” the court held that his appellate waiver was unenforceable for lack of consideration. *See id.* It did so because it found that Lutchman’s plea agreement provided him “with no increment of certainty as to the

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extent of his liability and punishment, and it provided him no chance at a reduced sentence.” *Id.* (internal citations and quotations omitted).

Lutchman is readily distinguishable here because Smith realized several benefits in exchange for his guilty plea, including the chance for a reduced sentence (which he received). First, the government agreed to dismiss and did dismiss the *four* possession-of-child-pornography counts charged in the indictment, which, if successfully prosecuted, would have exposed Smith to additional substantial periods of incarceration that could also have been imposed consecutively. Second, Smith retained his right to appeal the denial of his suppression motion, which, if successful, could have resulted in withdrawal of the plea or a reduced sentence. Third, Smith retained the right to argue for imposition of a sentence outside of the applicable Guidelines range. Consequently, unlike in *Lutchman*, Smith’s plea agreement was supported by adequate consideration. *See, e.g., United States v. Sensi*, 542 Fed. Appx. 8, 11 (2d Cir. 2013) (finding plea agreement supported by consideration where the defendant retained the right to appeal denial of suppression motion). Accordingly, Smith’s lawyer’s performance was not objectively unreasonable, and the waivers are enforceable.

Next, Smith maintains that his plea to Count 2 was unknowing because he entered it unaware of the elements the government must prove to secure a conviction and unaware that his conduct did not satisfy the first element of the offense. *See* Petition, Docket No. 74, pp. 39-40. Citing law from the Ninth Circuit, Smith maintains that

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the government was required to prove that he exerted “active or coercive conduct” upon the victim to be guilty of producing child pornography. *Id.* (citing *United States v. Crooker*, 360 F. Supp. 3d 1095, 1106-07 (E.D. Wash. 2019); *United States v. Overton*, 573 F.3d 679, 692 (9th Cir. 2009)). Neither argument is persuasive.

The record reveals that Smith was aware of and understood the elements of his crimes of conviction. During the plea allocution, Smith confirmed that he understood the charges in Counts 1 and 2, and that he had discussed those charges with his lawyer. *See* Plea Transcript, Docket No. 68, pp. 6-7. This Court then drew Smith’s attention to the elements of the offenses, described the elements as “critical,” and confirmed that Smith understood them. *See id.* pp. 7-8. Specifically, when this Court asked Smith whether he had reviewed the elements with his lawyer and whether he understood them, Smith responded, “I have, and I do.” *Id.* p. 8. Smith further confirmed his understanding that if the government was unable to prove each element beyond a reasonable doubt, he could not be convicted. *See id.* p. 9. Consequently, there is no merit in Smith’s present contention that his plea was unknowing because he was unaware of the elements of his crimes of conviction.

Similarly, there is no merit to Smith’s contention that his lawyer was ineffective for not advising him that the conduct underlying Count 2 failed to satisfy the first element of the offense—that Smith “employed, used, persuaded, enticed, or coerced a minor to engage in sexually explicit conduct for the purpose of producing

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visual depictions of such sexually explicit conduct.” *See* Plea Agreement, ¶ 6 (a). Smith admitted that he met Victim 2, who was less than 16 years of age, on MeetMe.com. *See id.* ¶ 7, Count 2 (d). He further admitted that when he and Victim 2 met in person, he lied about both his name and age, introducing himself as “James Brayden” and telling Victim 2 that he was 23 years old, when in fact he was 34. *See id.* Finally, he admitted that he then had sexual intercourse with Victim 2 and took sexually explicit photographs of her. *See id.*

This admitted conduct satisfies the first element of Count 2 and differs starkly from the conduct in *Cooker*, the case on which Smith relies, which involved a minor sending an unsolicited photograph after a sex-charged conversation with the defendant. *See Crooker*, 360 F. Supp. 3d at 1106-1108. Here, Smith affirmatively lied about his identity and age in order to coerce and convince underage Victim 2 to meet him for purposes of engaging in sexual intercourse and activity.² *Cooker* is therefore wholly distinguishable, and trial counsel’s performance was not objectively unreasonable.

Finally, Smith claims that his plea and waiver were unknowing because he did not understand the meaning of “collateral attack” when he entered his guilty plea. *See* Petitioner’s Reply Brief, Docket No. 87, p. 5. The record does not bear this out. Smith, a college graduate, reviewed his plea agreement with his retained lawyer and signed it

2. The offense conduct underlying Count 2 is further described in paragraphs 36-43 of the Presentence Investigation Report. *See* Docket No. 62.

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on the advice of counsel. *See* Plea Transcript, pp. 3, 4, 5, 6, 8, 9, 10, 13, 15. He confirmed that he had no difficulty understanding this Court, his attorney, or any of the documents in the case, including the plea agreement. *See id.* pp. 5, 17. He also confirmed that he understood the waiver section of the plea agreement (which contained the collateral attack provision), and he voiced no questions or concerns when this Court reviewed that section with him. *See id.* p. 14. Consequently, this Court finds no merit in Smith's contention that his plea was unknowing due to lack of understanding.

Accordingly, having thoroughly reviewed the record, this Court finds that Smith entered his guilty plea and the waiver provisions knowingly, voluntarily, and competently.

C. Smith's remaining claims fail.

Construing Smith's submissions and arguments liberally as required, *see Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999) (per curiam), this Court finds that he brings the following additional claims. First, he alleges that his lawyer was ineffective at the suppression stage by (1) failing to attack the validity of the search warrant, and (2) failing to object to the magistrate judge's Report and Recommendation. *See* Docket No. 74, pp. 14 (failure to attack search warrant as based on false information); 20 (failure to object to Report and Recommendation), 15, 21, 27-36, 39 (failure to raise meritorious attacks on the validity of the search warrant), 30-32, 39 (failure to challenge particularity of search warrant), and 32-36 (failure to challenge

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applicability of *Leon* exception). Second, Smith claims that his lawyer was ineffective at sentencing because he failed to challenge various statements contained in the Presentence Investigation Report. *See id.* at pp. 15, 40-45.

Having found that Smith knowingly, voluntarily, and competently waived his appeal and collateral-attack rights, this Court must enforce the waiver. *Cf. United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004) (“Knowing and voluntary appellate waivers included in plea agreements must be enforced because, if they are not, the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants.”). While there are narrow exceptions to the general enforceability of waivers, none of them apply here. A waiver provision is presumptively enforceable other than

(1) when the waiver was not made knowingly, voluntarily, and competently, (2) when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, (3) when the government breached the plea agreement, or (4) when the sentencing court failed to enunciate any rationale for the defendant’s sentence, thus amounting to an abdication of judicial responsibility subject to mandamus.

Sanford, 841 F.3d at 580 (quoting *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000)). Since none of these exceptions apply, this Court must enforce the waiver provision of the plea agreement.

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A valid “waiver bars claims based on grounds that arose after, as well as before, the [plea] agreement was signed.” *Muniz*, 360 F. Supp. 2d at 577. A valid guilty plea “conclusively resolves the question of factual guilt supporting the conviction, thereby rendering any antecedent constitutional violation bearing on factual guilt a non-issue.” *United States v. Gregg*, 463 F.3d 160, 164 (2d Cir. 2006); see *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973) (noting that if a defendant validly admits guilt, “he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea”). And the Second Circuit has “long enforced waivers of direct appeal rights in plea agreements, even though the grounds for appeal arose after the plea agreement was entered into.” *Garcia-Santos*, 273 F.3d at 509 (citing *United States v. Yemitan*, 70 F.3d 746, 747-48 (2d Cir. 1995)); see also *United States v. Harrison*, 699 F.3d 158, 159 (2d Cir. 2012) (per curiam) (finding that the petitioner’s “inability to foresee that subsequently decided cases would create new appeal issues does not supply a basis for failing to enforce an appeal waiver”) (quoting *Riggi*, 649 F.3d at 150 n. 7); *Medina v. United States*, 16 Civ. 5043 (AT)(JCF), 94 Cr. 0872 (SAS)(JCF), 2017 U.S. Dist. LEXIS 15710, 2017 WL 476670, at *2 (S.D.N.Y. Feb. 3, 2017) (citing *Garcia-Santos* in rejecting a petitioner’s argument that his waiver was not knowing and voluntary “because he could not have known ‘that he was also waiving a right that didn’t exist at the time of the guilty plea’”). The same is true for enforcement of waivers of collateral attack under § 2255. See *Garcia-Santos*, 273 F.3d at 509 (“The reasons for enforcing waivers of direct

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appeal [when the grounds for appeal arose after the plea agreement was entered into] lead us to the same conclusion as to waivers of collateral attack under § 2255.”).

Smith’s remaining ineffective-assistance-of-counsel claims are not the type that fall outside of the waiver. “[A] waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which a waiver has been procured,” such as a plea agreement. *Frederick v. Warden, Lewisburg Corr. Facility*, 308 F.3d 192, 195 (2d Cir. 2002). A waiver may thus be unenforceable if the petitioner has a meritorious claim that it was procured as the result of ineffective assistance of counsel. See *United States v. Monzon*, 359 F.3d 110, 118-19 (2d Cir. 2004); see *El Saleh v. United States*, 13-CV-1567 (DLI), 2016 U.S. Dist. LEXIS 122441, 2016 WL 4734601, at *3 (E.D.N.Y. Sept. 9, 2016) (“[A] defendant cannot be bound by an appeal waiver if the decision to enter a plea agreement was the product of counsel’s ineffective assistance”) (citing *Hernandez*, 242 F.3d at 114)). Thus, “[a]n ineffective assistance of counsel claim survives the guilty plea or the appeal waiver only where the claim concerns the advice the defendant received from counsel” that informed his or her decision to enter the guilty plea. *Parisi v. United States*, 529 F.3d 134, 138-39 (2d Cir. 2008) (emphasis added).

This is because, if a petitioner challenges counsel’s effectiveness in connection with the plea agreement itself, he is in essence challenging the constitutionality of the process by which he waived his right to collaterally attack the sentence, and his claim therefore survives the

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waiver. *Id.* (“although challenging the attorney’s role in shaping the defendant’s bargaining position cannot avoid the waiver, challenging the attorney’s advice about that bargaining position, by connecting the knowing and voluntary nature of the defendant’s plea decision with the attorney’s conduct, does.”); *see also El Saleh*, 2016 U.S. Dist. LEXIS 122441, 2016 WL 4734601, at *3 (“[W]here an attorney’s ineffective assistance caused a defendant to agree to a waiver, a court must look past the waiver and examine the underlying merits of the ineffective assistance claim.”). In short, ineffective-assistance-of-counsel claims that affect the plea process survive the waiver, and those that do not, do not. *See* 2016 U.S. Dist. LEXIS 122441, [WL] at *5.

Smith’s remaining ineffective-assistance-of-counsel claims do not relate to the plea process. Again, Smith claims that his lawyer was ineffective during the suppression and sentencing stages of his case. But because these claims do not relate to the plea process, they do not survive the valid, enforceable waiver.³ *See United States v. Djelevic*, 161 F.3d 104, 107 (2d Cir. 1998) (“[D]efendant

3. As previously indicated, Smith reserved his right to appeal the denial of his motion to suppress. *See* Plea Agreement, ¶ 28. That reservation of rights applies to an appeal of the *merits* of Smith’s motion and this Court’s decision denying it. *See id.* It does not apply to Smith’s current, wholly separate claims that his lawyer was ineffective in presenting the motion and/or failing to pursue certain alternate grounds for suppression. Those claims are instead barred by the valid waiver provisions of the plea agreement because they do not relate to the process by which Smith entered his guilty plea. *See Oehne v. United States*, No. 03:14-CV-44 (JCH), 2016 U.S. Dist. LEXIS 197571, 2016 WL 10721817, at *11 (D. Conn. Oct. 20, 2016).

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claims that his waiver should not bar consideration of his appeal because counsel was ineffective not at the time of the plea, but at sentencing. We emphatically reject this contention.”); *United States v. Jimenez*, 106 F. App’x 92, 93 (2d Cir. 2004) (citing *Monzon*, 359 F.3d at 118 (“[A] claim of ineffective assistance is waived when . . . it attacks the sentence itself and not the underlying plea agreement that supported the sentence.”)); *Mitchell v. United States*, Case Nos. 14-CV-6350-FPG, 11-CR-6019-FPG, 2020 U.S. Dist. LEXIS 20628, 2020 WL 587883, at *7 (W.D.N.Y. Feb. 6, 2020) (finding pre-plea ineffective-assistance-of-counsel claims barred by valid waiver where they pertained solely to pre-plea errors that did not pertain to the plea process); *Oehne v. United States*, No. 03:14-CV-44 (JCH), 2016 U.S. Dist. LEXIS 197571, 2016 WL 10721817, at *11 (D. Conn. Oct. 20, 2016) (finding that “suppression-related claim is barred because it is clearly unrelated to the process by which [the defendant] decided to plead guilty”); *United States v. Cano*, 494 F. Supp. 2d 243, 248 (S.D.N.Y. 2007) (finding that only “when the claim relates to the negotiation and entry of a plea or sentencing agreement” may “[c]laims of ineffective assistance of counsel . . . survive § 2255 waivers”).

Finally, to the extent Smith raises a claim of actual innocence, it fails. Read liberally, Smith argues in his petition that he is actually innocent of Count 2 because his offense conduct does not satisfy each element of the offense. While this Court has already rejected that contention, Smith’s claim is otherwise wholly deficient because a claim of actual innocence requires a much stronger showing. To establish actual innocence, Smith

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must produce “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial” and “show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 324-27, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Smith’s bare claim does not approach this standard. *See United States v. Hirsch*, 239 F.3d 221, 225 (2d Cir. 2001) (finding that a claim of actual innocence “must be supported by evidence”).

Consequently, for the reasons stated above, this Court finds that each of Smith’s claims fail.

D. Evidentiary Hearing

As indicated above, § 2255 provides that a court must hold an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” Rule 4 (b) also provides that “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion”

Here, this Court finds that no evidentiary hearing is warranted or required because Smith’s motion and the record conclusively demonstrate that Smith is not entitled to relief under § 2255. *See Orbach v. United States*, 11 Cr. 111 (NRB), 2017 U.S. Dist. LEXIS 192767, 2017 WL 5632815, at *7 (S.D.N.Y. Nov. 7, 2017) (denying

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request for a § 2255 hearing where “[t]he existing record is conclusive that petitioner is not entitled to relief on any theory presented to [the court]”).

E. Certificate of Appealability

For a certificate of appealability to issue, a petitioner must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253 (c)(2). To make the required “substantial showing,” Smith must establish that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Rhagi v. Artuz*, 309 F.3d 103, 106 (2d Cir. 2002) (per curiam) (citations and internal quotation marks omitted). Smith has made no such substantial showing of the denial of a constitutional right in this case. A certificate of appealability will therefore not be issued.

IV. CONCLUSION

For the reasons stated above, Smith’s Motion to Vacate, Set Aside or Correct his Sentence is denied. If Smith wishes to appeal, he must file a Notice of Appeal with the Clerk’s Office, United States District Court, Western District of New York, within 60 days of the date of judgment in this action. Requests to proceed on appeal as a poor person, if any, must be filed with the United States Court of Appeals for the Second Circuit, in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

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V. ORDERS

IT HEREBY IS ORDERED, that Petitioner's Motion to Vacate, Set Aside or Correct his Sentence and Conviction under 28 U.S.C. § 2255 (Docket No. 74) is DENIED.

FURTHER, that this Court hereby certifies, pursuant to 28 U.S.C. § 1915 (a)(3) and Rule 24 (a)(3) of the Federal Rules of Appellate Procedure, that any appeal from this Decision and Order would not be taken in good faith and therefore leave to appeal as a poor person is DENIED. *See Coppedge v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

FURTHER, that a Certificate of Appealability under 28 U.S.C. § 2253 is DENIED.

FURTHER, that the Clerk of Court is directed to CLOSE 19-CV-1365S.

FURTHER, that the Clerk of Court is directed to mail a copy of this decision to Petitioner at his current address of record.

SO ORDERED.

Dated: September 16, 2021
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge